The quest for labour rights and social justice

Work in a changing world

Part I edited by Marco Mocella and Elena Sychenko
Part II edited by Valentina Aniballi, Martina Bassotti and Anna Casalino

Universitas Mercatorum
Università telematica delle Camere di Commercio Italiane

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Labour Law
IN NATIONAL, INTEGRATED AND TRANSNATIONAL LEGALS SYSTEMS

Book series founded by Giuseppe Pera
Edited by Franco Liso, Luca Nogler and Silvana Sciarra

FrancoAngeli

Labour Law

IN NATIONAL, INTEGRATED AND TRANSNATIONAL LEGALS SYSTEMS

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In addition, this book series seeks to contribute to a conceptual and intellectual renewal of our discipline, which has been, and remains, at the core of the Italian academic general debate. The editors place a great weight on the quality of the scientific contributions which will be assessed by means of rigorous and impartial criteria of academic excellence.

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Introduction. Work in a changing world and labour and social security law

Maria Emilia Casas Baamonde[1]

It is an honour and a pleasure to welcome you to the XXIVth World Congress of the International Society for Labour and Social Security Law, and to Rome, a city unique in the world in its historical heritage and unique in uniting its splendid past with a permanent cultural renewal, which welcomes us in its magnificent Auditorium "Parco della Musica", thanks to the initiative of the Associazione Italiana di Diritto del Lavoro e della Sicurezza Sociale, to the generous hospitality of the *Universitas Mercatorum* and to the invaluable collaboration of Professor Marco Mocella.

Our World Congress is a unique analytical enclave that comes to life every three years with the intention of exploring the significant changes in labour and social security law, now fully affected by the historic digital, climate and demographic transitions, and to offer us a time of discussion and dialogue, of immersive encounter, always necessary and fertile, on a theme that summons us all. In this 24th edition, our congress will discuss the topic "*Work in a changing world. The quest for labour rigths and social justice*".

Since our last World Congress, held in Lima in 2021 in virtual mode because of the terrible Covid-19 pandemic, work and labour relations have undergone profound transformations, with universal impact and irreversible consequences. The pandemic had immediate effects, previously unknown, on production and work, on safety and health in its provision and on social protection, showing the need for a strong hybridisation between labour law and social protection systems worldwide. Labour and *welfare* law played a strategic role where those laws were strong, although the assessment of this role was not unanimous in any country. Covid-19 revealed and accentuated the inadequacy and weaknesses of labour and social protection

[1] ISLSSL President.

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legislation and, consequently, social inequalities. And it placed at centre stage, in addition, obviously, to public health, the essential nature of work and of "critical" workers, put under stress the regulation of labour relations, based on the relationship of proximity and personal interaction that it put at risk – in the advanced economies around 70% of the workforce worked in relationships of personal proximity – and forced the immediate development of labour law and social protection solutions, indispensable instruments, although not capable, when the pandemic broke out, of dealing with its devastating economic and social consequences. The shifting sands of social legislation were diluted under the pandemic shock in countries with informal work and without social protection networks. The legislation of the States with a mature social model held up, and the governance of the health and socio-economic crisis was based on labour institutions, broader and better resourced health and social protection systems, and on social dialogue, tripartite agreements and collective bargaining, with varying degrees of intensity and effectiveness.

After, the processes of an uneven recovery from that unprecedented and global viral emergency began, which called into question the collective capacity of our societies, new crises have ridden on top on the previous pandemic: armed conflicts, a runaway inflationary process at record highs in energy and food prices, and political crises in various nations, have had a negative impact on workers' labour and social protection rights and have continued to drive the increase in inequalities. Moreover, digitalisation and climate and demographic changes have accentuated their capacity to challenge, and have done so at breakneck speed and with unstoppable extensive force, the composition and volume of employment, human labour, its institutions and regulatory sources, its organisation and forms of business organisation, as well as the action of its actors and collective bargaining, posing systemic challenges of unpredictable and uncertain scope to the organisation of labour and social protection systems around the world; these challenges are particularly relevant to the achievement of social justice, a crucial objective in the global agenda of the United Nations, closely linked to the sustainable development goals of the 2030 Agenda, which cannot be unattainable at this stage of the 21st century because of the above-mentioned transformations. It is essential to explore and implement various strategies that address the existing growing inequalities and promote fair and decent working conditions as conditions of democratic civilisation, governed by the higher values of freedom of equality.

Labour and social security laws have been in constant transformation since their very existence, in Europe since its democratic construction in the post-World War II era, although the scars on their normative body did

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not show until the economic crises of the 1970s. Essential for economic systems, labour markets and the democratic organisation of societies, labour and social protection regulations have been and will continue to be subject to the turbulence of continuous economic and social transformations and crises, which have made the need for their constant normative and institutional renewal their hallmark.

It is important not to forget this when we look at the present and try to explore the future, because otherwise we would go back in time to a pre-modern labour law thinking, unable to understand the immersion of labour and social security laws in the democratic organisation of the States, in the markets, in the demands of competitiveness and productivity of the economy, and in the problems of employment and, more broadly and centrally, of human labour. This obviously does not mean – this obviousness has reached the level of logical impertinence, even though we have historical proof of this impertinence and its serious social consequences – that the solutions to crises and transformations are the subordination of labour and social protection laws to the needs of economic and monetary policies, markets and employment, which are taken for granted as indisputable in the field of democratic policy and social and economic dialogue. Economic crises should not necessarily lead to a shift in the balance between the respective interests of workers and the freedom of enterprises towards the latter, nor should labour regulations neglect their own functions of redistribution and social protection in critical moments of economic recession or social contraction, which do not constitute a parenthesis of non-application of international standards of rights, constitutions and the fundamental rights of individuals, including workers. Implicit in the ILO's principle, which is accepted in all legal systems, that work is not a commodity, is the idea that the terms and conditions of work and employment are not the automatic result of the market; it is precisely to ensure that this is not the case that the normative response of the ILO and state labour and social security laws was conceived in social pacts recognising the rights of people to and in work.

As a consequence and condition of democracy, labour and social protection regulations, born to correct markets and basic socio-economic and power inequalities, have witnessed, powerless, in successive legislative reforms, the unstoppable increase of economic and social inequalities, the impoverishment of the working population and of the most vulnerable. The global recessionary crisis in 2008 produced this "downward" law, justifying its political rationale in the demands of the economy imposed as scientific and ideologically neutral axioms, applicable to labour markets regardless of their structural features, to meet the needs of employment, affecting social dialogue and the existential presupposition of democracy, the game

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of the majority principle and respect for minorities and individual freedoms; forgetting that the conception of truth that formalises the general (majority) will of the law is always relative and debatable, even in areas where scientific research claims to ensure proven results. The economic and legislative adjustments of that crisis resulted in a serious destruction of jobs and labour rights and social protection, marked and prolonged the crisis and gave rise – together with other factors – to the political fragmentation and polarization that we know today in different countries.

And although it is a false methodological assumption to take the historical present as the "quintessence of all time", the truth is that the powerful current changes, and the pressure on them from a future that is scientifically predicted to be pressing and full of disruptive innovations of uncertain scope, are so many and of such intensity that it is essential to take a look at their current state in order to know what we are facing; that is, to be able to use the canons of a scientific methodology in its analysis and in the responsible proposal of solutions that must accurately and necessarily assess the capacity for legal innovation required by social innovation, neither insubstantial nor peripheral, it seems to me. Denialism would reduce labour and social protection laws to the status of self-absorbed laws, with their heads turned backwards, towards a past that will not return, and with no future to defend labour rights and social justice and to open up to previously unknown areas and processes of profound and accelerated change, but of obligatory transit. This is why our World Congress in Rome takes on a special responsibility and significance.

Labour and social security law are universally affected, in all areas, by the already high development of digital technology and the centrality of AI, a factor that is also in permanent evolution and a risk factor for the protection of fundamental rights, which develops in instances of difficult access to the regulatory power of the States, which, however, do not have to declare the obsolescence of the law and their own lack of autonomy, or precisely of sovereignty, which is essential for their own political survival.

Digitalisation has revolutionised the world of work, diversifying forms of employment and significantly altering traditional labour relations and work organisation. Remote work and remote work by digital nomads, digital platforms, automation and robotisation have transformed the employment landscape. AI has multiplied to the nth degree the initial consequences of digitalisation and automation on job and work substitution, the loss of skills and routine professional, manual and cognitive tasks of working people, coupled with their longevity, and the consequent need for the recognition by labour laws or collective bargaining of a new subjective right to training and lifelong learning, essential to ensure not only people's employability, but also

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their personal self-determination choices, i.e. their life and work decisions, to overcome the gap between urban and rural and sparsely populated areas, and to strengthen labour productivity. People's vocational skills have become a key challenge of our time, the instrument that will enable access to and maintenance of employment, and the development of entrepreneurial strategies for re-skilling and work, which must be promoted, or dismissal, which must be avoided. Furthermore, the skills gap can seriously hamper the adoption of new technologies by companies and business growth and innovation. We are moving towards an unprecedented change of occupations, professions and tasks, in the transition to human work in the digital and green era. This new subjective right must be accompanied by the recognition of a new situation of need, which must be covered by social security systems, in the face of the obsolescence of competences.

This is not an easy task considering that entirely new occupations have already emerged, which will create a labour supply for jobs that are currently unimaginable. Academic research suggests that between 8% and 9% of jobs in 2030, in different economies, will be non-existent or barely existing jobs, also for the education system, driven by the growing global demand for digitalisation, automation and artificial intelligence and decarbonisation of the economy and, at the same time, by an increased need for personal services and creative jobs that machines cannot replace for the time being.

The International Monetary Fund, in its *Discussion Note* on "*Artificial Intelligence and the Future of Work*" of January 2024, warned that AI is "set to profoundly change the global economy as a new industrial revolution", although with a much greater impact and much faster. And it questioned previous estimates that in high-quality jobs, with creative and non-routine skills, the substitution effect of robotics and AI would be lower, and the complementation effect would prevail. According to the IMF, almost 40% of global employment would be exposed to IA, with advanced economies being more exposed, at around 60%, because of the prevalence of cognitive-oriented jobs, although these economies are better poised to benefit from IA than emerging market and developing economies. The employment effects of IA are still uncertain, as it may increase labour productivity, while threatening to replace people in some jobs and complement them in others, leading to greater income inequality between workers and countries. The IMF stresses occupational displacement. College-educated workers are better able to move from jobs at risk of displacement to jobs with high complementarity, while workers without post-secondary education have reduced mobility. Younger workers, who are adaptable and familiar with new technologies, will also be better able to take advantage of new opportunities. On the other hand, older workers and women, with low or very low representation in STEM

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studies and professions, are more vulnerable to the transformation of IA and face greater difficulties in retraining and re-employment, technological adaptation and training in new job skills.

The strategic dimension of digitalisation goes beyond work provided remotely and for digital platforms, *online and offline*, to reach the various areas of the economy, work and society (5G technologies, IIoT, of course IA), where, however, the personal relationship is irreplaceable. The digital transformation of companies and jobs is an obvious reality. It is crucial to develop regulatory frameworks that protect the rights of digital workers and provide access for all workers to digital skills, correcting discrimination by gender (digital divides), by age, and by algorithmic work management. This includes ensuring fair working conditions, retraining, adequate social protection and pay equity. Legislators must ensure that labour laws are adapted to these new realities, providing adequate coverage and training for workers in all forms of employment. It should not be forgotten that what has also changed is the accelerated pace of evolution of these factors of transformation and their unstoppable impact on the shaping of the economic-social and labour reality and, therefore, on the institutional territory of the labour and social protection system and its own regulatory solutions. This should lead us to reflect on the transitory nature of these solutions, and the incorporation into their DNA not only of change, but also of their adaptation to the processes of epochal transition in which we find ourselves. We must open a debate on the productivity gains that may come from digitalisation and, in particular, from AI, if it complements human labour in certain occupations, and on its destination to compensate for the substitution effect of human labour through policies of redistribution, re-skilling or social protection.

Globalisation and the spread of economic competitiveness, climate and energy transformations towards a carbon-free economy and work, substantial demographic changes in labour markets – gender, age, migration – and in the forms of work and business organisation themselves, with transnational development through global value and supply chains previously unheard of, have changed the face and diversified the contents of labour and social security law. Without prejudice to the value of international instruments, hard and soft law, national labour laws have to be provided with techniques to contain the exploitation and the low working conditions of workers in "globalised labour". I will return to this point.

This 24th World Congress of our International Society aims to address the most recent and important lines of global change in labour and social security law in order to strengthen labour rights and social justice, an aim of the utmost relevance in the face of ever-increasing diversity and inequality, this is the message that ISLSSL wanted to send out in 2024, providing for this

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purpose the unbeatable occasion of this World Congress at the *Universitas Mercatorum* in Rome for the exchange of research results and comparative practical experiences on the basis of empirical evidence. The axis of comparative law is essential to advance the knowledge we need to possess and to agree on or compromise effective results. We must situate theoretical reflection in our specific countries and regions and beyond these different geographical realities in order to examine the real underlying problems affecting labour and social security law in the world. The World Congress, which by its very nature is nourished by the comparative technique, endows it with a unique capacity for the analysis of collective labour and social security or social protection laws.

Our World Congress in Rome is organised around six closely interlinked themes (*The ways to achieve social justice in the world of work: current trends*; *Digitalization, AI and employment*; *The new trends in the collective labour law*; *Occupational health issues*; *Social protection systems: lessons learnt and new ideas; Teaching Y generation: new approaches, methods and digital tools*), the first five of which, divided into the four sub-themes of the programme, which can be easily accessed on our website, provide a situational and etiological or causal diagnosis, and at the same time, prospective, accompanied by proposals for the future, on the consequences of the transformations, translated either into the appearance of new regulations and institutions, or into the combination of the permanence and innovation of essential concepts for our labour and social protection systems and for our democracies.

Decent work in the reality of trade and a world without borders, but with serious inequalities in the countries of sustainable development, and care for the planet are objectives not only for workers' representatives and political actors, but also for companies, which is an example of the renewal of their technical solutions. This technical renewal has already begun through international framework agreements between multinational and transnational companies and international trade union federations (in the countries where the multinational company is headquartered and in the countries where production is relocated), which constitute manifestations of collective bargaining in this same global space to guarantee decent work and environmental protection. Transnational social dialogue, which generates binding agreements that can be applied by unions, goes beyond the former mere codes of conduct that channeled a weak social responsibility of these companies, and offers enormous future utility to expand their functions of contractual regulation and union control, and ultimately of governance of the phenomenon of globalized production and work in global supply and value chains given their impressive quantitative dimension.

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At the European Union level, the recently adopted *Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (Text with EEA relevance),* is an call for (large) companies to prepare themselves until 2027 to move towards economic, environmental and labour sustainability, correcting the adverse effects of their activities, and their chains of activities, on the environment and global warming. In this sense, and as an expression of the interweaving of the EU's own legislation with that of the ILO and SDGs No. 8 and No. 13 of the United Nations 2030 Agenda, the *Directive (EU)* it must be a step towards decent work.

Sustainability is a value that obliges us all, and companies must also be social and responsible in the fight against climate change or they will not be, that is, they must take on board the social qualification of economic systems, which must be respectful of the environment, the commitment to social justice and the objectives of ending hunger, poverty and reducing inequalities. These objectives are not only the responsibility of the social justice plan, but also of economic activity. As economic activity is directed towards wealth creation, it is also directed towards the creation of decent and green employment, with labour rights and social protection, as an essential means of reducing inequalities.

In our societies, where inequality is a structural feature, and which are moving towards greater diversification driven by the major transformation processes described above, gender equality cannot be left unaddressed, nor can it be addressed with a neutral approach. Gender policies and the incorporation of gender balance and parity in the management and representative bodies of corporations and public institutions, and in current and future work, are essential. The United Nations *Sustainable Development Goals Report* 2023 shows how slow progress has been made and how much remains to be done to achieve SDG 5 on gender equality by 2030. This is also the conclusion drawn from the WEF's *Global Gender Gap Report* of June 2024: the global gender gap in 2024 for the 146 countries analysed stood at 68.5% closed, having advanced by only 0.1 percentage point since the 2023 annual report, and without reaching this average percentage, the gaps in economic participation and opportunities and political empowerment closed at 60.5% and only 22.5%, respectively.

Participants at this World Congress in Rome will have the opportunity to discuss how the above transformations are influencing the world of work and to explore innovative technical solutions to promote and protect labour rights in a global context so decisively shaped by change, which spills over into collective labour law and collective bargaining and social protection systems.

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Under the premise of their acceptance, and of the purposes of leadership and governance of these changes, which, inexorably, cannot, however, develop on the margins of political democracies, and of dialogue and agreements of trade unions and employers' organisations among themselves and with governments, certainly a basic ingredient of social justice and a powerful sign of recognition of this legal territory of borders that are not always easy to demarcate.

Just as AI and automated decision-making systems must be subject to human supervisory action – in the current state of affairs and regulation where it exists; the European Union has adopted *Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024*, or *European Law on Artificial Intelligence*, the world's first general law on AI, which affirms this principle, in addition to those of technical soundness and security; privacy and data management; transparency; diversity, non-discrimination and fairness; social and environmental welfare; and accountability, which are intended to help ensure the reliability and ethical basis of AI, in accordance with the values on which the Union is founded and its fundamental rights – the behaviour of markets and the economy must be in line with democratic politics and fundamental rights. The EU AI Regulation specifies that according to the guidelines of the Independent High Level Expert Group on AI, "human action and oversight" means that AI systems are developed and used as a tool in the service of individuals, respecting human dignity and personal autonomy, and operated in a way that can be properly controlled and monitored by human beings, by natural persons with the necessary competence, training and authority (Recital 27 and Articles 14 and 26). Respect for the fundamental rights of natural persons, for their safety and health, are the key to qualify an IA system as "high risk", if it carries out profiling of natural persons, and not if its influence on the outcome of decision-making is not substantial.

This book demonstrates that the sustainability of the edifice of labour and social security law, whether legislative, judicial or collectively negotiated, is based on the value of personal work and its rights, essential to the human condition and social citizenship. Labour and social security laws, in permanent reconstruction, have codes of identity, which are what we can identify with the concept of social justice, understood as the function of democratic and social states to achieve equality of opportunity, equity, access to rights of any condition and nature and, significantly, to social rights, the protection of disadvantaged or vulnerable people and the fight against poverty and inequalities.

The ILO unanimously adopted in 2008 a solemn *Declaration on Social Justice for a Fair Globalization*, which it renewed in 2022 to reflect the

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inclusion of a safe and healthy working environment in the ILO's normative framework of *fundamental principles and rights at work*, a 1998 *Declaration* also amended with the same addition in fulfilment of *its Centenary Declaration for the Future of Work*, 2019.

The United Nations commemorates every 20 February the World Day of Social Justice, and the theme for this year 2024, coinciding with the year of our XXIV World Congress, is "Promoting social justice" against inequalities and for a more equitable and just future for all people.

During 17-20 September 2024, our World Congress in Rome will cover its busy agenda and become a key public dialogue space to renew and strengthen our research networks, disseminate information on new initiatives, publications and advances in our research fields. And, of no small importance, to strengthen our personal relationships.

I strongly believe that the World Congress in Rome will not only serve to broaden and enrich our understanding of the current challenges we face, but can also inspire the promotion of concrete public action, including regulatory action, in our countries and in supranational and global governance organisations towards a fairer and more equitable and sustainable future of work. In other words, the Congress will fulfil its scientific objectives and, in so doing, will chart the paths to pursue the achievement of social justice in the world of work of our time, which is, indeed, a political as well as a legal, labour-legal, essential postulate. We should remember that this is our function, the function of scientific doctrine, according to the founder of European labour law, Hugo Sinzheimer ("Über soziologische und dogmatische Methoden in der Arbeitsrechtswissenschaft", *Arbeitsrecht*, 1922). Labour law thinking must have an impact on the field of legal policy, on legislative policy, and not be limited to the study of formal law.

The ISLSSL wishes to thank the splendid programming work of the *Universitas Mercatorum* of Rome, which has made it possible to hold our XXIV World Congress, fulfilling our statutory commitment, as well as the outstanding participation of its twenty-eight speakers of proven scientific quality, an expression of our associative wealth and of our radical pluralism of thought, geography and gender. Among them, the work of the coordinators of the research groups and of the groups themselves (on: "*The effects of the pandemic on labor relationships and their regulation*"; "*Business restructuring*"; "*The great inequality gaps*"; "*Automation and digitization of labor relationships*"; "*The new forms of representation and collective organisation of work and its instruments of action*"; "*Social security systems facing the coverage of new risks: dependency and long-term illnesses, obsolescence of professional qualifications*"), in the already established line of work of our International Society, inaugurated by President Treu, of

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strongly supporting the preparation of the World Congress in order to achieve its objectives. The *young scholars* of the ISLSSL are the lifeblood of our International Society and demonstrate with their magnificent contribution on the *millennial* generation ("*Teaching Y generation: new approaches, methods and digital tools*") that the pace and intensity of their exchanges, debates and contributions are exemplary and enviable.

We are about to celebrate the longest running World Congress on labour law, and I am convinced that this new edition will be essential for the success of its scientific objective.

At the ISLSSL, we are committed to a World Congress, and to Congresses in the different regional areas, which want to speak to the world about the phenomena they deal with and which concern us, about the phenomena of our time and, prospectively, of the time to come. The important sediment that our World Congress in Rome leaves for this purpose of forming specialised legal-labour opinion can be seen in this book.

This very significant world meeting of our association provides us with the necessary oxygen to continue our daily work, which, although no less attractive, is indispensable for the maintenance of our vital network in permanent communication, for which it now has at its disposal technological means that it lacked in the past.

There is no one left to write the history, the chronicle, of our world and regional congresses, and the legacy they have left, which will be the history of the ISLSSL, which, like the disciplines it deals with, has to show its willingness to change, to modernise, to modernise, in short, to adapt to its time, with its complexities and diversities and with respect for this diversity presided over by the value of equality, a value of change and social progress that cannot be renounced, of social justice.

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[*] Es un honor y un placer darles la bienvenida al XXIV Congreso Mundial de la Sociedad Internacional de Derecho del Trabajo y de la Seguridad Social, y a Roma, ciudad única en el mundo en su patrimonio histórico y única en la unión de su esplendoroso pasado a una renovación cultural permanente, que nos acoge en su magnífico Auditorio "Parco della Musica", gracias a la iniciativa de la Associazione Italiana di Diritto del Lavoro e della Sicurezza Sociale, a la generosa hospitalidad de la *Universitas Mercatorum* y a la inestimable colaboración del profesor Marco Mocella.

Nuestro Congreso Mundial es un enclave analítico único que cobra vida cada tres años con la intención de explorar los cambios significativos de los Derechos del trabajo y de la seguridad social, ahora plenamente afectados por las históricas transiciones digital, climática y demográfica, y de ofrecernos un tiempo de discusión y diálogo, de encuentro inmersivo, siempre necesario y fértil, en un tema que a todos nos convoca. En esta XXIV edición, "*Work in a changing world. The quest for labour rigths an social justice*".

Desde nuestro último Congreso Mundial, celebrado en Lima en 2021 en modo virtual por la terrible pandemia de la Covid-19, el trabajo y las relaciones laborales han experimentado transformaciones profundas, de afectación universal y de consecuencias irreversibles. La pandemia tuvo efectos inmediatos, antes desconocidos, en la producción y en el trabajo, en la seguridad y salud en su prestación y en la protección social, mostrando la necesidad de una fuerte hibridación entre los Derechos del trabajo y los sistemas de protección social en todo el mundo. Los Derechos del trabajo y del "*welfare*" desempeñaron un papel estratégico allí donde esos Derechos eran fuertes, aunque la valoración de ese papel no haya sido

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unánime en ningún país. La Covid-19 reveló y acentuó la inadecuación y las debilidades de las legislaciones laborales y de protección social, y, en consecuencia, las desigualdades sociales. Y situó en el centro de la escena, además, obviamente, de la salud pública, la esencialidad del trabajo y de los trabajadores "críticos", puso bajo estrés la regulación de las relaciones laborales, sostenidas en la relación de proximidad e interacción personal que convirtió en riesgo – en las economías avanzadas en torno al 70% de la mano de obra trabajaba en relaciones de proximidad personal –, y obligó a poner a punto con inmediatez las soluciones de los Derechos del trabajo y de protección social, instrumentos indispensables, aunque no capacitados cuando la pandemia estalló, para enfrentar sus consecuencias económicas y sociales devastadoras. Las arenas movedizas de las legislaciones sociales se diluyeron bajo el shock pandémico en países con trabajo informal y sin redes de protección social. Las legislaciones de los Estados con un modelo social maduro resistieron, cimentaron el gobierno de la crisis sanitaria y socio-económica en instituciones laborales, en sistemas de salud y de protección social más amplios y dotados de más recursos, y en la interlocución social, en los acuerdos tripartitos y en la negociación colectiva, con grados distintos de intensidad y eficacia.

Después, iniciados los procesos de una recuperación desigual de aquella emergencia vírica, inédita y global, que puso en cuestión la capacidad colectiva de nuestras sociedades, nuevas crisis han cabalgado sobre la pandémica anterior: los conflictos bélicos, un proceso inflacionario desbocado a máximos históricos de los precios de la energía y de los alimentos, y las crisis políticas en diversas naciones, han influido negativamente en los derechos laborales y de protección social de los trabajadores y han seguido impulsando el incremento de las desigualdades. Además, la digitalización y los cambios climático y demográficos han acentuado su capacidad de desafío, y lo han hecho a una velocidad de vértigo y con una fuerza extensiva imparable, frente a la composición y al volumen del empleo, frente al trabajo humano, a sus instituciones y fuentes regulatorias, a su organización y a las formas de organización empresarial, así como a la acción de sus protagonistas y de la negociación colectiva, planteando retos sistémicos de alcance imprevisible e incierto a la organización de los sistemas laborales y de protección social en todo el mundo; retos que interpelan singularmente a la consecución de la justicia social, objetivo crucial en la agenda global de Naciones Unidas, estrechamente ligada a los objetivos de desarrollo sostenible de la Agenda 2030, que no puede ser inalcanzable a estas alturas del siglo XXI por causa de las transformaciones señaladas. Es esencial explorar y aplicar diversas estrategias que aborden las crecientes desigualdades existentes y promuevan condiciones de trabajo

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equitativas y dignas como condiciones de civilización democrática, regidas por los valores superiores de libertad de igualdad.

Los Derechos del trabajo y de la seguridad social han estado en constante transformación desde su propia existencia, en Europa desde su construcción democrática en la segunda postguerra mundial, si bien las cicatrices en su cuerpo normativo no se mostraron hasta las crisis económicas de los años 70 del pasado siglo. Esenciales para los sistemas económicos, los mercados de trabajo y la organización democrática de las sociedades, los Derechos laborales y de protección social han estado y estarán sometidos a las turbulencias de las continuas transformaciones y crisis económicas y sociales, que han hecho de la necesidad de su renovación normativa e institucional constante su seña de identidad.

Conviene no olvidarlo cuando miramos al presente y tratamos de explorar el futuro, pues lo contrario nos haría retroceder en el tiempo hacia un pensamiento iuslaboralista premoderno, incapacitado para comprender la inmersión de los Derechos del trabajo y de seguridad social en la organización democrática de los Estados, en los mercados, en las exigencias de competitividad y de productividad de la economía, y en los problemas del empleo y, mas amplia y centralmente, del trabajo humano. Lo que no significa obviamente – esta obviedad alcanza la categoría de impertinencia lógica, pese a que contemos con comprobaciones históricas de esa impertinencia y de sus graves consecuencias sociales – que las soluciones a las crisis y a las transformaciones sea la subordinación de los Derechos del trabajo y de protección social a las necesidades de las políticas económicas y monetarias, de los mercados y del empleo, dadas por supuestas como indiscutibles en el terreno de la política democrática y de la interlocución social y económica. Las crisis económicas no han de saldarse necesariamente con el desplazamiento del equilibrio entre los intereses respectivos de los trabajadores y de la libertad de las empresas hacia éstas, ni los ordenamientos laborales han de despreocuparse de sus propias funciones de redistribución y de protección social en los momentos críticos de recesión económica o de contracción social, que no constituyen paréntesis de inaplicación de las normas internacionales de derechos, de las Constituciones y de los derechos fundamentales de las personas, también de las personas trabajadoras. En el principio, constitutivo de la OIT y aceptado en todos los ordenamientos, de que el trabajo no es una mercancía está implícita la idea de que los términos y condiciones del trabajo, y del empleo, no son el resultado automático del mercado; precisamente para que así no sea se concibió la respuesta normativa de la OIT y de los Derechos del trabajo y de la protección social estatales en pactos sociales de reconocimiento de los derechos de las personas al y en el trabajo.

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Consecuencia y condición de la democracia, los Derechos del trabajo y de protección social, nacidos para corregir los mercados y las desigualdades básicas socio-económicas y de poder, han asistido, impotentes, en sucesivas reformas legislativas, al incremento imparable de las desigualdades económicas y sociales, del empobrecimiento de la población trabajadora y de los mas vulnerables. La crisis recesiva mundial en 2008 produjo ese Derecho "a la baja", justificándose su razón política en exigencias de la economía impuestas como axiomas científicos e ideológicamente neutros, aplicables a los mercados de trabajo con independencia de sus rasgos estructurales, para atender las necesidades del empleo, afectando al diálogo social y al presupuesto existencial de la democracia, el juego del principio mayoritario y el respeto de las minorías y de las libertades individuales; olvidando que la concepción de la verdad que formaliza la voluntad general (mayoritaria) de la ley es siempre relativa y discutible, incluso en terrenos en que la investigación científica dice asegurar resultados contrastados. Los ajustes económicos y legislativos de aquella crisis se saldaron con una grave destrucción de empleo y de derechos del trabajo y protección social, marcaron y prolongaron la crisis y dieron lugar – junto con otros factores – a la fragmentación y polarización política que hoy conocemos en distintos países.

Y aunque sea un presupuesto metodológico falso tomar el presente histórico propio como la "quintaesencia de todos los tiempos", lo cierto es que los poderosos cambios actuales, y la presión sobre ellos de un futuro que científicamente se predice apremiante y preñado de innovaciones disruptivas de incierto alcance, son tantos y de tal intensidad que hacen imprescindible pulsar su estado actual para saber a qué nos enfrentamos; esto es, para poder utilizar los cánones de una metodología científica en su análisis y en la propuesta responsable de soluciones que han de valorar precisa y necesariamente la capacidad de innovación jurídica precisada por la innovación social, ni insustancial ni periférica, me parece. El negacionismo reduciría los Derechos del trabajo y de protección social a la condición de Derechos ensimismados, con su cabeza vuelta hacia atrás, hacia un pasado que no volverá, y sin futuro para defender los derechos laborales y la justicia social y abrirse a terrenos y a procesos de cambio profundo y acelerado antes desconocidos, pero de tránsito obligado. De ahí que nuestro Congreso Mundial de Roma cobre especial responsabilidad y significación.

Los Derechos del trabajo y de protección social están universalmente afectados, en todos sus ámbitos, por el ya alto desarrollo de la tecnología digital y la centralidad de la AI, un factor asimismo en permanente evolución y de riesgo para la protección de los derechos fundamentales, que se desenvuelve en instancias de difícil acceso al poder regulador de los Estados,

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que, sin embargo, no por ello han de declarar la obsolescencia del Derecho y su propia falta de autonomía, o con precisión de soberanía, imprescindible para su propia supervivencia política.

La digitalización ha revolucionado el mundo del trabajo, diversificando las formas de empleo y alterando significativamente las relaciones laborales y la organización del trabajo tradicionales. El trabajo remoto y el trabajo remoto de nómadas digitales, las plataformas digitales, la automatización y la robotización, han transformado el panorama laboral. La IA ha multiplicado a la enésima potencia las consecuencias iniciales de la digitalización y la automatización sobre la sustitución del empleo y del trabajo, la pérdida de cualificaciones y de tareas profesionales, manuales y cognitivas rutinarias, de las personas trabajadoras, unida a su longevidad, y la necesidad consiguiente del reconocimiento por las legislaciones laborales o la negociación colectiva de un nuevo derecho subjetivo a la formación y al aprendizaje permanentes, esencial para asegurar no solo la empleabilidad de las personas, sino sus opciones de libre autodeterminación personal, esto es, sus decisiones de vida y trabajo, superar la brecha entre zonas urbanas y rurales y de baja densidad de población, y fortalecer la productividad del trabajo. Las competencias profesionales de las personas se han convertido en un desafío clave de nuestro tiempo, en el instrumento que permitirá el acceso y el mantenimiento del empleo, y el desarrollo de estrategias empresariales de recualificación y trabajo, que hay que promover, o de despido, que se han de evitar. Por lo demás, la brecha de habilidades puede obstaculizar gravemente la incorporación de nuevas tecnologías por las empresas y el crecimiento y la innovación empresarial. Caminamos hacia un cambio ocupacional sin precedentes, de profesiones y de tareas, en la transición al trabajo humano de la era digital y verde. Ese nuevo derecho subjetivo ha de acompañarse del reconocimiento de una nueva situación de necesidad, que han de cubrir los sistemas de seguridad social, frente a la obsolescencia competencial.

No es una tarea fácil si tenemos en cuenta que ya han surgido ocupaciones totalmente nuevas, lo que creará una oferta de mano de obra para empleos hoy inimaginables. Según sugieren determinadas investigaciones académicas entre el 8% y el 9% de los puestos de trabajo en 2030, en distintas economías, serán puestos hoy inexistentes o apenas existentes, también para el sistema educativo, promovidos por la creciente demanda mundial de digitalización, automatización e inteligencia artificial y de descarbonización de la economía y, al tiempo, por una mayor necesidad de servicios personales y de empleos creativos que las máquinas no puedan sustituir por el momento.

El International Monetary Fund, en su *Discussion Note* sobre "*Artificial Intelligence and the Future of Work*", de enero de 2024, advirtió de que la AI está "llamada a cambiar profundamente la economía mundial como una

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nueva revolución industrial", aunque de impacto muy superior y mucho mas veloz. Y puso en cuestión las estimaciones anteriores de que en los empleos de alta calidad, con competencias creativas y no rutinarias, el efecto de sustitución de la robótica y de la AI sería menor, y se impondría el efecto de complementación. Según el IMF, casi el 40% del empleo mundial estaría expuesto a la AI, siendo mayor el índice de exposición de las economías avanzadas, en torno al 60%, por causa de la prevalencia de empleos orientados a tareas cognitivas, si bien esas economías están mejor preparadas para beneficiarse de la AI que las economías de mercados emergentes y en desarrollo. Los efectos de la AI sobre el empleo son aún inciertos, pues puede aumentar la productividad del trabajo, al tiempo que amenaza con sustituir a las personas en algunos trabajos y complementarlas en otros, provocando una mayor desigualdad de ingresos entre trabajadores y países. Insiste el IMF en los desplazamientos ocupacionales. Los trabajadores y trabajadoras con estudios universitarios están mejor preparados para pasar de empleos en riesgo de desplazamiento a empleos de alta complementariedad, teniendo los y las trabajadoras sin educación postsecundaria una movilidad reducida. Los trabajadores más jóvenes, adaptables y familiarizados con las nuevas tecnologías, también podrán aprovechar mejor las nuevas oportunidades. En cambio, los trabajadores de más edad y las mujeres, con baja o muy baja representación en estudios y profesiones STEM, son más vulnerables a la transformación de la AI y chocan con mayores dificultades en su reciclaje y reempleo, adaptación tecnológica y formación en nuevas competencias laborales.

La dimensión estratégica de la digitalización va más allá del trabajo prestado en remoto y para plataformas digitales, *on line y of line*, para alcanzar los distintos ámbitos de la economía, del trabajo y de la sociedad (tecnologías 5G, IIoT, desde luego AI), en que, no obstante, la relación personal es insustituible. La transformación digital de empresas y trabajos es una realidad evidente. Es crucial desarrollar marcos regulatorios que protejan los derechos de los trabajadores digitales y provean el acceso de todos los trabajadores y trabajadoras a competencias digitales, corrigiendo las discriminaciones por género (brechas digitales), por edad, y por la gestión algorítmica del trabajo. Esto incluye la garantía de condiciones de trabajo justas, de recualificación profesional, de protección social adecuada y de equidad salarial. Los legisladores deben asegurarse de que las leyes laborales se adapten a estas nuevas realidades, proporcionando una cobertura y una formación adecuadas a los trabajadores en todas las modalidades de empleo. Conviene no olvidar que lo que, además, ha cambiado es el acelerado ritmo de evolución de esos factores de transformación y su incidencia imparable en la conformación de la realidad económico-social y laboral y, por ende,

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en el territorio institucional del ordenamiento laboral y de protección social y en sus propias soluciones normativas. Lo que nos debe hacer reflexionar sobre la transitoriedad de dichas soluciones, y la incorporación a su ADN no ya del cambio, sino de su adecuación a los procesos de transición de época en que nos encontramos. Hemos de abrir un debate sobre las ganancias de productividad que puedan advenir de la digitalización y, en particular, de la AI, si complementase el trabajo humano en determinadas ocupaciones, y sobre su destino a compensar el efecto de sustitución del trabajo humano a través de políticas de redistribución, de recualificación o de protección social.

La globalización y la extensión de la competitividad económica, las transformaciones climática y energética hacia una economía y un trabajo libre de emisiones de carbono, las sustanciales variaciones demográficas de los mercados de trabajo – género, edad, migraciones –, y de las propias formas de organización del trabajo y empresariales, con un desarrollo transnacional a través de cadenas globales de valor y de distribución antes inusuales, han cambiado la faz y han diversificado los contenidos de los Derechos del trabajo y de seguridad social. Sin perjuicio del valor de los instrumentos internacionales, de *hard* y *soft law*, los Derechos del trabajo nacionales han de proveerse de técnicas de contención de la explotación y de las condiciones de trabajo ínfimas de los trabajadores del "trabajo mundializado". Volveré sobre este punto.

Este XXIV Congreso Mundial de nuestra Sociedad Internacional tiene como objetivo abordar las mas recientes e importantes líneas de cambio, globales, de los Derechos del trabajo y de la seguridad social con el objetivo de afianzar los derechos laborales y la justicia social, un propósito de la mayor relevancia ante el imparable incremento de la diversidad y de la desigualdad, que es el mensaje que la ISLSSL ha querido lanzar en este 2024, proporcionando a ese fin la ocasión inmejorable de este Congreso Mundial en la *Universitas Mercatorum* de Roma para el intercambio de resultados de investigaciones y experiencias prácticas comparadas a partir de la evidencia empírica contrastada. El eje del Derecho comparado es imprescindible para avanzar en el conocimiento que precisamos poseer y para acordar o comprometer resultados eficaces. Debemos situar la reflexión teórica en nuestro concretos países y regiones y por encima de esas distintas realidades geográficas con el fin de examinar los verdaderos problemas de fondo que afectan al Derecho del trabajo y de la seguridad social en el mundo. El Congreso Mundial, que por su propia naturaleza se alimenta de la técnica comparatista, la dota de una singular capacidad para el análisis de los Derechos colectivos del trabajo y de las leyes de seguridad o protección social.

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Nuestro Congreso Mundial de Roma se organiza en torno a seis grandes temas estrechamente enlazados entre sí (*The ways to achieve social justice in the world of work: current trends*; *Digitalization, AI and employment*; *The new trends in the collective labour law*; *Occupational health issues*; *Social protection systems: lessons learnt and new ideas; Teaching Y generation: new approaches, methods and digital tools*), que permiten, divididos los cinco primeros en los cuatro subtemas que constan en su programa, de cómodo acceso en nuestra web, ofrecer un diagnóstico situacional y etiológico o causal, y al tiempo, prospectivo, acompañado de propuestas de futuro, acerca de las consecuencias de las transformaciones, traducidas bien en la aparición de nuevas regulaciones e instituciones, o bien en la conjugación de la permanencia e innovación de conceptos esenciales para nuestros ordenamientos laborales y de protección social y para nuestras democracias.

El trabajo decente en la realidad de un comercio y un mundo sin fronteras, pero con graves desigualdades de los países en desarrollo sostenible, y el cuidado del planeta son objetivos, no solo de los representantes de los trabajadores y de los actores políticos, sino también de las empresas, lo que ha de constituir todo un ejemplo de renovación de sus soluciones técnicas. Esa renovación técnica ya se ha iniciado a través de los acuerdos marco internacionales de empresas multinacionales y transnacionales con federaciones sindicales internacionales (de los países sedes de la empresa multinacional y de los países de deslocalización de la producción), que constituyen manifestaciones de negociación colectiva en ese mismo espacio global para garantizar el trabajo decente y la protección del medio ambiente. El diálogo social transnacional, generador de acuerdos vinculantes susceptibles de control aplicativo sindical, más allá de los antiguos meros códigos de conducta que canalizaban una débil responsabilidad social de esas empresas, ofrece una enorme utilidad futura para ampliar sus funciones de regulación contractual y control sindical, de gobernanza en definitiva, del fenómeno de producción y de trabajo globalizado en cadenas globales de suministro y de valor ante su impresionante dimensión cuantitativa.

En el ámbito de la Unión Europea, la recientemente aprobada *Directiva (UE) 2024/1760 del Parlamento Europeo y del Consejo de 13 de junio de 2024, sobre diligencia debida de las empresas en materia de sostenibilidad y por la que se modifican la Directiva (UE) 2019/1937 y el Reglamento (UE) 2023/2859 (Texto pertinente a efectos del EEE)*, es una llamada a la preparación hasta 2027 de las (grandes) empresas a transitar hacia la sostenibilidad económica, medioambiental, de los derechos y laboral, corrigiendo los efectos adversos de sus actividades, y de sus cadenas de actividades, para el medio ambiente y el calentamiento global. En tal sentido,

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y en expresión del entrecruzamiento del ordenamiento propio de la Unión con el de la OIT y los ODS nº 8 y nº 13 de la Agenda 2030 de Naciones Unidas, la *Directiva UE* ha de ser un avance hacia el trabajo decente.

La sostenibilidad es un valor que a todos nos obliga, y las empresas han de ser también sociales y responsables en la lucha contra el cambio climático o no serán, esto es, han de hacer suyo el calificativo social de los sistemas económicos, que han de ser respetuosos con el medio ambiente, el compromiso de justicia social y los objetivos de acabar con el hambre, la pobreza y reducir las desigualdades. Estos objetivos no sólo competen al designio de justicia social, sino también a la actividad económica. Dirigida la actividad económica a la creación de riqueza, también lo está a la creación de empleo decente y verde, con derechos del trabajo y de protección social, como medio esencial de reducción de las desigualdades.

En nuestras sociedades, en que la desigualdad es un rasgo estructural, y que avanzan hacia su mayor diversificación empujadas por los grandes procesos de transformación descritos, la igualdad de género no admite no ser abordada, ni consiente su abordaje con un enfoque neutro. Son esenciales las políticas de género y de incorporación del equilibrio y la paridad de género en los órganos de administración y representación de las empresas societarias y en las instituciones públicas, y en el trabajo actual y futuro. La consulta del *The Sustainable Develompent Goals Report* de 2023, de Naciones Unidas, pone de manifiesto la lentitud de los avances y lo mucho que queda por hacer para alcanzar en 2030 el ODS nº 5 sobre igualdad de género. También es esta la conclusión que se obtiene del *Global Gender Gap Report* del WEF, de junio de 2024: la brecha de género global en 2024 para los 146 países analizados se situó en el 68,5% cerrada, habiendo avanzado sólo en un 0,1 punto porcentual desde el informe anual de 2023, y sin alcanzar ese porcentaje medio las brechas de participación y oportunidades económicas y de empoderamiento político, cerradas en un 60,5% y tan sólo en un 22,5%, respectivamente.

Los y las participantes en este Congreso Mundial de Roma tendremos la oportunidad de debatir cómo las transformaciones señaladas están influyendo en el mundo del trabajo y de explorar soluciones técnicas innovadoras para promover y proteger los derechos laborales en un contexto global tan decisivamente atravesado por los cambios, que se propagan al Derecho colectivo del trabajo y a la negociación colectiva y a los sistemas de protección social. Bajo la premisa de su aceptación, y de los propósitos del liderazgo y gobierno de esos cambios, que, inexorables, no pueden, sin embargo, desarrollarse al margen de las democracias políticas, y del diálogo y los acuerdos de los sindicatos y de las organizaciones empresariales entre si y con los gobiernos, por cierto un ingrediente básico de la justicia social y

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un potente signo de reconocimiento de este territorio jurídico de fronteras de no siempre fácil demarcación.

Al igual que la AI y los sistemas de decisiones automatizadas han de someterse a la acción de supervisión humana – en el estado actual de la cuestión y de su regulación allí donde existe; la Unión Europea ha aprobado el *Reglamento (UE) 2024/1689 del Parlamento Europeo y del Consejo, de 13 de junio de 2024*, o *Ley europea de inteligencia artificial*, primera ley general en el mundo sobre la AI, que afirma ese principio, además de los de solidez técnica y seguridad; gestión de la privacidad y de los datos; transparencia; diversidad, no discriminación y equidad; bienestar social y ambiental, y rendición de cuentas, que tienen por objeto contribuir a garantizar la fiabilidad y el fundamento ético de la AI, de acuerdo con los valores en que se fundamenta la Unión y sus derechos fundamentales –, el comportamiento de los mercados y de la economía han de hacerlo a la política democrática y a los derechos fundamentales. Precisa el Reglamento europeo de Inteligencia Artificial que de acuerdo con las directrices del Grupo independiente de expertos de alto nivel sobre IA, por "acción y supervisión humanas" se entiende que los sistemas de AI se desarrollan y utilizan como herramienta al servicio de las personas, que respeta la dignidad humana y la autonomía personal, y que funciona de manera que pueda ser controlada y vigilada adecuadamente por seres humanos, por personas físicas con la competencia, la formación y la autoridad necesarias (considerando 27 y artículos 14 y 26). El respeto de los derechos fundamentales de las personas físicas, de su seguridad y salud, son el fiel de la balanza para calificar un sistema de AI como de "alto riesgo", siéndolo cuando lleve a cabo la elaboración de perfiles de personas físicas y no siéndolo si su influencia en el resultado de la toma de decisiones no es sustancial.

Este libro demuestra que la sostenibilidad del edificio de los Derechos del trabajo y de la seguridad social, de composición legislativa, judicial o negocial colectiva, se basa en el valor del trabajo personal y de sus derechos, esencial para la condición humana y de ciudadanía social. Los Derechos del trabajo y de la seguridad social, en permanente reconstrucción, poseen unos códigos de identidad, que son lo que podemos identificar con el concepto de justicia social, entendido como la función de los Estados democráticos y sociales de lograr la igualdad de oportunidades, la equidad, el acceso a los derechos de cualquier condición y naturaleza y, significadamente, a los derechos sociales, la protección de las personas desfavorecidas o vulnerables y la lucha contra la pobreza y las desigualdades.

La OIT aprobó por unanimidad en 2008 una solemne *Declaración sobre la justicia social para una globalización equitativa*, que renovó en 2022 para reflejar la inclusión de un entorno de trabajo seguro y saludable en el marco

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normativo de la OIT *relativo a los principios y derechos fundamentales en el trabajo*, *Declaración* de 1998 también reformada con igual adición en cumplimiento de la *Declaración de su Centenario para el Futuro del Trabajo*, 2019.

Naciones Unidas conmemora cada 20 de febrero el día mundial de la justicia social, siendo el lema de este 2024, coincidiendo con el año de nuestro XXIV Congreso Mundial, "Promover la justicia social" contra las desigualdades y por un futuro mas equitativo y justo para todas las personas.

Durante los días 17 al 20 de septiembre de 2024, nuestro Congreso Mundial de Roma cubrirá su apretada agenda y se convertirá en un espacio de diálogo público fundamental para renovar y fortalecer nuestras redes de investigación, difundir información sobre nuevas iniciativas, publicaciones y avances en nuestros campos de investigación. Y, lo que en absoluto posee una importancia menor, para estrechar nuestras relaciones personales.

Estoy firmemente persuadida de que el Congreso Mundial de Roma no solo servirá para ampliar y enriquecer nuestro entendimiento de los retos actuales que enfrentamos, sino que también podrá inspirar la promoción de acciones públicas concretas, incluidas las regulatorias, en nuestros países y en las organizaciones de gobernanza supranacional y mundial hacia un futuro laboral más justo y equitativo y sostenible. Dicho en otras palabras, el Congreso cumplirá sus objetivos científicos y, al hacerlo, trazará los caminos para perseguir el logro de la justicia social en el mundo del trabajo de nuestro tiempo, que es, ciertamente, un postulado político y también jurídico, jurídico-laboral, esencial. Convendrá recordar que esta es nuestra función, la función de la doctrina científica, según el fundador del Derecho del trabajo europeo, Hugo Sinzheimer ("Über soziologische und dogmatische Methoden in der Arbeitsrechtswissenschaft", *Arbeitsrecht*, 1922). El pensamiento jurídico laboral debe incidir en el terreno de las políticas del Derecho, de la política legislativa, sin limitarse al estudio del Derecho formal.

La ISLSSL desea agradecer el espléndido trabajo de programación de la *Universitas Mercatorum* de Roma, que ha hecho posible la celebración de nuestro XXIV Congreso Mundial cumpliendo con nuestro compromiso estatutario, así como la participación destacada de sus veintiocho ponentes de comprobada calidad científica, expresión de nuestra riqueza asociativa y de nuestro radical pluralismo de pensamiento, geográfico y de género. De entre ellos, verdaderamente imprescindible ha sido el trabajo de los coordinadores y las coordinadoras de los grupos de investigación y de los propios grupos (sobre: "*The effects of the pandemic on labor relationships and their regulation*"; "*Business restructuring*"; "*The great inequality gaps"; "Automation and digitization of labor relationships*"; "*The new forms of representation and collective organization of work and its*

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instruments of action"; "*Social security systems facing the coverage of new risks: dependency and long-term illnesses, obsolescence of professional qualifications*"), en la línea ya asentada de trabajo de nuestra Sociedad Internacional, inaugurada por el Presidente Treu, de fuerte sostenimiento de la preparación del Congreso Mundial en orden a la consecución de sus objetivos. Los *young scholars* de la ISLSSL son la savia de nuestra Sociedad Internacional y demuestran con su magnífica aportación sobre la generación de los *millennials* ("*Teaching Y generation: new approaches, methods and digital tools*") que el ritmo y la intensidad de sus intercambios, debates y aportaciones son ejemplares y envidiables.

Nos disponemos a celebrar el Congreso Mundial de mas larga trayectoria del iuslaboralismo, y estoy convencida de que esta nueva edición será esencial para el éxito de su objetivo científico.

En la ISLSSL apostamos por un Congreso Mundial, y por Congresos de los distintos ámbitos regionales, que quieren hablar al mundo sobre los fenómenos de que se ocupan y que nos ocupan, sobre fenómenos de nuestro tiempo y, prospectivamente, del venidero. El importante sedimento que nuestro Congreso Mundial de Roma deja a este fin de formar opinión jurídico-laboral especializada se comprueba en este libro.

Este encuentro mundial tan significado de nuestra asociación nos proporciona el oxígeno necesario para proseguir muestra tarea cotidiana, que, no por menos vistosa, deja de ser indispensable para el mantenimiento de nuestra red vital en comunicación permanente, para lo que hoy dispone de medios tecnológicos de los que antes carecía.

Falta quien escriba la historia, la crónica, de nuestros Congresos mundiales, y regionales, y del poso que han dejado, que será la historia de la ISLSSL, que, como las disciplinas de que se ocupa, tiene que mostrar su disposición al cambio y a la innivación, a su modernización, en definitiva, a su adaptación a su tiempo, con sus complejidades y diversidades y con el respeto de esa diversidad presidido por el valor de igualdad, un valor de cambio y de progreso social irrenunciable, de justicia social.

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Welcome address

Giovanni Cannata[1]

With great pleasure, I present this volume that gives an account of the key importance of the topics that will be at the centre of the XXIV World Congress of the International Society of Labor and Social Security Law (ISLSSL) on the theme "Work in a Changing World: The Quest for Labour Rights and Social Justice", held in Rome from September 17-20, 2024.

The reader will be able to navigate through a sea of highly relevant themes in a world characterized by social and economic dynamism and turbulence, from the consequences of the Covid-19 pandemic crisis to the drama of wars and political crises that have a strong impact on society, and consequently also on the world of work.

Other factors that have greatly destructured the global economy and challenged traditional labour law pillars include the growing globalisation of economies and the processes and effects of digital transformation.

These factors pose pinnacle challenges to social justice globally.

As a result, they also emphasised how important it is to modify current laws, with labour legislation being one of the top priorities.

The purpose of the ISLSSL World Congress is to talk about these problems, offer solutions, and present the main results of current research. However, it also aims to serve as a platform for the creation, growth, and consolidation of research networks and the dissemination of information on publications and study projects in the broad field of traditional and "grey" literature.

Multiple panels cover the six main themes of the conference.

1) The ways to achieve social justice in the world of work: current trends.
2) Digitalization, AI and employment.

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3) The new trends in the collective labour law.
4) Occupational health issues.
5) Social protection systems: lessons learnt and new ideas.
6) Teaching Y generation: new approaches, methods and digital tools.

Each section is divided into several subsections, where the over 400 abstracts received were distributed.

All this and other planned initiatives such as the rich poster session, some round tables, interviews with experts, presentation of books and magazines, as well as research centres are in the detailed map according to the program developed by a Scientific Committee chaired by Prof. Franco Carinci and to which the university is grateful.

In concluding this brief presentation, I want to sincerely thank the Organising Committee for their work, along with Professor Marco Mocella, the new Director of the Department of Legal Sciences of our University, for the customary dedication he invested in this event. I also want to express him friendly encouragement in dealing with this initiative, which he strongly wanted, and I have no doubt will be successful.

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Part 1
The ways to achieve social justice in the world of work: current trends

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Social justice in labour law: it's no longer actually about the law

Catherine Barnard[1]

1. Introduction

What is social justice in labor law? In the context of labor and employment, social justice ensures that "*those who have less in life must have more in law*"[2].

I'm not sure I entirely agree.

Let me explain why.

To do so I want to tell you a story about Great Yarmouth, a place you probably have never heard of, let alone visited. It is, in fact, a declining seaside resort in the East of England. In its heyday it boasted grand Victorian and Edwardian villas, houses which have now been turned into scruffy HMOs (homes of multiple occupation), lived in primarily by EU nationals, mainly from central and Eastern Europe, who came to Great Yarmouth to work in the chicken factories and on local farms. They took advantage of their free movement rights under Article 45 TFEU and under Regulation 492/11 and the Citizens Rights Directive 2004/38. Their work is labour intensive and low paid, involving long anti-social shifts. They often work via agencies and, more recently, many are employed on zero hours contracts. The local population has not wanted to do this short-term, low paid work.

We have been working with this group of EU migrant workers for the last five years, with the help of GYROS, a frontline advice agency who have

[1] Trinity College, Cambridge.

[2] Velasco J. Jr. (2009), *Separate and Dissenting Opinion* in *Perez* v. *Philippine Telegraph and Telephone Company*, G.R. No. 152048, 07 April 2009. There are a number of attributions for the source of this quote.

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given us access to their records[3]. The strand of the research I would like to focus on for the purposes of this article concerns their experiences at work. The story, as you might guess, is not always a happy one.

Research participants reported that factory work, especially in the poultry factories, was the fastest way to start work immediately upon arrival in the UK. All spoke of the cold temperatures in the factories and how the cold, wet environment hurt their hands. They also complained about the lack of training; they were expected to learn 'on the line' and fast. Many research participants said the first English word they learned was 'faster', due to the demands in the factory[4].

All those we interviewed agreed that the worst section to work in involved lifting heavy weights: interviewees said they were expected to lift between 30-60 kilos. In a (Portuguese nationality) focus group, of 6 attendees, three were off work with heath issues, all related to the physicality of work on the factory floor. Dorota, who worked for a recruitment agency providing staff to poultry factories, said:

> They [the workers] are given jobs that they physically cannot do. It's too hard for them or too quick in the factories, people are complaining it is too quick. Sometimes that the lines are making them sick, it must be so quick that when the line stops people are [dizzy].

Treatment by the "white helmets" (management) is often poor. One interviewee complained that a Portuguese national who was promoted to a managerial role caused "*problems to the Portuguese* […]. *She causes a lot of problems* […] *discrimination* […] [She is] *very strict with people and demeans them*". Ana (Romanian) said she feared being shouted at and humiliated in front of colleagues: "*They yell at you. They are calling you names. They are talking with you, very bossily. They humiliate you through their attitude. And I think this is the worst humiliation form ever*".

There were practical issues too: non receipt of pay slips and non-payment of holiday pay. Then there are additional "expenses". We were told by one research participant that some individuals pay line managers up to £20 cash per week to "guarantee" their shifts, with line managers exploiting and capitalising on the precarity of zero-hour contracts. Income is crucial because without it workers quickly get into debt, cannot pay their rent and

[3] For full details, see: Barnard C. *et al*. (2024), *Low-Paid EU Migrant Workers: The House, the Street, the Town*, Bristol: Bristol University Press, Appendix I and II for methodology. Some of the quotes below are taken from this book.

[4] For further details, see Barnard C. *et al*. (2024), chap. 4.

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other bills and then face eviction. This 'problem clustering' was very visible in our research[5].

UK employment law does, of course, apply to the factories in Great Yarmouth, assuming the individuals fall within the personal scope of the relevant law (ie they are an 'employee' for purposes of, say, claiming unfair dismissal or a 'worker' for claiming rights under the Working Time Regulations). There is in fact lots of law which applies in these situations, much of it based on EU law which continues to apply in the UK as 'assimilated law'. But, in addition, there is a significant volume of domestic law, particularly protecting employees against unfair dismissal and breach of contract, giving them a range of family friendly rights, and protecting them against whistleblowing. It's not the lack of laws that's the problem; it's the inadequate enforcement of those laws.

2. The question of enforcement – or lack of it

Article 3 of the Enforcement Directive 2014/54 says that Member States must ensure judicial procedures "*for the enforcement of obligations under Article 45 TFEU and under Articles 1 to 10 of Regulation (EU) No 492/2011*" are available to all Union workers and members of their family who "*consider themselves wronged by a failure to apply the principle of equal treatment to them, even after the relationship in which the restriction and obstacle or discrimination is alleged to have occurred has ended*". Formally speaking, the UK complied with its obligations under the Enforcement Directive. EU migrant workers had/have access to Employment Tribunals in the same way as nationals.

Yet, our earlier research shows EU migrant workers rarely take their cases to Employment Tribunals. A look at the data is telling. While these data are not robust, due to serious problems with methodology, they do give a flavour. We have looked at two periods: from 1 January 2010 to 31 December 2012 and 1 April 2019 to 1 April 2022.

In the first period (2010-2012), the ET judgments were all paper records and they were carefully combed and coded – noting which judgments had certain markers that might indicate that the Claimant was an EU migrant worker. The most helpful were the markers indicating that the Claimant's nationality was expressly referred to in the judgment and or where they used a translator into an EU language. In the 2010-2012 cohort, that gave

[5] Genn H. (1999), *Paths to Justice: What People Do and Think about Going to Law*, Oxford: Hart Publishing, p. 31.

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238 cases where either there was an express reference to nationality and or there was the use of an interpreter. And of those, there were 46 where there was both an express reference and an interpreter. That is compared to a total caseload in those years of about 333, 333 cases. The 238 cases therefore represented just 0.071% of claims. As an aside, the issues brought before tribunals closely reflected the issues we were witnessing in Great Yarmouth: the most common type of claim before the ETs was a wages claim – for unpaid wages or holiday pay. The second most common was unfair dismissal.

We then turn to more recent data (2019-2022), this time using the search function on the Tribunals website which has since been introduced. Again there are limitations on the methodology because it relied again on an express reference to nationality in the judgment or to an interpreter being present. We identified 265 claims over the 3 years in which there was either an express reference to nationality and or reference to an interpreter. 70 claims had both an express reference and an interpreter. We estimated that this would represent about 0.199% of claims – which is a more than doubling compared to the previous dataset but still a miniscule number of claimants, especially when compared to the 6 million or so EU nationals now known to be registered in the UK. As in respect of the first period, the main types of claims were UD (59.6%), race discrimination (36.98%), wages claims (24.91%) and holiday pay (23.77%). In terms of outcome, at the full merits hearing stage, 50.93% of cases were either fully or partially upheld. This compares extremely favourably to the MoJ statistics that indicate a success rate of about 8-9% for the 2019 and 2020 financial years. In other words, those cases which do make it to tribunals, have a far higher chance of success that those from UK nationals. This raises the question, then, of why so few individuals bring claims.

3. Why do so few EU migrant workers bring cases to Tribunals?

Our earlier work explored some of the barriers facing individuals bringing claims[6]. They can broadly be summarised as relating to the period of residence of the worker (the longer they have been in the UK or plan to be in the UK the more likely they are to enforce their rights), cultural expectations and previous experiences of work (particularly a reluctance of some workers to engage with state bodies arising from their experiences in communism), as well as practical and legal obstacles. Those practical and legal obstacles could be

[6] Barnard, Ludlow and Fraser Butlin (2018), "Beyond Employment Tribunals: Enforcement of Employment Rights by EU-8 Migrant Workers", *Industrial Law Journal*, 47, p. 226.

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grouped around four themes – the precarity of work and a fear of reprisals for raising complaints; language issues; a perception of a low chance of success (unfounded from our other data analysis) and a lack of knowledge of tribunals. This extends to advisers: one adviser told us that she thought tribunals were for "extreme cases" and not for something like a £200 wages claims.

Out of the 6856 case notes for the period of 2015 to 2020 in the database we worked on, provided by GYROS the frontline advice charity based on Great Yarmouth, there is no express reference to Employment Tribunals. In two case notes, ACAS (Advisory, Conciliation and Arbitration Service) is mentioned. However given the volume of cases, the relative paucity of references to the employment tribunal, or ACAS is surprising. As one adviser said in our interview:

> In all my years at GYROS [10 years] I have only had three people who made complaints to tribunals but a lot who have made complaints to me! People don't follow it through.

And for those few bringing claims, the procedures before the tribunals are intimidating. Take Case No. 4118198/2018 *Bocian* v *Millers of Speyside Ltd* as an example. The Claimant had received assistance from a (paid) representative to write letters to his employer during the disciplinary process but then sought advice from solicitors who did not advise him on time limits. Once he was dismissed those solicitors did not reply to his emails, and the representative spoke to ACAS and told the Claimant that he had to await his appeal outcome before starting Early conciliation. At a preliminary hearing the tribunal had to consider whether his claim was out of time. The judge specifically noted that:

> The reasons for that are firstly that he is a Polish national whose command of English is at best limited. He required a translator for the disciplinary hearing and the appeal hearing, and the Respondents arranged that on each occasion. He had a translator for the present proceedings. He described his own command of English as "5 out of 10". He was an operative working in a meat processing factory. His knowledge of what were for him foreign legal procedures was, I considered, very limited. Secondly, whilst he did seek advice from a Scottish solicitor, and had initial advice shortly after the dismissal, latterly his attempts to secure advice failed. The solicitor concerned did not reply to him. In any event he was not able to afford legal representation, and that probably explains the lack of response further from her.

Together with the erroneous advice from his representative, this formed the basis of the Tribunal's judgment that it had not been reasonably practicable for him to bring his claim within the time limits.

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So the bottom line is that individuals – in pour case EU migrant workers – have huge difficulties – social, linguistic, cultural – in bringing claims. Dawson and Muir raise a similar issue: EU law, they note, establishes a legal system that has "*uniquely relied on individuals to enforce, through litigation, the rights laid down in the founding EU Treaties*"[7]. What happens if the individuals are unable to enforce their rights due to resource (money) or capacity (knowledge) issues? The purported uniqueness of EU law – individual enforcement – becomes a weakness rather than a strength[8]. In the UK the problem is exacerbated by the absence of trade unions in many workplaces[9] and the absence of a system of labour inspectors. This leaves EU migrant workers (indeed most migrant workers) unprotected.

4. Conclusions

I have argued in this article that there is a lot of relevant law but little enforcement of that law. This means that some employers are getting away with some bad conduct: bullying, poor management and line management, refusal of toilet breaks and even some instances of exploitation and modern slavery. In our case study, the principal response to workplace issues is to move and find other work.

The European Commission is under significant pressure to introduce a proposed Directive on enforcement. At a recent conference when this suggestion was put to an informal vote, the audience was split but on balance came out against it. Modern Directives now contain extensive provisions on enforcement. Take for example the Platform Work Directive[10]. Article 18 provides persons performing platform work (PPPW), including those whose employment or other contractual relationship has ended, must have

[7] Dawson M., Muir E. (2011), "Individual, Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons from the Roma", *Common Market Law Review*, 48(3): 751-775, p. 754.

[8] Ibid., p. 755.

[9] Cf Art. 3(2) of Directive 2014/54 "*Member States shall ensure that associations, organisations, including the social partners, or other legal entities, which have, in accordance with the criteria laid down in their national law, practice or collective agreements, a legitimate interest in ensuring that this Directive is complied with, may engage, either on behalf of or in support of, Union workers and members of their family, with their approval, in any judicial and/or administrative procedure provided for the enforcement of the rights referred to in Article 1*".

[10] I use this version of the text: *Texts adopted – Improving working conditions in platform work – Wednesday, 24 April 2024* (*www.europarl.europa.eu/doceo/document/TA-9-2024-0330_EN.html*).

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"*access to timely, effective and impartial dispute resolution and a right to redress, including adequate compensation for the damage sustained, in the case of infringements of their rights arising from this Directive*". Article 18 is supported by Article 22 which provides PPPWs with protection against adverse treatment or consequences and Article 23 which provides that Member States shall take the necessary measures to prohibit the "*dismissal, termination of contract or their equivalent* […] *on the grounds that they [PPPWs] have exercised the rights provided for in this Directive*".

However, while the extensive protection is good, the problem is that it largely relies on the individual enforcement model. Yes, the Platform Work Directive does allow, under Article 19, representatives of PPPWs and legal entities having a legitimate interest in defending the rights of PPPWs, to engage in any judicial or administrative procedure to enforce any of the rights or obligations arising from the Directive. However, this pre-supposes that there are representatives, such as trade unions, to go to which, in the case of EU migrant workers in places like Great Yarmouth, is not the case. It also supposes that the workers are willing to raise their concerns, which often they're not.

So the question is what can be done. This is where the state, not the individuals, should play a role. The privatisation of enforcement – i.e. reliance on individuals to enforce their rights – is a failed model for many low paid workers. The state needs to step in, not to provide more rights, but to focus its resource on ensuring the enforcement of the existing rights. A proper and well funded system of labour inspectorates would be a good start. But it would also be good for states to fund small scale, front-line trusted organisations, like GYROS, to provide more holistic advice and support. In Great Yarmouth those EU migrant workers facing difficulty go to a GYROS drop in. They get help, usually in their mother tongue. And we know that help is tremendously practical. So, for example, GYROS often calls the employer or agency on behalf of the client and seeks to resolve the issue directly.

> Client thought he was no longer working for (Agency) and wanted to know why he did not receive P45. I called to main office to speak to the agency directly and administrator informed that client is still employed, and he still has outstanding holiday pay. Client did not know he was still employed as he hasn't been called for any shifts. Said he will then try to get some work with them, if not he will come back if he needs to in order to request P45. [Lithuanian, male, food processing factory, GYROS case note ID 485]

Alternatively, GYROS' assistance might be to support a client to find a new job: the case notes reveal that GYROS supported the client above into

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a new job, helping him write a CV, fill out the application form and even phoning the new company on his behalf. He was at an induction the day after he came to see GYROS. Once he started to work, GYROS helped the client to apply for benefits, namely Universal Credit (UC).

So beyond simply 'advice' for many clients, GYROS acts simultaneously as advocate, translator, donor (eg in relation to money, phone), and broker (or all four) in their employment relationships, depending on what is needed. The multi-faceted response by GYROS is appreciated by its clients. From August 2019 to August 2021, GYROS received 2166 service feedback forms from clients accessing services. In this time 83.6% of GYROS clients rated the service they received as 10/10, with a further 1.4% rating it at 9/10 and 1% at 8/10.

What our study shows, then, is that at least among the cohort we are looking at, many do not access formal legal advice to resolve their problems. Rather, they go to the GYROSs of this world, where they exist, to seek practical resolution of their problems. The problem resolution is often pragmatic (anti-bureaucratic) and multi-faceted. And the clients appreciate this. We call this approach pragmatic law. It is about pragmatism in the approach to difficulties experienced by the clients which are often rotted in the law. It is not about more law. Law enforcement, in its many different guises, should be the priority for the next decade for governments and the EU alike[11]. If this do not, the story I tell of Great Yarmouth show what happens when enforcement does not happen.

[11] Rasnača Z. *et al*. (2022), *The Effective Enforcement of EU Labour Law*, Oxford: Bloomsbury.

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Achieving social justice in the world of work

Kamala Sankaran[1]

1. Introduction

From its founding, the ILO has acknowledged that work undertaken in conditions of "injustice, hardship and privation", is likely to produce unrest and imperil peace and harmony. Thus, the Preamble of the ILO's Constitution opens with the resounding lines "*Whereas universal and lasting peace can be established only if it is based upon social justice*".

The ILO Constitution of 1919 adopted at the end of World War I, quite remarkably, indicated that the road to peace required member States to address injustice in the world of work. Supiot (2023, p. 16) notes that "*Albert Thomas, the organisation's first Director-General, had chosen the motto 'si vis pacem, cole justitium' (if you desire peace, cultivate justice)*". This understanding was widely shared by the member States, workers and employers gathered in that first International Labour Conference (ILC) and who acknowledged that the causal link between peace and social justice required that the world of work needs to be underpinned by a minimum set of rights available to all those who work. The delegates went on to adopt Conventions relating to hours of work, unemployment, maternity protection and night work[2].

The link between peace and social justice has been recalled on multiple

[1] National Law School of India University, Bengaluru and a member of the ILO Committee of Experts on the Application of Conventions and Recommendations. Viewed expressed are personal.

[2] Hours of Work (Industry) Convention, 1919 (No. 1); Unemployment Convention, 1919 (No. 2); Maternity Protection Convention, 1919 (No. 3); Night Work (Women) Convention, 1919 (No.4); Minimum Age (Industry) Convention, 1919 (No. 5) and Night Work of Young Persons (Industry) Convention, 1919 (No. 6).

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occasions by the ILO. The Declaration of Philadelphia of 1944, noted that "*poverty anywhere constitutes a danger to prosperity everywhere*". The year 1969 which was the ILO's 50th anniversary was declared by the UN as the International Year for Social Justice[3]. The then Director-General of the ILO, C. Wilfred Jenks, wrote extensively on the links between human rights and social justice (Jenks, 1968; 1969). He emphasised the importance of social justice as it enables all person to realise human rights and stressed the importance of enforcement procedures as being equally important as labour standards. More recently, the present Director-General of the ILO, Gilbert F. Houngbo, in his report to the ILC in 2024 has underscored the importance of renewing the social contract in order to advance social justice (ILC, 2024). He has highlighted economic insecurity, uncertainty and inequality that are "*a reflection of the unravelling of the social contract in respect of multiple elements of human development*".

2. Social justice as a human right?

Early constitutions adopted across the world were "*short, sparse and rigid documents*" (Landau, Bilchitz, 2018). The emphasis on political and civil rights echoing the calls for liberty, equality and fraternity were the focus of the rights entrenched in some of the early constitutions around the world. The emergence of social rights, and therefore of social justice, has been in large part due to the resistance of the labour movement demanding substantive, and not merely, formal equality. Writing on the emergence of social justice in industrializing Europe, Brodie (2007, p. 93) observes that "*If we paint the history of capitalist development with very broad strokes, it is apparent that the 19th century was marked by the creation of wealth, the 20th century by its redistribution, and the early 21st century by its concentration and polarization*". In several countries of the industrializing Global North, the push for recognition of social citizenship, and the emergence of the social question was closely linked to the trade union movement and the emergence of the welfare state. This post-war social contract is in deep crisis, and its consequent roll-back in recent decades, has led to the re-emergence of the social question globally (Breman, van der Linden, 2014).

The emergence of the concept of social citizenship, and the role of the post-war welfare state coincided with the recognition of the social question internationally. The Universal Declaration of Human Rights has some nearly 30 rights encoded in it (D'Souza, 2018). Subsequently, due to what some

[3] The ILO was awarded the Nobel Peace prize that year.

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call a "rights revolution" several more human rights have been articulated and recognised. Yet in order to enjoy these human rights, it is first essential to recognise the "*right to be human*" (Baxi, 1986). Some basic rights are essential, to become a human who is the bearer of such rights. This approach is reflected in Article 25 of the Universal Declaration of Human Rights (UDHR) that "[e]*veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control*".

The Universal Declaration of Human Rights, that was adopted in 1948 viewed human rights as indivisible[4]. Yet, the creation of the Committee on Freedom of Association within the ILO marked the special place of freedom of association amongst various labour standards, that permitted complaints to be filed by trade unions operating in countries that had not ratified either Convention No. 87 nor Convention No. 98 dealing with freedom of association and collective bargaining. At the same time, the ILO with its early emphasis on social justice continued its work of adopting labour standards on a variety of topics, not limited to only a narrow compass of what human rights properly ought to comprise as suggested by some scholars at thar time (Cranston, 1962).

Notable among the labour standards adopted by the ILO in that period is the Social Policy (Non-Metropolitan Territories) Convention, 1947 (No. 82) that directly addressed the colonies/territories that were governed by many of the member States of the ILO. The Convention laid down standards for "*the well-being of the peoples of non-metropolitan territories*" (Article 2). The principles of this Convention were revised and elaborated in the Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117). This was done keeping in mind the newly independent post-colonial states of the Global South, and Convention No. 117 made explicit that the revision of the 1947 Convention was carried out "*primarily with a view to making its continued application and ratification possible for independent States*" (Preamble to Convention No. 117). The Convention deals with matters as varied as public health, housing, nutrition, education, the welfare of children, status of women, condition of employment, remuneration of not only wage earners but also independent producers, protection against usury, training, non-

[4] As is well-known, the politics of the Cold War divided these rights: civil and political rights viewed as relatively 'costless' find place in the International Covenant on Civil and Political Rights, while the so-called second-generation rights, the socio-economic rights are reflected in the International Covenant on Economic, Social and Cultural Rights.

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discrimination (on grounds broader than Convention No. 111) the protection of migrant workers, social security, standards of public services and general production. In terms of its scope and vision, it far-outstrips provisions falling under the rubric "socio-economic rights" covered by various jurisdictions.

The emergence of "social justice" in the rights discourse of the Global South has had a slightly different trajectory than that noticed earlier in the Global North. The broad scope of the Social Policy Conventions reflects developments in the post-colonial countries following World War II. In the case of several countries of the Global South, the demand for social justice was part of the freedom movement against colonialism, and the issues of development, inclusion and recognition of identities was placed more broadly as a 'social' question and not narrowly as a matter of labour rights. This found reflection in several twentieth century post-colonial constitutions that were drafted amidst the calls for social justice (read: against oppression). These documents have a far broader conception of rights and according to a central place of social rights in the constitution. Unlike the lengthy debates that occurred in the Global North about the whether these socio-economic rights can be properly termed human rights, the inclusion of such social rights into these post-colonial constitutions was viewed as inevitable and non-controversial.

Post-colonial constitutions such as India, Kenya, South Africa, and more recently Nepal, have recognised that the earlier iterations of rights are not adequate to address discrimination, poverty and identity rights. India for instance, incorporated the principle of social justice in its Constitution. Its preamble resolved to secure to its citizens – Justice, social, economic and political. Nepal in its Constitution of 2015 has an elaborate provision on the right to social justice which goes beyond merely socio-economic rights of health, housing, education, livelihoods and social security but also addresses inclusion, the protection of the environment, and the honour and dignity of marginalized groups.

The constitutionalizing of such social rights, in the sense that they form part of these 'thicker' post-colonial constitutions allows for the greater acceptance of the ideas of social justice among the political community in these countries. Social justice therefore is not a matter solely for the workers or their organizations to espouse but becomes part of the broader political discourse in these countries. Whether that will lead to a greater acceptability of international labour standards is, of course, another matter. Yet, as the example from my own country shows, workers often move the courts to demand labour rights by citing constitutional provisions relating to social justice and welfare. This provides them with an alternative route of redress, outside of labour law.

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The understanding that human rights encompass all forms of labour rights and that they are inextricably intertwined with social justice is captured in the recent resolution adopted by the ILC in 2024. At the conclusion of the International Labour Conference (ILC) in June this year, the ILC adopted a resolution reading rights at work with social justice. The resolution noted, "*Fundamental principles and rights at work (FPRW) are universal human rights and immutable in nature. They are inseparable, interrelated and mutually reinforcing. They are key to human dignity and well-being and to the foundation of inclusive and just societies. They are important for ensuring that economic and social progress advance together in the pursuit of social justice*" (ILC, 2004).

The CEACR, too, in 1924 in its Report noted that, "*The protection afforded by international labour standards is not designed to apply in good times only. It is in times of crisis that international labour standards acquire their full significance by providing guidance on a way forward, safeguarding and promoting social justice through a rules-based multilateral system, of which the ILO supervisory system is an integral part*" (ILC, 2024, p. 58).

3. Challenges for achieving social justice in the Global South

ILO statistics indicate that 2 billion workers (constituting 60 percent of all workers) were in informal employment (ILO, 2023). Informal employment occurs both in the formal sector (usually covered by regulations) as well as in the informal sector. A majority of women in the Global South work in informal employment. Thus, any talk of championing gender equality in the world of work cannot be fulfilled without also championing the transition to formality. At the very least, coverage under social protection of those in an informal employment has to be part of a social justice agenda. However, what makes such a programme challenging is that the bulk of informal employment in such countries occurs among those working outside employment relationships. These are persons who are working on own-account with the help of their family members and eking out a livelihood. Such workers could be the last link in production supply chains, or those earning a livelihood as street vendors or waste pickers. Labour law had traditionally not focused on such workers. What is interesting is that Social Policy Conventions of the ILO mentioned earlier paid attention to 'independent producers'. Greater international attention in recent times has highlighted the precarious conditions under which such work is performed. Other forms of labour such as forced labour or child prostitution that do not fall under regimes of labour law also important areas to focus upon. Addressing informal employment,

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providing social protection to such vulnerable workers alongside a range of other policies to 'formalise' them is a necessary pre-condition to ensuring social justice for all.

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Las tendencias de pluralización, segmentación y expansión del Derecho del Trabajo y la idea de Justicia Social

Adrián Goldin[1]

El sistema de protección del trabajo fue construido históricamente en función de la figura del *trabajador de la industria* según se manifestaba en el tiempo de la primera revolución industrial, figura a partir de la cual se reconoció el *tipo teórico del trabajo subordinado*. Fue el punto de partida para establecer *un régimen de protección*, necesario por la condición de fragilidad en que ese trabajador se encontraba.

Hace algún tiempo[2] – antes aún del desencadenamiento de la pandemia – yo había señalado dos tendencias que veía ya en curso en el sistema de protección del Trabajo y que me parecían por entonces divergentes, hasta quizás contradictorias. En primer lugar, una *tendencia hacia la segmentación del sistema de protección del trabajo y consiguiente pluralización de los estatutos de protección*; simultáneamente, me pareció posible reconocer *una tendencia hacia la universalización de la protección social.* Revisada la

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[2] En Goldin A. (2019), "Sur les droits du travail en Amérique latine. Évolution et perspectives", *Le Travail au XXI Siècle: Livre du centenaire de l'Organisation internationale du travail*, sous la direction de Alain Supiot, Ivry-sur-Seine: Les Éditions de l'Atelier, pp. 236-239.

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cuestión, esta vez ya en pleno desarrollo del proceso pandémico, desestimé aquella hipotética contradicción[3]; creo desde entonces, por el contrario, que esa protección universal sería, precisamente, el mecanismo que podría dotar al sistema en su conjunto de la propiedad de involucrar en un régimen de algún modo *unificado* a todos los que prestan trabajo personal y necesitan protección.

De ese modo, el *trabajador subordinado* – en un primer momento, *el de la industria* – se constituyó en beneficiario excluyente del sistema de protección laboral. La figura así identificada dio lugar al reconocimiento de una serie de *constantes* consideradas definitorias de ese su modo de trabajar, que fueron elevadas a nivel de abstracción para configurar conceptualmente una categoría – la de la de la *subordinación o dependencia* – que no sería sino una *réplica conceptual y abstracta* de aquel específico modo de trabajar. Esa categoría sería desde entonces una suerte de "c*alificador inclusivo/excluyente*" que permitiría, cuando estuviera presente, la inclusión de un vínculo determinado en el sistema de protección laboral y que, por el contrario, lo excluiría en caso de ausencia. Esa "réplica", adicionalmente, implicaría una estilización de aquella categoría y daría lugar a una expansión del sistema de tutela pues habilitaría la inclusión de muchos otros trabajadores, *entre* ellos los del comercio, los servicios, el campo y hasta la función pública.

Mediante cotejo con esa categoría, el vínculo de dependencia podía reconocerse de modo "*simple, evidente y casi intuitivo*", haciendo innecesaria en la mayor parte de los casos, su sumisión a la técnica del "haz de indicios", a la que se recurre en general en presencia de "casos grises" en los que no es posible reconocer la subordinación con aquella simplicidad.

Erigido en torno de esa idea dominante – la de la "subordinación" – el régimen normativo de la protección del trabajo había respondido en su tiempo a esa unidad conceptual que definía a los sujetos protegidos mediante una lógica correlativa de "*unicidad regulatoria*". Por decirlo de otro modo, a una única categoría de sujetos protegidos – *los trabajadores subordinados* – debía corresponderle un único régimen de protección. Existían por entonces (y aún existen) algunos regímenes especiales que regulan el desempeño de trabajadores de ciertos sectores profesionales (sólo a título de ejemplo en el derecho argentino, entre varios otros, los de los trabajadores de la construcción, los periodistas profesionales, los trabajadores del campo, etc.). Pero su existencia no alteraba aquella condición *dominante* del *trabajo dependiente*, como principal y virtualmente única expresión laboral genérica y de alcances amplísimos.

[3] Goldin A. (2021), "Segmentación de la tutela laboral y Universalización de la protección social", *Derecho de las Relaciones Laborales*, 6: 844-850.

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Sobrevinieron en tiempos más recientes *otras modalidades de reclutamiento del trabajo humano* que ya no reproducen con comodidad aquella figura histórica. Sí, en cambio, su posición de debilidad en relación con el empleador. Y fue necesario concebir, como en otros países, *regímenes legales especiales (estatutos) para dispensarles protección adecuada, que reconocieran sus singularidades*. Es el caso, entre otros, de los *teletrabajadores* y otros trabajadores *a distancia*, cuyo régimen fue ya sancionado entre nosotros, y el de los *trabajadores de plataforma*. Junto a esos problemas de identificación se generalizan los contratos de trabajo *atípicos* dando lugar a un proceso de *desestandarización contractual* y se profundizan de ese modo las dificultades para el reconocimiento de la naturaleza de los vínculos[4].

Por todo ello, ese concepto de *dependencia laboral* como calificador *inclusivo/excluyente* para identificar la pertenencia al centro de imputación del Derecho del trabajo parece en trance de perder su condición de unico criterio de acceso al sistema de protección. Es en ese marco que aparecen nuevas modalidades de reclutamiento del trabajo humano también distantes de aquella histórica *tipicidad*; y es notable que buena parte de ellas procuran para ello ampararse en ese tipo de vínculos que no definen con claridad el tipo de relación que media entre quien presta el servicio y quien lo recibe. Se vislumbra, de modo algo menos nítido, otro efecto sobreviniente como sería el de la *segmentación y pluralización de los regímenes de protección laboral*, en cuyo marco el del tradicional *trabajador subordinado* que venimos de evocar – es el que en especial consagran la mayor parte de los ordenamientos laborales – *habrá de constituir sólo una categoría más entre algunas otros y ya no la única y virtualmente excluyente,* pues v.gr., y por ahora, podrían sumarse otras – y sus respectivos estatutos normativos – como los ya evocados de los *teletrabajadores* o, más ampliamente, trabajadores "a distancia", los *trabajadores reclutados por medio de plataformas informáticas*[5], los autónomos (¿sólo los económicamente dependientes?), y otros por venir. Y es altamente posible que una cantidad apreciable de

[4] Esas atipicidades son también atribuibles a las tendencias de "*huida del Derecho del Trabajo*" (trabajo "en negro", fraude y simulación, interposiciones y descentralización productiva, individualización (huida del Derecho Colectivo), el recurso – real o artificial – al *trabajo independiente*, la *desestandarización*. En la concepción de esta idea de la "huida del derecho del trabajo", véase Rodríguez Piñero M. (1992), "La huida del derecho del Trabajo", *Relaciones Laborales*, 1: 85-94.

[5] Consideré el tema en Goldin A. (2020), *Los Trabajadores de Plataforma y su regulación en Argentina*, Signatura: LC/TS.2020/44 74 p. Editorial: CEPAL junio 2020 distribución y logística, asistidas, por otra parte, por las formas también digitalizadas de venta de los productos.

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ellos requerirán otros tantos regímenes legales, en especial si por sus aún impredecibles especificidades no pudieren quedar encuadrados en las normas del vigente sistema de protección del trabajo humano.

1. Otra morfología estatutaria

Como en los casos del teletrabajo y de los trabajos de plataformas, no se trataría de los ya evocados estatutos sectoriales, sino de *regímenes de otra morfología estatutaria*, cuyos destinatarios se definirían por la utilización de las tecnologías de la comunicación, del procesamiento de la información, de los modos de reclutamiento y de prestación.

Si así sucediere, ha de perder vigencia, como de hecho ya sucede, la lógica histórica de la existencia de un único régimen de protección para todos los trabajadores subordinados – el tradicional Derecho del Trabajo – que evolucionaría en el sentido de incluir en lo sucesivo una pluralidad de regímenes normativos que contendrían normas distintas para categorías diversas, lo que implicaría una forma de segmentación de la tutela y pluralización de los regímenes de protección del trabajo. Se *resquebrajaría de ese modo aquella lógica histórica de la virtual "unicidad reglamentaria" que tuviera centro de imputación en una* única *y dominante categoría como lo fuera hasta no mucho la del trabajo subordinado*. No es desdeñable, entonces, la hipótesis de que el ordenamiento laboral pueda estar evolucionando en tal caso en el sentido de la *diversificación creciente de sus contenidos*, concibiendo normas y estatutos distintos para categorías diferenciadas – una forma, como queda dicho, de *pluralización o segmentación tutelar* – adquiriendo por ello una nueva conformación.

2. Tendencia de pluralización

A aquella tendencia se suma una segunda línea pluralizadora. La de ciertos *trabajadores autónomos*, que han estado hasta ahora al margen del sistema de protección. Son aquellos que prestan personalmente sus servicios, escasa o nulamente dotados de recursos de capital y sin el auxilio de terceras personas. Como quedó en evidencia en la pandemia, soportan las más altas condiciones de desprotección y están sujetos al brutal dilema del "work or lose your income" ("trabaja o pierdes tus ingresos") de modo análogo a cuanto sucede con los trabajadores informales.

Esos trabajadores son autónomos *desde el punto de vista legal*, pues no están subordinados a sus dadores de trabajo. Pero no lo son en

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un número significativo de casos *desde una perspectiva económica*, en aquellos casos en que buena parte de sus ingresos – cuando no la totalidad – depende de un único cliente y dador de trabajo. *Esos y otros trabajadores autónomos* que prestan personalmente sus servicios escasa o nulamente dotados de recursos de capital y sin el auxilio de terceras personas conforman, como queda dicho y lo puso en evidencia la pandemia del Covid-19, uno de los sectores más desprotegidos de los sistemas de la producción y los servicios[6]. Resta, desde luego, discernir cómo será el estatuto de regulación de esos trabajadores que, como categoría diversa a la de los *trabajadores subordinados*, seguramente no tienen los mismos requerimientos de protección laboral. Si bien esa tarea de discernimiento no constituye el objeto de esta reflexión, se impone como evidencia adicional que *bien distinto será el tratamiento de la relación de trabajo cuando se pueda reconocer en ella un dador de trabajo que detente un poder contractual superior al del prestador*, respecto de esos otros casos en que tal desigualdad no se manifieste, o no se pueda constatar que en efecto ocurre. En aquél supuesto no parece necesario pretender que existe allí un vínculo de dependencia sino, más ampliamente, un fenómeno de *desigualdad contractual* que deberá tener el tratamiento consiguiente. Eso dio lugar a regímenes especiales de protección en diversos países (España, Italia, Alemania), bajo la genérica designación de "*trabajadores autónomos económicamente dependientes*".

Esta distinción y aquella de los estatutos de nueva morfología son los puntos iniciales del *proceso de doble sendero* de la segmentación tutelar que parece estar en curso.

3. Derecho en expansión

Hoy se percibe, en efecto, que las diversas manifestaciones del trabajo se ordenan, más bien, en un espectro plural, en el que *subordinación y autonomía plenas* no son más que instancias terminales o extremas de un "continuum" en formación. Se trata de *un derecho del trabajo nuevamente en expansión* que abarca mucho más que el trabajo subordinado pero que incluye a este último, que no perderá en lo inmediato su condición dominante.

De ese modo, luego del recordado primer trayecto expansivo del sistema de protección, habilitado por la *estilización* y consecuente mayor capacidad abarcativa de la idea de *dependencia como calificador inclusivo-excluyente*,

[6] Conf. Patrick Belser, ILO Senior Economist, Geneva, (ILO news) March 30, 2020, *Covid-19 cruelly highlights inequalities and threatens to deepen them.*

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aquel proceso de *resquebrajamiento de la unicidad reglamentaria* y consiguiente *segmentación y pluralización del régimen de protección del trabajo y agregación de nuevos estatutos* podría estar albergando *una nueva tendencia expansiva* – un Derecho del Trabajo de mayor alcance – que si bien no prescindiría del concepto de *dependencia* como *calificador inclusivo*, sí estaría desembarazándose del mismo como calificador *excluyente* (hasta ahora, la ausencia de la dependencia excluía del sistema de protección). La *dependencia laboral* configuraría una de las categorías y ya no la única ni necesariamente la determinante central de pertenencia al sistema de tutela. En ese proceso expansivo del sistema de protección del trabajo humano, el tradicional trabajo *subordinado* – y la categoría que lo define – de ningún modo desaparece e incluso seguirá siendo por un tiempo impredecible, en tanto es el centro de imputación de uno de los estatutos, mayoritario y de algún modo (tal vez decreciente) el estatuto dominante. El sistema de protección, hasta ahora encorsetado en torno del concepto de dependencia laboral, no parece renunciar a él pero tampoco acepta quedar a él confinado. Otros estatutos pueden albergar la posibilidad de incluir el vínculo de dependencia, *pero también formarán parte del sistema de protección aún al margen de ese vínculo*. En otras palabras: el derecho del trabajo parece reorganizarse para acoger a todos los que viven de su trabajo personal y en tal condición necesitan protección.

En cualquier caso, el Derecho del Trabajo en expansión parece incluir también un esquema básico y generalizado de tutela – una suerte de derecho mínimo y común del trabajo – que incluye la *Garantía Laboral Universal* postulada de modo harto sugerente en el Informe de la Comisión Mundial sobre el Futuro del Trabajo, los *Derechos Fundamentales en el Trabajo de la OIT* (libertad sindical, prohibición del trabajo infantil, prevención de la discriminación y del trabajo forzoso, entorno seguro y saludable), y los demás componentes regulatorios propuestos como parte de aquella Garantía Laboral Universal (condiciones de trabajo básicas, salario vital adecuado, límites a las horas de trabajo, salud y seguridad en el lugar de trabajo). Todo ello, junto a los ya recordados derechos personalísimos o inespecíficos de las personas en el trabajo, estos últimos producto de la jurisprudencia y también de la legislación, definitivamente incorporados al plexo tutelar.

Estaríamos pues rumbo a un sistema más complejo que no se limita al trabajo dependiente sino a todas las manifestaciones del trabajo personal *pero que se estructura en torno de una construcción de pluralidad estatutaria y por lo tanto, incluyente de diversos regímenes*.

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4. Un sentido de justicia social específico del trabajo

Si esta transformación – esta segmentación y pluralización del sistema de protección laboral – estuviera efectivamente en marcha, *la realización del principio de justicia social también debería buscarse en el marco de este esquema.* Si se cambia la forma de regular el trabajo, inevitablemente habrá que mutar la idea de justicia social en su conexión con el trabajo. Por lo tanto, es necesaria la ampliación de la idea de la justicia social más allá del empleo asalariado, lo que ya está en marcha en el concepto mismo de "Trabajo Decente". Esta idea – propuesta por la OIT desde principios de siglo[7] – se refiere a "*un trabajo que sea productivo y proporcione ingresos justos, seguridad en el lugar de trabajo y protección social para las familias, mejores perspectivas de desarrollo personal e integración social, libertad para expresar sus preocupaciones, organizarse y participar en las decisiones que afectan sus vidas y la igualdad de oportunidades y de trato para todas las mujeres y hombres*". Se trata claramente de una formulación más conceptual y menos casuística (en términos de derechos) de justicia social, que no sólo está vinculada a los asalariados sino a todas las personas que trabajan y a todas las empresas en las que lo hacen[8]. Desde esa perspectiva, promover la justicia social significa no sólo aumentar los ingresos y crear empleos; es también una cuestión de derechos, dignidad y libertad de expresión de los trabajadores, así como de autonomía económica, social y política[9].

De esta manera, es el estándar de Trabajo Decente que se alcanza cuando su régimen de protección no se limita al trabajo y sus condiciones, sino que permite la conexión con otros valores de la vida. Por tanto, no basta con

[7] Véase: OIT (1999), *Trabajo Decente, Informe del Director General*, Conferencia Internacional del Trabajo, 87ª reunión (Ginebra). Véase: *www.ilo.org/global/topics/decent-work/lang--en/index.htm*.

[8] OIT (2018), *Declaración sobre la justicia social para una globalización equitativa*, adoptada por la Conferencia Internacional del Trabajo (2008), Artículo I.A (Ginebra), p. 11.

[9] Un concepto amplio de justicia social, no sólo como un intercambio adecuado de cantidades (de trabajo por salario) sino también de un acceso adecuado al trabajo y de un reconocimiento justo de las personas, ya contenido en el Preámbulo de la Constitución de la OIT y en la Declaración de Filadelfia, requiere condiciones de trabajo verdaderamente humanas. Se trata del justo reconocimiento de las personas enfocadas en la dicotomía entre tener y ser para que tengan la satisfacción de dar la plenitud de sus capacidades y hacer el mayor aporte al bien común, que facilite la posibilidad de desarrollo de las personas, de sus capacidades personales, y la integración social, la libertad para expresar sus preocupaciones, organizarse y participar en las decisiones que afectan sus vidas (ver A Supiot, *¿Qué justicia social internacional en el siglo XXI?* discurso de apertura en el XXI Congreso Mundial de la Sociedad Internacional de Derecho del Trabajo x y de la Seguridad Social, Ciudad del Cabo, 12 a 15 de septiembre de 2015).

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garantizar las políticas, actividades e instituciones directamente vinculadas a los mercados laborales; por el contrario, es necesario que a nivel global y nacional se refuerce la convergencia de políticas en toda una gama de esferas que tienen impacto en la producción, las empresas y los trabajadores, es decir, en los niveles social, financiero, fiscal y económico. En resumen, se podría decir que la idea de Trabajo Decente es la expresión laboral moderna de la justicia social, que se enriquece explícitamente con otros componentes; en la tendencia a ampliar el alcance subjetivo del sistema de protección, *la superación del marco restringido de la dependencia* es, por tanto, sólo uno de los ejes del proceso de extensión.

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The great inequality gaps: a brief overview[1]

Catarina de Oliveira Carvalho[2]

1. Study delimitation and methodological approach

The present paper corresponds to a synthesis of the study done by Research Group 3 on "The Great Inequality Gaps" appointed by the International Society for Labour and Social Security Law (ISLSSL) to be presented at the XXIV World Congress on Labour Law and Social Security Law ("*The Quest for Labour Rights and Social Justice*"), to be held in Rome in September 2024. The coordination of the group was assigned to me at the end of October 2023 by ISLSSL to promote collaborative research around this topic, and the work of the research group extended between January and June 2024.

Firstly, a questionnaire proposal limiting the object of the study was prepared, debated, and adjusted accordingly. This topic is extensive, so we had to determine which inequality gaps would be addressed, and we decided to focus mainly on anti-discrimination law, with some occasional references to forms of the so-called "atypical employment". Then, the main discrimination factors to tackle were restricted according to their relevance in the different legal frameworks involved, leaving some final questions to specificities of some inequality factors which were not previously addressed, but had interesting insights in some of the countries. Afterwards, all research

[1] I would like to express my gratitude to all researchers involved in Research Group 3 (identified in the following notes) for the commitment to carry out this collective effort and for producing such interesting and detailed reports, which allowed me to learn so much while preparing the present paper. A special thanks to my colleague Milena Rouxinol who helped me to prepare the first questionnaire and was always available to debate and exchange point of views during all the research period.

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teams/researchers answered the questionnaire, such contributions being the basis for this paper. Since the page limit established does not allow for an extensive analysis of all the problems covered in the questionnaire, some of them were left out. At the same time, the depth of the research developed in national reports is not perceptible, justifying the direct reading of the national reports, which can be consulted directly in the ISLSSL website.

Unfortunately, due to different sorts of reasons, the initial broader group of researchers from several continents was reduced to six countries – four of which belong to the EU – and two continents: Croatia[3], Italy[4], the Netherlands[5], Portugal[6], Brazil[7], and Venezuela[8].

2. Which are the great inequality gaps?

Even though most of the countries involved in this research group recognize that in the last decades progress has been made in achieving the principle of equality, also through the implementation of antidiscrimination law, there are still some persistent "inequality gaps" and new ones on the horizon.

Gender inequalities, including the gender pay gap, remain a critical subject in all the countries under analysis. Regarding the EU countries, the Gender Equality Index[9] can be used as a comparator. In a quick overview, Italy ranks 13th with 68.2 points out of 100, Portugal ranks 15th with 67.4 points out of 100, and Croatia ranks 20th with 60.7 points out of 100. They all score below the average for the 27 EU Member States, which is 70.2 points out of 100. But even the Netherlands, ranking 2nd on the Gender Equality Index with a score 7.7 points above the score for the EU as a whole, identify gender as one of five primary disparities that contribute to unequal opportunities for access to the Dutch labour market: older women have lower incomes, work part-

[3] Ivana Grgurev (University of Zagreb, Faculty of Law).

[4] Massimiliano Delfino (University Federico II of Naples, in cooperation with Mariagrazia Lamannis, Univ. Magna Graecia of Catanzaro); Carla Spinelli (Univ. Aldo Moro of Bari, in cooperation with Federica Palmirotta, University of Modena e Reggio Emilia), Anna Zilli (University of Udine, in cooperation with Massimiliano De Falco, University of Siena).

[5] Heleen Andriessen and Fieke Weber (Leiden University).

[6] Milena Rouxinol, Ana Teresa Ribeiro (Universidade Católica Portuguesa, Faculty of Law) and Luísa Andias Gonçalves (University of Coimbra, Faculty of Law).

[7] Christiana D'Arc Damasceno Oliveira, Academia Brasileira de Direito do Trabalho (ABDT).

[8] Juan Carlos Pro-Rizquez and Jacqueline Richter (Universidad Central de Venezuela).

[9] Available at: *eige.europa.eu/gender-equality-index/2023* (accessed 12 July 2024).

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time more frequently, and face more obstacles in career development than men of the same age, due to task differences throughout their lives and the sectors they work in, which are generally lower paid[10]. This gender inequality is worse in Venezuela[11] and Brazil[12], where the gender gap in labour market participation expands, and women continue to face strong obstacles linked to wage inequality, occupational segregation, underrepresentation in leadership positions, double shifts, and lack of access to day-care and other support facilities, which would help them handle their professional responsibilities and household duties.

Gender can be intersected with both contract type and race. All countries report that part-time work is predominantly female[13] and, in the case of Brazil, if race is taken into consideration, 30.9% of black women work in part-time jobs, compared to 24.9% of white women[14].

In fact, regarding contract types, the Netherlands, who have the highest proportion of part-time employment in the OECD (72%)[15], include this feature in the five primary disparities that contribute to unequal opportunities in access to the Dutch labour market, alongside gender (as previously mentioned), age (older individuals have a weaker position in the Dutch labour market), and ethnic and cultural background (non-Western migrants find it more difficult to secure employment)[16]. In Portugal, labour market segmentation[17] is also indicated as a major inequality contributor, as well as

[10] PricewaterhouseCoopers (PwC) (2018), *De toekomst van werk 2030 Een wake-upcall voor organisaties, burgers en overheid*, Den haag, 11.

[11] In the absence of official statistical information, data is provided by the National Survey on Life Conditions (ENCOVI) of Universidad Católica Andrés Bello, 2023. See *www.proyectoencovi.com/* (accessed 12 July 2024).

[12] Instituto Brasileiro de Geográfica e Estatística, *Estatísticas de gênero: indicadores sociais das mulheres no Brasil*, 3 ff. Available at: *biblioteca.ibge.gov.br/visualizacao/livros/liv102066_informativo.pdf* (accessed 10 March 2024).

[13] Even in the Portuguese labour market, which has low rates of part-time work in comparison with other EU countries, the number of women doubles that of men (9.1% against 4.7%, in 2022). See Comissão para a Cidadania e Igualdade de Género (2023), *Igualdade de género em Portugal. Boletim Estatístico*, p. 64, available at: *cld.pt/dl/download/e31838f9-aac0-4b19-ba8e-495e4fc452a1/BE2023.pdf* (accessed 12 July 2024).

[14] Instituto Brasileiro de Geográfica e Estatística (2024), *Estatísticas de gênero: indicadores sociais das mulheres no Brasil*, p. 4. Available at: *biblioteca.ibge.gov.br/visualizacao/livros/liv102066_informativo.pdf* (accessed 12 July 2024).

[15] OECD (2017), *Skills Strategy Diagnostic Report for the Netherlands*.

[16] PwC (2018), *De toekomst van werk 2030 Een wake-upcall voor organisaties, burgers en overheid*, cit., p. 11.

[17] ILO (2016), *Non-standard employment around the world: understanding challenges, shaping prospects*, Geneva, p. 53; ILO (2018), *Decent work in Portugal 2008-18. From crisis to recovery*, Geneva, p. 51.

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socioeconomic background. The new "forms of working", namely through digital platforms, contribute to this phenomenon.

In connection with some of the previously mentioned factors, Italy highlights the difficulties felt by foreigners in accessing social security and welfare benefits as a current issue in recent case law addressing (and sometimes denying) the legitimacy of requirements for various benefits (e.g., the so-called *reddito di cittadinanza* and *bonus bebè*[18])[19]. Non-declared migrant work has been on the rise in Portugal, leading to similar and often other serious human rights' problems, more segmentation and inequality in the labour market[20].

Finally, disability is also pointed out as a relevant inequality factor, namely in Italy[21] and Croatia[22], due to the difficult access to the labour market for people with disabilities and/or the lack of transparency in employment procedures.

3. Legal framework on equality and non-discrimination

3.1. The equality and non-discrimination principle: old and new prohibited grounds for discrimination

All the considered countries have an explicit declaration of equality and non-discrimination principle at both constitutional and infra-constitutional levels. Differentiation in treatment (affirmative action) is also allowed to remove inequalities that exist in practice, if reasonable and non-discriminatory.

In most cases, open non-discrimination clauses are provided[23]. This

[18] "Citizenship income" and "baby bonus", respectively.

[19] For a comprehensive analysis and report of case law, see the database of *ASGI*, Association for legal studies on immigration, available here: *www.asgi.it/aggiornamenti-giurisprudenza/*. For example, and very recently, see: Constitutional Court No. 77/2023 and No. 44/2020 on access to public housing; Constitutional Court No. 107/2018 on access to kindergartens; Court of Cassation No. 15170/2019 on the social allowance recognition; Court of Cassation No. 23763/2018 on civil invalidity pension.

[20] *V.g.*, *sicnoticias.pt/pais/2023-11-22-Exploracao-de-imigrantes-Achamos-que-a-vitima-e-que-esta-a-infringir-a-lei-54a9fad4* (accessed 12 July 2024).

[21] See Giovannone M. (2022), *L'inclusione lavorativa delle persone con disabilità in Italia*, Roma: ILO. Available at: *www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-rome/documents/publication/wcms_874035.pdf* (accessed 12 July 2024).

[22] See Annual Reports of the Ombudsman for Persons with Disabilities: *posi.hr/*.

[23] Regarding the Portuguese Constitution, although Article 13 does not have a clearly open formulation, legal literature reads it together with Article 26-1, which enshrines protection against discrimination of any kind. See Gomes Canotilho J.J., Moreira V. (2007),

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means that although a list of prohibited grounds for differentiation is usually provided, it can be expanded to cover other grounds. A different option, shielding exhaustively all prohibited grounds for discrimination, could negatively impact cases of discrimination based on grounds not specifically mentioned, as well as the adaptation of the legal framework to diverse contexts and times (including emerging forms of discrimination[24]).

However, there are diverse solutions in two countries. In the Italian case, it is not clear if Article 3 of the Constitution contains an exhaustive list of factors, since some legal literature stresses that the reference to "personal and social conditions" is sufficiently broad to allow for the inclusion of additional factors, thus making the list an open one[25]. Still, the infra-constitutional list of prohibited grounds in Italian anti-discrimination law (which implements the EU relevant directives) is usually considered closed. A similar situation can be found in the Netherlands. Although the Dutch Constitution clearly provides for an open, non-exhaustive list, Dutch labour law states a closed list of prohibited grounds[26]. This means that for a discrimination claim to be valid, it must be based on one of the enumerated grounds (religion, belief, political opinion, race, sex, nationality, sexual orientation, civil status, working hours – full-time or part-time –, and type of contract – permanent or temporary).

The grounds mentioned are quite established, even those which do not implement European Directives[27]: age, sex, sexual orientation, gender identity, civil status, family status, economic situation, descent, education, social origin or condition, genetic heritage, disability, chronic illness, nationality, ethnic origin, race, territory of origin, language, religion, political and ideological beliefs, and union membership.

Nevertheless, there are some less common discrimination factors that are worth mentioning. For instance, Portuguese law forbids discrimination

Constituição da República Portuguesa Anotada, Artigos 1º a 107º, vol. I, Coimbra: Coimbra Editora, p. 340.

[24] Brazil: Appeal to the Superior Labour Court 105500-32.2008.5.04.0101. 3rd Panel. Rapporteur: Justice Alberto Luiz Bresciani de Fontan Pereira. Justice Editor: Justice Rosa Maria Weber. Publication date: 5 August 2011.

[25] See Militello M., Strazzari D. (2019), "I fattori di discriminazione", in Barbera M., Guariso A. (eds.), *La tutela antidiscriminatoria. Fonti, strumenti, interpreti*, Torino: Giappichelli, pp. 85-86.

[26] As, for example, outlined in Article 1 of the General Equal Treatment Act. See Kamerstukken II 1991/92, 22014, No. 5, 17.

[27] Namely, Directives 2000/43/EC (Racial Equality Directive), 2000/78/EC (Employment Equality Directive), 2006/54/EC (Recast Directive on Gender Equality), 2010/41/EU (Self-employed Workers Directive 2004/113/EC (Gender Equality in Access to Goods and Services Directive), and 92/85/EEC (Pregnant Workers Directive).

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of smokers in the context of their employment relation (namely in what concerns selection and admission processes, termination of the employment relation, salary, and other rights and privileges)[28]. In the Netherlands, the Legal Position of Transgender and Intersex Persons (Clarification) Act (*Wet verduidelijking rechtspositie transgender personen en intersekse*) clarifies the scope of discrimination based on sex to include being transgender, non-binary, or intersex in order to address potential interpretational challenges regarding this prohibition. Finally, among other interesting examples, Brazilian Law expressly prohibits discrimination stemming from the use of social names: "*the use of offensive and discriminatory expressions to refer to travesties and transgender people is prohibited*"[29]. While increasingly common in modern anti-discrimination laws, these pieces of legislation reflect progressive recognition of LGBTQ+ rights.

Other relevant prohibited grounds for discrimination are recognized by case law and/or by legal literature in some countries. For instance, in Brazil, case law has recognized aesthetic discrimination as an unfair disqualifying factor. This encompasses employers' involvement in their employees' choices regarding beards, moustaches, makeup, and hairstyle, as long as these factors are unrelated to the task at hand or lack reasonable and pertinent justifications, such as concerns for workplace safety[30]. Similar situations can be found in Dutch literature and case law with different "legal clothing". Instead of being considered autonomous discrimination grounds, they relate to indirect discrimination cases that may not immediately appear evident. Particularly when it comes to employers' right to issue instructions[31], such as dress codes or grooming standards, instances of discrimination can arise. For instance, a Rotterdam district court ruling (1994) found that a prohibition on wearing earrings or piercings constituted a direct infringement on an employee's freedom to dress according to personal preference, resulting in discrimination between men and women[32]. If a particular item of clothing or hairstyle does not fall under one of the prohibited grounds, the employer has more scope to

[28] Article 5-10 of Act No. 37/2007 of 14 August. As noted by Rouxinol, M. (2024), *Direito antidiscriminação nas relações laborais*, Coimbra: Almedina, p. 37 and ft. 77, this shows the increase of protected categories in the Portuguese legal framework.

[29] Article 2 of Executive Order No. 8.727 of 2016. The head of this article also sets forth that "the federal public service, in its acts and procedures, must adopt social names of transvestite and transgender people, in accordance with the provisions of this Executive Order and following any individuals' request".

[30] Superior Labour Court. RR – ARR – 343-45.2015.5.07.0003. 2nd panel. Rapporteur: Justice Maria Helena Mallmann. Publication date: 17 December 2021.

[31] Article 7:660 of the Dutch Civil Code.

[32] Ktr. Rotterdam 3 August 1994, ECLI:NL:KTGROT:1994:AK0566.

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impose requirements, for example in terms of representativeness[33]. However, such requirements may conflict with employees' fundamental rights, such as the protection of privacy[34]. Considerations regarding representativeness, neutrality, and authority led an employer to enforce a ban on piercings among uniformed police officers, referring to concerns over professional image and safety. While a decision by the Central Appeals Tribunal (*Centrale Raad van Beroep*) upheld this prohibition, citing its limited application to work hours and lack of impact on personal time[35], a similar ruling regarding hairstyle standards for police officers was deemed an infringement on fundamental rights, including personal privacy and bodily autonomy[36]. Portuguese legal literature also alludes to discrimination based on physical appearance, perceiving that it may take place autonomously from discrimination based on sex. In such cases, several factors may be at stake, either immutable aspects (e.g., facial features/shape, eye colour, height, sex, race), or factors resulting from personal choices, such as hair length, clothing, or accessories[37]. These situations underscore the complexity of navigating seemingly neutral workplace regulations and potential forms of discrimination and conflicts with fundamental rights.

Another discrimination ground considered in Portuguese case law is marital status. In spite its traditional inclusion on lists of discrimination grounds, here it was considered in a rather interesting way. In a case presented before the Court of Appeal of Lisbon[38], two pilots, married to each other, had been prevented from flying together, in the same cockpit, for security and operational reasons (this was also banned regarding members of the same family – such as parents and their children or siblings). Even though the couple argued discrimination, the Court upheld the employer's decision. Firstly, it did not consider the rule to be discriminatory, since it would apply not only to the plaintiffs, but to any other employees in the same situation. Secondly, the

[33] See, for example, Hof Amsterdam 19 November 2019, ECLI:NL:GHAMS:2019:4131.

[34] Hof Den Haag 18 December 2021, ECLI:NL:GHDHA:2021:2552. See also: Vegter M.S.A. (2023), "Commentaar op art. 5 AWGB", in *Tekst & Commentaar Arbeidsrecht*, Deventer: Wolters Kluwer.

[35] CRvB 7 april 2005, ECLI:NL:CRVB:2005:AT4006.

[36] CRvB 24 December 2009, ECLI:NL:CRVB:2009:BK8903.

[37] For further developments, see Rouxinol, *op. cit*., p. 267 ff. As noted by the Author, some factors are harder to categorize. Obesity may be caused both by behavioural and biological factors, while tattoos, even though stemming from personal choices, have a highly permanent (or, at least, difficult to change) nature.

[38] Decision of 14 September 2016, process No. 13665/14.7T8LSB.L1-4. Available at: *www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/0a77b4f0b5dfccad8025804200371c2b?OpenDocument* (accessed 12 July 2024).

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Court considered that the security reasons invoked by the employer provided sufficient justification. This decision raised controversy, because even though the security grounds were deemed reasonable, the idea that a certain treatment cannot be discriminatory because it potentially affects several people (and not just the couple at hand) was considered faulty. In effect, that is the case of discrimination, for example, based on religious or racial grounds, which is still very much forbidden[39]. Furthermore, in order to be fully effective (*vis-à-vis* the invoked security reasons), the aforementioned ban should also apply to other categories, such as close friends (as well as enemies), non-marital partnerships, and lovers, among others, which were not targeted[40].

Genetic discrimination and its corresponding employment ramifications have also gained the attention of Brazilian legal literature: "*In labour relations, genetic discrimination consists of one's discriminating, harmful, or disproportionate behaviour towards an individual based on an unjustifiable reason linked to genomes. Such behaviour, when contrasted with that directed towards another individual or group, detrimentally impacts the rights of the affected person, carrying concrete or potential implications within the realm of employment*"[41]. In addition, State Act No. 4.141 of 26 August 2003 (State of Rio de Janeiro), although not being a national jurisdiction, addresses matters concerning human genetic heritage and other associated measures, prohibiting employers from collecting information concerning genetic heritage or using it to adversely affect the employment status of their employees in any way[42].

Finally, in close connection with this issue, although not involving exactly new discrimination grounds, but rather new ways of discriminating based on the traditional grounds, problems related to the recent technological evolution (e.g., algorithmic discrimination) have been on the academic debate in several countries, namely Brazil and Portugal[43].

[39] See Amado J.L. (2017), "O casal voador", *Revista de Legislação e Jurisprudência*, 4002, pp. 216-217; Oliveira G. (2018), "Ainda o caso SATA", *Lex Familiae*, 15, pp. 29-30.

[40] Amado J.L., *op. cit.*, p. 215, Oliveira G., *op. cit.*, p. 20.

[41] Sandim F.L.A (2024), *Discriminação genética no direito do trabalho: o genoma no acesso ao emprego a partir dos sistemas de proteção aos direitos humanos e do direito comparado* (in press).

[42] House of Representatives of the State of Rio de Janeiro. Article 8 of State Law No. 4.141, of 26 August 2003 (State of Rio de Janeiro), which provides for the human genetic heritage and other measures. Available at: *www3.alerj.rj.gov.br/lotus_notes/default.asp?id=73&url=L2NvbnRsZWkubnNmL2M4YWEwOTAwMDI1ZmVlZjYwMzI1NjRlYzAwNjBkZmZmLzQ4NDQ2Mjg4YzI0MjEzMzA4MzI1NmQ5MTAwNjlkNDhlP09wZW5Eb2N1bWVudA==* (accessed 2 January 2019).

[43] See Rouxinol M. (2021), "O agente algorítmico – licença para discriminar? Um [segundo] olhar sobre a seleção de candidatos a trabalhadores através de técnicas de inteligência artificial", *Revista do CEJ*, I: 235-268.

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3.2. Key concepts and discrimination' modalities

All EU countries have, as expected, adopted the basic key concepts derived from the anti-discrimination Directives, such as "direct" (*disparate treatment*) and "indirect" discrimination (*disparate impact*)[44], in one[45] or several pieces[46] of legislation applicable to employment relationships. On the contrary, such explicit definitions of key concepts cannot be found in Brazil or Venezuela's legislation, being left for case law to determine.

Other modalities of direct discrimination are harassment[47], instruction to discriminate, and victimization[48]. Since all of them are outlined in EU Directives, all the EU countries involved in this research prohibit such conducts, even though victimization is not always clearly qualified as discrimination. Similar concepts are also known in Brazilian and Venezuelan labour legislation, although less settled in an anti-discrimination perspective or with a narrower scope, especially in the latter[49].

A far as harassment at work is concerned, all EU countries consider harassment and sexual harassment as discriminatory conducts. However, the Portuguese Labour Code (Article 29) also recognizes that harassment may occur without discriminatory grounds. Irrespective of it being discriminatory

[44] In general terms, with slightly different formulations, "direct discrimination" happens when, on account of a factor of discrimination, a person is subject to a less favourable treatment than the one that has been given, is being given, or will be given to another person in a comparable situation. Whereas "indirect discrimination" happens when an apparently neutral provision, criterion or practice is likely to put a person, due to a discriminatory ground, on a position of disadvantage compared to others, unless that provision, criterion, or practice is objectively justified by a legitimate aim and the means of achieving it are appropriate and necessary.

[45] For instance, Portugal includes such definition in the Labour Code (Article 23-1-*a)* and *b)*) regarding all discrimination grounds. Still, such definitions can also be found in different pieces of legislation outside the employment regulations.

[46] For example, the Italian legal system contains various definitions of discrimination. This is because anti-discrimination law is not provided for by a single piece of legislation, but there are different legislative instruments concerning specific grounds of discrimination, thus establishing their legal definition. However, these definitions, with one exception, are similar. The exception refers to the Gender Equality Code (Legislative Decree No. 198/2006), whose definition of discrimination was recently amended by Law No. 162/2021. The same, with no exception, happens in the Netherlands.

[47] Considered an unwanted conduct related to one of the protected characteristics that takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

[48] An adverse treatment adopted by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

[49] For instance, connected to anti-union conducts.

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or not, it is still illegal. In accordance, one should call upon the discrimination legal regime only in the former case.

Victimization is prohibited, so any act of retaliation, including dismissal and change of tasks, is null and void. This should be understood as covering both acts towards the employee previously discriminated against and towards a third party, that is, a person that reacted to the previous discriminatory conduct without being its victim. This latter scenario occurred in the ECJ's case *Hakelbracht and others*[50]. The Court had the occasion to clarify that the victim of the previous discriminatory act and the victim of the retaliation are not mandatorily the same. At the same time, this case allowed the Court to clarify that the protection due to the person reacting to a previous discriminatory conduct shall be provided even if that reaction is informal[51]. Still, the Netherlands Institute for Human Rights (*College voor de Rechten van de Mens* – CRM[52]) has considered that the victimization must be related to the filing of a discrimination complaint[53]. It must involve 'objective retaliation', not an action perceived as detrimental by the appellant[54]. For example, an employer who gave a warning to an employee for inappropriate behaviour, citing the filing of a discrimination complaint as one of those behaviours, was found guilty of victimization. The concept of 'invoking' shall be interpreted broadly[55].

Other subtypes of direct discrimination, namely the ones that are addressed by the CJEU case law, are not always considered in EU countries' national legislations. For instance, discrimination by association[56] is not expressly recognized in Portuguese labour legislation[57], and the same happens in the Netherlands[58] and in Italy[59]. Still, following the interpretation given by the

[50] Case C-185/97, judgement of 22 September 1998.

[51] The *Coote* case (Case C-404/18, judgement of 29 June 2019) added further clarification on the victimization scope, stating that this prohibition is applicable even if the act takes place after contract termination.

[52] Still, the rulings of CRM are not legally binding.

[53] CRM oordeel 2016, 137.

[54] HR 10 July 2009, ECLI:NL:HR:2009:BI4209 (A./Leprastichting); Vegter, M.S.A. (2022), *T&C Arbeidsrecht*, commentaar op art. 8a AWGB.

[55] *Kamerstukken II* 2002/03, 28770, No. 5, 33.

[56] Its recognition derives from the landmark *Coleman* case (Case C-303/06, judgement of 17 July 2008).

[57] Also, it has never been called upon the Portuguese case law. Nonetheless, this concept can be found in Act No. 93/2017, of 23 August, which bans discrimination on grounds of racial/ethnical origin, colour, nationality, and home territory (Article 3-1-*d)*). This regime, however, does not seem to be applicable to employment relationships (Article 2).

[58] There is some criticism in Dutch literature with regard to the absence of codification of case law in this area into Dutch equal treatment legislation. See Ruygrok W., Kroes M. (2002), "Conceptwetsvoorstel Integratiewet AWGB", *TAP*, 3, p. 9.

[59] However, one should question whether this absence has been to some extent filled by

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CJEU, Italian case law has protected caregivers of disabled persons using the concept of discrimination by association[60]. Also, the Netherlands Institute for Human Rights (CRM) recognises such concept, recommending that the government codify (in Article 1 of the Equal Treatment Act) that discrimination by association can also occur in relation to the ground of disability/chronic illness[61]. This concept needs to be further deepened. On the one hand, since the *Coleman case* relates to discrimination based on disability, one may ask if its reasoning applies to other grounds[62]. In any case, as Yolanda Maneiro Vásquez[63] points out, that case was not the only occasion in which the CJEU held a reasoning based on *association relationships*. Despite the absence of explicit references to the concept of "discrimination by association", both cases *Chez*[64] and *Hakelbracht*[65] (the former related to ethnic origin, the latter to sex discrimination) stem from similar premises. In fact, we would say that every time a similar factual situation is at stake the concept of discrimination by association shall be called upon by the national applicators, regardless of the concrete discrimination ground[66]. On the other hand, this concept is connected to direct discrimination, which can raise doubts regarding its applicability in the case of indirect discrimination. The last question might be answered soon by the CJEU, since, in January 2024, the Italian Court of Cassation (17 January 02024, No. 1788) issued an interlocutory order asking the ECJ to clarify whether discrimination by association – as defined in *Coleman* – can occur in the case of indirect discrimination as well. In Venezuela and Brazil, such concept is not considered by the legislator. Nevertheless, it is in some way surprising that Brazilian case law admits discrimination by family association, manifested

the 'new' definition of gender discrimination of Article 25-2bis of the Gender Equality Code (Legislative Decree No. 198/2006, amended by Law No. 162/2021), since here reference is made to any treatment or change in the organisation of working conditions and hours which, due to personal or family care needs, places or is likely to place the employee in at least one of the of the following conditions: i) a position of disadvantage compared to other workers in general; ii) limitation of opportunities to participate in the life or choices of the company; iii) limitation of access to the mechanisms for advancement and career progression.

[60] E.g., Court of Pavia, 19 September 2009; Court of Appeal of Milan, 11 November 2022, No. 857.

[61] Ruygrok, Kroes (2002), *op. cit.*, p. 9.

[62] The Netherlands Institute for Human Rights (CRM), previously mentioned in the text, also advises investigating whether the extension of "discrimination by association" to other grounds is appropriate. See Ruygrok, Kroes, *op. cit*.

[63] Maneiro Vásquez Y. (2021), *La discriminación por asociación: desafíos sustantivos y procesales*, Navarra: Aranzadi, 24 ff., 68 ff., 83 ff.

[64] Case C-83/14, judgement of 16 July 2015.

[65] Case C-185/97, judgement of 22 September 1998.

[66] Rouxinol M. (2024), *op. cit.*, 46-49.

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in cases in which the employer illegitimately denies the reduction of working hours and maintenance of the employee's salary for those who have dependents with special needs (autism, schizophrenia, *Down* syndrome, among others)[67].

Regarding multi-dimensional discrimination – including both "additive discrimination" (*i.e.* discrimination simultaneously grounded on two or more prohibited classifications) and "intersectional discrimination" (*i.e.* when resulting from composite classifications, calling for the recognition of a new head of discrimination although not the acceptance of new grounds)[68] –, none of the studied legal frameworks, nor their case law, explicitly address it, except for Croatia. Croatian Anti-Discrimination Act prohibits multiply discrimination and provides for higher damages for such victims, since it is considered a more severe form of discrimination (Article 6). In legal frameworks such as the Dutch one, whose legislation categorizes according to grounds of discrimination, multi-dimensional discrimination might be overlooked[69]. In the Italian framework, the application of different procedural rules for gender discrimination (see Legislative Decree No. 198/2006, Chapter III), as opposed to discrimination based on other factors, probably excludes upstream the possibility of claiming a finding of discrimination due to both gender and some other factor in the same legal case. We would say that the major role in the acknowledgement of this category belongs, currently, to scholars, namely when addressing the most challenging type of multiple discrimination, the so-called intersectional discrimination, which refers to a combination of two or more grounds that, working together, appear as being an *autonomous cause* of differentiated treatment[70].

[67] Superior Labour Court (TST). RR-11204-62.2017.5.15.0144. 3rd Panel. Rapporteur: Alexandre de Souza Agra Belmonte. Publication date: 4 December 2020.TST. Ag-RR-951-96.2022.5.17.0010. 3rd Panel. Rapporteur: José Roberto Freire Pimenta. Publication date: 7 December 2023. TST. RR-10409-87.2018.5.15.0090. 3rd Panel. Rapporteur: Alexandre de Souza Agra Belmonte. Publication date: 7 June 2021.

[68] Evelyn E., Watson P. (2014), *EU Anti-discrimination law*, II ed., Oxford: Oxford University Press, 156-157.

[69] This is also the reason why the Dutch CRM has spoken out against organizing by discrimination ground. See Ruygrok, Kroes (2002), *op. cit.*, 9.

[70] In Croatia's legal literature, see Grgurev, I. (2024), "Šošić, Trpimir M., Zabrana diskriminacije – u središtu međunarodne zaštite ljudskih prava na univerzalnoj i regionalnoj razini", *Zbornik Pravnog fakulteta u Zagrebu*, 74(2), (forthcoming); Dutch government and literature have also discussed intersectional discrimination. See, for example, BKB (2021), *Rapportage Kennistafels intersectionaliteit Verkenning van hoe een intersectionele benadering de preventieve aanpak van racisme en discriminatie kan versterken*, 3-27, available at: *www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2022/01/21/rapportage-kennistafels-intersectionaliteit/Rapportage%2BKennistafels%2BIntersectionaliteit_BKB_januari%2* (accessed 16 June 2024).

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3.3. Burden of proof in discrimination cases

Since such regime is required by the non-discrimination directives, all EU countries provide special regulations concerning the burden of proof in discrimination cases (including harassment)[71] designed to facilitate the protection of individuals who allege discrimination. If the employee presents facts that could suggest discrimination, namely using a comparator[72], the burden of proof shifts to the employer. The employer must then prove that they did not act in violation of the prohibition of discrimination. Usually, these particular regimes do not imply a full reversal of the burden of proof, but only its easing in favour of the claimant, who only has to make out a *prima facie* case of discrimination.

Still, there are some specifics worth mentioning. For instance, in Italy, mechanisms to ease the burden of proof vary depending on the protected factor[73]. In the case of gender discrimination, the regulation of the burden of proof is stricter than the one concerning discrimination based on other grounds. In fact, to give *prima facie* proof of gender discrimination, multiple facts need to be provided, and these must be precise and mutually concordant[74]. On the contrary, concerning other discrimination grounds, a single fact could be enough to make the burden of proof shift to the other party[75].

[71] See Article 25-5 of the Portuguese Labour Code; Article 10 of the Dutch General Equal Treatment Act, as well as Article 7:646 of the Dutch Civil Code and Article 10 of the Equal Treatment DCI Act; Art. 28-4 of the Italian Legislative Decree No. 150/2011, and Art. 40 its Gender Equality Code.

[72] For instance, according to Article 25-5 of the Portuguese Labour Code, those who claim discrimination shall name the employee or employees regarding whom they consider themselves discriminated against, and it will be incumbent on the employer to prove that the difference in treatment is not based on any discrimination grounds.

[73] See *amplius* on the burden of proof in Italian antidiscrimination law Castro R.S. (2021), *Anti-discrimination Law in the Italian Courts: the new frontiers of the topic in the age of algorithms*, WP CSDLE "Massimo D'Antona".IT, 440: 18 ff., available at: *csdle.lex.unict.it/sites/default/files/Documenti/WorkingPapers/20210519-100206_Santagata_n_440_2021itpdf.pdf* (accessed 16 June 2024); Militello M., Guariso A. (2019), "La tutela giurisdizionale", in Barbera M., Guariso A. (eds.), *La tutela antidiscriminatoria. Fonti, Strumenti, Interpreti*, Torino; Giappichelli, 459 ff.

[74] Article 40 of the Italian Gender Equality Code establishes that "where the appellant provides factual evidence, including statistical data relating to recruitment, remuneration schemes, assignment of tasks and qualifications, transfers, career progression and dismissals, which is sufficient to grounding, in precise and concordant terms, the presumption of the existence of acts, pacts or conduct discriminatory on grounds of sex, the burden of proof on the non-existence of the discrimination lies with the defendant".

[75] Article 28 of Legislative Decree No. 150/2011 does not require the *prima facie* proof to be based on precise and concordant terms: for the appellant, it is sufficient to provide

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Such shifts on the burden of proof cannot be found in Brazil or Venezuela. Still, Brazilian case law has pointed out that the distribution of the burden of proof may be subject to nuances in such scenarios, paying attention to the suitability to produce evidence, the possibility of reversing the burden of proof, and the application of rebuttable presumption[76].

4. Sex/Gender discrimination

4.1. Discrimination on the ground of pregnancy and maternity

Despite the content of article 2-2-*c)* of Directive 2006/54/EC – stating that discrimination includes "*any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC*" –, not all EU Member States establish explicitly that discrimination on grounds of pregnancy and maternity constitutes a case of sex discrimination. This is the case of Portugal and Croatia, although interpretation in conformity with EU law (namely in the light of the settled CJEU case law[77]) can be easily achieved[78].

On the contrary, both Dutch and Italian Law explicitly prohibit discrimination based on pregnancy, childbirth, and motherhood as a form of discrimination based on sex[79]. When the discrimination is based on the condition of pregnancy, it is associated by case-law to a direct discrimination on the grounds of sex and gender, for being biologically linked to these factors[80]. For the same reason, such discrimination does not require the comparison with the treatment of similar persons.

factual elements, including statistical data, from which the existence of discriminatory acts, agreements or conduct may be presumed, to make the burden of proof shift to the defendant.

[76] Superior Labour Court (TST). RR-105500-32.2008.5.04.0101. 3rd Panel. Rapporteur: Justice Rosa Weber. Also, Precedent No. 443 of the Superior Labour Court.

[77] For example, Case C-421/92 (*Habermann-Beltermann*), Judgement of 5 May 1994; Case C-207/98 (*Mahlburg*), Judgement of 3 February 2000.

[78] Regarding Portugal, it is worth noting that, recently, the Court of Appeal of Coimbra recognized that the different treatment of workers grounded on the exercise of rights relating to maternity is qualified as discrimination based on sex. See Court of Appeal of Coimbra, process 1689/2023, ruling of 12 January 2024, available at: *www.dgsi.pt/jtrc.nsf/8fe0e606d8f56b22802576c0005637dc/89b26ff948a2acef80258ab400417fd6?OpenDocument* (accessed 15 June 2024).

[79] Article 7:646-5-b) of the Dutch Civil Code, Article 1-2 Equal Treatment Act on Gender Equality in Employment, and Article 1-3 of General Equal Treatment Act. Regarding Italy, see Article 25 of Code of Equal Opportunities, which also includes paternity.

[80] See Italian case law Cass. Civ Sez. Lav. 5 April 2016, No. 6575, where the judges

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However, in Italy, since 2010, pregnancy and parental status benefit from a new status as autonomous grounds of discrimination, together with discrimination based on personal or family care needs and maternity or paternity, including adoptive ones[81]. Recently, the objective scope of this legal provision seems to have been restricted by Law No. 162/2021, since the separation from the grounds of sex and gender seems to mainly refer to the so-called "organisational" discrimination that originates from changes in the organisation of working conditions and working time[82].

Similarly, in Portugal, since 2019, the Labour Code[83] bans any form of discrimination based on employees' enjoyment of their maternity and paternity rights, including adoption and similar situations. Additionally, it expressly recognizes as a form of discrimination the differences in remuneration related to the award of attendance and productivity bonuses, as well as unfavourable effects in terms of career progression.

In Brazil, discrimination based on pregnancy and maternity is comprehensively forbidden, both by the Federal Constitution[84], as well as by infra-constitutional legislation, and it can be considered a case of gender discrimination[85]. In Venezuela, such link is not directly established, but maternity is protected in the Labour Code, namely forbidding exams to diagnose pregnancy and protecting parents in maternity/paternity leave from dismissals.

established the unlawful and discriminatory nature, on the grounds of gender, of the dismissal issued as a result of the mere announcement by the employee of her intention to be absent from work in order to undergo artificial insemination; see also Cass. Civ. Sez. Lav. 26 February 2021, No. 5476. The Netherlands' Supreme Court ruled the existence of direct prohibited sex discrimination in the case of a female employee who, according to the collective labour agreement for secondary education, was not entitled to compensation for maternity leave taken during the autumn and Christmas holidays – HR 6 November 2020, ECLI:NL:HR:2020:1748.

[81] See Article 25-2-bis of Code of Equal Opportunities and Article 3 of Legislative Decree No. 151/2001 (Consolidated Text on Maternity and Paternity).

[82] See, in this regard, Alessi C. (2023), "La flessibilità del lavoro per la conciliazione nella direttiva 2019/1158/UE e nel d.lgs. 30 giugno 2022 n. 105", *Quaderni della Rivista Diritti Lavori Mercati*, 14: 85 ff.; Calafà L. (2022), *Il dito, la luna e altri fraintendimenti in materia di parità tra donne e uomini*, available at: *www.italianequalitynetwork.it/il-dito-la-luna-e-altri-fraintendimenti-in-materia-di-parita-tra-donne-e-uomini/* (accessed 16 June 2024).

[83] Article 35-A of the Labour Code, amended by Act. No. 90/2019, of 4 September.

[84] See Articles 5, in its *head* and in item I; Article 6 and its *head*; Article 7, items XVIII and XX; and Article 10 of the Transitional Constitutional Provisions Act – ADCT.

[85] Expressly outlined in Article 373-A of the Consolidation of Labour Laws (CLT) and in Articles 1 and 2 of Act No. 9029 of 1995.

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4.2. Work-life balance and discriminatory treatment

Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June on work-life balance for parents and carers was the first piece of EU binding legislation to establish explicitly the link between reconciliation and equality between men and women with regard to labour market opportunities and treatment at work (Article 1). Nonetheless, this Directive does not go so far as to determine that discrimination on the grounds of reconciliation shall be considered sex discrimination, when, in fact, if care responsibilities are not equally shared by both parents, this unbalanced division enhances direct and indirect sex discrimination practices in access to employment and at the workplace[86]. Still, this Directive broadens the concept of reconciliation, strengthens the existing conciliation rights, introduces new rights, and strongly contributes to an integrated perspective on the issues of gender equality and work-life balance[87].

This message was well received by some Member States that consider any disparate treatment related to parenting or care responsibilities, or the exercise of relevant rights, as discriminatory. That is the case of Italy[88], where such discrimination is often qualified as gender or sex discrimination due to the cultural norms that burden mainly women of care responsibilities. However, other case-law explicitly recognises discrimination based on parental status, consistently with the "autonomy" that this ground of discrimination has been granted since 2010[89]. Likewise, Portugal recognises the enjoyment of parental rights, as well as of other rights related to work-life balance, including the status of carers, as specific discrimination grounds[90].

[86] Ballester Pastor M.A. (2017), "La conciliación de responsabilidades: estado de la cuestión a la luz de la propuesta de Directiva de la Comisión Europea de 26 de abril de 2017", *Lan Harremanak*, II(38): 73 ff.

[87] Carvalho C.O. (2020), "Reconciling professional and family life for promoting gender equality in Portugal: some considerations and prospects in the light of the new Directive 2019/1158 on work-life balance for parents and carers", *Revue de Droit Comparé du Travail et de la Sécurité Sociale*, 4: 96-107.

[88] See Article 25-2-*bis* of the Code of Equal Opportunities and Article 3 of the Consolidated Text on Maternity and Paternity.

[89] See Trib. Firenze, 22 October 2019; Trib. Bologna 31 December 2021.

[90] See Article 35-A of the Labour Code, as well as Article 25-6 and 25-7, as amended by Act No. 13/2023, of 3 April. Furthermore, this provision expressly considers as discrimination practices, on that ground, pay discriminations related to the awarding of attendance and productivity bonuses, as well as unfavourable effects in terms of evaluation and career progression. See Ramalho, R.P. (2023), *Tratado de Direito do Trabalho, Parte II: situações laborais individuais*, IX ed., Coimbra: Almedina, pp. 214-216; Carvalho C.O. (2023), "A

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Differently, unequal treatment related to reconciliation of work and family life is not inherently construed as instance of discriminatory treatment within the Dutch and Croatian law[91]. The same happens in Brazil and Venezuela[92], although in the latter the Law on Equal Opportunities for Women relates obstacles to work-life balance to gender discrimination, since socially and culturally care is assigned to women.

4.3. Legal strategies to promote fairer division of care and domestic work

The promotion of care and domestic work division is still the Achilles heel of gender anti-discrimination law. It is a fact that, in all Member States of the EU, some regulations aiming a fairer division of care and domestic work can be found, since they are the result of the implementation of Directive 1158/2019 (e.g., paternity leave), but they do not go so far.

Some countries have adopted other measures that go beyond Directive 1158/2019. Still, their efficiency is debatable[93]. They consist mainly in strategies to foster working fathers in assuming care responsibilities, surpassing the anachronic perspective where the mother is the natural carer.

In this context, the Portuguese Labour Code of 2009 adopted a new paradigm. It reformulated all the maternity and paternity legal protection regime in order to treat parenthood as a phenomenon for which both parents are jointly responsible. Among other changes, the previous *maternity leave* has been replaced by an *initial parental leave*, as a leave to which both working parents are entitled, at the time of the birth of a child, to share with each other (except for the period of 42 days postpartum, and the period of 30 days before childbirth, which are periods exclusive to women)[94].

Other strategies involve progressively extending paternity leaves[95] (with

proteção da parentalidade e da conciliação no âmbito da designada Agenda do Trabalho Digno (Lei n. 13/2023, de 3 de abril)", *Reforma da Legislação Laboral – Trabalho Digno; conciliação entre a vida profissional e familiar,* Estudos APODIT (11), AAFDL, Lisboa, 200-201; Rouxinol (2024), *op. cit.*, 100.

[91] It only refers to family status as a prohibited ground of discrimination.

[92] Although Venezuela, contrary to Brazil, has ratified the ILO Convention No. 156 on workers with family responsibilities of 1981.

[93] Regarding Italy, see Calafà (2023), *op. cit.*, 13 ff.

[94] See Article 40-1 of the Portuguese Labour Code.

[95] In Brazil, on 14 December 2023, due to the default of more than 35 years to regulate a provision on paternity leave, the Brazilian Federal Supreme Court set a period of 18 months for the Legislative Branch to draft the aforementioned act. The decision was rendered in the

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allowances equal to 100% of pay)[96], determining the non-transferability of leaves[97], as well as the attribution of supplementary periods in cases where the father enjoys a certain minimum period by himself[98], or using social security allowances to promote fathers' participation. In the last case, the strategy is to improve the social protection afforded to parents who share parental leaves (in a minimal significant way, meaning that each of them must enjoy, at least, a reasonable share of the licence).

Some representative examples can be found in the Portuguese framework[99]. For instance, as explained above, after childbirth, both parents are jointly entitled to an *initial parental leave* of 120 or 150 consecutive days, which they can share. The difference between the option for 120 or 150 days is, precisely, the amount of the social benefits to which they will be entitled. These social benefits will increase if the father shares part of the leave[100]. The same happens regarding parental leave not only in

Direct Action of Unconstitutionality by Omission No. 20. Likewise, there is still no legislation on parental leave in the country.

[96] That is the case of Italy and Portugal. In both cases, there are mandatory periods: 10 days in Italy and 28 days in Portugal (Article 43 of the Labour Code).

[97] For instance, in Italy, out of the six months of parental leave to which each parent is entitled, three months are non-transferable to the other parent (Legislative Decree No. 151/2001). In Portugal, all parental leave is non-transferable (Article 51-2 of the Labour Code).

[98] In Italy, a supplementary month of parental leave is given if the working father exercises his right to take off work for a continuous or fractioned period of at least three months (Article 32-2 Legislative Decree No. 151/2001); in Portugal, a supplementary month of the *initial parental leave* (after-birth leave) can be given if the father enjoys by himself at least one month (article 40-3 of the Labour Code).

[99] In Portugal, this scheme began in 2009, and was extended in 2023 with the amendments introduced to the Labour Code by Act No. 13/2023, and to Decree-Laws No. 89/2009 and 91/2009 by Decree-Law No. 53/2023.

[100] For the 120-day leave, Article 30-1-*a)* of Decree-Law No. 91/2009 provides for a 100% replacement rate. Choosing a leave of 150 implies a reduction in the rate to 80% (Article 30-1-*b)* of Decree-Law No. 91/2009), unless each parent takes at least 30 consecutive days, or two consecutive periods of 15 days of leave (using 120 days + 30 additional days provided for in Article 40-3 of the Labour Code), in which case the rate remains at 100% (Article 30-1-*c)* of the Decree-Law No. 91/2009). In the event that the parents opt for the 150-day leave (from Article 40-1 of the Labour Code) with an additional 30 days (provided for in Article 40-3), the leave will last 180 days, with the rate depending on the extent of the sharing: in situations where each parent enjoys at least 30 consecutive days, or two consecutive periods of 15 days, the rate will be 83%; in situations where the father takes at least one period of 60 consecutive days, or two periods of 30 consecutive days of the total of 180 initial parental leave, in addition to the father's exclusive parental leave, the rate rises to 90% (Article 30-1-*d)* and *e)* of Decree-Law No. 91/2009). This last hypothesis was established by Decree-Law No. 53/2023, representing a growing incentive for parents to share the leave.

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Portugal[101], but also in Italy[102]. Lastly, among the legal strategies to foster fairer division of care and domestic work adopted in Italy, the possibility to obtain a Gender Equality Certification for virtuous company should be mentioned. Indeed, the promotion of equal care responsibilities is an indicator that the accredited certifying bodies should take into consideration when issuing the Certification. Furthermore, the reconciliation of work and family life is expressly included in the minimum parameters to be taken into consideration for the attainment of the Gender Equality Certification, as established by article 46-bis of the Code of Equal Opportunities.

4.4. Equal pay between men and women

All the countries within the scope of this research recognize the principle of equal pay for male and female workers for equal work or work of equal value, which in some cases is enshrined in their Constitution[103], thus assuring compliance with Article 157 of the Treaty on the Functioning of the European Union (regarding EU countries) and/or ILO Convention No. 100 on Equal Remuneration[104].

In order to tackle the gender gap, several EU countries develop such

[101] Act No. 13/3023 added another modality to Article 51-1 of the Labour Code: part-time work for three months, as long as the leave is taken in full by both of the parents alternatively. This new modality of additional parental leave only gains its reason when analysed in conjunction with the provisions of the social protection regime, as it entitles the beneficiaries with social benefits (with a 20% replacement rate), unlike what happens with the general modality, which is not accompanied by any benefit. Once the enjoyment of the part-time additional parental leave is accompanied by social benefits, there is an impetus towards sharing parental responsibilities between the two parents, towards reconciling work with family life, in this case reinforced by the fact that the enjoyment of this modality of leave implies its use, in full, by both parents.

[102] The allowance for the parental leave is normally equivalent to 30% of their salary for nine months, six of which are reserved to each parent (three for each, while the other three can be used alternatively between parents). The percentage of allowance can be increased to 80% of the salary for one month and 60% for an additional month, alternatively, between the parents, for a total maximum duration of two months until the sixth year of the child's life (Article 34 of Legislative Decree No. 151/2001, amended by Law No. 213/2023).

[103] See, for example, Article 37 of the Italian Constitution or Article 59 of the Portuguese Constitution, the latter with a broader scope. According to Venezuela's Constitution (1999), international conventions on human rights have preference over the Constitution when establishing a more favourable regulation (Article 23). Consequently, the principle of ILO Convention No. 100 on equal compensation is applied at constitutional level.

[104] Ratified by both Brazil and Venezuela.

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principle on the Labour Code[105] or through specific legislation[106], which enacts transparent remuneration policies. In some cases, the Gender Equality Bodies and National Labour Inspectorates might be involved[107].

Pay differences do not constitute discrimination when based on objective criteria common to men and women. Portuguese legislation expressly considers merit, productivity, attendance, and seniority[108], while the Netherlands recognize factors like education, experience, and suitability for other roles[109]. In 2022, a Dutch Court justified a pay discrepancy between a male and a female employee because it had objective grounds when, according to the employer's policy, initial salary offers were typically based on a predetermined scale, unless the candidate brought exceptional expertise or experience to the table. In this instance, the male employee possessed relevant prior experience for the position, unlike his female counterpart[110]. However, the CRM found the justification for the discrepancy lacking. In the KLM/Parallel Entry case, the Supreme Court admitted situations where differentiation was based on fairness and reasonableness, with all aspects of the case taken into account[111].

5. Disability discrimination

5.1. Definition of disability (and equivalents) as grounds for discrimination

All the legal frameworks of the countries involved in this study, apart from the Netherlands, provide for a general definition of disability[112], applicable in the field of equality and non-discrimination in labour context, that is aligned

[105] For instance, Croatia (Article 91 of Labour Act) and Brazil (Act no. 14.611 of 2023 amended the Consolidation of Labour Laws (CLT), on this regard). Also, in Brazil, Executive order No. 11.795 of 2023 was published in November 2023, regulating Act No. 14.611, which defines the criteria for conducting wage audits and for the disclosure of information on employees' remuneration. Additionally, Act No. 12.527 of 2010 allows access to data related to public servants' remunerations.

[106] For example, Italian Law No. 162/2021 (Law on Equal Pay), and Portuguese Law No. 60/2018 of 21 August (Law on Equal Pay).

[107] That happens in Italy, and to a less extent in Portugal.

[108] Article 31-2 of the Portuguese Labour Code.

[109] HR 7 December 1994, ECLI:NL:HR:1994:ZC1322 (*Agfa/Schoolderman*).

[110] Rb. Overijssel 21 February 2022, ECLI:NL:RBOVE:2022:590.

[111] HR 30 January 2004, ECLI:NL:HR:2004:AM2312 (*KLM/Parallel Entry*).

[112] Portugal (Article 2 of Act No. 38/2004, of 18 August); Croatia (Article 3-1 of Act on Professional Rehabilitation and Employment of Persons with Disability); Brazil (Article 2 of

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with the notion encompassed in the United Nations' Convention on the Rights of Persons with Disabilities, of 12 December 2006, without prejudice to some other narrower definitions relevant in minor contexts[113].

Italy, in particular, has a complex and fragmented system of disability statuses and assessment procedures[114], which creates inefficiencies and hurdles, ultimately leading to inequality across people and regions[115]. Still, the recent Italian Legislative Decree No. 62/2024, of 3 May, formalized, in its Art. 2, the definition of "person with disabilities", moving beyond an interpretation of disability based on the physical or mental impairment of the person, and embracing the biopsychosocial model, which emphasizes environmental conditions. Nevertheless, the Italian discipline is very recent, and many provisions now apply experimentally in some territories of the country.

The Netherlands do not have a definition of disabled people for discrimination purposes[116]. The explanatory memorandum to the bill of the Equal Treatment DCI Act indicated that disabilities and chronic diseases could be physical, mental or psychological in nature. In addition, it stated that disability is in principle irreversible[117]. Nevertheless, it is understood that a conclusive definition is neither necessary nor desirable in the context of Dutch equal treatment legislation, since whether someone experiences barriers because of their disability or illness depends on the context in which a person performs[118]. This is because disability (or chronic illness) is not so much about narrowly defined characteristics of a person, but about characteristics that may entail limitations in certain situations ("situationally determined limitations")[119]. Therefore, it is left to case law and the CRM

Act No. 13.146 of 2015 (Act of Persons with Disabilities); Venezuela (Articles 5 and 6 of the Disabled People Law, Official Gazette No. 38.598, 5 January 2007).

[113] For example, in Portugal, for purposes of positive action (quotas) – Act No. 38/2004; Decree-Law No. 29/2001, of 3 February, concerning the Public Administration, and Act No. 4/2019, of 10 January, concerning private employment relationships.

[114] De Falco M. (2021-2022), "The agreements for access to employment of persons with a disability: a genuine tool to promote people and work", *E-Journal of International and Comparative Labour Studies*, Joint Issue (vol. 10, No. 03/2021 – vol. 11, No. 01/2022), 143 ss., available at: *ejcls.adapt.it/index.php/ejcls_adapt/article/view/1160*.

[115] Agovino M., Rapposelli A. (2014), "Employment of disabled people in the private sector. An analysis at the level of Italian Provinces according to article 13 of Law 68/1999", *Quality & Quantity*, 48: 1537-1552.

[116] Peters S.S.M. (2021), in D.M.A Bij de Vaate (red.), *De zieke werknemer*, Wolters Kluwer, 2.4.5.3.

[117] *Kamerstukken II* 2001/02, 28 169, No. 3, 24, en No. 5, 16.

[118] *Kamerstukken II* 2001/02, 28 169, No. 3, 9.

[119] *Kamerstukken II* 2001/02, 28 169, No. 3, 24, en No. 5, 16.

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to give further substance to these concepts[120]. When interpreting the provisions of the Equal Treatment DCI Act, both the Dutch courts and the CRM must follow the interpretation given by the CJEU to the 'parent' directive provisions. Under the CJEU case-law, the concept of disability is to be interpreted autonomously and uniformly within the Union. This means that the interpretation of what constitutes a 'disability' within the meaning of the directive is not up to the Member States, but to the CJEU. For Dutch legal practice, the CJEU case law on this point is therefore of great importance, and CRM interprets the terms 'disability' and 'chronic illness' 'generously'[121].

However, if we consider the extent of the concept of disability held by the CJEU, we might conclude that the national concept adopted in conformity with the United Nations' Convention on the Rights of Persons with Disabilities (e.g., Portugal, Italy) is, in fact, wider, from the following point of view: whilst the CJEU refers to the *professional* impairment resulting from the personal characteristics of the subject at stake, the notion provided by the United Nations Convention covers all types of impairments, regardless of the impact being professional or of another kind[122].

Some of these legal systems also refer to chronicle illness apart from disability[123], but no specific definition is given in this regard. In some cases, the legal framework is the same for both situations (Portugal, Netherlands[124]). In other countries, it is only partially applicable to chronicle illness (Italy)[125].

[120] *Kamerstukken II* 2001/02, 28 169, No. 5, 16.

[121] Peters S.S.M. (2021), in D.M.A Bij de Vaate (red.), *De zieke werknemer, Wolters Kluwer,* 2.4.5.3.

[122] See, in particular, Case *Z* (C-363/12, judgement of 12 March 2014) and Case *Kaltoft* (C-354/13, judgement of 12 December 2014).

[123] Croatia refers to health status (Article 1-1 of the Anti-Discrimination Act). Some legal frameworks include other similar categories such as reduced working capacity and oncological disease, also without any definition (that is the case of Portuguese Labour Code).

[124] The Dutch Equal Treatment DCI Act refers to "disability *or chronic illness*", and the same happens with the Portuguese Labour Code.

[125] Within the Italian legal system, attempts to regulate this phenomenon have been made with Article 8-3 of Legislative Decree No. 81/2015, of 15 June, and Article 1-7 of Law No. 183/2014, of 10 December, which extended the right to part-time to employees suffering from "serious chronic-degenerative diseases (s.c. ingravescenti)", a right already introduced by Article 46 of Legislative Decree No. 276/2003, of 10 September, for workers suffering from oncological diseases only. See: Davolio M.C., Bertolini F., Cascinu S., Longo G., Partesotti G., Artioli F., Cellini M., Pelosi S. (2018), "Disability in cancer patients: A new organization model with an integrated care approach", *Rivista Italiana di Medicina Legale*, 3: 813-825; Bernell S., Howard S.W. (2016), "Use your words carefully: what is a chronic disease?", *Frontiers in Public Health*, 4: 159.

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Venezuela considers chronicle illness in the context of disability[126], and Brazil also allows chronic disease to be equated to disability, depending on the extent of the impairment caused by the illness[127]. Despite everything, the need to interpret national frameworks in conformity with EU and International Law, which adopt a broad concept of disability, makes it difficult to differentiate both categories clearly[128].

5.2. The obligation of reasonable accommodation of working conditions

All EU countries, and Brazil, have set forth the obligation of reasonable accommodation towards employees suffering from disabilities[129]. Therefore, employers are obliged to take appropriate measures to ensure that these persons have access to a job, can perform it, and progress in it, or have vocational training, unless such measures would impose a disproportionate burden, in conformity with Article 5 of Directive 78/2000. In some cases, one can find the explicit clarification that if a measure is supported by the State, then there is no disproportionate burden (e.g., Portugal).

The Italian regulatory framework is the result of a 2013 ECJ judgment (ECJ, 4 July 2013, C-312/11, European Commission v. Italian Republic)[130], in which Italy was condemned because the legislator did not require all employers to provide reasonable accommodation for all persons with

[126] Articles 5 and 6 of the Disabled People Law (Official Gazette No. 38.598, 5 January 2007).

[127] There is a Bill filed before the Brazilian House of Representatives (Bill No. 1.074 of 2019) that aims to "set equal rights between individuals with serious diseases and individuals with disabilities".

[128] See. Peters S.S.M (2021), *op. cit*.; Tiraboschi M. (2015), "The new frontiers of welfare systems: The employability, employment and protection of people with chronic diseases", *E-Journal of International and Comparative Labour Studies*, 4(2): 5 ff., available at: *www.bollettinoadapt.it/wp-content/uploads/2015/05/TIRABOSCHI_EJICLS_2015.pdf*.

[129] See Article 86-1 of the Portuguese Labour Code; Article 2 of the Dutch Equal Treatment DCI Act; Articles 4 and 37 of Brazilian Act No. 13.146 of 2015; Article 3 of the Italian Legislative Decree No. 216/2003, as well as the very recent Article 5-*bis* of Law No. 104/1992 of 5 February (amended by Legislative Decree No. 62/2024 of 3 May). Venezuela also regulates similar obligations, but in the broader context of health and safety at work (Organic Law on Prevention, Work Conditions and Work Environment ("LOPCYMAT"), Official Gazette No. 38.236 of 26 July 2005).

[130] The decision has been fully discussed by EQUINET (2021), *Reasonable accommodation for persons with disabilities: Exploring challenges concerning its practical implementation*, available at: *equineteurope.org/wp-content/uploads/2021/03/Reasonable-Accommodation-Disability-Discussion-Paper.pdf*.

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disabilities, as requested by Art. 5 of Directive 78/2000. After that, paragraph 3-*bis* was added to Article 3 of Legislative Decree No. 216/2003, stating that "*to ensure compliance with the principle of equal treatment of persons with disabilities, public and private employers are required to make reasonable accommodations, as defined in the United Nations' Convention on the Rights of Persons with Disabilities, ratified under Law 3 March 2009 No. 18, in the workplace, to ensure that people with disabilities are fully equal to other employees*". Very recently, as previously mentioned, a new piece of legislation was approved (Legislative Decree No. 62/2024 of 3 May, amending Law No. 104/1992), which also addresses this mechanism (Article 17).

Some legal frameworks provide examples of accommodation measures (e.g., Croatia refers to adjusting the infrastructure and space and using equipment), others do not (e.g., Portugal). In the same way, not all countries have relevant case law in this regard (Portugal and Croatia have no case law on this obligation). The CJEU case law can provide relevant interpretation on this regard, considering, for instance, that transfer to another workplace or a reduction in working hours[131], can be an effective adjustment[132]. Under Dutch Law, the measures that enable disabled and chronically ill people to effectively participate in work can involve both tangible and intangible adjustments[133]. A first example is adjusting working hours. In a case that arose before the Haarlem subdistrict court in 2010, it was ruled in this regard that adjusting the work schedule for an employee who, due to kidney problems, was not employable before 11:00 a.m., was a disproportionate burden on the employer[134]. A second example are adaptations related to the accessibility to buildings or its layout[135]. The CGB (the predecessor of the Dutch CRM) ruled, in 2006, that adaptations related to personal care and other everyday living needs, such as removing mucus from mouth or airways, are not effective adjustments[136]. Italy's framework provides several examples of "reasonable accommodations", such as guaranteeing the right to convert the relationship to part-time[137], ensuring priority in access

[131] Joined Cases C-335/11 and C-337/11, C-485/2010, judgment of 11 April 2013.

[132] Case C-485/2010, judgment of 10 February 2022.

[133] *Kamerstukken II* 2001/02, 28 169, nr. 3, p. 25.

[134] Ktr. Haarlem 27 April 2010, ECLI:NL:RBHAA:2010:BM8190.

[135] *Kamerstukken II* 2001/02, 28 169, nr. 3, p. 25. See, for more examples, Peters S.S.M. (2021), *op. cit*.

[136] CGB 6 April 2006, judgement 2006-59.

[137] See Legislative Decree No. 81/2015, confirming the provisions contained in previous regulations (Legislative Decrees No. 61/2000 and No. 276/2003, as well as Law No. 247/2007), which protects workers suffering from oncological pathologies or serious chronic-degenerative diseases.

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to remote work[138], as well as the choice of the nearest place of work[139], including for carers[140].

The explicit link between the obligation of reasonable accommodation and the prohibition of discrimination, which is established by Article 5 of Directive 78/2000[141], is not always evident within national frameworks. For instance, Article 86-1 of the Portuguese Labour Code does not refer to or suggest any connection between the breach of such obligation and the lack of compliance with the equality and non-discrimination principle. Read on its own, there is no link between reasonable accommodation and discrimination on grounds of disability. However, this connection shall be established, on grounds of EU Law, but also based on Act No. 46/2006, of 28 August (Article 5), on the prevention and sanctioning of acts of discrimination against persons with disabilities. Other national frameworks establish an explicit link between the obligation to make adjustments and the prohibition of discrimination (e.g., Article 2 of the Dutch Equal Treatment DCI Act[142]; Article 4-2 of Croatia's Anti-Discrimination Act; and Article 4-1 of Brazilian Act No. 13.146 of 2015[143]). According to recent Italian

[138] Zilli A. (2020), "Il lavoro agile per Covid-19 come 'accomodamento ragionevole' tra tutela della salute, diritto al lavoro e libertà di organizzazione dell'impresa", *Labor*, 4, available at: *www.rivistalabor.it/lavoro-agile-covid-19-accomodamento-ragionevole-tutela-della-salute-diritto-al-lavoro-liberta-organizzazione-dellimpresa/* (accessed 16 June 2024); De Falco M. (2021), "L'accomodamento per i lavoratori disabili: una proposta per misurare ragionevolezza e proporzionalità attraverso l'INAIL", *Lavoro, Diritti, Europa*, 4, available at: *www.lavorodirittieuropa.it/images/de_falco_NOTA_A_SENT_MDF_copia_2.pdf* (accessed 16 June 2024).

[139] Article 21 of Law No. 104/1992 regulates the right of priority in public employment. The law states that disabled civil servants, with a certain degree of disability, have priority in choosing among available locations to work, as well as in the case of voluntary transfer.

[140] See Article 33 of Law No. 104/1992, of 5 February. Article 33-5 of the same Law provides for the right of the caregiver to choose, where possible, the place of work closest to the home of the person to be cared for. The provision does not specify whether the person with a disability must necessarily be in a serious situation, but the case law seems to point in this direction. The State Council (Decision No. 2226 of 2 April 2020) established that to deny the transfer under Article 33-5 the service needs can neither be generically referred to, nor based on generic assessments regarding staff shortages. The Court of Cassation, Labour Section (sentence No. 26603 of 18 October 2019) established that, to recognise the worker's right to transfer, it is necessary to ascertain the existence of some indicators revealing the real need for assistance in favour of the disabled caregiver. See Lamonaca V. (2014), "Le agevolazioni ed i limiti al trasferimento dei lavoratori che prestano assistenza ai disabili gravi", *Il Lavoro nella Giurisprudenza*, 1051.

[141] "In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided".

[142] Peters S.S.M. (2021), *op. cit*.

[143] Also applied in Brazilian case law. See, for example, Superior Labour Court (TST),

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case law, the refusal of reasonable accommodation for disabled persons is considered discrimination[144]. Furthermore, many Italian courts[145] have judged as discriminatory the failure to consider the greater risk of sickness due to disability when calculating the period of job retention in the event of illness[146]. In other words, guaranteeing disabled workers a job retention period of the same duration as that guaranteed to other employees constitutes indirect discrimination and makes the subsequent dismissal unlawful.

5.3. Brief final remarks

The European Union equality and anti-discrimination *acquis* settled in the last decades is responsible for the evolution of this fundamental legal framework in its Member States. Therefore, the proximity of key concepts is visible, as well as a common integrative dogmatic approach that comes from the need to interpret national legislation in conformity with EU law, including the CJEU case law.

Nevertheless, international instruments which address anti-discrimination in various domains show their influence and reduce the gap between EU and non-EU countries on this regard. In fact, Brazilian case law seems to be very proactive, applying new concepts even when the legislation does not address them specifically, whilst Venezuela looks to be more focused on problems raised by discrimination for political reasons, due to their specific pollical situation.

Still, there are diverse approaches, making it interesting to compare different options and results, from which we can all learn. In many situations, Member States go far beyond what is imposed by the EU framework. New forbidden grounds emerge (e.g., physical appearance), challenging legal frameworks which do not have open non-discrimination clauses, often leading to the widening of the scope of traditional grounds. On the other

AIRR – 86-70.2017.5.17.0003. 7th Panel. Rapporteur: Justice Cláudio Brandão. Date: 12 May 2023.

[144] See, e.g., Court of Appeal of Milan 11 November 2022, No. 857, which considered the refusal of reasonable accommodation to be an indirect discrimination, as well as Court of Cassation 9 March 2021, No. 6497.

[145] See, for example: Court of Cassation No. 9095/2023, Court of Appeal of Naples No. 168/2023, and Court of Appeal of Milan of 01.12.2022.

[146] The "protected period" is a timeframe, generally established by collective bargaining, during which an employee is entitled to retain employment when absent due to illness. Once this period has passed, the employee can be legally dismissed "for exceeding the grace period", according to Article 2110-2 of the Italian Civil Code.

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hand, some new problems are rising, leading to new dogmatic conceptions (e.g., intersectional discrimination), or to the need to address the new ways to discriminate brought by AI. At the same time, more established concepts such as "discrimination by association" continue to raise doubts: is its reasoning applicable to other grounds besides disability? can it be used in an indirect discrimination context?

Disability remains a challenging discrimination factor. The concept is not easily reachable, making it difficult to differentiate from health status, chronic illness, reduced work capacity and similar concepts, which may very well overlap due to the need to interpret national frameworks in conformity with EU and International Law. The obligation of reasonable accommodation needs constant updates. Even its configuration within anti-discrimination law can be questioned: can the refusal of reasonable accommodation be considered, at least in some cases, direct discrimination? can it be considered an autonomous discrimination ground?

Finally, work-life balance and the fairer division of care and domestic work continues to be the main issue regarding gender discrimination. There is growing awareness of this connection, justifying the more frequent qualification of any disparate treatment related to parenting or care responsibilities, or the exercise of relevant rights, as gender discrimination or as an autonomous discrimination factor. New legal solutions aiming to promote a fairer division of care can be found. A long road lies ahead to tackle these difficulties, but some important steps are being taken.

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Labor law in Brazil: old and new myths

Mauricio Godinho Delgado[1]

1. Introduction

This article seeks to examine some of the most recurrent myths that have emerged in relation to Labor Law and the Labor Courts throughout Brazilian history in the 20th and 21st centuries, which, as a general rule, also involve the country's labor system as a whole, albeit with varying intensity.

Some of these myths are old, having emerged in the 1930s and '45s, either with a highly laudatory view of the labor system organized in greater detail during that historical phase (the so-called "myth of the grant"), or with a highly critical view of that same system (the other myths found).

Some of the old myths have continued to be reproduced over the last 80-90 years, especially the critical ones, although they have been partly adjusted by their propagators to a more contemporary format.

Other myths have gained strength in recent times, especially during the rise of neoliberal thinking in Brazil. This thinking has been characterized throughout the Western world by a very critical perspective of state social policies, in particular public labor and social security policies, and this trend also reverberates in the Brazilian context.

The article is based on diversified, multidisciplinary bibliographical research, with works from different areas of scientific knowledge, such as History, Political Science, Sociology, Anthropology, Economics and Law.

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2. Labor Law and Labor Justice in Brazil: old myths

There is a traditional and recurring range of myths that permeate the history of Labor Law and Labor Justice in Brazil.

Some of these myths were created or conveniently reproduced by the first Vargas government itself, in the years from 1930 to 1945, in its propaganda strategy, although they were later incorporated, with some nuances, by critics of the Brazilian labor system, in its various dimensions and eras.

Other myths emerged from the imaginary of the political, social, economic and ideological forces opposed to the 1930 Revolution and the public social policies it triggered, especially those that came to govern the organization of part of the world of work in the country. Some of these myths, in fact, continue to be brandished in narratives that are in harmony with the lines of advocacy for a largely deregulated labor market in the Brazilian economy and society, leading to the devaluation of work and employment.

Another group of myths perhaps derives from the recurrence of traditional narratives, without the care taken to deepen research and reflection on the Brazilian reality and the relevance of individual and social labor rights in the advancement and development of democracy and capitalism in historical experiences less affected by the persistent socioeconomic inequality within the respective populations. Through their reverberation, whether purposeful or uncritical, these narratives maintain their influence.

2.1. A brief analysis of some ancient myths

Moving on to a specific analysis of the most relevant of these old myths, it is worth noting that the first of them – which, fortunately, is now quite outdated – is that of the granting of individual and social labor rights by the state, which would have occurred in the 1930s until 1943 (the year the CLT was published and came into force). The myth of the grant, probably created by enthusiastic supporters of the government of the Second Republic (1930-1945), including the official propaganda machine itself, revolved around the idea that individual and social labor rights and the entire Brazilian institutional labor system was a generous concession by the government inaugurated by the 1930 Revolution, in favor of the workers, but without any effective participation by these historical subjects and without precedence in the previous socioeconomic, political and institutional reality. The aim of this narrative was manifest, i.e. to uncritically praise the leadership of President Getúlio Vargas, cementing, over time, a broad socio-political,

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institutional and ideological base of support for the leader of the 1930 Revolution[2].

Numerous historians, political scientists, sociologists and jurists have shown, however, especially since the 3rd Republic (which began at the end of 1945), based on carefully conducted scientific research, that Brazilian Labor Law and the various labor institutions structured in the 1930s and consolidated in the CLT in 1943, they did have references in previous historical phases and were not merely the voluntary creation of the Vargas government[3]. An example of this is the presence of various state and federal labor laws published during the First Republic (1889-1930), which – although lacking the generality and systematicality developed after the 1930 Revolution – were incontrovertible proof of the social pressure to build a broader and more efficient labor system in the country[4]. The presence of an active trade

[2] An important Brazilian intellectual, part of the Vargas government, who brandished such an interpretation of Brazilian reality and the social policies of the 1930s and '45s, was Oliveira Viana. In this respect, one of his outstanding works was: Vianna, Oliveira F.J. (1951), *Direito do Trabalho e Democracia Social: o problema da incorporação do trabalhador no Estado*, Rio de Janeiro: José Olympio.

[3] Along these lines, we can mention, for example, research that studies the presence of the workers' movement, trade unionism and strikes in the so-called First Republic, even though it recognizes the enormous problems that these workers experienced in organizing and fighting for individual and social labour rights at that time. This group also includes works that research the labor legal system during the same phase (1889-1930). For example, the following works: Batalha C.H.M. (2000), *O Movimento Operário na Primeira República*, Rio de Janeiro: Jorge Zahar; Biavaschi M.B. (2007), *O Direito do Trabalho no Brasil, 1930-1942 – a construção do sujeito de direitos trabalhistas*, São Paulo: LTr/Associação Luso-Brasileira de Juristas do Trabalho, 2007, pp. 71-220; Bodea M. (1978), *A Greve Geral de 1917 e as Origens do Trabalhismo Gaúcho*, Porto Alegre: L&PM; Cardoso A. (2019), *A Construção da Sociedade do Trabalho no Brasil – Uma investigação sobre a persistência secular das desigualdades*, II ed., Rio de Janeiro: Amazon, pp. 126-128, 129-171, 175-182, 198-201; Goldmacher M., Mattos M.B., Terra P.C. (2010), *Faces do Trabalho: escravizados e livres,* Niterói: EdUFF; Goldmacher M. (2010), "As associações operárias e a 'greve geral' de 1903", in Goldmacher M. *et al*. (eds.), *Faces do Trabalho: escravizados e livres*, Niterói: EdUFF, pp. 143-165; Gomes A.M. de Castro (1988), *A Invenção do Trabalhismo*, São Paulo/Rio de Janeiro: Vértice/IUPERJ. The bibliography in the following footnote, when examining the pre-1930 period, also shows the historical references for most of the public policies systematized between 1930-1945.

[4] The following works should be mentioned, among others: Batalha C.H.M. (2000), *O Movimento Operário na Primeira República*. Rio de Janeiro: Jorge Zahar; Biavaschi M.B. (2007), *O Direito do Trabalho no Brasil, 1930-1942 – a construção do sujeito de direitos trabalhistas*. São Paulo: LTr/Associação Luso-Brasileira de Juristas do Trabalho, pp. 71-220; Brito filho J.C. (2021), *Direito Sindical*, IX ed., São Paulo: LTr, pp. 63-66, 285-287; Cardoso A. (2019), pp. 126-128, 129-171, 175-182, 198-201; Delgado M.G. (2024), *Curso de Direito do Trabalho*, XXI ed., São Paulo: Juspodivm, pp. 121-139; Delgado M.G. (2024), *Direito do*

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union movement throughout the First Republic is also illustrative, although in its early days it did not use the epithets "trade unions" or "trade unionism", which only became more common after the turn of the 20th century[5].

There were also several typical strike movements during the First Republic, which demonstrated the growing organization of a workers' and trade union movement in various Brazilian cities and regions, especially in the urban geographic space of the economy. Although there is a large body of literature pointing to São Paulo as the center of these advances in trade unionism and its demand movements, the fact is that more diverse historical studies show that the trade union movement was also active in other federal states, such as Rio de Janeiro (actually the Federal District), Minas Gerais, Pernambuco, Rio Grande do Sul, among others. There are references to important and wide-ranging strike movements in 1903, 1907, 1917 and 1919, for example, respecting the focus of each investigation[6].

In fact, such strike movements emerged even during the imperial period, as attested to by the winners' strike in Salvador in 1857 (this one with the intense participation of enslaved or freed black people), and the graphists' strike in Rio de Janeiro, capital of the Empire, in 1858[7].

What's more, mention should be made of the numerous and very relevant liberation movements of the enslaved black population, which prove the strong resistance of enslaved workers to the regime of violence, indignity and over-exploitation to which they were subjected. It should be remembered, in

Trabalho no Brasil, *Formação e Desenvolvimento – colônia, império e república*, São Paulo: Juspodivm, pp. 103-126; Fausto B. (1976), *Trabalho Urbano e Conflito Social (1890-1920)*, São Paulo: Difel, pp. 13, 122, 146-150, 157-217; Goldmacher M., Mattos M.B., Terra P.C. (2010), *Faces do Trabalho: escravizados e livres*, Niterói: EdUFF; Goldmacher M. (2010), "As associações operárias e a 'greve geral' de 1903", in Goldmacher M. *et al*. (2010), *Faces do Trabalho: escravizados e livres*, Niterói: EdUFF, pp. 143-165; Gomes A.M. de Castro (1988), *A Invenção do Trabalhismo*, São Paulo/Rio de Janeiro: Vértice/IUPERJ; Hardman F., Leonardi V. (1991), *História da Indústria e do Trabalho no Brasil (das origens aos anos 20)*, II ed., São Paulo: Ática, pp. 121-168; Silva F. (2010), "Justiça do Trabalho brasileira e Magistratura Del Lavoro italiana: apontamentos comparativos", in Caixeta M.C.D. *et al*. (eds.), *IV Encontro Nacional da Memória da Justiça do Trabalho – cidadania: o trabalho da memória*, São Paulo: LTr; Vianna L.W. (1989), *Liberalismo e Sindicato no Brasil*, Rio de Janeiro: Paz e Terra, pp. 46-61.

[5] In this regard, refer to the bibliography cited in the two immediately preceding footnotes.

[6] In this regard, refer to the bibliography mentioned in the three immediately preceding footnotes.

[7] A relevant work on the winners' strike movement in Salvador can be found in Reis J.J. (2019), *Ganhadores – the black strike of 1857 in Bahia*, São Paulo: Companhia das Letras. An important reference on the graphics strike in the capital of the Empire can be found in Hardman F., Leonardi V. (1991), *História da Indústria e do Trabalho no Brasil (das origens aos anos 20)*, II ed., São Paulo: Ática, pp. 102-103.

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this regard, that scientific studies show that Brazil, among all the countries in the three Americas, was the one with the largest number of this type of liberation movement, with the countless quilombos that were structured in the country from the Colony to the monarchical period[8].

In other words, the image of a working population that was disinterested, dispersed, amorphous and inefficient in terms of seeking out and defending its individual and social interests and rights, which the myth of the grant also tried to convey, was not borne out by the various scientific studies on the Brazilian reality before 1930.

The second relevant myth that has emerged since the 1930s and '45s is the supposed absolute uniqueness of Brazilian labor law and labor justice. This myth was very much in line with the interests of the Vargas regime's own official propaganda, along with its defenders in the intelligentsia of the time and beyond. The myth has been revived in recent periods of neoliberal influence in Brazil since 1990, since it also serves the purpose of disfavoring the value of work and its legal and institutional system of protection, by considering it a kind of Brazilian exoticism.

However, once again, scientific studies demonstrate the fallacy of this thesis, since there is more to Western countries than just the British and North American models of legal order, in which state laws have a lesser presence and role than in Roman-Germanic systems. In fact, this model of unwritten law is clearly the exception in the West. The fact is that, in general, in countries with a Roman-Germanic legal and cultural affiliation (such as Germany and France, and Brazil itself), written law is of great importance in all fields of law, and there is no technical or scientific reason to consider that it is only labour law that could not be harmonized with this major current in the structuring of Western national legal fields.

On the other hand, the structuring of a judicial system for resolving labor disputes, with preliminary references in the pre-1930 period, even in Brazil, reverberates, in a way, the tripartite guideline of the International Labor Organization (State/Employers/Workers), created in 1919 and with more than 60 international normative diplomas approved by the end of the 1930s. This structure also echoes the Social Constitutionalism inaugurated in the second decade of the 20th century, especially in this case the Weimar

[8] Along these lines: Klein H.S., Vinson B. III (2015), *A Escravidão Africana na América Latina e Caribe*, Brasília: UnB, 2015, pp. 284-285. Also: Moura C. (2021), *Rebeliões da Senzala – quilombos, insurreições, guerrilhas*, VI ed., São Paulo: Anita Garibaldi/Fund. Mauricio Grabois; Reis J.J., Gomes F. dos Santos (1996), *Liberdade por um Fio – história dos quilombos no Brasil*, VI ed., São Paulo: Companhia das Letras. Likewise: Reis J.J., Gomes F. dos Santos (eds.) (2021), *Revoltas Escravas no Brasil*, São Paulo: Companhia das Letras.

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Constitution, which also instigated the organization of a branch of the judiciary aimed at resolving labour disputes inherent in the new industrial society, with a tripartite format (State/Employers/Workers), as endorsed by the Treaty of Versailles of 1919 and the then-created ILO. If that wasn't enough, experiences of mixed first-degree commissions and even second-degree courts, with equal or tripartite composition, had already existed since the end of the 19th century – long before the Treaty of Versailles and the ILO, therefore – as exemplified by the legal and institutional orders of Australia and New Zealand. Not to mention the famous *Conseils de Proud'Hommes*, established in the first decade of the 19th century in France (around 115 years before the 1930 Revolution in Brazil), with equal membership and the power to hear, conciliate and judge disputes arising from labor relations[9].

A third widely reverberated myth is that which insists on the supposed importation of Italian fascism and its 1926 *Carta Del Lavoro into the* Brazilian labor system and its Consolidation of Labor Laws. In a gross simplification (but with good anti-social propaganda results over the decades), it is claimed that the Brazilian labor system, with its Labor Law and Labor Justice, are essentially copies of Italian fascist legislation, especially the *Carta Del Lavoro of the* 1920s.

Such a framework leads to a series of disqualifications of public policies for income distribution, socio-economic and institutional inclusion, citizenship and the democratization of power on a social and political level, all of which, to a certain extent and dimension, are embodied in a labour legal system that values work and the people who make a living from their work within the capitalist system.

It so happens that the Brazilian labor system is the result of a diverse set of influences and movements, woven into the Brazilian reality since decades before the 1930s and added to the institutional, legal, political and

[9] In this regard, for example, Silva F. Teixeira da (2010), "Justiça do Trabalho brasileira e Magistratura Del Lavoro italiana: apontamentos comparativos", in Caixeta M.C.D. *et al.* (eds.) (2010), *IV Encontro Nacional da Memória da Justiça do Trabalho – cidadania: o trabalho da memória,* São Paulo: LTr, p. 66. Incidentally, in this book, organized by Enamat and the TST's Documentation and Memory Commission, there is another important article by historian Fernando T. da Silva, in partnership with historian Ângela de Castro Gomes, on these very important earlier institutional references: Gomes A. de Castro, Fernando T. da Silva (2024), "A Justiça do Trabalho e os direitos sociais e humanos dos trabalhadores do Brasil", in Delgado M.G., Lopes E.P.V. (eds.) (2024), *History and Memory of Labor Law – myths of the formation and positivization of labor law in Brazil*, Brasília: Enamat; Biavaschi B.M. (2024), "O processo de construção do sistema público de proteção social no Brasil: conquistas, limites e possibilidades", in Delgado M.G., Lopes E.P.V. (eds.), *História e Memória do Direito do Trabalho – mitos da formação e positivação do direito laboral no Brasil*, Brasília: Enamat.

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cultural innovations triggered from the second decade of the 20th century in the Western world, which, in one way or another, had repercussions in Brazil. Mention should be made of some of these relevant movements and influences: the Soviet revolution of 1917; Social Constitutionalism in 1917 (Mexican Constitution) and 1919 (German Constitution); the social and institutional internationalism of the Treaty of Versailles and the creation of the ILO (this international institution was the result of the aforementioned treaty at the end of the post-war period), all widely disseminated in 1919; the Christian humanism sparked by Leo XIII's Encyclical *Rerum Novarum* in the 1880s.

All these external factors influenced both the 1930 Revolution and the government of Brazil's Second Republic, in an accumulation of forces and indignation that would only be resolved with the revolutionary movement of 1930 and the new government phase.

On an essentially domestic level, a huge number of factors must be highlighted, all of them equally relevant. For example, the growing repudiation of the elitism of Brazil's First Republic (1889-1930), with its repeatedly fraudulent elections and its grotesque insensitivity to the so-called "social question"; the blatant and profound exclusion of women and the entire black population, who together (women in general and blacks in general) made up the vast majority of Brazilians; the economic crisis of 1929, which devastated the whole of the West, but received no effective response from the liberal oligarchic government then in power; the repeated demonstration by the rulers of the First Republic that their understanding of national economic policy was strictly limited to the sectoral and restricted interests of coffee-growing agriculture; the cannibalistic vision of the rulers of the various republican mandates, who refused to see the state as a fundamental agent for the more diversified and broader development of the Brazilian economy and society; cultural positivism which, in Brazil at the end of the 19th century and the beginning of the 20th century, curiously enough, boasted a certain progressive dimension; incidentally, this political-ideological current was quite strong in the state of Rio Grande do Sul, where the new national ruler, Getúlio Vargas, was born and had his first political experience. All these factors led to the 1930 Revolution and, soon afterwards, to multiple and rapid transformations in national public policies, one of the hallmarks of which was social policy, especially labor policy and social security.

Was there also an influence of Italian fascist thought after October 1930? Certainly yes, but not in the intensity and simplification reiterated by the mythological current under examination. Fascism was just one strand of political thought that circulated between 1922 and the Second World War in Europe and the Americas. However, several other relevant currents of

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thought were also active in the Western world and in Brazil during this same period, such as socialism, communism, Christian socialism, Christian humanism, solidarism, anarchism, positivism, among other ideological and cultural lines. Of all the existing ones, the one that lost the most prestige since the 1929 crisis was the old elitist and exclusionary liberalism, which was overtaken by economic conceptions aimed at greater state intervention in the economy, the incessant pursuit of industrialization, the promotion of urbanization, the resumption of economic growth, the search for full employment, the creation of general and diversified state policies, including those of a social nature – conceptions often identified in broad epithets such as "developmentalism", "Keynesianism", etc.

In this context, reducing individual, collective and procedural labor legislation and its related institutions – all of which were spelled out in dozens of pieces of legislation from October 1930 until May 1943, and subsequently brought together in the CLT (which itself boasted more than 900 articles, several of them with countless paragraphs, incisions and subparagraphs) – to the simple *Carta Del Lavoro*, with its modest three dozen articles, is undoubtedly an eminently ideological, myth-building operation, with no commitment to scientific research or objective analysis[10].

2.2. The logic of public economic, social and institutional policies structured in the 1930s-45s

There is no doubt that the construction of public policies from the 1930s to 1945 was fraught with contradictions, shortcomings and defects. However, there is also no doubt that these policies had the ability to trigger the longest phase of economic and social growth in Brazilian history – considering the more than 50 years from the installation of the Vargas government until the 1980s – with transformations driven in various dimensions of the national reality. In these more than five decades, among other aspects, the Brazilian economy has achieved an average of strong economic growth compared to the world average – apart from some occasional negative fluctuations in some short periods – and the country's urbanization has also accelerated; The diversification of the production system also increased (the industrial sector grew rapidly, overtaking the agrarian GDP in the 1950s and reaching, two decades later, around 30% of the entire national GDP); finally, socio-economic and institutional inclusion through Labor Law and Social Security

[10] In this regard, please refer to the bibliography mentioned in the immediately preceding footnotes.

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Law put an end to the 122 years of exclusion from 1822 until before the Revolution of 30[11].

The myths mentioned above disregard all of this, preferring to brandish simplifying explanations, today mostly aimed at devaluing work, employment, workers, the search for greater socio-economic development with social justice, the focus on the growing inclusion of human beings, regardless of their origin, race, ethnicity, gender, sexual orientation, nationality, disability, age, among other factors, in the socio-economic dynamics of capitalism in the country.

In this context, while this article focuses on the Brazilian labor system, especially Labor Law and the Labor Courts, it should be noted that these public policies had, among other things, several important dimensions, all influential at the same historical juncture. On the one hand, they were part of a public policy to modernize the Brazilian economy and society, breaking through the backwardness and deep exclusion that characterized the previous 128 years, dating back to the date of Brazil's independence (1822-1930). Along these lines, labor policy was added to social security policy, electoral policy (the latter creating the Electoral Court and extending active and passive electoral legitimacy to women – which would only have real effects after 1945), educational policy, cultural policy, not to mention industrializing public policy (which will be detailed below).

On the other hand, public labor policies were an important dimension of the industrializing project finally taken on by the Brazilian state, which was achieved through countless tax, credit and currency exchange benefits for entrepreneurs, including the establishment of what is known as the "S System" (professional training institutions for workers, which would be funded by mandatory social contributions – taxes, in short – but managed by the business community itself). Labor legislation and its various institutions

[11] The Vargas government immediately adopted a developmentalist economic policy, in harmony with Keynesian parameters for understanding the economy, managing to respond efficiently to the economic catastrophe of 1929 and setting a public policy parameter that would prevail in Brazil until the early 1980s. However, at the beginning of the 1980s, after the autocratic military governments had ended, the country signed several letters of intent with the IMF (1982-1983), opening up an unfortunate path of neoliberal influence on national public policies, which would soon lead to the impairment not only of economic growth and employment rates, but also of the economy's industrialization levels. With regard to high rates of economic growth, IBGE data shows that from 1932 (this year, with a 4.30% increase in GDP) until 1987, there were 52 years of positive GDP growth, with a sporadic four years of negative GDP growth. Source: *BRASIL – IBGE, 1.1.1 – Brasil: População, Produto Interno Bruto, Produto Interno Bruto "per capita" e deflator implícito do Produto Interno Bruto, 1901-2000. IBGE-Estatísticas Históricas do Brasil, IBGE*, 1986.

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emerged as a vehicle aimed at workers, avoiding (or mitigating), in the new industrial area, the perverse ways of structuring strictly savage capitalism, without restraints, controls and social counterparts – a model so characteristic of Brazilian history.

Thirdly, these public policies, in one way or another, institutionalized the integration of the urban working class into the socio-economic system, providing a response to the "social question" that had been raised in previous decades, but which had not obtained significant resonance in state guidelines. What's more, these policies conferred a new *status of* citizenship on working men and women, a fact little considered in previous periods of the country's history.

It is clear that these public policies contained, as mentioned, contradictions, shortcomings and defects. For example, they only favored urban workers, excluding a large part of the Brazilian population, especially those who lived in rural areas (more than half of the country's population still lived in the countryside, considering the first six decades of the 20th century; the significant overtaking of the urban percentage over the rural percentage only occurred in the 1960s). These policies also excluded domestic workers, a category predominantly made up of women, even when they worked in the urban economy. They also excluded the self-employed and casual workers, who also made up a significant part of the working population. In other words, the new system was initially aimed only at urban employees, within the framework of an employment relationship, in addition to a significant extension that gradually occurred in favour of temporary port workers, due to their high capacity for organization and pressure in the country's seaports, with victories coming from collective bargaining, sparse laws and favourable administrative acts by the federal bureaucracy. Even so, with Brazil's growing industrialization and urbanization, this process of socio-economic and institutional inclusion, as well as inclusion in terms of citizenship, would prove to be very important, not to mention frankly progressive, considering the severe exclusionary wounds typical of Brazil's economic and social history.

From the point of view of rural workers, there was a relevant inclusive guideline that emerged in 1963 – that is, 20 years after the publication of the CLT – consisting of the Rural Workers' Statute (Law No. 4.212, in force since June 63), a federal law that extended labor legislation to the Brazilian countryside, with some specificities. Unfortunately, however, this inclusive process was somewhat delayed in practice, not only because of the coup d'état in April 1964 (a few months after the ETR came into force), which installed an autocratic government with little affection for labor issues. This delay was also due to the fact that the Ministry of Labor (with its labor inspection

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body), the Labor Courts (with their Conciliation and Trial Boards), as well as the Public Prosecutor's Office, along with Brazilian trade unionism itself, did not have solid and well-established structures in the country's rural areas at the time, in contrast to their broader presence in urban areas.

As far as domestic workers are concerned, the process of inclusion took much longer and only really began in earnest with the 1988 Constitution (i.e. 35 years after the publication of the CLT). In the previous period, there was only a modest piece of legislation that extended only three rights to this professional category (Law No. 5,859, of 1972, issued 29 years after the publication of the CLT: signing of the CTPS; inclusion in the Social Security system; paid annual leave of 20 working days). In the vicinity of the new Federal Constitution, the transportation voucher was also extended to such workers (Decree-Law No. 7.619/1987 and Decree No. 95.247/87).

However, with the Constitution of October 5, 1988, eight new rights were immediately extended to the domestic category, opening the way for a path of legislative advances to be implemented by the Brazilian state. Thus, once the neoliberal phase between 1990 and 2002 was over (in this neoliberal phase, only a single right was regulated – even so, under the discretionary choice of the employer: the voluntary enrollment of the worker in the FGTS system), three new and wide-ranging pieces of inclusive legislation emerged: Law no. 11.324 of 2006, which extended four new rights to the category; Constitutional Amendment 72 of 2013, which extended 16 new rights to domestic workers, some of them with multidimensional content; and finally, Complementary Law 150 of 2015, which extended eight new rights to the category. Finally, domestic workers also had the ratification of ILO International Convention No. 189, along with Recommendation No. 201, which came into force in Brazil on January 31, 2019.

From the point of view of women, the process of socio-economic and institutional inclusion has been relevant since the beginning of the structured labor system in the 1930s and 40s, generating a growing dynamic of integration of female workers into the formalized labor market in the country. There is no denying that the legislation of the time had several precepts that severely restricted women's prerogatives and rights, such as, for example, marital consent for certain acts, limitations on night work, the absence of combating discrimination and harassment of female workers, among other normative defects; however, even so, one cannot deny the relevance of this growing inclusive process triggered by Labor Law and its related institutions in the Brazilian reality.

From the perspective of the black population, it is necessary to recognize that the labor legal system of this historical phase also failed to create any specific public policy to encourage the greater inclusion of black workers

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in the country's formal labor market (at the time, it should be remembered, inclusion took place in the formal market of urban employees, in addition to temporary port workers, as already explained). To this extent, the omission was no different from the same serious institutional flaw perceived in the First Republic – which had always ignored the needs for inclusion of the black population. However, one specificity should be highlighted here: the new public labour policy, from December 1930 onwards, laid down legislation on the "nationalization of work" (Decree no. 19.482, 12.12.1930), with even stricter regulation a few months later (Decree no. 20.291, 19.08.1931). This public policy, although aimed at discouraging European immigration at the time, certainly in view of the criticism that Brazilian elites were making of the alleged socialist, anarchist, trade unionist, etc. inspiration of these European immigrants, determined that 2/3 of the jobs in Brazil, in any sector of the economy and society where there was an urban employment relationship, should go to Brazilian workers. With this, it indirectly encouraged the inclusion of a significant part of the black population in the formal urban labor market, having an undeniably progressive effect in this respect – even if this was not the apparent intention of the national legislator.

All of this demonstrates the importance of the Brazilian labor system in the country's socio-economic development, as well as unveiling the fallacy and harm resulting from the repeated myths that are brandished about Labor Law, the Labor Courts and other institutions that regulate the world of work in Brazil.

3. Labor law in Brazil: new myths

In the last three and a half decades in Brazil, since the 1990s, during the phases of accentuated neoliberalism in the country (the 1990s, until 2002, and since May 2016), texts and speeches about the old myths have resurfaced, as well as some narratives adverse to Labor Law and Labor Justice, also affecting, in some situations, the entire Brazilian labor system.

Focusing only on the new or reshaped narratives and versions, we can mention, on the one hand, the allegation that this institutional and regulatory system stands out as an obstacle to the vigorous development of the economy, even jeopardizing the generation of jobs in the country.

This narrative, however, is not based on truthful facts and correlations. As this article has already shown, using official data from different Brazilian governments for more than 50 years, it has been demonstrated that the longest and most continuous periods of socio-economic development in Brazil were between 1931/32 and the mid-1980s, involving more than 52

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years of growth, with only four negative GDP figures. This long period was experienced as a result of the structuring and presence of the labor system in the country, which was responsible, to some extent, for irrigating the Brazilian domestic market with a floor of income distribution, at least with respect to the segment of the working class that worked under employment contracts regulated by the labor law system.

The coordinated set of these public policies – usually referred to as developmentalist – enabled the Brazilian economy to get through the hardships of World War II (1939-1945), with only two drops in GDP (1940: -1.00%; 1942: -2.70%), and also enabled the economy to get through the dramatic world crisis of 1974-76 without any drop in GDP. In fact, Brazil would only experience a sequence of drops in its Gross Domestic Product from the 1980s onwards, when the country signed several letters of intent with the IMF (1982-1983), causing the state bureaucracy to begin to adopt the antisocial perspectives and policies typical of these multilateral international institutions at the time. At the beginning of this decade, there were two drops in GDP: 1981: -4.25%; 1983: -2.93%; both drops were suggestively interspersed with the signing of letters of intent with the IMF[12].

In addition, the new myth would lead to the conclusion that the most developed capitalist countries on the entire European continent – which have been characterized for decades by a consistent system of labour regulations, often combining collective bargaining agreements and heteronomous state legislation – would not have had, in history, favourable conditions for their own development (which, in fact, would be a contradiction in terms). In the logic of the same narrative, the underdeveloped countries of Africa and the Americas, characterized by the absence of labour regulation, would have had ideal conditions for their growing development – a fact that, as is well known, has not been proven over the last 120/130 years.

Contrary to what this new myth (or remodeled old myth) proposes, the guarantee of a reasonable level of individual and social labor rights (in addition to social security rights, of course) is what generates the structuring

[12] As already explained, IBGE data shows that, from 1932 inclusive (this year, with a 4.30% increase in GDP) to 1987 inclusive, there were 52 years of positive GDP growth, with a sporadic four years of negative GDP growth. Here are the years with negative rates during this phase: 1940: -1,00%; 1942: -2,70%; 1981: -4,25%; 1983: -2,93%. The two biggest negative indices found in this enormous historical series of more than half a century occurred right next to the signing of the letters of intent with the IMF, i.e. 1981 (just before the signing) and 1982 (the year the signatures were confirmed). Here is the source of the Brazilian GDP percentages: *BRASIL – IBGE, 1.1.1 – Brasil: População, Produto Interno Bruto, Produto Interno Bruto "per capita" e deflator implícito do Produto Interno Bruto, 1901-2000. IBGE-Estatísticas Históricas do Brasil, IBGE*, 1986.

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of a solid internal market for the growth and maintenance of the capitalist system, including boosting the domestic economy to face, with greater vigor, the countless international crises that characterize this system. A broad and solid internal market, with millions of people involved in a dynamic production system, with reasonable levels of individual and social labor rights, organizes a consistent basis for the performance of capitalist companies and the state's own tax collection needs. On the contrary, the impoverishment of human beings who live from work – who make up the vast majority of the population – sets off a spiral of economic degradation for a significant part of society, with damage to the capitalist economic system itself and the wide range of public services that the state has to establish and execute[13].

On the other hand, there is the discourse that legally protected labor relations make it impossible for the capitalist economic system to function properly, indirectly harming the very people who make a living from their work, insofar as they restrict their insertion into the dynamics of the respective system.

The narrative, as we can see, is similar to the previous one and, along with others, is yet another ideological justification for a public policy of deregulation and/or flexibilization of labor relations, in order to bring this universe of contractual and social relations closer to the neoliberal paradigm, with the continuous downgrading of the value of work in the economy and society.

4. Final considerations

This article sought to study some of the most recurrent myths that have arisen in relation to Labor Law and the Labor Courts during the Brazilian history of the 20th and 21st centuries, which, as a general rule, also involve the country's labor system as a whole, albeit with varying intensity.

As explained above, some of these myths are old, having emerged in the 1930s and '45s. They involve two large groups: on the one hand, the strands that present a clearly laudatory view of the labor system organized in greater detail during that historical phase, such as the so-called "myth of the grant". This myth, although very influential for a long time, has been the subject of countless investigations by historians, political scientists, sociologists and

[13] On the deleterious and precarious consequences of neoliberalism's public policy prescription, see, for example, Delgado M.G. (2017), *Capitalismo, Trabalho e Emprego – Entre o paradigma da destruição e os caminhos de reconstrução*, III ed, São Paulo: LTr.

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jurists, who have managed, in a very convincing way, to demonstrate the fragility of the narrative brandished at the time.

On the other hand, there were the myths that sought to attack Labor Law, Labor Justice and the Brazilian labor system as a whole, possibly as a way of combating its existence and, perhaps, seeking the goal of a more deregulated and/or flexible labor market in the country's socio-economic reality. This group includes the myths of the alleged exoticism of the Brazilian legal and institutional labor system, along with the myth of the fascist importation of Brazilian labor law and labor justice.

The text sought to explain these two other myths, pointing out their weaknesses and inconsistencies.

Finally, the article lists some more contemporary myths, which have arisen at times of greater neoliberal influence in the Brazilian imagination, also trying to point out their inconsistencies and weaknesses.

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The quest for labour rights and social justice: the role of NGOs

Elena Sychenko, Marco Mocella[1]

The last decades have introduced a variety of "alternative" ways to protect social rights at the international and regional level. Under alternative ways we mean those which were not foreseen in the ILO system. After the first and second world wars the ILO was the key driver of the struggle for the protection of labour rights[2]. It was supposed to play the role in the international trade under the article of the Charter of the World Trade Organization (Havana charter) and have a voice in the international trade disputes resolution[3]. However, due to the non-ratification of the Havana Charter those ideas were never realized and labour standards don't play a role in the GATT and the WTO system[4]. Currently the ILO faces a number of challenges, as, for example, the issue of the adequacy of the tripartite structure for the modern world[5] or the questioning of the right to strike be

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[2] See, for example, Maupain F. (2020), "A Second Century for What?: The ILO at a Regulatory Crossroad", *International organizations law review*, 17(1): 291-343.

[3] See the text of the Charter available at: *www.wto.org/english/docs_e/legal_e/havana_e.pdf*.

[4] Jensen J.M. (2016), "Negotiating a World Trade and Employment Charter: The United States, the ILO and the Collapse of the ITO Ideal", *The ILO from Geneva to the Pacific Rim: West Meets East*, pp. 83-109, London: Palgrave Macmillan UK; Graz J.-C. (2016), "The Havana Charter: when state and market shake hands", *Handbook of Alternative Theories of Economic Development*, pp. 281-290, Edward Elgar Publishing.

[5] Standing G. (2008), "The ILO: An Agency for Globalization?", *Development and Change*, 39, pp. 379-380, cited from La Hovary C. (2015), "A Challenging Ménage à Trois? Tripartism in the International Labour Organization", *International Organizations Law Review*, 12: 204-236, *DOI: 10.2139/ssrn.2684455*.

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employers[6]. In the same time, the reference to the ILO standards in the new EU framework for due diligence which aims "*to comprehensively cover human rights, including all five fundamental principles and rights at work as defined in the 1998 ILO Declaration on fundamental principles and rights at work*" opens the new venues for the protection of labour rights and solving the quest of social justice.

In this brief chapter, we will consider the role of the NGOs in the protection of labour rights at the UN and the OECD and in the implementation of the due diligence obligations by business under the new EU Due Diligence Directive. We will argue that with the years the role of other venues than ILO for the protection of labour rights has strengthened. In the same time, as it will be demonstrated below, ILO is still at the forefront and its standards are a source of legitimacy and interpretative guidance for the human rights bodies[7] and for the alternative venues of labour rights protection.

1. The role of NGOs in labour rights protection

NGOs don't play a role in the structure of the ILO and there has been criticism of this point[8]. However, NGOs still play a significant role in the international protection of labour rights. Mentioning just a few of the opportunities we can refer to the mechanisms of human rights protection at the UN level, to the OECD system and the envisaged role of the NGOs in the new EU system of due diligence.

1.1. The role of NGOs in protection of labour rights at the UN

Almost all UN human rights conventions and both covenants have a part on labour rights: International Covenant on Civil and Political Rights (ICCPR) enshrines the freedom of association, the prohibition of discrimination and forced labour; Covenant on Economic, Social and Cultural Rights (ICESCR)

[6] Bellace J.R. (2018), "ILO Convention No. 87 and the Right to Strike in an Era of Global Trade", *Comparative Labor Law & Policy Journal*, 39(3): 495-530; Hornung-Draus R. (2018), "The Right to Strike in the ILO System of Standards: Facts and Fiction", *Comparative Labor Law & Policy Journal*, 39(3): 531-536.

[7] Christian E.F., Oelz M. (2012), *Bridging the gap between labour rights and human rights: The role of ILO law in regional human rights courts*, ILO.

[8] Thomann L. (2008), *The ILO, Tripartism, and NGOs: Do Too Many Cooks Really Spoil the Broth?*, in Steffek J., Kissling C., Nanz P. (eds.), *Civil Society Participation in European and Global Governance. Transformations of the State*, London: Palgrave Macmillan, London.

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lists the number of individual and collective labour rights including the right to decent wage[9] and to strike (articles 7 and 8), other human rights convention protect most vulnerable groups from discrimination at the workplace (e.g. Convention on the Elimination of All Forms of Discrimination against Women, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Convention on the Rights of Persons with Disabilities)[10].

At the level of the UN, NGOs are engaged in the two possible procedures of the monitoring of the state compliance with the UN human rights covenants and Conventions. They may represent people making individual communication about the violation of the UN norms in case if the relevant state has ratified the option of an individual communication. An individual communication might be sent by any person alleging a breach of their rights under the respective treaty, or from a third party representing an individual, also an NGO, who has provided their consent in writing or is unable to do so. Occasionally, complaints may be lodged on behalf of collectives of individuals (such as to the HRC, CESCR, CERD, CEDAW, CRPD, or CRC) whose rights have been violated.

NGOs under UN human rights instruments might also present alternative reports on the implementation of international standards by reporting countries. The research of the jurisprudence of the UN human rights committees demonstrates that ILO standards are often used as an argument by the NGOs. The comments by ILO bodies are an important tool for the estimation of state's compliance with the human rights obligations[11] under the Covenant on Economic, Social and Cultural Rights. The alternative reports of the NGOs might be easily found on the site of the UN dedicated to the sessions of the human rights committees and serve as a valuable source of the real-life information about the situation in the country[12]. These reports often evidence the violation of the labour rights and refer to the ILO Conventions and the jurisprudence of the ILO bodies. As an example, we can refer to the report prepared by the Cotton Compaign about the problem of forced labour in Turkmenistan[13]. Cotton Compaign is coalition of international

[9] See ICESCR, *General comment No. 23 (2016) on the right to just and favourable conditions of work*.

[10] *www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies*.

[11] Sychenko E. (2021), "ILO Contributions to the Jurisprudence of International Human Rights Bodies", *Zbornik Pravnog fakulteta u Zagrebu*, 71(6): 897-920.

[12] See, for example, sessions for the CESCR available at: *tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/SessionsList.aspx?Treaty=CESCR*.

[13] Cotton Campaign Submission to the UN Human Rights Committee 137th session (27

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human and labor rights NGOs, brand and retail associations, responsible investor organizations, supply chain transparency groups, and academic partners, united to end forced labour and promote decent work for cotton workers in Central Asia[14]. They have provided the report which has become the cornerstone for the Concluding observations of the UN Human Rights Committee (HRC) on forced labour[15]. As another example we can refer to the report of the Migrant Working Group – a network of non-governmental organizations working on migrant workers' rights – on the situation of migrant workers in Thailand[16].

Therefore, even though the NGOs don't have a role in the monitoring mechanism elaborated by the ILO (see procedures under articles 27-33 of the ILO Constitution), they still play an important role in the implementation of the ILO standards and the promotion of labour rights as human rights in the UN system.

1.2. The NGO's role in promoting international labour standards in the OECD system

OECD has created its own unique system of National contact points (NCPs) for the consideration of the violations of human rights and the violations of labour rights are considered most often. This mechanism has been part of the Guidelines since the 2,000 review[17]. The Procedural Guidance to the OECD Guidelines states: "*Consistent with the objective of functional equivalence and furthering the effectiveness of the Guidelines, adhering countries have flexibility in organising their NCPs, seeking the active support of social partners, including the business community, worker organisations, other non-governmental organisations, and other interested*

February – 24 March 2023), *Third Periodic Report of Turkmenistan State-Imposed Forced Labor in the Turkmen Cotton Industry*, text available at: *tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/DownloadDraft.aspx?key=Z2evgg/KQitPmEcSGMucoGp4gyAs/dbqrZrsUlVmUocLMiCRild14NPYjAgfpklFqvCOK4GCAFhsJAprAhxLUQ==*.

[14] *www.cottoncampaign.org/*.

[15] HRC (20017), *Concluding observations on the second periodic report of Turkmenistan*, text available at: *documents.un.org/doc/undoc/gen/g17/096/09/pdf/g1709609.pdf?token=c1TGe6Nb3F5ucREP0K&fe=true*.

[16] Migrant Working Group (MWG) (2017), *Civil Society Report on the Implementation of the ICCPR (Replies to the List of Issues CCPR/C/THA/Q/2) Thailand, 31 January 2017*; text available at: *tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCCPR%2FCSS%2FTHA%2F26534&Lang=en*.

[17] OECD (2018), *Structures and Procedures of National Contact Points for the OECD Guidelines for Multinational Enterprises*.

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parties"[18]. According to the rules, any entity – an individual, organisation or community – may allege in a specific instance that a company has not observed the OECD Guidelines and may submit a formal request to an NCP. These instances are not legal cases and NCPs are not judicial bodies but their opinion often matters for the companies and they tend to cooperate with the NCPs. According to the most recent OECD report, in 2022 NGOs and individuals remained the primary submitters in closed cases, accounting for 37% and 29%, respectively while the trade unions were close behind with 27% of submissions[19]. Also, among over 650 specific instances that have been treated by country NCPs in over 100 countries almost a half of cases (331 case) was on employment and industrial relations[20].

In the OECD system one can find 94 cases on labour rights brought before the NCPs by NGOs[21]. For example, in the recent case "Former employees of DRC company vs. anonymous UK company" the NGO presented several former employees of an anonymous company, a natural resource supplier operating in the Democratic Republic of Congo. They complained that the respondent had not met various expectations in the OECD Guidelines regarding carrying out risk-based due diligence on suppliers in relation to, inter alia, labour rights (including workers' rights to engage in constructive negotiations on terms and conditions of employment)[22]. The application and the agreement reached is confidential and there is no information in the final statement about the details of the violation. However, we may presume that the violation of collective labour rights might have been substantiated through the reference to the ILO standards as they are mentioned in the Chapter V of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. This chapter of the Guidelines was "*designed to echo all fundamental principles and rights at work which are contained in the ILO Declaration on Fundamental Principles and Rights at Work*"[23].

These examples demonstrate that the importance of NGOs for the protection

[18] Structures and Procedures of National Contact Points for the OECD Guidelines for Multinational Enterprises, text available at: *chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://mneguidelines.oecd.org/Structures-and-procedures-of-NCPs-for-the-OECD-guidelines-for-multinational-enterprises.pdf*.

[19] The 2022 Annual Report on the activity of National Contact Points for Responsible Business Conduct, text available at: *mneguidelines.oecd.org/ncps/annual-report-of-NCPs-2022-highlights.pdf*.

[20] See the OECD NCPs database, text available at: *mneguidelines.oecd.org/database/*.

[21] *www.oecdwatch.org/complaints-database/?fwp_oecd_complaint_keyword=labour-rights*.

[22] NCP United Kingdom (2024), *Final statement: former employees of Democratic Republic of Congo company complaint to UK NCP about UK based company*, text available at: *www.oecdwatch.org/complaint/30794/*.

[23] OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, text

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of human rights is growing with years and despite the lack of the special procedures for the monitoring of the ILO standards which might be launched by the NGOs, these actors use alternatives ways to contribute to social justice at the UN and the OECD level. Recently, with the adoption of the new EU directives on corporate sustainability reporting (CSRD)[24] and on due diligence (DDD)[25], their role was emphasized in the EU. For example, according to the *Article 29 of the DDD*, non-governmental organization might be authorized by *an* alleged injured party of the violation of human/labour rights to bring actions to enforce the rights of the alleged injured party and ensure the civil liability of companies and the right to full compensation. Also, NGOs are among the subjects that might be consulted in the process of materiality assessment and are mentioned as the stakeholders in the due diligence rules. Below we will consider the new EU norms on due diligence, their significance for the labour rights protection and the role of NGOs in this process.

2. The new EU system of due diligence and the role of the NGOs

But the consequences in terms of risks for workers in global value chains were such that first some European nations then the EU Commission itself intervened in the matter.

In order to harmonise national protection standards both for the benefit of a better functioning of the market and for the more effective protection of social and environmental rights (see recitals 3, 21 and especially 99 of the Directive), the European legislator presented on 23 February 2022 a proposal for a Due Diligence Directive[26]. The long process finally culminated in the approval of Directive (EU) 2024/1760 of 13 June 2024 on a company's sustainability due diligence, amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859[27].

available at: *www.oecd-ilibrary.org/deliver/81f92357-en.pdf?itemId=%2Fcontent%2Fpublication%2F81f92357-en&mimeType=pdf*.

[24] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, text available at: *eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022L2464*.

[25] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, text available at: *eur-lex.europa.eu/eli/dir/2024/1760/oj*.

[26] See footnote 24.

[27] On the proposal of the directive, amongst others, Sanguineti R.W. (2022), *Diligencia debida y trabajo decente en las cadenas globales de valor*, Thomson Reuters Aranzadi;

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2.1. The scope of application of the new Directive

The first national experiences, in particular French and German but also partly Norwegian and Dutch, pushed the adoption and influenced the European standard. It is worth mentioning that the scope of application of the DDD is wider than of the national norms: the French Law No. 2017-399 (Loi de vigilance) provides for a vigilance duty of companies employing more than 5,000 employees in France and 10,000 employees worldwide on their global value chain[28]; the German Due Diligence Act applies to large companies with headquarters or a secondary head office in Germany with more than 3,000 employees as of 2023 and with 1,000 employees as of 2024. However, it does not apply to foreign companies that do not have a head office or a branch in Germany, even if they provide goods and services on the German market[29]. The Norwegian law on due diligence on human rights applies to large companies that reside in Norway, but also to foreign companies that offer goods and services and are subject to taxation in Norway. Those can be large enterprises as defined in internal law or enterprises exceeding the threshold of two of the following three conditions: sales revenue of NOK 70 million, a balance of NOK 35 million or 50 full-time employees in the last financial year[30].

The European Directive as a general rule covers the companies that had more than 1,000 employees on average (this threshold was significantly raised in the last version of the Directive) and had a net worldwide turnover of more than EUR 450,000,000 in the last financial year, thus the scope is wider than the majority of national laws[31] at least as far as the number of employees are concerned.

Murgo M. (2022), "La proposta di direttiva sulla corporate sustainability due diligence tra ambizioni e rinunce", *Diritto delle Relazioni Industriali*, 943 ss.

[28] Gustafsson M.T., Schilling-Vacaflor A., Lenschow A. (2022), "Foreign corporate accountability: The contested institutionalization of mandatory due diligence in France and Germany", *Regulation & Governance*, 17(4).

[29] On national legislation see Koos S. (2022), "The German Supply Chain Due Diligence Act 2021 and Its Impact on Globally Operating German Companies" in *Proceedings of the 2nd Riau Annual Meeting on Law and Social Sciences (RAMLAS 2021)*, text available at: *www.atlantis-press.com/proceedings/ramlas-21/125973359*; Krajewski M., Tonstad K., Wohltmann F. (2021), "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?", *Business and Human Rights Journal*, 6(3), text available at: DOI: 10.1017/bhj.2021.43; Weihrauch D., Carodenuto, Leipold S. (2022), "From voluntary to mandatory corporate accountability: The politics of the German Supply Chain Due Diligence Act, *Regulation & Governance*, text available at: *onlinelibrary.wiley.com/doi/full/10.1111/rego.12501*.

[30] Krajewski M., Tonstad K., Wohltmann F., *op. cit*., p. 553.

[31] According with Murgo M., *La proposta di direttiva sulla corporate sustainability due diligence tra ambizioni e rinunce*, cit., pp. 943 ss, around 13,000 companies from the EU

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Both "*companies that are incorporated in accordance with the law of a Member State*" (Art. 2(1)) and "*companies that are incorporated in accordance with the law of a third country*" operating within the single market (Art. 2(2)) are subject to the requirements.

Of course, since companies are normally located in several countries, the responsibility to avoid negative environmental and social impacts concerns not only the activities of the company itself but also those of its subsidiaries, as well as those "*in the value chain carried out by entities with which the company has an established business relationship*".

In this way, of course, the scope of the directive already extends outside the territory subject to European law. However, the real novelty compared to national regulations (except for the Norwegian one) is the inclusion of companies operating in the EU territory that are obliged to comply with the regulation. Any multinational company wishing to have a significant presence in the EU market will have to comply with the regulation. Thus, the scope of the directive is extended far beyond the territory subject to EU rules.

In this way, the EU gets global leadership on human rights introducing an interesting new mechanism to oblige companies not normally subject to European law to respect its principles.

2.2. The role of NGOs in the due diligence process under the DDD

It has been highlighted that, as large companies are highly susceptible to reputational ranking, NGOs are an effective instrument of control and pressure on multinationals[32]. NGOs can enable the transition to more sustainable social and industrial systems[33]. NGOs act as watchdogs regarding the existence of

and another 4,000 from third countries would be involved. According to the same author, the principle of nationality is expressly adopted by German law, and by French law: see, critically, Schiller S. (2019), "Synthèse Introductive", in *Le Devoir De Vigilance*, Lexisnexis, p. 3, the territorial one by the Dutch Child Labour Due Diligence Act and the Anglophone laws on modern forms of slavery and the Norwegian one. In general, for a extensive reconstruction, Sanguineti R.W., Vivero Serrano J. (2023), *La dimensión laboral de la diligencia debida en materia de derechos humanos*, Aranzadi.

[32] Schäfer N., Petersen L. Hörisch J. (2024), "The Interplay Between Supply Chain Transparency and NGO Pressure: A Quantitative Analysis in the Fashion Industry Context", *Journal of Business Ethics*, 192: 713-727, p. 715 ss., text available at: *doi.org/10.1007/s10551-023-05480-3*. See also Garciandia R. (2023), "Accountability of NGOs: The Potential of Business and Human Rights Frameworks for NGO Due Diligence", *King's Law Journal*, 34(3): 524-545, text available at: *www.tandfonline.com/doi/pdf/10.1080/09615768.2023.2283235*.

[33] Gualandris J., Klassen R. (2018), "Emerging discourse incubator: delivering transformational change: aligning supply chains and stakeholders in non-governmental organiza-

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abuses in the supply chain thanks to the supply chain information disclosed by the companies themselves.

If they find unsustainable conditions, they put pressure on companies to improve working conditions. In addition, they provide information on the supply chain to the public which, in the same way, can put pressure on companies to substantially improve conditions for suppliers and thus for workers. Thanks to pressure from NGOs to overcome unethical and unsustainable practices, many companies have changed their supply chains[34].

To this typical function of NGOs, some authors have recently identified a new one that monitors a company's compliance with predetermined standards and provides external stakeholders with the assurance that the company has complied with its voluntary obligations[35].

This function is well regarded by companies with strong roots in international markets that usually prefer more structured and recognised NGOs with greater consumer recognition[36]. For this reason, companies involved in global value chains (GVCs) prefer the use of soft law (codes of conduct etc), that is better perceived by business than state intervention, as national laws or directives.

tions", *Journal of Supply Chain Management*, 54(2): 34-48, text available at: *onlinelibrary.wiley.com/doi/abs/10.1111/jscm.12164*; Rodriguez J.A., Gimenez Thomsen C., Arenas D., Pagell M. (2016), "Ngos' initiatives to enhance social sustainability in the supply chain: poverty alleviation through supplier development programs", *Journal of Supply Chain Management*, 52(3): 83-108, text available at: *onlinelibrary.wiley.com/doi/abs/10.1111/jscm.12104*. For an empirical study: Chen S., Zhang Q., Zhou Y.-P. (2019), "Impact of Supply Chain Transparency on Sustainability under NGO Scrutiny", *Production and Operations Management*, 28(12): 3002-3022, text available at: *onlinelibrary.wiley.com/doi/abs/10.1111/poms.12973*; Prakash Sethi S., Rovenpor J. (2016), "The Role of NGOs in Ameliorating Sweatshop-like Conditions in the Global Supply Chain: The Case of Fair Labor Association (FLA), and Social Accountability International (SAI)", *Business and Society Review*, 121(1): 5-36, p. 6 ss. See also Garciandia R. (2023), "Accountability of NGOs: The Potential of Business and Human Rights Frameworks for NGO Due Diligence", *King's Law Journal*, 34(3): 524-545, text available at: *www.tandfonline.com/doi/pdf/10.1080/09615768.2023.2283235*. On how to identify better NGOs, according to Garciandia (2023), it is possible to apply business and human rights legal frameworks to NGOs and whether this could contribute to a better approach to the accountability of NGOs, focusing on due diligence rules.

[34] Chatain O., Plaksenkova E. (2019), "NGOs and the creation of value in supply chains", *Strategic Management Journal*, 40: 604-630, pp. 604 ss.

[35] Prakash Sethi S., Rovenpor J. (2016), "The Role of NGOs in Ameliorating Sweatshop-like Conditions in the Global Supply Chain: The Case of Fair Labor Association (FLA), and Social Accountability International (SAI)", *Business and Society Review*, 121(1): 5-36, p. 10 ss.

[36] Chatain O., Plaksenkova E. (2019), "NGOs and the creation of value in supply chains", *Strategic Management Journal*, 40: 604-630, pp. 604 ss.

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The DD Directive shows considerable attention to the involvement of stakeholders, including NGOs, and also expressly including workers through their organisations (considerando 65, 66 and 67). In fact, Art. 13 of the directive is expressly devoted to dialogue with stakeholders. The definition of stakeholders in Article 3(1)(n) is extremely broad[37].

They, in fact, must be consulted both in the identification of negative impacts (Art. 13 para. 3 letter a) and in the drafting of operational prevention plans and corrective action plans (letter b)[38]. Also, in taking the decision to terminate or suspend a business relationship under Art. 10(6) and 11(7) (sub-para. c) and in identifying repairs under Art. 12 (letter d). But above all, when developing qualitative and quantitative indicators for the monitoring the compliance with HR and labour standards required under Article 15 (e).

With regard to the role of trade unions, it is explicitly recognised within the complaints procedure (Art. 14 para. 2 letter b but also Art. 29 para. 3 letter d), where civil society organisations that are active and experienced in the areas covered by the complaint may also submit it.

In any case, all stakeholders can monitor compliance with social and environmental parameters through the mandatory declarations that companies must publish under Directive (EU) 2022/2464 on corporate sustainability reporting. Furthermore, they have the right to request relevant and complete information in addition to that required by law (Art. 13 para. 2).

Compared to national regulations, the directive makes considerable progress with regard to the involvement of NGOs. In fact, the French law on the duty of vigilance provides only that the mechanism for alerting and collecting complaints must be agreed with the trade unions. Similarly, the German law limits itself, according to Art. 1, sect. 2, para. 4, para. 4, to providing that companies only have to take the position of the stakeholders into consideration.

The role of stakeholders in the Directive is more intense, including trade unions, also thanks to the corrective action taken by Parliament. It

[37] "Stakeholders" means employees of the company, employees of its subsidiaries, trade unions and workers' representatives, consumers and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and activities of the company, its subsidiaries and business partners, including employees of business partners and their respective trade unions and workers' representatives, national human rights and environmental institutions, civil society organisations whose purposes include environmental protection, and legitimate representatives of such individuals, groups, communities or entities.

[38] Murgo M., *op. cit*., and "Appunti per una corporate sustainability due diligence equa", in Sanguineti Raymond W., Vivero Serrano J. (2023), *La dimensión laboral de la diligencia debida en materia de derechos humanos*, Aranzadi.

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is envisaged that companies must dialogue with stakeholders (Art. 5(e)), including trade unions and other employee representatives, at all stages of due diligence (Art. 7(2)).

The role attributed to stakeholder consultation by the Commission for the purpose of adopt guidelines on voluntary standard contractual clauses (Art. 18) and general guidelines and guidelines specific to certain sectors or certain negative impacts (Art. 19) is also worth noting.

3. Conclusions

The above analysis shows the importance of NGOs in the protection of labour rights as human rights and their important role as stakeholders in the process of due diligence.

While in the ILO monitoring system they are not formally considered, in the UN system they can play an active role, either by submitting complaints on behalf of the victims or alternative reports about the violation of the UN norms. In the OECD framework, NGOs may submit a formal request to an NCP and are the most frequent applicants in the cases relevant to labour rights.

The role of the NGOs under the DDD is extensive. They may not only file complaints, but have a proactive and controlling role. The Commission itself is required to consult them for the purpose of drafting sectoral guidelines in order to assist companies or Member State authorities in defining the way in which companies must fulfil their due diligence obligations (Art. 19 (1) and (2a)).

Compliance with these rules must be ensured by the Member State when transposing the directive. The area of application of the DDD makes it possible to consider that the European standards, but also the international labour standards referred to, must be respected by all multinational companies. The effect of these two innovations, the extension of the scope of the Due Diligence Directive and the increased weight of NGOs, is expected to increase the importance of these also outside the EU. This is the new challenge for NGOs in the future world of work.

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Part 2
Social protection systems: lessons learned and new ideas

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Social security law and the ecological crisis

Anja Eleveld[1]

1. Introduction

Shaping solidarity, guaranteeing basic subsistence, maintaining income and work activation can be seen as basic values underlying social security law in many European welfare states (Pieters, 2006). This paper argues that the meaning of these values or concepts is determined by the dominant external political and philosophical framework within which they are interpreted, which has to date been based on Rawls's theory of justice and related egalitarian liberal philosophies. Owing, however, to the ecological crisis, other candidates have now come to inform this external framework. These include 'green republicanism', which, instead of serving a capitalist economy based on economic growth, promotes a post-productive society. The aim of this paper is to contribute to the emerging debate on social security reform by illuminating the contours of a potentially new external framework based on green republican theory and to explain how this framework can fill social security law's basic values or concepts with meaning that is more in line with current ecological concerns. It builds on several recent contributions that have sought to rethink labour and social security law ('social law') in a way that is more compatible with our ecological and climate crisis (Dermine, 2023; Dermine, Dumont, 2021; 2023; Routh, 2018; Ter Haar, 2022; Tomassetti, 2018; Zbyszewska, 2018). In contrast, however, to these previous contributions, this paper is based on a post foundational ontology and argues that an external political and philosophical framework for social security law does not exist in isolation from powerful discourses[2].

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[2] This contribution is a shorter version of my paper which was published on SSRN (Eleveld, 2023). An extended open access version is now published as an online first article

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2. Internal and external frameworks

According to Taekema (2018), normative frameworks are useful in legal research to differentiate between good and bad law; they provide a yardstick for evaluating the law and thus enable us to formulate recommendations for improving it. Taekema distinguishes between internal and external frameworks, whereby internal frameworks consist of the basic principles and values that are stated or pre-supposed in a certain area of law and that are often seen as foundational elements of the law. These internal frameworks do not require elaborated political philosophies: 'inequality compensation', for example, can be seen as a central value informing labour law's internal framework (Zekić, 2020), without necessarily being rooted in philosophy. External frameworks, by contrast, are often based on political philosophies that transcend the values of a given legal system, but can also be based on social policy aims that, in turn, can be legitimized by specific political philosophies or theories. These external frameworks can be used to evaluate the law's internal normative framework and, as such, provide arguments for legal change.

Research in positive law usually provides us with the basic material for establishing the internal normative framework of social security law. Based, for example, on Pieters (2006), Eichenhofer (2015) and Dermine and Dumont (2014) we can delineate three building blocks of the internal framework underlying social security law in many European welfare states: 1) shaping solidarity by 2) providing basic needs (through means-tested benefits or universal schemes) and maintaining income (through social insurance schemes), and by 3) work activation. Within these building blocks or main concepts, 'solidarity' can be seen as the overarching concept or value, and one that manifests itself in various ways. These include solidarity as reflected, for example, in the principle of collective financing, which requires an appropriate sharing of responsibility between rich and poor individuals; solidarity between individuals, employers and the state for covering risks such as unemployment, sickness or old age; and the solidarity necessary for maintaining income or providing basic needs after a risk has materialized. In Bismarckian systems, the value of maintaining income through social insurance systems (usually financed by employers and employees) will be more important than in Beveridgian systems, where

on the website of the European Journal of Social Security (see Eleveld, 2024). It enabled me to re-think my PhD thesis, *A critical perspective on the reform of Dutch social security law* (Eleveld, 2012), in which I drew on post-structuralist theory to construct an evaluative framework for social security law reform.

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more emphasis is put on the universal provision of basic needs (financed by collectivity). Yet, in European welfare states, Bismarckian systems have in recent decades increasingly evolved into Beveridgian systems (Palier, 2010). In addition, and in order to ensure solidarity between people dependent on social benefits and people able to sustain themselves in other ways (Van der Veen *et al*., 2012), work activation, too, has become a central value in these welfare states (Dermine, Dumont, 2014; Eichenhofer, 2015; Eleveld, 2014).

Taekema argues that external normative frameworks (e.g. political philosophies or policy aims) can be used to evaluate the internal normative framework of the law (consisting of values such as solidarity, providing basic needs, maintaining income and work activation). While this distinction between internal and external normative frameworks can be very useful for analytical purposes, it should be noted that, from the post-foundationalist perspective that I endorse, internal and external frameworks cannot be neatly separated (Eleveld, 2019). Post-foundationalism is an approach in contemporary philosophy that encompasses various thinkers, including Derrida, Butler, Laclau, Mouffe and Rancière (see e.g. Marchart, 2007). Central to post-foundationalist thought is the rejection of an *ultimate* ground for our society or politics, implying that it is not possible to formulate an 'objective yardstick' with which to evaluate the internal framework underlying social security law.

However, post-foundationalists' denial that political philosophy provides ultimate answers to questions such as "What is just?" and "What is unjust?" does not make political philosophies irrelevant. Political philosophies can, for example, feed political discourses on a just distribution of goods and, as such, legitimize certain policy goals. In addition, political philosophy and political theories often comprise coherent and consistent theories, that can provide convincing arguments legitimizing the law (Eleveld, 2019). Yet, post-foundationalists will argue that these 'legitimations' are contingent and dependent upon existing power constellations. This means that, from a post-foundational perspective, legitimizing political philosophies or legitimizing social policy goals are seen as 'dominant discourses' and that the answer to the question of "What is just?" and "What is unjust?" will ultimately be determined in a pluralistic, agonistic democracy that acknowledges the "*impossibility of establishing a consensus without exclusion*" (Mouffe, 2005, p. 105). The aim, then, of this paper, drawing on ideas developed within green republican theory, is to fuel this agonistic democratic debate.

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3. Legitimizing modern social security law: Rawls's theory of justice

Before considering alternatives to current external frameworks of social security law, I will examine Rawls's theory of justice, which is sometimes seen as the philosophical foundation of social security law in modern welfare states. This, of course, is not entirely correct as Rawls's *A Theory of Justice* was published in 1971, by which time social security law in many European welfare states had already reached a peak. Nonetheless, Rawls's philosophy provided, for the first time, a modern and precise definition of distributive justice, and one that helped to settle disputes about what is meant by "*from each according to his abilities*" or "*from each according to his needs*" (Fleischacker, 2004, p. 114). Hence, a main function of Rawls's theory of justice was that it legitimized elaborate social security systems in modern welfare states or, as Mouffe (1987) argues, it could be seen as a different interpretation in a struggle between the various justice discourses that became hegemonic in the 1970s. And this Rawlsian interpretation has become strongly linked to the politics of the welfare state, or "*welfare-state capitalism*" (Kymlicka, 2002, p. 88).

So what is Rawls's theory of justice about? In his seminal work, Rawls asks what principles of justice people would agree on in a hypothetical situation in which they lack knowledge about who they themselves or others are. He concludes that, behind this veil of ignorance, they would decide on two basic principles, with the first principle being that every individual should have an equal right to the most extensive system of equal basic liberties, and the second principle being that social and economic inequalities should be arranged in such a way that they are attached to positions and offices open to all. This second principle also incorporates the difference principle, whereby all social primary goods such as freedom, opportunities, income, well-being and the social bases of self-respect should be divided equally, unless an unequal division of these goods would benefit the least advantaged. Those with more talents should thus be encouraged to increase their income, providing this contributes to the income of the least advantaged. Rawls's second principle of justice also conveys his view that differences in income and prosperity resulting from differences in peoples' efforts cannot be considered exclusively to be 'earned' differences because effort can also be affected by factors that are irrelevant from a moral perspective, such as differences in natural ability or the social class in which one is born.

If we consider Rawls's conception of justice as a master signifier, it could be argued that it clearly fills the overarching concept or value of solidarity with meaning. The difference principle, then, requires everyone who is part

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of a specific society to be entitled to a minimum share of the total social product. As such, it formulates an obligation of the more advantaged (or rich people) towards the least advantaged (or poor people). The value of 'providing basic needs' is also expressed in the difference principle. While, for Rawls, the extent of this minimal provision is not predetermined, it will at least exceed the essential needs for leading a decent life, given that the difference principle specifically endeavours to *maximize* the prosperity of the least advantaged (Rawls, 2001, pp. 129-130).

Rawls's justice conception is less clear regarding the value of work activation, which, as a matter of fact, imposes a duty on the less well-off. Indeed, it can even be questioned whether a duty to work is compatible with Rawls's theory as this kind of obligation contravenes his first principle of justice, which also entails the right to free choice of occupation. This aspect of Rawls's theory of justice, however, has been firmly criticized by those known as 'luck egalitarians' who emphasize people's personal responsibility for their income and which ideas reinforced the New Right's agenda and started to dominate welfare states' social security discourses in the 1980s. In an amalgam with a communitarian (paternalistic) perspective on welfare recipients (Etzioni, 1997), luck egalitarianism also legitimized the Third Way 'no rights without obligations' discourses (Giddens, 1998), which spread across many northern and western European countries in the 1990s. As such, 'activation to work' was increasingly interpreted to mean a duty to work being imposed on all able-bodied recipients of social security benefits (Eleveld, 2014).

4. Rawlsian philosophy as an economic growth framework?

Rawls's theory of justice not only provides a philosophical framework for legitimizing European welfare states' social security law, but also seems to have legitimized socio-economic policies aimed at creating efficient labour markets sustaining a system of unlimited economic growth. In *A Theory of Justice* Rawls argues, for example, that the free-market economy is essential for realizing these principles of justice; it not only protects individual freedoms, such as the liberty to freely choose one's occupation, but also fosters economic efficiency (Rawls, 1971 & 1999, par. 42). According to Rawls, then, the market system encourages entrepreneurs "*to do things which raise the prospects of labouring class. Their better prospects act as incentives so that the economic process is more efficient, innovation proceeds at a faster pace, and so on*" (Rawls, 1971 & 1999, p. 68). In other words, for Rawls, a more efficient system that stimulates economic growth

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responds to the second principle of justice in that it maximizes the position of the least advantaged (see also Arnold, 2022). This interpretation of Rawls's theory of justice has been very influential in feeding discourses in which the welfare state needs economic growth in order to sustain its redistributive policies (Queralt, 2013). However, it should also be noted that Rawls himself did not believe that maximizing the expectations of the least advantaged required continual economic growth over generations (Rawls, 2001, pp. 63, 159). Indeed, and especially in his later work he became more critical of the capitalist welfare state (Audard, 2024). He also endorsed a property-owning democracy that (like welfare-state capitalism) acknowledges private ownership, but (unlike welfare-state capitalism) assumes an ex-ante equal distribution of productive assets and human capital against a background of fair equality of opportunity (Rawls, 1971 & 1999, par. 42; 2001, pp. 136-140). Yet, the link Rawls established between efficiency/economic growth and redistributive policies in *A Theory of Justice* became central to socio-economic discourses in European welfare states, and clearly affected the design of social security law in these states.

It is not difficult to show the association between social security provisions and the capitalist-based system, as legitimized in liberal egalitarianism (including in Rawls's work and luck egalitarianism) as social security rights provide support to people who are temporarily unable to participate in the economy, with the aim being to return them to the labour market as quickly as possible. The social security system thus embodies the 'double movement' coined by Polanyi (2001), meaning that the market economy cannot be self-regulating. On the contrary, governmental action (i.e. regulation of social security) is needed to secure the supply of sufficient labour and to ensure a well-functioning market economy. Empirical research has furthermore shown that employers in countries such as Germany, France, Belgium and Sweden endorse the system of collective social insurance as this enables them to attach good workers to their companies (Mares, 2003; Swenson, 2002). These findings substantiate Deakin's conclusion that social security law not only has a market-correcting function, but also constitutes the market economy (Deakin, 2011), and suggests that social security law (and labour law) has not only created a legal framework that regulates and legitimizes wage labour (as a commodity), but that it also, as such, has served the capitalist market economy (Dermine, Dumont, 2022; see also Dukelow, Murphy, 2022).

Being strongly linked with a capitalist economy that aims to produce as efficiently as possible, social security law also supports a system that aims for unlimited production growth. As Jackson (2021) explains, in an efficient capitalist economy the demand for products and the supply of work

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can only be maintained through growth. Work activation plays a pivotal role in this system (Dukelow, 2022). However, as the ecological crisis is showing us, economic growth and related production growth are having a disastrous impact on our environment. A 'post-productive' society seems to be inevitable if we want to move to a society in which further depletion of the earth's resources is actually to be brought to a standstill (Jackson, 2021; Koch, 2020). It is my contention that we therefore urgently need an alternative external framework that enables us to interpret the basic elements of our current internal normative framework in a way that is compatible with a post-productive society. In the next section, I take the opportunity, as an academic scholar, to contribute to this discursive struggle over justice by arguing for green republicanism as an alternative philosophy informing social security law's external framework.

5. Green republicanism: a potential new external framework

Green republicanism is based on the neo-republican theory of non-domination developed by Pettit (1997; 2012) and Lovett (2010). An important difference between Rawls's theory of justice and the neo-republican theory of non-domination is that while the former constitutes an ideal theory, the latter is a non-ideal theory that does not require abstractions of reality such as Rawls's veil of ignorance. This difference has important consequences for their conceptions of freedom. While Rawls presupposes an ideal (Kantian) rational autonomous subject, the republican theory of non-domination departs from the real world in which "*the dangers of corruption and the darker aspects of human nature are, inevitably, central issues*" (Birnbaum, 2015, p. 26).

Central to the republican theory of non-domination as developed by Pettit (1997, p. 2012) and Lovett (2010) is the need to minimize arbitrary or uncontrolled power. This means that it is not enough for a powerful agent to abstain from interfering with other people's lives in practice as, in the case of uncontrolled power, lack of interference may also result from people seeking to avoid harm and adapting their behaviour to the powerful agent's expectations. This emphasis on freedom from arbitrary or uncontrolled power, together with its non-ideal approach to society, makes the republican theory of non-domination more sensitive than Rawls's theory of justice to people's relations to others, as well as to the environment. Hence, a main difference between Rawls's theory of justice and the republican conception of social justice is that the latter clearly recognizes existing interdependencies that are both social – and nature-oriented (Pinto, 2020).

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As, for example, Pettit (2012) argues in *On the People's Terms*, Rawls' principles of justice do not sufficiently protect against arbitrary power in *private asymmetric dependence relations* because these relations disregard the fact that people legally permitted to make certain choices are not necessarily able to make such choices. Rawls also wrongly assumes that there is general compliance in his idealized, well-ordered society and that, therefore, sanctions that prevent people from interfering with others do not need to be severe. Instead, as Pettit points out, the lack of penalties "*may leave the powerful effectively unbound; it may leave them able to interfere at a relatively low cost*" (Pettit, 2012, pp. 108-109). According to Pettit, in order to ensure freedom in relations between private persons, a republican social justice would require the state to implement three types of social policy programmes: infrastructural programmes, public insurance and public insulation of people against danger from others. Interestingly, these programmes not only provide external justification for social security and labour law regulation, but also take account of existing interdependencies, both with regard to the environment and to other people. Infrastructural programmes, for instance, instruct the government to take care of a sustainable natural environment so as to ensure people's enjoyment of basic liberties (Pettit, 2012, pp. 112-113). Meanwhile the second and third types of social programmes specifically consider people's relations to others by preventing needy citizens from becoming dependent on voluntary forms of philanthropy and, as such, on the goodwill of others or the arbitrary power of employers (Pettit, 2012, pp. 113-115).

For Lovett, the other main contributor to the republican theory of non-domination, the centrality of non-domination in neo-republican theory also means that republican social policies should aim for 'human flourishing' rather than focusing on efficient labour markets and production growth (Lovett, 2020, p. 162). He, furthermore, argues that the duty of fairness found in Rawls's theory of justice, and which imposes obligations on people as part of a community to collectively share certain risks and burdens based on solidarity, runs into problems when it comes to intergenerational (and global) justice. Lovett's idea of social justice as 'minimization of domination' instead takes account of the ability of the next generation to achieve a similar level of non-domination to that of the present generation, implying, for example, that the present generation should minimize its consumption of non-renewable resources that are indefinitely sustainable in order to leave sufficient non-renewable resources to the next generation (Rawls, 2010, pp. 183-184). This is not to say that Rawls failed to engage with intergenerational justice. However, his engagement with intergenerational justice was related to the idea of just savings aimed at preserving the gains of culture and civilization,

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of maintaining just institutions and of investing in machinery or education rather than being related to ecological preservation (Rawls, 1971 & 1999, par. 43-46).

Another important difference between Rawls's approach and the neo-republican theory of non-domination concerns the latter's emphasis on democratic control. Although Rawls believed his theory of justice to be consistent with classical republicanism (Rawls, 2001, pp. 141-145), Pettit rightly asserts that a neo-republican conception of democratic control goes beyond the formal procedures proposed by Rawls. Pettit states, for example, that republicanism is not only "*grounded in an equally accessible system of influence that operates in an equally acceptable direction*", but also requires "resistance-prone" people (Rawls, 2012, p. 174). As such, Pettit advocates a contestatory culture, meaning a high level of civic engagement, and a democratic life with an agonistic character and exercising of civic vigilance[3].

The relational approach to justice, which we find in the republican theory of non-domination has been taken up in green republicanism (Barry, 2012; 2021: Frémaux, 2019)[4]. In addition to reasons related to environmental sustainability, green republicanism has formulated arguments against policies of economic growth, which are grounded in the republican theory of non-domination, as summarized by Barry (2021, pp. 734-735):

1) economic growth is particularly "*promoted by and for the interests of a minority who benefit not just materially but in terms of having private arbitrary power over others*";
2) under economic growth policies, "*active citizenship and democratic practices are at greater risk of being undermined or eroded*". Barry points in this respect to the lack of exits for workers without assets, property or capital and who are consequently controlled by their employers. He also makes the point that one of the main justifications for denying democracy in the workplace is efficiency and the maximization of production;
3) economic growth requires and reproduces extremes forms of socio-economic inequality. This has a negative effect on social cohesion, the common good and practices of citizenship.

[3] It should be noted that Pettit's political struggle plays out within the established institutions, while for Mouffe the political struggle may lead to transience of the existing regime and the instituting of a new hegemonic project.

[4] For a more extensive analysis of a green republican perspective on social security law see Eleveld (2024).

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In short, economic growth jeopardizes some main goals of republican theory, namely the minimization of domination, and active citizenship or civic engagement.

6. A green republican interpretation of social security law's basic values

Let us now reconsider the building blocks or main concepts of the internal framework of social security law and use the green republican theory of justice to interpret them. First of all, it could be argued that, from a republican viewpoint, the right to maintain income and basic subsistence is essential if people are to avoid becoming subjected to arbitrary domination as a result of their dependence on the goodwill of their employer and the benevolence of other people. Furthermore, people's entitlement to a minimum means of subsistence should not harm the environment and thus leave insufficient means to future generations. Hence, 'basic subsistence' should be interpreted as people's essential needs (e.g. water, food, shelter, secure forms of employment, education, healthcare, childhood security, social relations, physical and economic security and a safe environment) in relation to limited natural resources (see Coote, 2022).

Providing people with basic needs or, in the case of employees, with a right to maintain their income means basing social security on the value of solidarity. Indeed, for Pettit, the need to prevent people from being subjected to uncontrolled or arbitrary power justifies redistributive taxation and the introduction of collective insurance schemes. Republican theory also challenges the privatization of collective goods, such as education and healthcare, because privatizing these goods will inevitably result in domination of the rich and powerful over other people (Kohn, 2022). Moreover, although these collective goods are not usually considered to be part of 'social security law' (Pieters, 2006), this may be different if the value of solidarity is interpreted within this republican framework. Furthermore, from the viewpoint of intergenerational solidarity (on a global scale), scarce environmental goods such as energy should be seen as collective goods that ought to be publicly guarded and distributed in a way leaving sufficient resources for next generations (Lovett, 2010). An ethics of care for the environment may also imply solidarity with the least polluting groups, with financial compensation if necessary, and solidarity with caregivers, who can be highly vulnerable to domination if they are not financially compensated for their care activities. Finally, for republicans, republican solidarity is about the need for active citizenship and civic engagement, meaning that solidarity

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amounts to *collectively* "*managing our relationship to the environment*" (Barry, 2021, p. 731).

This brings us to the value of work activation. Benefit recipients obliged to comply with activation obligations are very vulnerable to being subjected to arbitrary power exercised by case managers or work supervisors, especially given that these parties have ample discretionary space in which to make their decisions and in practice are hardly controlled by democratic bodies and client representatives (Eleveld, 2020; Dermine, Eleveld, 2021). For this reason, Lovett (2010) argues for the introduction of a basic income instead of means-tested social assistance benefits, or at least for relieving people of a requirement to integrate (or re-integrate) into the workplace (see Dumont, 2022), meaning that, in a republican interpretation, 'work activation' would not necessarily be interpreted in the context of a sanctioning regime. In addition, within the framework of green republicanism, 'work' would also be interpreted differently: instead of being limited to paid work, it could include forms of work such as unpaid care work, which would be considered to constitute 'work' because of caregivers actively contributing to the common good (see also Dermine, Dumont, 2023). In a circular economy, moreover, and as mentioned by Yeoman (2022), being a consumer may also become a form of work. Indeed, from this perspective, taking your waste to a place where you can separate it in an ecologically responsible way could also be seen as 'work'. It should also be noted that, from a republican point of view, human flourishing extends well beyond working lives. Especially where economic activities and work increase ecological damage, facilitating meaningful free time is to be preferred over work. Instead, therefore, of imposing a duty to perform paid work, 'activation to work' from a republican perspective would mean recipients of social security benefits actively participating in how they want to be activated and the activities they want to engage in. These collaborative decisions would need to be controlled by democratic bodies and other forms of civic vigilance also aimed at protecting the common good, such as our ecological environment.

7. Discussion and conclusion

In this paper I have argued that it is not possible to detach external frameworks for evaluating and improving social security law from dominant discourses. These dominant discourses are often, furthermore, built on people's identification with attractive or convincing narratives (Schön, Rein, 1994), which do not necessarily address various nuances of these philosophies. Whether the current evaluative frameworks in social security law will be

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replaced by a discursive framework informed by green republicanism will depend on the outcome of agonistic democratic processes in each country. As Mouffe argues, consensus politics, which characterized most European welfare states' politics in the 1990s, will not be able to provide an opening for radical changes. She insists on "*the need to leave the conversation on justice for ever open*" (Mouffe, 2005, p. 76). Only in this way will voices, alarmed by the ecological crisis, be heard in the political arena; and only in this way will floating signifiers such as solidarity, guaranteeing basic subsistence, maintaining income and work activation be able to establish themselves and be filled with new meaning in "*green republican social security discourses*". In line with others in the field, such as Beryl ter Haar (2022) and Elise Dermine (2023), it is my contention that we as social lawyers have a responsibility to participate in and fuel this discourse.

It should also be noted that the interpretation of social security law's basic values within the framework of green republicanism aligns perfectly with the internal normative framework of the fundamental right to social security enshrined in Article 9 ICESCR. The importance of the relationship between people and the environment is particularly clearly reflected in governments' obligation to respect the fundamental right to social security. General Comment No. 19 of the ICESCR monitoring body, the CESCR, specifies this obligation as the first of three, with the other two obligations being the duty to protect and the duty to fulfil this right. The legal literature generally assumes that, unlike the other two obligations, the duty to respect the right to social security imposes only a negative obligation on a government to refrain from interfering in the lives of its citizens (e.g. with regard to how the social security system is organized). However, this body of literature ignores Shue's classic *Basic Rights* (Shue, 1980), which inspired the formulation of the three duties referred to in General Comment No. 19 (i.e. to respect, protect and fulfil the right to social security) (Birchall, 2022). Indeed, Shue makes clear that the duty to respect socio-economic rights is also about respect for the natural environment in which people live and work. According to Shue, then, this duty to respect imposes a positive obligation on governments to take care of the natural environment for the welfare of future generations. In other words, the relationship between people and the environment forms the inevitable backdrop against which social security law should be fleshed out.

Finally, an issue not discussed in this paper relates to a possible reconsideration of the range of risks covered under social security law in times of ecological crisis. In section 2 it was argued that the three internal values of social security law are expressed in the form of social risks such as unemployment, sickness and old age, while it has recently been argued

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that social security coverage should be extended to include the risk of energy poverty (Eleveld, Hermans, 2024) and to risks related to climate change, such as the risk of not being able to continue providing for oneself due to natural disasters (Becker, 2022). As will be clear by now, this new concept of social risks aligns perfectly with an external framework informed by green republicanism.

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New risks and social protection

Eri Kasagi[1]

1. Introduction[2]

More than 20 years have passed since the emergence of 'new social risks', and the extremely diverse responses to these risks in different countries have begun to be discussed in welfare state studies (see for example Klaus, Bonoli, 2006). There are various factors or changes behind these new social risks, which can be broadly divided into changes in the employment model in the post-industrial era and changes in the family model, which are interrelated. In the first part of this paper, these new social risks are summarised in terms of the dysfunction of the conventional social security system in established welfare countries, considering not only the debates on the post-industrial welfare states and their challenges, but also the normative elements, as well as more recent evolutions related to the rapid digitalisation of labour market and working environment (par. 1). Among a numerous and diverse issues raised by these changes, the second half of this paper will focus on the issue of how social law and social security systems in different countries have covered and are covering more and more new risks in relation to the need and responsibilities of "care" (par. 2).

[1] University of Tokyo.

[2] In this text, written in preparation for the ISLSSL World Congress, it was not possible for the author to fully follow the state of debate in different countries on the issues covered, and what is provided here is only a simplified overview of the report. In particular, the details of the long-term care programmes in each country and the characteristics of the evolutions of the systems in different regions in the world are very poorly described. We hope to present additional information at the congress.

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2. General observations

The 'social' risks that social security should cover are not those that can be uniformly defined across time and countries (Zacher, 1987). If we were to define this concept as broadly as possible[3], avoiding the tautology of saying that risks covered by social insurance are social risks, we could, above all, define it as something that, since it is a risk, puts a person's survival or livelihood at stake in some way. The 'social' part is more difficult to define, but for the moment, we would like to be content to say that it means that the risk is not personal, in the sense that it is not linked to individual choice or responsibility but rather related to social and economic conjunctures. What is and is not covered by social security and social protection among such social risks largely depends on the degree to which the risk manifests due to socio-economic context and political conditions in each country and is ultimately determined by the decisions of the democratic decision-making process. As is well known, many conventional social security systems established and developed from the early and mid-20th centuries, especially social insurance systems, were based on certain forms of employment and family structures. These models of employment and family – both of which are interrelated, i.e. the male worker with formal and full-time employment and supports the whole household, while the female spouse largely takes on domestic care responsibilities – have, needless to say, become largely outdated due to deindustrialisation and the accompanying changes in work and family models. The increased number of vulnerable workers, long-term unemployment, and the active participation of women in the job market have rendered social security systems dysfunctional in several aspects. Typically, for workers who are repeatedly in precarious employment, the traditional pension insurance system does not provide a stable retirement. Working does not necessarily guarantee a stable life for individuals or households; therefore, a certain support is needed for the working poor. Young long-term unemployed individuals have many difficulties in accessing job markets and require special support. In recent years, the impact of deindustrialisation has been further exacerbated by the impact of digitisation on the job market (Werner *et al*., 2022)[4]. A typical example is the growing importance of platform workers who are not covered or are insufficiently covered by conventional social insurance (Busemeyer, 2022). While these workers will then need more tax-financed social protection,

[3] Different approaches are possible to define the social risk. See Streban (2020), particularly on the difference between private risks and social risks.

[4] See Mårten (2017) about the debates in Sweden.

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platforms that benefit from these workers do not always pay enough taxes. Although there are many theories about the impact of digitalisation on the labour market, there is no doubt that technological innovation will further accelerate the difficulties of the welfare state and make the need for new ideas even greater.

These changes seem not only to be explained by the emergence of new social risks, but also as a situation of increasing diversity and omnipresence of social risks[5]. This means that traditional full-time, long-term workers will not disappear and will continue to hold an important position, at least for some time. At the same time, the number of people with different careers, such as those who alternate between worker and self-employed status, or who have periods of non-working for part of their lives, is increasing, and the risks they may face are extremely diverse. The same applies to families. Although the family model based on marriage and other couples will not disappear, the increase in the number of single-person households will reveal different risks in life compared to the life of a family composed by couple, parents, children, etc. In such a situation, the social insurance system is particularly problematic in relation to its basic structure and fundamental principles. Namely, in its most typical form, the social insurance system identifies the common risks to many citizens and provides standardised benefits. This by-definition of the collective nature of social insurance schemes is clearly inappropriate as a framework to adequately respond to the risks that each individual faces when experiencing and aspiring extremely diverse professional careers, life courses, and family models. The idea of a tight link between employment and social protection, as envisaged by social insurance, still in its historical form (the so-called Bismarck model), is also becoming increasingly less meaningful in this context.

From our perspective as legal scholars, we can add the following further changes to these trends. Namely, the importance of gender equality norms in society and employment has become significantly more important in recent years in different countries, particularly in Europe but also in Asian countries where gender bias in employment and in family had sometimes been largely tolerated, making it difficult to accept social laws based on the above-mentioned division of gender roles[6]. The idea of considering a series

[5] Here, we can also doubt whether we can yet talk about "risk", we might ask whether it is not rather a series of disabling events, likely to be repeated or accumulated, capable of affecting an individual's situation (Chauchard, 2018).

[6] Gender-biased social security systems that protect women can, in turn, be a factor in discouraging women from participating in the labour market. Regarding the debate over survivors' pensions in Japan, see Kasagi (2016).

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of social protection benefits as fundamental rights also seems to require more universal and egalitarian social benefits.

The question is how social security systems can respond to the new social risks faced by those who deviate from the so-far majority's way of working, lifestyle, and family – precarious work, long-term unemployment including the young unemployed, difficulties in single-parent families, and difficulties in balancing paid work and care work. It is in this context that so-called social investment policy has been actively debated and applied in certain countries to their social policies[7]. Needless to say, the responses in different countries are very diverse, and we need to carefully analyse the true purpose and consequences of these responses, especially in terms of the nature and content of the rights granted to individuals or their limits in various social security systems.

It is also important to mention two additional and external factors that make it more complicated for countries to respond to these 'new social risks' in implementing new social policies and particularly in enlarging the sphere of social protection. The first factor is the demographic factor, i.e., ageing population (or, for some countries, falling birth-rates and declining population) (Harper, 2014). The second factor, which is also tightly related to the first issue, concerns the limited financial resources that can be allocated to social security financing in the context of economic stagnation and globalisation. The ageing population makes these financial limits even more severe, especially when accompanied by a declining birth rate[8]. The first point means that addressing new risks must be undertaken while at the same time the importance of old social security systems, such as pensions and health care, increase (Huber, Stephens, 2016). The ageing population also means that, as we argue in the next section, among the various 'new risks', risks around care may emerge as a central issue for social security systems in the future. The second point – the limited financial resources, suggests that measures to cover new risks may be hampered by difficulties in raising financial resources. In some countries, the picture of intergenerational and social stratification is also apparent in the picture, where the core social security enjoyed by insiders is maintained at a certain level, while adequate financial resources may not be allocated to cover those who fall outside of it.

[7] These policies have also responded, at least for certain authors, to normative debates of the A. Sen's capability theory (Morel, Palme, 2016).

[8] The 2024 edition of OECD's *Society at a Glance* shows that the total fertility rate dropped from 3.3 children per woman in 1960 to just 1.5 children per woman in 2022, on average across OECD countries (*www.oecd.org/en/publications/2024/06/society-at-a-glance-2024_08001b73.html*).

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3. Responding to new social risks by new ideas – How can social security face the increasing visibility of care needs and burdens?

Based on the above general considerations, a wide range of topics can be dealt with as individual issues, and a large body of research work has been conducted in the field of social security law and that of study on social security systems[9]. In the last World Congress in Turin, a group of issues related to the non-standard forms of work were actively debated (Casale, Treu, 2019)[10]. The second half of this report deals with, among these extremely diverse topics, the issue of care as one of the most important issues today for social security. This topic has emerged, as indicated in the above discussion, at the intersection of major changes in welfare state model and demographic changes.

3.1. Need for LTC as a social risk

From the 1980s and 1990s, the need for "long-term care (LTC)", that might be defined as "*care for people needing daily living support over a prolonged period of time*" (Colombo *et al*., 2011), has started to be an increasingly important issue in many countries with a rather established Welfare State. However, it was not until the 1990s or 2000 that some countries introduced systems that covered long-term care more comprehensively than before (Claude, 2017; Ranci, Pavolini, 2013)[11]. Before this rather recent period, compared to the other typical "social risk", the LTC was widely understood, or even defined, as family responsibility with social assistance-oriented public support that had a residual character (Österle, Roothgang, 2021).

Several factors may underlie this recognition of the situation which requires LTC as social risk. In relation to what has already been mentioned, first and foremost, the ageing of the population and the increasing number of older people requiring care as a social reality have made it clear that the traditional approach of limited social assistance cannot meet these rapidly growing needs (Claude, 2017). Second, LTC needs have become a

[9] Regarding the conceptual ambiguity of the notion of "new social risks", see Pollak (2011).

[10] Specifically on topics about social security law, see Treu (2019).

[11] In European Union, the "European pillar of Social rights" listed the long-term care alongside the conventional social security (sickness, poverty, unemployment, etc.) as one of the 20 basic principles. In Latin America, where there is also a growing recognition of this issue, the policymakers might yet concentrate the programmes for the poor and the vulnerable (Martin *et al*., 2017).

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significant burden for the working-age population. In particular, the entry of female workers into the employment market, who until then had been solely responsible for informal care, required the 'socialisation' of care, which had been confined inside the family cercle. In this regard, as we will discuss more in detail in the next section, it is important to emphasise that the massive participation of female workers in the labour market has meant that the issue of care has also become an issue for the "workers who care". These two factors seem to have been important causes of the greater visibility of the need for LTC as 'social' risk. Another background to the expansion of the LTC system is the evolution and deepening of the debate on disability (Österle, Roothgang, 2021). The growing debate on the empowerment and autonomy of people with disabilities may have contributed to the enhancement of these institutions (Österle, Roothgang, 2021; Clark, 1988; Schulmann *et al*., 2017).

The systems adopted to date in different countries are diverse and can be classified according to different criteria[12]. The first classification axis might be whether a special system is provided for the elderly among those requiring LTC. Although the examples presented here are not exhaustive, Germany, Netherland and Spain introduced LTC programmes that included younger people with disabilities, whereas in Japan, Finland, and France, disabled and elderly people were covered by distinguished systems. Second, there is also a classification axis of whether contributive 'social insurance' system covers long-term care needs. Germany and Japan have adopted an LTC social insurance system, whereas in Sweden, UK and Spain, public services are provided by local authorities using tax funding[13]. The related point is whether the benefit is associated with a condition of income or means-test (Muir, 2018) and if there is a co-payment of the recipient. Also in relation to funding method, how to share the financial burden of LTC among different generations can be an important issue[14].

One another axis of analysis that is not unrelated to but should be distinguished from those systemic comparative perspectives is the very difficult issue of what level of care needs are considered in each country to be covered by social security in the first place (Kasagi, 2020). Such issues can only be properly discussed if it is analysed from both a normative perspective, such as the objective provisions of the laws and regulations governing social protection systems offering long-term care and the provisions on benefit levels, and from a practical perspective, such as what is covered by the long-

[12] About the situations in OECD countries, see Muir (2018).

[13] These differences should also be examined in the light of the variation of the model of social insurance as well as the historical path of social security in each country.

[14] Regarding the Japanese situation, see Imanaka *et al*. (2023).

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term care programmes in each country. Although such a detailed analysis is beyond the scope of this report and the author's capacity, given that the LTC had been for a long time considered a private risk in the first place and that the financial resources to support the LTC are often limited, the question of what should be precisely seen as "social" in the first place and to what extent there should remain room for private – individual as well as family – responsibility, also in taking into account the legal duty of support and maintenance between family members, seems to be a particularly important one for legal researchers.

In relation to this, the question of how to position family caregiving is also an important axis of analysis[15]. Many care needs not covered by social security are indeed taken care of by family members, except in cases where older people have resources and then the private services are purchased on the market. If some public support is then provided for family care, it is a sensitive issue regarding what objectives such support should be seen as. Does such public support authorise the family to partially supplement the lack of services that should be provided by social protection[16]? Does the public support for the family consider the care provided by family members to be of special significance to the care recipient? Does the family have a right to care another family member who requires LTC? Or do the public support see the care givers themselves as people with certain needs and consider the very situation in which they become care giver as a new risk?

3.2. Changing the vision of workers and citizens – living with needs and responsibilities of care

Another important point in terms of care issues is that a new image of humans and workers in social law, including social security law and labour law, is emerging alongside the new social risk of becoming in the situation of requiring LTC. This means that the changes are far-reaching and go beyond the expansion of social security that directly covers LTC needs.

As longevity and ageing mean that many people are reaching old age and losing their autonomy, as discussed above, it is obvious that the need for social protection to cover such needs will become increasingly visible, but this also means that many of us will be living with families who are growing

[15] About the particular importance of family care in Italy, see Pavolini *et al*. (2016).

[16] In Japan, support for family caregivers was avoided because it would have fixed the social situation of the moment of introduction of long-term care insurance (2000), when women were massively responsible for informal care.

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old and losing their autonomy, and in many cases, as workers. This means that we are expected to balance our daily lives with these family members who require LTC and our own life and work. Thus, care is omnipresent in contemporary society for everyone's everyday life[17]. This can require a new vision for social protection systems and social law as a whole. In this context, the legal system for care leaves is being developed in the field of labour law (Collombet, Math, 2019). In the field of social security law, measures are also being taken to provide not only welfare services for family care givers, as well as to reduce the burden of social insurance contributions for the period during which they are caring for a family member[18].

4. Conclusion

In the context of rapid social change, the emergence and omnipresence of new risks and, at the same time, the difficulty of raising sufficient financial resources for social security, the debate on future social protection appears to be in a chaotic state. It is a particularly difficult task to examine it from a legal point of view, to identify the issues, and to conduct comparative law analyses. Although it is beyond the scope of this paper to argue this deeply and provide answers, analysing the systems of each country from the perspective of basic concepts such as the principle of equality, universality of social protection, legal conditions of eligibility for different benefits, responsibility of the state and the obligation of the family for support might provide a starting point to tackle this difficult task.

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[17] This kind of observation was also proved by many authors after the Covid-19 crisis. See, for example, Vallaud-Belkacem, Laugier (2020).

[18] In France, caring for a family member for 30 months adds one-quarter to the social insurance contribution period (up to eight quarters). The discussion here also relates to developments in childcare leave, exemptions/additions to social security contributions, etc., which will not be the subject of this report.

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Social risks and their development

Grega Strban[1]

1. Introductory thoughts

One of the fundamental legal questions related to social security is, who is responsible for providing income security when costs are disproportionately raised or earned income is reduced or lost due to one of the risks of living or a specific situation of need. Is it the duty of legal subjects (natural and juridical persons) governed by civil law, i.e. the individual him/herself, his/her family or employer, or is it the responsibility of legal persons governed by public law, i.e. the State, local communities and other public entities.

Until a couple of decades ago, we could witness not only the trend of juridification, but also of de-privatisation or socialisation of income security (Bley, Kreikebohm, Marschner, 2001, p. 16). Arrangements governed by public law were given priority over the private law solutions, at least in Europe. The State should be primarily responsible for providing protection in certain cases defined by law, regardless how it is organised, financed and delivered. This idea was (and still is) enshrined in many national constitutions and international legal documents[2]. Nevertheless, recently the conversed trend could be detected. Many States are (considering) reducing their responsibility and shift it (back) to private organisations and individual persons themselves.

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[2] For instance, Tomaševski (1995, p. 125) argues that priority is accorded to public health measures, as illustrated by Article 12 of the International Covenant on Economic, Social and Cultural Rights. Interestingly, on one hand international legal documents followed the evolution on the national level, and on the other they may guide and even restrict national legislators when they want to reform the social security system in their respective country.

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Therefore, one of the core topics of the law of social security is social risk. Research question of the present paper is how social risk could be understood and implemented. Has it always been understood in the same manner across the Globe, or has it been construed dynamically in time and space? By applying historical and comparative methods the concept of social risk at present and possibly peeking into the future might be discovered.

Firstly, it should be explained how social risk could be understood and why it differs from private risks. Secondly, development of distinctive social risks, such as old-age, sickness, unemployment and others is explained, before some concluding ideas are presented.

2. When does a risk of living become a social risk?

It is essential to determine, which risks are in need of social protection, before introducing new or amending the existing branches of social security law[3]. When certain events in the individual person's life are rather rare or even isolated, there is no need for the State to organise a social protection system. Moreover, due to small scale, there might also be no interest of private insurance companies to organise a community of insured persons. When certain occurrences reach a larger number, but do not present the general risk in life, an interest of private insurance companies might be expressed, and private insurance offered.

However, when risks of an individual or living community are numerous enough and occur on a regular basis (become predictable) in the society, they become general risks of life. Their materialisation may influence not only the existence and free development of an individual, but the society as such. Therefore, they could be described as 'social risks' and social protection has to be organised, either in the form of social insurance (accompanied by social assistance) or national protection (as a rule tax financed and residence based) schemes (Becker, 2022, p. 46).

The notion *social* itself derives from a Latin word *socius* and means relating to society, public, considering also interest of others or the society as such. It is the opposite of particular, individual or private[4]. Hence, social

[3] Social security law is understood as including social insurance, national protection, family benefits and social assistance schemes. It is part of broader area of social protection law, which encompasses social compensation and social advantages, next to social security law.

[4] *Socius* means associate, colleague, also the divine friend and companion of man, *www.merriam-webster.com/dictionary/socius* (July 2024).

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systems are public systems intended to mitigate and regulate living conditions of insured persons or inhabitants in general (Strban, 2020).

The duty of the State to organise public systems is not new. It could be traced back to the French revolution and adoption of the *Déclaration des droits de l'homme et du citoyen* (1789). Article XII of the Declaration emphasises that the guarantee of the rights of man and of the citizen necessitates a public force. Such force should be instituted for the advantage of all and not for the particular utility of those in whom it is trusted. Moreover, Article XIII of the Declaration foresees an indispensable common contribution for the maintenance of the public force and for the expenditures of administration. Such contribution must be equally distributed to all the citizens, according to their ability to pay[5].

Fundamental social rights are undoubtedly part of indivisible human rights, belonging to every human being. They are enshrined in the Universal Declaration of Human Rights (UDHR, 1948). Among them is the right to social security which should be enjoyed by everyone as a member of society and is indispensable for his/her dignity and the free development of his/her personality (Art. 22). UDHR shows relation between the theory of natural law (individual perception of freedoms, directly based on human reason and conscience) and social human rights (enjoyed by a person as a member of society). The latter could be described as fruits of 20th century on the tree of 18th century (Köhler, 1987, p. 274).

One of the fundamental duties of the contemporary State is to provide security to its inhabitants. Such duty might transcend providing security to citizens or residents of respectful State, since also non-nationals and non-residents might be covered, if e.g. economically active in the State concerned. Security provided by the State should encompass not only state security (including armed defence and police forces) or public security (including security in cases of fires or natural disasters, on the roads), personal (including data security) and legal security, but among others, also income security.

Hence, the purpose of social security is to provide income security and social inclusion in cases of reduced or lost income or additional expenses, which cannot be mastered by individuals and their households or families (however they are defined) alone. The cornerstone of every social security system is a process of broader or narrower (vertical, horizontal or intergenerational) social solidarity. Social security has to cover persons with different risk levels and distribute burdens among them.

[5] Text of the Declaration at *www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789* (July 2024).

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Some argue that the notion of solidarity stems already from the Roman law[6]. In the times of the already mentioned French revolution its slogan of liberty, equality and brotherhood (fr. *liberté*, égalité, *fraternité*) has been promoted. These values were incorporated also in the UDHR. In its first Article it can be read that all human beings are born *free* and *equal* in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of *brotherhood*. In the times of promoting (substantive, material and not only formal) gender equality, it would be only equitable to add also in the spirit of sisterhood, or maybe a more general term of solidarity could be used instead (Strban, 2016, p. 243).

Solidarity has gained importance also in the regional international and supranational law. For instance, in the law of African Union, the African Charter on Human and Peoples' Rights (Banjul Charter) stresses the obligation of (social) solidarity[7].

Also in EU law, solidarity is expressly mentioned. The EU Treaty emphasises the values, which are common to all Member States[8] in a society characterised not only by pluralism, non-discrimination, tolerance, justice, equality between women and men, but also solidarity. Among distinctive forms of solidarity, solidarity between generations is stressed and should be promoted (Art. 3). Furthermore, the Charter of Fundamental Rights of the EU, which has the same legal value as the Treaties, explicitly mentions solidarity as an indivisible and universal value of the Union[9]. In a special chapter, titled Solidarity, the Charter regulates the rights do social security, social assistance and healthcare[10]. Although the Charter does not introduce new competencies of the EU[11], it is an important guidance in interpretation of the EU law, also by the Court of Justice of the EU (CJEU)[12]. Solidarity in a more specific sense also plays a role when it comes to the influence of basic economic freedoms and the EU competition law on national social security systems. According to the CJEU, systems based on solidarity (or carriers of

[6] More precisely from *obligatio in solidum* (Latin phrase that means in total or on the whole). It regulates the situation, when two or more debtors vouch for the entire (total or whole) obligation of one of them (Kranjc, 2017, p. 564).

[7] See Articles 10 and 29 Banjul Charter.

[8] The values are human dignity, freedom, democracy, equality, the rule of law and human rights. Article 2 of the EU Treaty.

[9] Second paragraph of the preamble of the Charter of Fundamental Rights of the EU.

[10] Title IV, Articles 34 and 35 of the Charter of Fundamental Rights of the EU.

[11] Article 6 of the EU Treaty and Article 51 of the Charter of Fundamental Rights of the EU.

[12] For instance C-34/09 *Zambrano*, EU:C:2011:124 or C-571/10 *Kamberaj*, EU:C:2012:233 or C-243/19 *Veselības ministrija*, EU:C:2020:872.

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such systems) cannot be qualified as undertakings and are exempted from the application of competition law[13].

From international and supranational legal documents, it could be deducted that among social risks are the risks of unemployment, sickness, invalidity, decease, old age, all mentioned already by the UDHR. However, UDHR is open in describing the material scope of social security, since it adds a general clause of other lack of livelihood in circumstances beyond his/her control (Van Langendonck, 2007, p. 5). Hence, other social risks are possible, and they are enumerated by the ILO convention 102 on minimum standards of social security. Added are accidents at work and occupational diseases, maternity, healthcare and family. Moreover, some more modern legal instruments protect paternity in a similar way as maternity[14], and add a 'new' social risk of dependency (or reliance on long-term care)[15]. Few international legal instruments are concerned with social (and medical) assistance[16].

All these risks could be designated as social risks. When they materialise, the society provides protection to its members. Moreover, some benefits might be aiming at preventing the occurrence of social risks, such as various forms of medical prevention (Strban, 2005, p. 174) or the entire system of occupational health and safety where labour and social security law are intertwined).

Social solidarity, which largely has replaced family solidarity, is therefore a *differentia specifica* between social and private risks. When organising private insurances, covering private risks, certain reciprocity within the pool of insured persons may exist, but solidarity among distinctively endangered insured persons is as a rule absent.

3. Social or private risks or both at the same time?

Risk is a notion commonly used in private insurance law, as part of commercial law. It is also applied in social insurance law, as part of social

[13] More in cases C-159/91 *Poucet et Pistre*, EU:C:1993:63, but also in some other cases like C-437/09 *AG2R Prévoyance*, EU:C:2011:112, C-350/07 *Kattner Stahlbau*, EU:C:2009:127, or in the field of social security of migrant workers C-345/09 *van Delft and Others*, EU:C:2010:610. Solidarity is expressly mentioned e.g. also in case C-140/12 *Brey*, EU:C:2013:565.

[14] Regulation (EC) 883/2004 on the coordination of social security systems regulates "maternity and equivalent paternity benefits" (Article 3).

[15] Article 34 Charter of Fundamental rights of the EU.

[16] See Art. 13. European Social Charter (initial and revised) and European Convention on Social and medical assistance.

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security law. In both cases (private or social) insurance risk could be described as a threat covered by insurance, i.e. a possibility that certain event could occur. For instance, both, private and social insurances could cover the same risks, e.g. reduction or loss of income or increased expenses due to old-age, sickness, invalidity or reliance on long-term care. Other risks are rarely defined as private risks, such as unemployment (which is rather unpredictable an could be on a mass scale during societal distresses, such as economic or sanitary crises, but might be included in a loan insurance package), maternity (which is as a rule well covered as a social risk and leaves less space for private insurance), or social assistance (which is primarily the duty of a state or local community).

In private insurance law a distinction is made between insurance risk or insurance threat on one hand and materialised insurance case on the other. Insurance contract, with which an insurance relation is established, is concluded concerning a specific insurance risk, which may or may not materialise during the existence of an insurance relation. Insurance risk, as a deferred condition in private law, should as a rule be possible and legally admissible, but uncertain, (as a rule) future event, which is not influenced by the exclusive will of the contracting parties (Bubnov Škoberne, Strban, 2010, p. 112).

Although, social insurance is also based on insurance principle, it is traditionally excluded from private insurance law and is subject to social security law. Distinctively from private insurance, it is limited to most burdening threats in the life of individual and his or her family. Also in social insurance law, a distinction could be made between social (insurance) risk or threat and materialised social (insurance) case. Nevertheless, there are some distinctions in comparison with private insurance law definitions. Social risk is a threat in need of social protection. It presents the outcome of societal consensus, reached in the parliament and expressed in legislative acts. Security should be provided to people in need of social protection. Included are the most damaging threats which can hinder development or even existence of an individual and the society as such. Conversely, there are a wide range of events that could be considered private insurance risks (Berghman, 1999, p. 16).

Social risks are determined by legislative acts and the discussion on possibility and legal admissibility is superfluous. It has already been foreseen by the legislature. Moreover, the insurance risk could have already materialised (insurance case already exists) before (social) insurance relation is established, e.g. in the case of a chronic disease or invalidity. Hence, social risk is not necessarily a future event, and this is known to both parties of a social insurance relation. The threat might also not be uncertain

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and independent of the exclusive will of the parties. For instance, we all more or less optimistically await old-age or (in most cases) decide freely on parenthood and hence, contribute towards the realisation of a social risk (Bubnov Škoberne, Strban, 2010, p. 114). Moreover, no insurance contract (insurance policy) is required. Social insurance relation is established *ex lege* and there is little or no space for contractual shaping of such (in its core public) relationship. An exception could be voluntary inclusion in social insurance. In this case a social insurance relation is established with an expression of a free will to be insured (if the social insurance law allows it). There is no need for an insurance contract (Tomandl, 2002, p. 30).

In social insurance law a distinction could be made between primary and secondary social risks. Primary social risks are usually well legislated as separate branches of social insurance and insured persons well protected if such risks materialise. For instance, social (statutory or mandatory) health insurance provides protection in cases of sickness or injury (or childbirth, i.e. maternity), pension insurance in case of old-age, unemployment insurance in case of unemployment etc. However, social security systems might not be fully adjusted to materialisation of secondary social risks, e.g. if an unemployed person gets sick[17] or sick person becomes of old-age or disabled. Elderly or disabled person or a child might also be reliant on long-term care for performing activities of their daily living (Kreikebohm, 1999, p. 318).

One of the most important distinctions between private and social risks is their leading principle. Private insurance premiums are based on the principle of equivalence, i.e. they are calculated based on the chance that a certain insurance risk will be realized and the possible scope of damage. The greater the chance of the risk occurring and the higher possible damage, the higher the premiums will tend to be. According to the Aristoteles definition of justice this could be an example of commutative justice. Conversely, underlying principle of social risks is, the above already mentioned, principle of solidarity, and hence, distributive (or even redistributive) justice.

3.1. Old age

The legal nature of social risk may change over time and in place. This applies also to the social risk of old age. When the old-age insurance was first introduced, old-age as a social risk was based on the presumption of

[17] For instance, in Slovenian law, the Employment Service of Slovenia continues to provide unemployment benefit for a certain period of time of sickness, even though a sick person is not able to work and hence not unemployed.

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disability. In German old-age insurance scheme from 1889 the retirement age was set at 70 years, while average life expectancy was 58 years, and average time of drawing a pension was not exceeding two years (Dawson, 1912, p. 138).

Such perception of a social risk of old age is now outdated. Today, it is perceived an outcome of a societal consensus, determined by the legislative act, at which age economic activity of a person is no longer required, and may, if so desired, or is under an obligation to (in some countries)[18] retire. The purpose of pension insurance is to enable receiving an old-age pension at a normal state of health. It is one of the outcomes of wealthier societies and medical progress, which enable us to live longer (at least on average). Hence, old-age (as agreed in the society) and retirement (ceasing of economic activity) after certain period of insurance (seniority) should present a happy moment in the life of an insured person (*risque heureux* and not *risque malheureux*).

However, many insured persons retire at an age (usually between 60 and 67 years), while still retaining working capacity and might desire to remain in employment or self-employment also after reaching the retirement age. The question then is whether such persons could be economically active and receive (full) pension at the same time. The discussion on the so-called 'double status', i.e. being a fully employed worker or a self-employed person and a pensioner at the same time, is high on the agenda in some countries (Strban, Bagari, 2019). For instance, full-time (self-)employed persons may continue working when meeting the retirement conditions and draw a full or partial old-age pension. In Many countries work of pensioners (up to certain income or above certain age) is admissible[19]. Conversely, in such a case at hand, old-age pension is guaranteed to workers and self-employed persons, rather than *vice versa*.

Providing a pension at a certain age, regardless whether income is lost/reduced or not, is a feature of private insurances, a so called endowment policy[20]. From a social security point of view, paying a certain amount from social pension insurance, next to full salary after reaching a certain age, might be perceived more as an active employment measure (AEM) and not a

[18] CJEU gives rather broad discretion to the Member States in regulating the labour markets. See e.g. decision on mandatory retirement of university professors in case C-250/09 *Georgiev*, EU:C:2010:699.

[19] For Europe, consult *www.missoc.org/* (July 2024).

[20] An endowment policy is a specialized life insurance contract designed to pay a lump sum (assured sum, face amount) after a specific term (on its "maturity", e.g. 10 or 20 years) if a person is still living at the end of the policy's term or upon the death, whichever occurs first. More at *thelawdictionary.org/* (July 2024).

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'pension' as such, which is according to its legal nature a longer-term income replacement benefit. However, if its legal nature is promoting of economic activity of elderly, it should be provided out of the general budget (supported by the European Social Fund), as every other AEM, and not from pension insurance. In the latter case active insured persons, contributing towards social pension insurance, might be overburdened[21].

Moreover, the core principle of solidarity might be questioned. Younger, active population is financing pensions of persons, who do not actually need them, since there is no loss or reduction of income from their economic activity. Also in this case the notion of reverse or even perverse solidarity might be used (Sinfield, 1998, p. 7). In no other social security scheme are benefits provided without a social risk, either to prevent its materialisation (e.g. in case of preventive healthcare) or negative consequences of its materialisation.

Moreover, competition at the labour market could be distorted. Elderly with (unreduced) higher income and (full or partial) pension could offer their goods and services at a lower price compared to younger insured persons, since their livelihood is secured. This might happen with self-employed persons or reactivated workers.

At the same time, receiving an old-age pension only when income is reduced or lost does not breach the right to work[22]. Elderly workers and self-employed persons are free to continue working as long as they want and are able to. However, there is no need for income replacement, if income is not reduced. Hence, no need for an old-age pension as one of the income replacement benefits. Any other interpretation might oppose another fundamental human right, i.e. the right to social security.

Receiving a benefit at a certain age, just because you have contributed towards social insurance is mora characteristic for private insurances. However, at the same time, there is no private risk of insured persons involved, e.g. they could carry the burden of volatility of fiscal markets.

A mixture of private pension insurances and social risk of old-age could also be detected in the so called NDC (non-financially or notionally defined-contribution) pension schemes (Holzmann, Palmer, 2006). Social security schemes are repartition defined benefits schemes and private pension schemes are based on defined contributions (knowing how much you pay in, but pension is dependent on administrative costs, taxes and capital gains or losses). With NDC schemes a mixture of public and private schemes is

[21] Slovenian Constitutional court already argued that preventing of overburdening active insured persons by introducing new benefits is reasonable (U-I-6/03, SI:USRS:2005:U.I.6.03).

[22] For instance, Art. 1 (The Right to Work) European Social Charter.

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introduced by fictitious pension accounts. However, whenever pension accounts are introduced (either funded or fictitious), social solidarity is as a rule missing or reduced.

3.2. Sickness

Not only the legal nature of social risk of old age, but also the one of sickness may change over time and place. Reportedly, Wilhelm von Humboldt argued already more than two centuries ago, that before medical doctors we only knew life or death. Sickness, which goes beyond the two can be defined only due to medical doctors, who are skilled and able to recognise sickness and show the path towards regaining of health (Eichenhofer, 2000, p. 189).

Good health is at the forefront of every human society. Its socio-political goal is not merely the absence of disease or infirmity, but complete physical, mental and social well-being[23]. Health shall be accessible to everyone, which is reconfirmed in the UN Political Declaration of the High-level Meeting on Universal Health Coverage "Universal health coverage: moving together to build a healthier world" (2019).

However, the international recognition of the right to health does not directly mean that people have the right to be healthy as such. Neither an individuals nor States could guarantee specific health. It is dependent on individual hereditary characteristics, environment and to a certain extent modified by medical interventions, in the form of public and private healthcare. Therefore, international law sets as a goal of the right to health as the right of everyone to the enjoyment of the highest attainable standard of physical and mental health[24]. Hence, recognising that substance of the right to health is relative and changing in time and in place. It also makes it clear that unfortunately, complete health (however it could be defined) is out of our reach (Tomaševski, 1995, p. 125).

The development of social risk of sickness can be followed also by the ILO instruments. For instance, later ones, like ILO Conventions 102 and 130 recognise also more specialised and dental sicknesses, since they add items to the benefits list (including specialised care, dental treatment and medical rehabilitation), compared to previous ILO Conventions 24 and 25. Sickness

[23] Accoding to the Preabmle of the WHO Constitution, *www.who.int/about/governance/constitution* (July 2024).

[24] Article 12 ICESCR. Similarly, Point 11 of Part I ESC (Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable.).

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can also be distinctively perceived in different continents, like Europe and Africa, with specific health challenges in each (Strban, Mpedi, 2021).

More specifically, sickness (and injury) as a social risk may be defined in legislative acts[25], or left to the notion building by the jurisprudence[26], possibly supported by the legal theory. Social risk of sickness may be defined as caused by exogenous or endogenous physical or mental disturbance (irregularity) in the functioning of the human body requiring medical care and/or causing incapacity for work (Strban, 2005, p. 176).

The definition of a sickness must be the one of social security law. Civil law, criminal law or even socio-political definitions (e.g. as a counterpart of health defined by WHO), cannot suffice. Moreover, it cannot be taken over from the medical science. The latter is fully operational without defining such abstract notions as sickness or injury. It must be defined in a non-medical context. Nevertheless, with the advancement of medicine, the definition is modified accordingly.

The purpose of social health insurance or national health service is not covering any sickness-related risk. It should take over only those burdens (medically necessary healthcare costs and income replacement) which individual alone is not able to carry. Self-responsibility, i.e. responsibility of an individual person for his or her own health, is one of basic principles of public healthcare systems. It means that everyone must conduct ther activities in the manner to minimise the occurrence of sickness. Additionally, he/she should also endeavour to eliminate damaging consequences of already materialised social risk of sickness. Principle of self-responsibility influences and conditions the principle of solidarity (Strban, 2022).

It is clear that in accordance with the principle of self-responsibility, intentional infliction of disease or injury should be outside the scope of social risk of sickness. In some countries this is clearly stipulated, while in some others the degree of individual's will is not clearly set (is intent required or does negligence suffice). In this respect, there is a dilemma to what extent should a person be held responsible for the costs caused by a lifestyle which presents higher than average health risk (and what the latter is in a modern, active society). Ratio is protection of the solidarity community from the individual's action, which is against the principle of self-responsibility.

It could not be argued that a person by choosing riskier lifestyle agrees to sickness and all related costs (*volenti non fit iniuria*). Public healthcare

[25] For instance, Article 120 of the Austrian ASVG – Allgemeines Sozialversicherungsgesetz defines sickness as irregular physical or mental status, which requires medical care (Tomandl, 2002, p. 94).

[26] In Germany more flexibility in the definition is provided by leaving it to judiciary.

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system has to promote distinctive lifestyles. However, in certain cases there is a possibility to enhance the responsibility of such person, either on the financing, or the benefits side[27]. In this case a person could be obliged to cover costs of extra contributions or be entitled to modestly reduced benefits. There might even be some space to contract private health insurance.

Therefore, definition of the social risk of sickness at the same time defines the scope of the private risk of sickness. At the level of health insurance, many forms of private health insurances might exist, e.g. basic or substitutive insurance (like in Germany), supplementary insurance, additional insurance (for risks not covered by social insurance), or parallel health insurance (against waiting lists). The problem might occur when private health insurance is used to receive advantages in social health insurance, e.g. jump the ques with parallel insurance. This might be the case, if the same physicians (and healthcare organisations) are allowed to provide the same healthcare for public and private patients.

Hence, another level of distinguishing between social and private risks is at the level of healthcare providers. In many Member States private providers are allowed to treat public patients. However, they might need admission to the public network of healthcare provision, and some might stay out of it.

Nevertheless, by essentially making no distinction between healthcare providers (public, contracted private or purely private), the CJEU has paved the way for private healthcare provision at the account of public healthcare systems, at least in cross-border cases in the EU. Its decisions are not based on social security coordination rules, but on the free movement of goods and services within the EU internal market. One of the undesired outcomes for the moving persons is the so-called *steering of patients*. Private provision is as a rule guaranteed without waiting lists, but with higher tariffs and direct payment. Therefore, it is more convenient for healthcare providers to treat mobile patients as private patients. Nevertheless, the behaviour of the mobile patient should be decisive. The patient must decide whether he or she would like to be treated as a public or as a private patient, with a distinction in applicable tariffs and possible waiting times. To exercise free choice, a patient has to be properly informed. Healthcare system in the home Member State might be rather complex and even more so in another Member State. Asymmetry of information between healthcare providers and patients is still very much present.

[27] For instance, in cases of extreme sports (another question is which sports should be defined as such), racing activities, etc. But probably not for 'workoholics', overweight persons, smokers and alcoholics.

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While promoting non-discrimination on the active side of freedom of movement of services[28], the CJEU might be causing discrimination on the passive side, i.e. among the patients. They do not enjoy equal access to health care in another Member State. There is no freedom of choice, if sufficient funding is required to exercise it. The right to healthcare in another Member State could be normally exercised by younger, more mobile, better informed and wealthier members of our society. They may have immediate access to health care in any (public and private) facility in another Member State. With (partial) reimbursement they access limited healthcare funds earlier than others, by jumping the waiting lists and prolonging waiting times for others. The Directive 2011/24/EU on cross-border healthcare has merely codified the CJEU case law based of free movement of services (Strban, 2023).

Moreover, should not equitable and high-quality healthcare be accessible[29] to all EU citizens, also not mobile ones? The Directive 2011/24/EU does not apply to purely internal matters of a Member State. Nevertheless, the question might be whether purely private provision of healthcare should be enabled to public patients within a certain Member State (maybe for a lower reimbursement, as it is the case in Austria and Germany)? But, if majority of patients would rather see private physicians, public system might remain only for less wealthier patients. At the end of the day the system only for the poor might become a poor system.

Moreover, if we consider development of the social risk of old age, where private elements might be taken into account and more reciprocity between the contributions and pension benefit advocated, the question is, should not the same apply for the social risk of sickness. Should not people receive some benefits in kind and in cash, just because they have paid contributions, even though they did not become sick or injured in a given year? For instance, should not a healthy insured persons receive a basket of pharmaceuticals or food supplements or more preventive services as benefits?

The same could apply to sickness cash benefit. For instance, during the sanitary crises of Covid-19, sickness leave and benefit were granted without authorisation of a (chosen personal) physician. Insured persons could stay at home for certain number of days (e.g. in Slovenia three times three days per year) on their own (private) volition, when just feeling not completely (physically, mentally and socially) well. There are proposals to maintain such possibility also beyond Covid-19 situations in order to disburden medical

[28] Every health care provider's diploma should be equally recognized in the EU territory. Special directives exist for doctors, dentists, midwives, nurses and pharmacists.

[29] All forms of access should be taken into account, i.e. geographical, timely, financial, procedural and informational access.

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doctors and leave the choice of (medical) decision to insured persons. However, in many (European) countries, employers would have to carry a larger burden, since they have to pay for the initial period of sickness.

3.3. Unemployment

According to the ILO Convention 102 on social security minimum standards (Art. 20), social risk of unemployment includes suspension of earnings, as defined by national laws or regulations, due to inability to obtain suitable employment in the case of a person protected who is capable of, and available for, work. Capacity of work distinguishes unemployment from other social risks where a person is not able or required to work.

Many national laws or regulations require for unemployment not being voluntary but caused by business or inability or incapacity reasons. Even with self-employed workers[30], when they are included under the social insurance coverage (e.g. like in Slovenia), the social risk of unemployment has to be objectivised. Unemployment must occur due to loss of a crucial business partner, long-term disease, natural disaster, bankruptcy or similar objective circumstances.

Standing (2000, p. 2) stresses the question what makes unemployment so special. As commonly defined, unemployment is a condition (being without work), a desire (for work), a need (income from work), and an activity (seeking work). If someone satisfies one of these criteria without the others, he is unlikely to be classified as unemployed in the standard sense of the term. Yet defining or measuring any of them is notoriously difficult.

However, if we observe the discussion concerning social risks of old-age and sickness, why not introduce more private elements to the social risk of unemployment? For instance, providing unemployment benefits also when unemployment is voluntary, since an insured person has paid contributions, regardless of whether it is a personal (private) choice and no real need in terms of social security. A person could still be unemployed, but labour lac contrast has been terminated due to worker's wilful act, without any justifiable reason.

With unemployment one of the core questions is defining suitable employment. Basically, the question refers to what do we want to achieve? Do we foster general (uneducated and unskilled) labour force (who should, regardless of their skills, accept any kind of employment or even paid or non-paid work and if they do not, they are considered as voluntarily unemployed),

[30] For instance, Art. 48 TFEU refers to employed and self-employed (migrant) workers.

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or we prefer highly educated and skilled workers, who should remain in their profession and gain additional set of skills? But, with later, labour mobility might be increased (not only vertical, but also horizontal, within and between professions and cross-borders). However, if more freedom when using unemployment benefits would be provided for, could unemployment scheme remain sustainable and what kind of social solidarity would be promoted?[31]

3.4. Other social risks

If we take the same argument further, similar questions could apply for other social risks and relate to rewarding individual insured persons for their contribution. For instance, if not becoming disabled in a given year, why not receive some assistance (monetary or in nature, like services) to ease daily living, since social security contributions have been paid. The same could apply to long-term care. Even if not reliant upon it, why not receive some cash benefits or services, appliances, since contributions have been paid. Or, parenthood, why not receive some benefits, even when there are no children, since contributions have been paid etc. Why should different standards be applied to pensions and not for any other social risk?

It goes without saying that such rules would trigger a debate of a crucial social security issue, i.e. the purpose and boundaries (limits) of social solidarity. For instance, even the Court of justice of the EU recognises solidarity, in the sense that contributions have to be paid, even if no benefits can be awarded[32].

4. Concluding ideas

The fundamental question is how to we want our societies to be organised. Shall it be more concerned about an individual and we shall receive benefits, just because we (and our employers) have paid for them? Are we mere individuals, seeking only highest personal benefits?[33] Or are

[31] Similarly, if there is no solidarity among the EU Member States, European Unemployment Benefit Scheme (EUBS) would be mere (counties) re-insurance and might not be easy to accept.

[32] For instance, in case C-345/09 – *van Delft and Others*, EU:C:2010:610.

[33] To this end Art. 27 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families stipulates that where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions

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there any advantages in living in societies, since no one can stand completely alone? And in the latter case, should we not behave in a socially responsible way, take note of the others and benefit from social solidarity only when so required? Then, we should base our societies around the notion of solidarity as connecting tissue among societal members, who are of distinctive personal circumstances, some are old, some are young, able bodied and disabled, healthy and sick, with or without children, with higher or lower income of distinctive gender and sexual orientation. In this case defining of social risks when solidarity should be unleashed is of the essence.

Defining and understanding the legal nature, development and purpose of a social risks underpins the right to social security as a fundamental social human right. It might be shaped distinctively in distinctive societies, be of a broader or narrower scope. At the same time, it influences social solidarity in a given (national or international) society. The notion of a social risk is not static. It is dynamically construed in time and in place. Members of a society might require additional protection and 'new' social risks may emerge, such as a risk of reliance on long-term care or socio-ecological risks, which might hit individuals and communities due to climate change. Social protection might be required against risks that are not personal in the sense of traditional social risks but that will become more important in the future, e.g. natural disasters (Becker, 2023).

Hence, overemphasising individual (private) freedoms and entitlements, might lead to diminished solidarity. Paradoxically, due to mandatory social security schemes individuals may enjoy more freedom in life. They might be more willing to engage in risky activities, if legally regulated social security system guarantees certain rights in case social risks would materialise.

Once decided on the legal nature and purpose of social risks and solidarity circles (which should not serve only wealthier, more educated, skilled and mobile), other contemporary issues of social security might be easier to agree upon. They may relate to increasing mobility and changing patterns of work organisation with increasing flexibility, financing (not necessarily connection between standard work, standard income and standard social security), greater family and people living together arrangements, digital transformation and transparency, and cross-border cooperation (Schoukens, De Becker, Keersmaekers, 2024).

made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances. However, it merely provides for equal treatment in case national would have the right to reimbursement of contributions made by them (*argumentum a contrario*, and not by their employers). Although there are 59 parties to the Convention (July 2024), no EU Member State has ratified it.

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The right to social security might have to become more focused to all new specific (individual) features but should remain one of the most important societal systems, concerned with (substantive) equality, solidarity and hence equity in our societies, or universally, human society in general.

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Part 3
The new trends in the collective labour law

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Beyond traditional boundaries: social dialogue as a basis and catalyst to extend collective bargaining in a changing world of work

Evance Kalula[1]

1. Introduction

The International Labour Organization (ILO) is now into its second century, it cannot be over emphasised that it was born out of conflict, the first world war. Its unique mandate and character, with its inclusion in Part XIII of the Treaty of Versailles and its tripartite structure, was a triumph for multilateral consensus predicated on the hope for enduring peace through social justice[2].

Collective bargaining has been a defining feature of ILO tripartism, the core of what is now seen as social dialogue, which is central to freedom of association. In turn, freedom of association has underpinned the ILO's quest for social justice. As the ILO itself, freedom of association, which was later embodied as a fundamental principle, was part of the spirit of Treaty of Versailles. With the adoption of Conventions on Freedom of Association 87, 1948 and on Collective Bargaining 98, 1949, firm foundations were laid. In 1951, that foundation was reinforced with the establishment of the Committee on Freedom of Association (CFA) and came to withstand the Cold War era. The Cold war came and went, although its rancour has not diminished, the vison of social justice through labour rights endures.

It is useful to recall that the onset of the quest for social justice of which freedom of association and collective bargaining became instrumental was underlined by post-first world war consensus that somewhat was rekindled after the second world war. It was given a new lease of life with the European reconstruction whose impact was global.

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[2] For a comprehensive history of the ILO, see for instance, Shotwell J.T. (1934), *The Origins of the International Labour Organization*, vol. I: *History*, vol II: *Documents*, New York: New York University Press.

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Any semblance of that consensus has now broken down, overtaken by a multifaceted 'Global Polycrisis' compounded by the changing world of work in which traditional modes of work, mainly based on the formal economy, are inadequate and continue to decline. Despite these changes, the main focus of collective bargaining is still essentially on formal sector engagement. This contribution is a brief eclectic review developments from the onset to the current situation, in an attempt to better understand the changing role of collective bargaining and prospects to recast it beyond its traditional boundaries in support of labour rights and social justice. This contribution is tentative, more of a 'discussion prompter', it is not intended to be comprehensive, let alone exhaustive. It freely draws on a number of recent works by leading scholars on freedom of association and related topics, as will be apparent in the brief discussion below, including the reflection on 70 years of the ILO Committee on Freedom of Association (CFA) and the Global Coalition on Social Justice. The author gratefully acknowledges these indispensable sources[3].

2. The CFA and collective bargaining trends

Ever since the CFA was established in 1951, and started its work in 1952, it could be said that it has served as custodian of collective bargaining. Over the years, and more rapidly in recent years, developments have led to various trends in collective bargaining influenced by, and in response to economic changes worldwide and the world of work.

These changes call for considered reflection on collective bargaining beyond traditional boundaries, to take account of various dimensions implicit and apparent in those changes. They entail a search for a 'new universalism' that features in multiple ways, including the growing informalisation of economic sectors, gender dimensions, innovation and the need for reskilling, the search for democratic governance and the renewal of the ILO mandate itself in the face of the new changes[4].

[3] Curtis K., Wolfson O. (eds.) (2022), *70 Years of the ILO Committee on Freedom of Association: A Reliable Compass in any Weather*, Geneva, 2022, ten leading experts and scholars have examined various aspect of freedom of association and the work of the CFA, namely Bellace, Chigara, Teramoto, Waas, Curtis, Sankaran, Kangahh, Olivier, Gomes and Verma, and Aberhard-Hodges; The Global Coalition for Social Justice, Report of the Director General to the Governing Body, 346th session, Geneva GB.346/INS/17/1, 2023.

[4] On Democracy and Universalism in South Asia, see: Sankaran K. (2022), "Democracy, universalism and informal employment: The Committee on Freedom of Association and South Asia", in Curtis, Wolfson (eds.) (2022), *op. cit.*, pp. 97-108.

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How has the CFA responded to these new imperatives and what needs to be done to align its approach to the new realities? A cursory review of leading scholars' reflections seems to be unanimous in both attesting to new trends and also the need for collective bargaining, to broaden its scope of application commiserate with the objectives of the ILO Decent Work Agenda[5]

In the author's humble opinion, the 'genius' of the ILO Decent Agenda programme, lies in its need to be inclusive, not only to extend labour rights to wherever work is performed, but equally important, to cover all workers regardless of their status in the labour market. Thus, the pursuit of the Decent Work agenda extends to, among other aspects of coverage gender equity, all categories and forms of work. The challenge of course is how to apply and implement tools of the objectives such as collective bargaining to various types of work.

The challenges of the CFA and other ILO structures responsible for the implementation and promotion of various labour rights are considerable. Such challenges reflect both structural and practical barriers to the extension of coverage, not least in respect of collective bargaining.

As we have observed elsewhere, the changing dynamics in the world of work have brought forth new realities of not only the segmentation of work, but also how to regulate norms concerned with the advancement of labour rights and social justice. While the CFA has been alerted to these changes, the structural scope of its supervisory oversight is still essentially concerned with tripartism, which in turn is mainly concerned with formal sector employment. The tenets of collective bargaining as a central tool to promote freedom of association is therefore still predominantly limited to the formal economy. That is not to say, that the traditional tripartism is outdated, on the contrary, it is still relevant and both the CFA and another supervisory body, the Committee on the Application of Conventions and Recommendations (CEACR), are aware of the need to go beyond formal employment. Besides, despite its declining nature, the formal economy is still the major source of many countries' export earnings and therefore livelihoods as commodity producers. The CFA has in its work, recently sought to place emphasis on social dialogue, not only as the main driver in improving collective bargaining but extending the scope of democratic governance in countries which spills over the world of work, to enhance values of negotiation.

[5] See for instance, Olivier M., Kalula E. (2024), *Social Dialogue within the framework of the ILO Committee on Freedom of Association, and the need to better accommodate workers in the informal economy*, Conferences in Commemoration of Marco Biagi, Modena, Italy, 18-19 March 2024.

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In addition to the recognition of the need to broaden the reach of collective bargaining the supervisory bodies, they have been and are other initiatives elsewhere in the ILO and emerging experiences beyond. To take a normative example, the ILO Declaration on Fundamental Principles and the Rights at Work emphasizes that "*level right must be same for both formal and informal workers; there cannot be a lower level of rights for informal workers*"[6].

Similarly, other instruments concerned with the employment relationship and social protection, the other crucial element of the pursuit of social justice address the importance of extending social protection, that clearly include the right to collective bargaining as a core labour right[7].

One other area that is increasingly under scrutiny as far as representation in the informal economy is concerned is that of Occupational Health and Safety (OSH). As in many other areas of work in the informal economy, workers' representation which could promote labour rights, including collective bargaining, is largely absent. There is however a clear recognition of the need for inclusion, to devise ways that strive to go beyond trade union organization[8].

3. Beyond formal employment

The informal economy and employment represent the biggest exclusion from the traditional boundaries of collective bargaining. As reported by the ILO in 2019, informal employment worldwide amounted to about two billion workers, that is to say, that six in 10 workers. Globally, informal employment mirrors underdevelopment, it is prevalent in low-income countries. It represents 89 percent of total employment in such countries, compared to 82 percent and 50 percent respectively, in lower-middle and upper-middle income countries. In higher-income countries, the figure is only 16 percent. Overall, about 90 percent of total employment in more than half of low-income countries are in informal employment. As with other adverse aspects of the labour market, the proportion of women is dominant, with their share of informal employment exceeding that of men in 56 percent of those countries. Similarly, informal employment in formal enterprises represents a significant

[6] Olivier, Kalula (2024), *op. cit*.

[7] See among others, Employment Relationship Recommendation, 2006 (No. 198); Domestic Workers Convention, 2011 (No. 189); The Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204); Violence and Harassment Convention, 2019 (No. 190).

[8] Olivier, Kalula (2024), *op. cit*.

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proportion of informal and precarious jobs, that is the case in high-income countries as well[9].

Similarly, the CEACR has weighed in and confirmed the preponderance of the informal economy and the need to extend collective bargaining and social dialogue thus, "*with regard to the informal economy, the Committee added that in many countries around the world, 'the informal economy represents between half and three quarters of the overall workforce' and that, under terms of the Convention [98], these workers have the right to organize and to collective bargaining, without distinction whatsoever, to establish and join organizations freely and to represent their members in relation to the public authorities in structures established for the purpose of social dialogue*". A recent paper commissioned by the ILO on "Negotiation in the Informal Economy" cites several instances of what in effect in collective barraging[10]

However, despite the overwhelming reality of the informal economy and the need to extend labour rights to respective workers, there are considerable barriers, constraints that militate against the practical extension of collective bargaining and other labour rights. Such barriers are both structural and operational. They include limited access and use of collective bargaining. Is it possible to overcome them at all?

Despite the obvious constraints to extending collective bargaining and negotiation for labour rights in the formal institutional setting, there are developments that in some regions of the ILO constituency that indicate that it is possible to extend collective bargaining, if not formally in name, in its ultimate objective of involving workers in 'voice participation'. Such efforts are not limited to organized labour, they extend to civil society with impact on the labour market. They include a prominent example in India for instance, that of the Self-employed Women (SEWA) whose experience is well documented[11]. Efforts to adopt a broader and more inclusive approach are not limited to NGOs, there is at least one legislative attempt to be more inclusive beyond traditional tripartite engage in pursuit of social justice. In South Africa, the National Development and Labour Council (NEDLAC) legislation establish a fourth chamber involving civil society[12].

[9] ILO (2023), *Women and men in the informal economy: A statistical update*, Geneva, pp. 15-18, as referred to by Olivier and Kalula (2024).

[10] ILO (2023), *Negotiation in the Informal Economy*; Olivier, Kalula (2024), *op. cit*.

[11] See for instance: ILO (2012), *Giving globalization a human face*, Geneva.

[12] Olivier M. (2022), "African Complaints and the Committee on Freedom of Association", in Curtis, Wolfson (eds.) (2022), *op. cit.*,

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4. Global Coalition for Social Justice

Another major effort in support of labour rights and social justice that is currently underway is the Global Coalition for Social Justice[13]. This is a flagship initiative of the new ILO Director General. Its objective is to enhance and reinforce efforts for the renewal of the ILO's mandate in pursuit of social justice. The context outlined in tis presentation to the Governing Body (GB), highlights developments following Covid-19 pandemic, armed conflict, natural disasters and other global upheavals such as climate change, increasing migration flows, and the impact of technology, among many such occurrences. There seems to be no doubt that the Global Polycrisis has either created or resulted into an environment in which a breakdown in multilateral consensus has undermined international commitments, resulting into worsening economic situation worldwide. Needless to say, that such a situation is patently hostile to labour rights and social justice, adversely affecting efforts in collective bargaining and other strategies to promote cooperation.

According to the documents spelling out its scope presented to GB, the aim of the initiative is "*to contribute to the reduction and prevention of inequalities as well as to ensure that social justice is prioritized in national and global policy making and activities*". The Coalition also intends to support the delivery of the UN 2030 agenda, in that respect it aims at providing a coherent multilateral response to the world's socio-economic problems. It is thus linked to the promotion the SDGs, including SDC 8. It is targeted at both internal ILO structures as well as those outside, to bring greater policy coherence, and external stake holders and role players.

Its principles and main focus areas are revealing for labour rights and social justice. They are "*embedded in ILO's values and principles of tripartism and social dialogue as well as its normative mandate*", aiming to promote coherence of social justice policy at global, regional and national levels[14].

It has five priority areas enunciated: gender equality; non-discrimination and inclusion; transitions from the informal to t the formal economy; just transition towards environmentally sustainable economies and societies; decent work in supply chains; and decent work for crisis response. In the design of its programme, emphasis has also been given to the need for varied partnerships, including other international organizations, governments, tripartite social partners, and not least for evidence-based academic research.

[13] GB.346/INS/17/1: ILO Governing Body, 346th session, Geneva, October-November 2023; see also supplementary, 347th session.

[14] GB.346/INS/17/1 (2023).

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The Global Coalition is undoubtedly work in progress still unfolding, but it is clear that it is 'on all fours' with the pursuit of labour rights and social justice and in tandem with mandate of supervisory bodies such as the CFA and CEACR.

5. Conclusion

The quest for labour rights and social justice is a dynamic and ongoing imperative which requires a multifaceted approach in the face of the current Global Polycrisis. It needs to take account of not only the changes in the world of work, but the broader dimensions of national specific and international engagements that engender the persistence of the deficits in social justice. Such deficits are clearly apparent in increasing inequality, poverty, unemployment and other shortfalls such as in education and requisite skills.

Multiple instruments in the pursuit of labour rights and social justice are therefore needed. Collective bargaining in all its emerging trends is a vital tool, not only as key to negotiation and realisation of labour rights wherever work is performed, but also as a means of broadening it beyond the workplace. It essentially amounts to social dialogue, as a catalyst which enables collective bargaining to be extended beyond traditional boundaries.

They relate to both structural and operational changes. As it seeks renewal to its mandate, the ILO and its structures, in particular its supervisory bodies are key players in this pursuit. Among the several supervisory bodies, the CFA is particularly relevant and well suited, given its mandate as custodian of freedom of association of which collective bargaining key, embodied as it is in tripartism. The CFA has earned a reputation as a "*reliable compass in any weather*", as is evident from its record over 70 years but its work is not fully done.

A start has been made and efforts to find more appropriate ways of broadening collective bargaining as a key instrument in the realisation of labour rights as part of social justice, as is apparent in the ILO Decent Work programme, are already underway not only in the CFA as it seeks to heighten social dialogue, but also in other structures, such as the other supervisory body, the (CEACR). Equally import in this pursuit is the new Global Coalition for Social Justice initiative currently unfolding.

There is no doubt at all of the need for inclusive approaches, to use such enabling instruments as collective bargaining, to enhance labour rights as a means towards social justice. The major challenge is however how to implement the objective in practice. That is work in progress to which various efforts are directed, they need to be enhanced.

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Insights on the paramount importance of workers' rights: employed, atypical, and self-employed

Gaetano Zilio Grandi[1]

This paper addresses one of the most fascinating phases in the growth of labour law and, in my opinion, sometimes insufficiently valued. At the same time, the in-depth examination of non-discrimination and atypical contractual arrangements developments won't be treated here but on a more comprehensive occasion. We are talking about that labour doctrinal elaboration, referred to as constitutionalist, which placed at the centre of its attention the principle of equal treatment. This principle has been rediscovered only in connection with a well-known and controversial ruling of the Constitutional Court in 1989, No. 103 (Ichino, 2000; Chieco 1989; 1992; 2004; Del Punta, 1998).

In the 1950s the most sensitive doctrine, especially in civil and public law, considered Art. No. 3, paragraph No. 2 of the Italian Constitution, a possible basis for taking the new labour law, emancipated from civil law (Santoro-Passarelli, 1946; 1954; Scognamiglio, 1963; 2007), a further qualitative leap forward, considering the social function of the discipline (Scognamiglio, 1994). In this regard, there was effective talk of critical constitutionalism (Mariucci, 2016), meaning that labour law could have found the necessary impetus to overcome the limits deriving from the private law but above all from the political-economic context,through the strength of the constitutional charter.

Luciano Ventura, Giulio Pasetti, Ugo Natoli, Carlo Smuraglia and others are the evidence of a labour law that not only wants to be re-born because it was already born in the statutory and formalist interpretation (Santoro-Passarelli, Persiani and Dell'Olio, according to Mariucci, 2016), but also to fertilise further the narrative of the "*diversity*" of the subordinate worker. Labour law that in itself already saw its own "*fundamentality*", even before

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the fundamental rights it presupposed and gradually reconstructed (Del Punta, 2013; 2017).

Even before they are workers, men (and women) are citizens and, as such, must be respected as persons. In this sense, Article 41 Const., which has remained in the shadows, should be placed next to Article 3, c. 2, and enhanced precisely in the name of equality. Equality means equal treatment, a principle pursued by the mentioned doctrine (Natoli, 1956), albeit in different ways and with different outcomes.

The path of the cited fundamental norm, Article 3 Const., has been recently retraced, highlighting how theprinciple (*rectius* the ghost) of equality has always been in the dreams or nightmares of the powerful (Silvestri, 2022). Equality,conceived as *telos*, has manifested an autonomous generative force and therefore a prescriptive function, to be confirmed day after day, to the point of being somehow incorporated into dignity, or better still into equal social dignity (Ferrara, 1974).

From equality before the law to non-discrimination is a very short step.

The relations between the aforementioned principle of equality and non-discrimination resulting from Article 3 of the Constitution and those deriving from and then imperatively affirmed in the Charter of Fundamental Rights of the European Union (Articles 20 and 21) were also investigated. The assumption concerned a tendential difference between what was expressed at the national level and the Nice Charter, alsofollowing its acceptance among the principles first affirmed by the Court of Justice and then accepted in the Treaty. In particular, a clear discrepancy was highlighted between what is outlined in Article 3 of the Constitution and what is reaffirmed in the Nice Charter, in the sense that the latter lacks the reference to substantive equality and, therefore, to that material, factual meaning inherent in paragraph 2 of Article 3 of theConstitution.

However, even before observing the distances between the Italian Constitution and the European system, in terms of equality, it is the case to note how there could be two interpretations of Article 3 from a constitutional law perspective: one almost flattened on the formal equality of the precept, the other linking theprinciple of equality to that of 'internal' logicality of the legislation.

The outcome was to allow the Constitutional Court to '*read*' equality also in terms of the 'reasonableness' of laws, thus enabling it to evaluate legislative measures (including regional ones) (Sobrino, 2019) almost politically or at least discretionally. This means what the Constitutional Court would have reiterated in 1989, with the ruling entitled precisely equal treatment, but revolving around the prohibition of discrimination (*rectius* different treatment) for arbitrary reasons that are not reasonable, both in

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the regulatory activity of the State and in the exercise of the employer's power[2].

Therefore, the evolution of the principle of equality into a principle of non-discrimination clearly assumes a precise stance on the part of the legal system, meaning not only the rules but also the so-called living law (Cartabia, 2011). On the other hand, the same judgement of reasonableness is "naturally" empirical, so that "*reasonable inequalities*" (Rescigno, 1999) can be achieved, as will be seen about equality/non-discrimination precisely in the sphere of atypical relations and in the comparison between self-employment and subordinate employment: if it is true that the principle of non-discrimination produces neutralising effects, its rationale is, therefore, a value judgement.

The principle of equality is developed in private law (Rescigno, 1966; 1979; Navarretta, 2020[3]) but finds a specific elective sphere precisely in labour law, where the asymmetry between the parties, concealed by the civil code, has prompted some doctrine to support its transfiguration into a more operative principle of equal treatment (for equal duties), using the aforementioned intervention of the judge of laws in 1989.

The impassioned discussion around this principle in the early 1990s confirmed the doctrine's interest in the broader theme of limits to the entrepreneur's directive power and the presence and efficacy of general clausesin the employment relationship (Tullini, 1990; Zoli, 1988), and above all, it complements the coeval normative and interpretative elaboration on the theme of discrimination, not only gender discrimination, both in the national and Europeansphere.

In short, a favourable climate is being created for the explosion of instruments for applying the principle of equality on the one hand and for repressing discriminatory behaviour on the other. All of this is under the broad cover of the principle of equality, which moved from private law *stricto sensu* to labour law in the broadest sense[4].

As it emerges from the aforementioned affair concerning Constitutional Court 103/1989, in an almost paradoxical way, the true '*enemy*' of the principle of equality turns out to be collective bargaining: in the sense that it would have legitimised "*demolishing interventions by the judge of deviations from the principle* […] *put in place in collective bargaining*"[5]. But, in an

[2] For the first aspect see Ghera (2003); for the second see Ichino (2000); on the difference in approach between constitutional and european case law see Sorrentino (2001).

[3] Therein an insightful quotation from Don Milani: "to make equal parts among unequals is an injustice" and further enlightening references such as Pizzorusso (1983).

[4] Including labour and employment relations and social security issues.

[5] On the possible – but denied – functionalisation of entrepreneurial power: Zilio Grandi (1996), Mazzotta (1995), Santoro-Passarelli (1993).

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unforgettable meeting I had with Prof. Giuseppe Suppiej, he succeeded in a few minutes in overwhelming my ardent and youthful intentions to accept and revisit the principle of equality in labour law.

Two monographic papers devoted to discrimination, set in different '*eras*', albeit in years that are not far apart, first deal with the 'true' history and the misunderstandings (or amnesias) of the doctrine itself about the fundamental normative dictates, *id est*, art. 15 of the Italian Worker's Statute (De Simone, 2019), and subsequently the evolution of the concept of discrimination as it emerged at the European level and today in a digital context (Barbera, 2014). The impression is that it is only today that discrimination and the relative prohibition make it possible to recognise a true 'anti-discrimination right' in our legal system as well, i.e. to overcome the limits inherent in a national and predominantly formal vision of the issue.

Already thirty years ago, Prof. Umberto Romagnoli entrusted us with memorable pages on the relationship between equality and differences in labour law, immediately grasping how the development in the certainly very relevant sense of the non-derogation and uniformity of labour law had restricted the space of usability of the principle of equality constitutionalised and made operative by the second paragraph of art. 3, leaving in the background, like non-removable rubble, the discriminations and inequalities of fact that could not find tools to recompose them in a (non-existent) anti-discriminatory law. It seems almost surreal to reread evaluations of labour law at the time as "*heedless of the perverse consequences caused by the obtusely uniform and undifferentiated application of the most eye-catching and pervasive discipline possible*".

In short, it was already understood that the correct path would have been to go '*beyond*' subordination, modulating the protections in quantity and quality common to contractual relations in which a performance of activity is deduced; up to and including any acting on behalf of others (Zilio Grandi, 2007).

Even clearer words were then spent by those who made the theme of equality, in its various configurations, the main subject of their research. Having said that it is necessary to speak of '*principles*' and not the principle of equality, a good part of the doctrine, in fact, opposes the idea of a new liberal law based on the fundamental rights of freedom and dignity of the individual rather than on substantial equality and, in so doing, re-proposes equality in rights as a non-oppositional principle with respect to freedom and other fundamental rights such as, for example, dignity.

In the same way, the supposed attempt to bring our subject matter "*back into the arms of civil law as the law of equals par excellence*" certainly clashes with the simple observation that equality in civil law is not equality in labour law.

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A very important corollary of these considerations is then that concerning a principle of equality extended from the individualistic to the collective sphere, in the sense of awareness of differences that, in the former case, would be ignored. In short, this is the road that has been opened to consider the so-called positive actions legitimate, as measures and techniques of unequal law but founded in turn on this meaning of equality[6].

Moving on to the definitional question of '*discrimination*', even in our country, it has finally been possible to speak of an anti-discriminatory law, as a body of legislation that regulates the '*how*' of equality; and the how pertains to a fundamental point, namely the fact that equality does not eliminate differences but inequalities of treatment. In this sense, it has been correctly said that a '*second-generation*' anti-discrimination law is a law that is aware of the inequalities that result from belonging. This awareness, finally, also entails a different consideration of the cases in which the national legislature – legislative decrees No. 215 and 216 of 2003 – on the one hand distinguishes as always between direct and indirect discrimination; on the other hand, it excludes indirect discrimination in cases in which an objective justification is present.

It is now appropriate to clarify how the traditional *conceptual hendiadys* '*prohibition of discrimination*' and '*equal treatment*' should be read: according to some, in the instrumental meaning of the prohibition of discrimination for the realisation of the objective of equal treatment. Tshe Community legislator had been clear in stating that the principle of equal treatment entails the absence of any discrimination, at least in Directives 2000/43 and 2002/73; whereas the national legislature had more modestly used the formula that equal treatment "*means the absence of any discrimination*".

These clarifications on the plural valence of the concept of discrimination and its tendentially collective dimension (for the civil law perspective on the point see Graziadei, 2017 and therein other interdisciplinary references, as is right on these issues) inevitably lead us towards the main subject of this intervention. On the other hand, much of the doctrine, including that of labour law, has already highlighted the peculiar relationship between equality and (labour) flexibility, given that the labour market and its flexibilities may well, *naturaliter* one might say, develop differences in treatment and inequalities[7].

And yet the question is whether these differences result from the evolution of the market or from real choices made by the legal system, which would entail a sort of regression of the principle of equality or even a '*differentiation*

[6] Ballestrero M.V. (2004) and *ivi* references to US jurisprudence on equality and unequal rights.

[7] Fontana (2019) and *ivi* 'intriguing' but not always shareable reflections.

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of differences', whereas the principle of equality must instead be considered, according to the teachings of constitutionalists, in a privileged position concerning other constitutional values (Ruggeri, 2017).

As Maria Vittoria Ballestrero has well pointed out, "the crumbling of the employment contract", together with the almost "*greedy*" regulation of flexible and elastic forms of work, can only lead to a multiplication of the labour markets and therefore of the possibilities of discrimination, through the provision of more employment but on less favourable terms, especially by accepting a notion of affirmative action different from that – which has emerged in the US legal system – as conferring advantages (Ballestrero, 2004).

That the new frontier of discrimination is, for some time now, that of atypical employment contracts has also been evident in the jurisprudence of the Court of Justice, which has recognised protection for fixed-term and part-time workers (Militello, 2005; 2010; Piccone, 2016). Although this may also mean that the principle of equality and the prohibition of discrimination remain the last bastion, of Buzzatian memory, of guarantee for social policy objectives (Guarriello, 2003; Schiavone, 2019).

To conclude these reflections and without going back over arguments and considerations that are traditional, the changes in the world of work, *lato sensu* considered, have pushed the subject into a corner. The lines of defence have been mainly conservative and probably also for this reason ineffective. Some believe that the transition to a purely neo-liberal economy and, consequently, to a high rate of liberalism of labour law itself, reified in Legislative Decree no. 81/2015, is now complete; along with the reduction of the mandatory rule to a simulacrum, an expression not by chance used also about the evolution of the system of collective bargaining in its time in the so-called public employment and today at the company/territorial level.

The perspective of anti-discrimination law seems almost the last call for the very survival of the subject as we know it. But there is a further space for action. And it is that of the re-proposition of the fundamental rights of the working person in a world that is, indeed, different. But that does not mean they cease to play their role, as correctly pointed out (Tullini, 2020).

The intrinsic rigidity of the '*ideal*' architecture of the Statute of Workers' Rights and the consequent tendency to consider the evolution of labour law as an "*identity*" issue has clashed with the profound transformations of productive organisations and the labour market; and with digitalisation and new economic models, but also demographic changes[8][29], migration flows and

[8] In this regard, allow me to refer to a very recent interdisciplinary research carried out

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in general the continuous and persistent strengthening of economic-social inequalities (Villalon, 2018; Ballestrero, 2019).

If this is true, it is necessary to take up again, and almost wave, the flag of the human person, of the right to (of) work in all its forms and applications, including in and of the enterprise, and therefore of the right to (of) work as a fundamental right among other fundamental rights.

The doctrine above mentioned (Tullini, 2020) also hits the mark with regard to what we are dealing with here: the explosion in recent decades and years of flexible and non-standard work; work that the umpteenth digital revolution makes increasingly unstable, discontinuous and fragmented, with all that this entails in terms of its effects on the future of the worker. All this pushes towards a re-definition of the notion of work, with individual and collective veins, something certainly not unprecedented, but now unavoidable in the face of real gaps in constitutional protection.

Alongside this substantive issue, there is then, as always, the question of the effectiveness of the fundamental rights of the individual. Effectiveness is clearly influenced using technology that allows an increase in the intensity of employer powers to the limit of '*capturing*' the very life of the worker's person.

Competition to the bottom (so-called social and, at this point, digital dumping) acts strongly precisely on the fundamental values of the person involved in the employment relationship, albeit in a subtle and, according to some, precisely for this reason more ferocious way (Colangelo, Falce, 2017) and somehow demolishes from within the traditional framework of labour protections[9]. It overcomes in a single instant the dichotomy between self-employed and subordinate work, but without providing any further footholds other than hybrid and confusing figures such as the revisited coordinated and continuous collaborations and, lastly, hetero-organised collaborations.

Far more relevant, and this is a discussion already addressed at other times and in other venues, and on which we wish to '*positively*' conclude this paper, is the consideration of the need to link legal rights and protections to the '*person*' entering the labour market: work and its protection in a universalistic sense, from the point of view of the needs and demands for

at the Department of Management of the Ca' Foscari University of Venice: Zilio Grandi G., Mostarda A., Zanella E. (eds.) (2024), *Lavoro, sicurezza sociale e relazioni industriali nel prisma del fattore demografico*, Torino: Giappichelli.

[9] And here the plural is intended, meaning all work, regardless of the legal qualification; derailing beyond labour performance and yet including situations of subjection to the power of others.

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socio-economic and existential security of the person, according to a scheme that labour lawyers know well, namely that of human rights among which anti-discrimination law constitutes a model (Tullini, 2020).

After all, the so-called European Pillar of Social Rights and also the Transparent Working Conditions Directive and the Title V-bis of Legislative Decree No. 81/2015 – which have as their ultimate goal the overcoming of socio-economic weakness of the socio-economically weak workers in general – evoke what Giorgio Ghezzi wrote, now 40 years ago, in well-known legislative proposals, together with authoritative colleagues (for what interests us here, especially Alleva and D'Antona): turning a "*rearrangement of the discipline of atypical jobs*" (what now appears to result from legislative decree No. 81/2015) "*the pivot of a possible reunification consists in the priority identification of the* genus *of the employment relationship* […] *without adjectives or* sans phrase" which must be followed by a "modulation of the intensity and specificity of protections".

In this sense, the *genus* would include work relationships in which a "*functional connection with the employer's organisation*" emerges, which must necessarily correspond to a "*battery of common protections*": compensation, health and psychophysical integrity, professionalism, protection in cases of suspension, part of the Workers' Statute of Rights, the same (and then only incipient) anti-discrimination legislation and more (Ghezzi, 1996).

Thus, in the diversity of the ideas and projects presented there, the common element, which is of conclusive interest here, is the "*recognition of a minimum standard of rights*" (including anti-discrimination) also for those who are not employees in the proper sense, bringing "*on a more* laic *level the historical and dramatic alternative*" between autonomy and subordination.

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New trends in collective labor law from a european perspective

Carmen Sáez Lara[1]

1. Challenges, strategies and trends in collective labor law

Collective labor law has to face the challenges of the world of work. Economic globalization and the digital and ecological transitions demand effective strategies from trade union organizations (at the various national and transnational levels), which will determine the trends of their actions in the coming years. But companies, in this 21st century, have also assumed a leading role in the development of current trends, since from initial codes of conduct, the result of so-called corporate social responsibility, they have subsequently reached international framework agreements, authentic instruments of transnational collective bargaining, which mark an important step forward for collective labor law.

Social dialogue and collective bargaining can and must play an important role in addressing the main challenges posed by the transitions underway, but the regulatory framework plays, in my opinion, a decisive role in making this possibility a reality. That is why I would like to highlight this year, 2024, in which the EU has reached a series of standards that should, I hope, mark progress towards collective protection of decent work.

In short, we will focus on the trends in collective labor law that have a certain prominence at the European level.

In the face of the digital transition and incorporation of Artificial Intelligence into the world of work, regulatory demands are present from the USA or China to the EU.

The impact of AI on labor markets and workplaces will depend on how it is implemented, including the role of regulation and the extent to which

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workers and employers participate through social dialogue at different levels. In this regard, regulation and social dialogue can complement each other and create synergies, if, for example, regulations establish minimum standards and specify the terms that require dialogue and negotiation. From this perspective, two EU regulations, the Artificial Intelligence Regulation[2], the so-called Artificial Intelligence Act, and the Directive on improving working conditions in platform work of 2024 should be analyzed.

In the face of economic globalization, transnational collective bargaining is necessary, as a channel for global governance of labor relations, aimed at avoiding social dumping practices, channeled through the organization of production in supply chains, which stand as obstacles to the objective of decent work.

The formulation of safeguard mechanisms in these supply chains is represented in the EU by the 2024 Directive on Sustainability due diligence[3], which establishes a duty of governance of risks (for human rights and the environment) by large companies in their global supply chains or chains of activities.

This regulation should be assessed in the light of the role it assigns to social dialogue in the fulfillment of the aforementioned due diligence obligation. Without prejudice to the importance of this Directive, the role already played by social dialogue and collective bargaining must be highlighted. Indeed, the role played by international framework agreements (IFAs) in the protection of decent work and environmental protection in the activity chains must be acknowledged.

These challenges, strategies, and trends in collective labor law are discussed separately below.

2. Collective labor law and the digital transition

In the face of the digital transition, the participation rights of workers, through their union representatives, in the incorporation and management of changes, and particularly of Artificial Intelligence in the workplace,

[2] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No. 300/2008, (EU) No. 167/2013, (EU) No. 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

[3] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.

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must be strengthened. In 2024, two already cited EU regulations should be highlighted, the Artificial Intelligence Act, and the Platforms work Directive.

The Artificial Intelligence Act is heir to the European Strategy, which is aimed at achieving the goal of a reliable, person-centered AI that respects fundamental rights. This Act qualifies as a high-risk system (for health, safety and fundamental rights) AI systems for labor recruitment or selection, evaluation of candidates, promotion, assignment of tasks, control of activity and behavior and termination of employment relationships (art. 6.2 Annex III).

However, it only recognizes the rights to inform workers' representatives and the workers concerned that they "will be exposed" to the use of the high-risk AI system (Art. 26.7).

This is why the European Trade Union Confederation (ETUC) declared the inadequacy of this law in the workplace and called for an EU Directive on algorithmic systems in the workplace, which would strengthen the bargaining rights of trade unions and the participatory rights of workers' representatives (ETUC Executive Committee of 6/12/2022).

On the contrary, I consider that the EU Directive on improving working conditions in platform work does encourage the participation of workers through their representatives in the introduction and management of automated systems for decision-making and supervision of work on platforms. In addition, the Directive extends its protection to all persons providing services on platforms, regardless of whether they are employees or self-employed (whether their contract is an employment contract or not).

The importance of the regulation is also connected to the relevance of the platform economy which, regardless of its size or quantitative weight, appears at the center of the debate on the digital revolution, as it constitutes a "*unique laboratory*", where novel forms of collective representation and strategies for action by traditional trade unions are being developed. However, these initiatives face stiff opposition from the platforms against the institutionalization of workers' representatives and their collaboration with unions in collective bargaining.

Working through digital platforms breaks down all the identities that previously served to build the solidarity on which, in turn, the creation and action of trade unions was founded. Indeed, the great challenge for unions in the digital economy is not algorithms or robots, but the individualization of the working person. The most important problems for unions have to do with the new workers created by the new economic model, not with the technologies.

And the reality is that unions are addressing these challenges without opposing the digital revolution, but rather trying to exercise control and

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governance of its effects on labor relations. Unions have evolved towards an organizing model that embraces workers on digital platforms.

Beyond the profound transformations affecting the world of work, understanding the collective representation strategies of platform workers helps to envision effective means to cope with digital change, to ensure the capacity for collective action, and to achieve more inclusive and egalitarian societies. Experiences of organizing and collective action in the platform economy around the world have shown the need to broaden the subjective and objective scope of union representation and action.

The digital transition thus poses, from a subjective perspective, the challenge of extending representation and collective action to self-employed workers and, from an objective perspective, the necessary participation of workers through their representatives. A just digital transition requires, in short, that the well-known demands for transparency and accountability of technological changes are not exhausted in the individual explanation to those affected but in the information, consultation and participation of representatives, that is to say, that it encompasses forms of collective transparency.

Along with the Directive on platforms work, another instrument adopted in the EU along the same lines would be the Commission Guidelines on the application of competition law to collective agreements concerning working conditions of solo self-employed persons (2022/C374/02). Both regulations were announced in the European Pillar of Social Rights Action Plan to respond to the spread of self-employment on digital platforms and to protect the European social model.

The guidelines clarify that collective agreements concluded by self-employed persons without employees, who are in a situation comparable to that of employees, do not fall within the scope of Art. 101 of the Treaty on the Functioning of the EU, i.e. within the scope of the prohibition of competition, so that the Commission will not intervene against such agreements in cases where there is a clear imbalance of bargaining power.

This overcomes the doctrine of the Court of Justice of the European Union, which had not applied the Albany[4] exception in the case of self-employed persons, even if they are self-employed without employees, who are considered, in principle, as undertakings within the meaning of Article 101 of the TFEU, since they offer their services for remuneration on a given market and carry out their activities as independent economic operators[5].

[4] Judgment of 21 September 1999, Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie, C-67/96, EU:C:1999:430, paragraph 59.

[5] Judgment of 4 December 2014, FNV Kunsten Informatie en Media v Staat der Nederlanden,

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The Commission Guidelines thus extends the concept of collective agreement to agreements on working conditions of vulnerable self-employed, assuming that collective bargaining can be an important means to improve their working conditions. Consider the importance of these guidelines in light of the evolution of the labor market, in particular the trend towards outsourcing and subcontracting, as well as the digitalization of production processes and the rise of the online platform economy.

The Directive on platforms work, as we have pointed out, on the one hand, extends its regulation to persons providing services on platforms without an employment contract and their representatives, and on the other hand, recognizes the rights of participation of representatives in algorithmic management, both in automated decision-making and monitoring systems. It recognizes in favor of the representatives, the rights of information and consultation on the introduction of these systems (art. 13); rights of information on their use (art. 9.1), and rights of participation in the periodic evaluation of the effects of these automated systems (art. 10.1). Finally, the Directive also promotes collective bargaining on the platforms (art. 25).

In this way, the European standard supports the efforts of the social partners to extend their action to unrepresented forms of work and to extend bargaining rights to some self-employed workers who are in a "gray zone" and need forms of collective protection.

As we have already pointed out, trade unions are tackling the challenge of the digital transition without opposing it, but rather trying to exercise control and governance of its effects on labor relations, not only about the platform economy but also on corporate technological change. A well-known example was the project "Arbeit 2020", led by German industrial unions, to support works councils for their active participation in shaping the technological change associated with Industry 4.0.

To this end, agreements for the future were signed at several industrial sites, procedural agreements that set out ways to jointly address the challenges of digitisation. The agreements reached established joint working committees with representatives of management and works councils that have ensured the collective management of technological change. Ultimately, these agreements mark the beginning rather than the end of the process by which workers' representatives are involved in how digitalisation develops in their workplaces.

C-413/13, EU:C:2014:2411, paragraph 27; judgment of 28 February 2013, Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência, C-1/12, EU: C:2013:127, paragraphs 36 and 37; judgment of 14 December 2006, Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos S.A., C-217/05, EU:C:2006:784, paragraph 45.

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3. Collective labor law, economic globalization and climate change

Faced with economic globalization, which has favored the delocalization and fragmentation of production processes, the challenge for trade unions will be to achieve coordinated action at different levels, including the transnational level, to guarantee decent work in global supply chains. Economic globalization has highlighted the inadequacy of the state framework of collective labor law. Multinational corporations (MNCs) directly employ only 6% of their workforce, global supply chains are the "*central nervous system*" of the world economy; this negatively affects the quality of employment and increases social inequality between and within countries.

In this context, various national laws on due diligence in global supply chains established effective solutions for the protection of decent work and environmental protection and were exponents of a new globalization that challenges neoliberal dogmas[6]. In this process, the shift from voluntary to compulsory safeguarding mechanisms is represented by the EU Due Diligence Directive of 2024. The Directive is based on the idea of "sustainability" since economic development must go hand in hand with enforceable social and environmental standards.

Without prejudice to the importance of this standard, it is also necessary to highlight the role played by social dialogue, in international framework agreements, as they constitute a channel to involve MNCs and Global Union Federations in the implementation of these measures adopted by state and European standards. The IFAs constitute a point of arrival from the original codes of conduct, adopted by MNCs in the context of their corporate social responsibility policies, in whose elaboration, implementation, and enforcement of workers' participation gained prominence.

As a result of these experiences, IFAs negotiated between MNCs and international trade union federations or global works councils are a reality, as examples of transnational collective bargaining. (In any case, we cannot ignore their Eurocentric character, since most of the signatories are European MNCs, and these agreements are also the result of the global projection of the information and consultation instruments of the European Works Councils, which have become global Works Councils).

[6] Thus, we can cite the precedent of the Transparency in Supply Chains Act in California (2010), in the EU, for example, in the United Kingdom (2015) the Modern Slavery Act; in France (2017) Loi 2017-399 relative au devoir de vigilance des sociétés mère et des enterprises donneuses d'ordre; or in Germany (2021) Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten (Lieferkettensorgfaltspflichtengesetz – LkSG).

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In addition, the contribution of the IFAs to the strengthening of trade union structures at the transnational level should be emphasized, through the recognition of participatory powers (in the design, implementation, control, and monitoring) to multilevel trade union representation structures (local, central, transnational) that ensure compliance with the commitments made in the content of these agreements. A good example is the agreements of multinational companies such as Inditex (2019) or ENGIE (2022).

As is well known, the challenge for trade unionism today is the creation of organizational structures that are interlocutors of MNCs. For this purpose, trade union networks are a way of introducing international trade unionism into the company.

In short, from experiences of corporate responsibility (unilateral, voluntary, and poor in content), the IFAs (bilateral, binding, with trade union control mechanisms for their application) represent an important leap forward, in addition to the enrichment of content (protection of rights and environmental protection) that has been progressive, in parallel to the generalization of the extension of their scope of application to the supply chains of MNCs, or to the companies with which the multinational maintains commercial relations, a broader concept than that of supply chain.

Therefore, the question raised by the new 2024 Directive is: what role has it assigned to social dialogue in the fulfillment of the obligation of diligence?

In this regard, we can point out that the Directive provides for the participation of workers' representatives in the elaboration by the company of the risk-based due diligence policy (art. 7.2 Directive). A constructive collaboration that extends to the set of actions that make up the corresponding risk management system, the so-called due diligence process (detection and assessment of adverse effects, preventive, corrective, and remedial actions) (art. 13.3).

The new European Directive on due diligence, although we cannot ignore the negative fact of its restricted scope of application[7], will also favor the development of the transnationalization of trade union organization and action, the formation of representations at European and global level and transnational collective bargaining. However, as already stated, an ILO Convention on fundamental labor rights in the aforementioned chains of activities would also be necessary (ILC 105th Meeting Report, 2016).

Finally, it should be noted that IFAs are a particularly suitable instrument for implementing due diligence obligations, since, in addition to the advantages of their negotiated nature, they can promote measures for the

[7] The company had more than 1.000 employees on average and had a net worldwide turnover of more than EUR 450.000.000 in the last financial year.

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enforcement of compliance with this due diligence obligation, throughout the whole of the global supply chain, through the participation of workers channeled through trade union structures at various levels, articulated in trade union networks.

4. The necessary collective and Trade Union protection of decent work in the post-pandemic era

As the previous pages have shown, the protection of decent work and social and environmental rights in the context of the current transitions requires the expansion of the subjective and objective scope of action of trade union organizations, as well as their articulation at various levels, including the transnational level, to ensure the participation of workers.

Social dialogue, which was essential to meet the challenges of the Covid-19 pandemic, must also be the protagonist in the post-pandemic era of digital and climate change. To this end, the support of states, the EU, and international organizations will be necessary because, as we have been insisting, "*the regulatory framework matters*". For example, the transnationalization of collective bargaining has contributed to the institutionalization of transnational channels of dialogue, with the role of the European Works Councils, which are mandatory under Directive 38/2009/EU, being of particular note.

The digital transformation is not and will not be neutral, its consequences or effects on the economic and labor system are not and will not be alien to the role played by states or the EU in promoting social dialogue and trade unions as instruments for the democratic management of technological change or the so-called digital transition.

Although the 2017 European Pillar of Social Rights has had a narrow focus on trade unions and collective rights, regulatory developments in the implementation of the Pillar, such as the Minimum Wage Directive[8], or the aforementioned Commission Guidelines on collective agreements for vulnerable self-employed workers, can contribute to strengthening collective bargaining at the national level, but also to expanding its scope and incorporating new actors.

The Commission's Guidelines on collective bargaining for the self-employed without employees are in line with the Recommendation to promote greater collective bargaining coverage with special reference to new

[8] Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union.

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forms of work and atypical employment. The Council Recommendation of 12/06/2023 on strengthening social dialogue in the EU aims to adapt to the digital age and promote collective bargaining in the new world of work. The ETUC has stated the need for a regulatory framework to develop a European collective bargaining system consistent with the existence of a single market, articulated on the binding force, standards for validation of such agreements, sanctions for non-compliance, and specialized competence of the EU Court of Justice.

In short, I believe that European standards can serve as an impetus to generalize worldwide, the necessary practices of social dialogue and collective bargaining in the management of digital and climate transitions, practices that promote the participation of workers in these processes, through their representatives.

Workers will continue to assert their rights with a collective voice, participating in joint actions and exploring strategies to improve their working conditions because the protection of workers' rights has always been, is, and will be collective and unionized.

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Todolí Signes A. (2018), "La gobernanza colectiva de la protección de datos en las relaciones laborales "big data", creación de perfiles, decisiones empresariales automatizadas y los derechos colectivos". *Revista de Derecho Social*, 84: 69-88.

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Part 4
Occupational health issues

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Suicidio vinculado al trabajo: ¿una realidad en cuarto creciente?

David Lantarón Barquín[1]

1. Suicidio vinculado al trabajo: ¿la cara oculta del suicidio?

La Organización Mundial de la Salud (OMS) define el suicidio como "*todo acto por el que un individuo se causa a sí mismo una lesión, o un daño, con un grado variable de la intención de morir, cualquiera que sea el grado de la intención letal o de conocimiento del verdadero móvil*"[2].

Suicidio incorporado en los ordenamientos fundamentalmente en los ámbitos penal y mercantil[3]. Ni la notoriedad mundial de la realidad japonesa o de casos de extraordinaria gravedad como el de *France Télécom,* ni el agravamiento de la situación causado por el Covid-19[4], han vuelto la mirada de la normativa laboral hacia esta realidad. La propia OMS no consideró un tratamiento específico del suicidio laboral hasta tardíamente, y de manera conjunta con la OIT, en el año 2006.

En nuestros días, esta desatención quizás pudiera entenderse mejor porque su incidencia ha disminuido y porque su tasa puede verse atemperada por el diálogo sobre la reducción de los días de jornada o sobre su entidad misma, vigente por momentos en muchos países europeos, como actualmente en España. Quizás, más probablemente, porque sus cifras, difíciles de conocer,

[1] Catedrático de Universidad de Derecho del Trabajo y de la Seguridad Social de la Universidad de Cantabria.

[2] OMS (2006), *Prevención del suicidio. Un instrumento en el trabajo*, Ginebra, p. 6.

[3] Abogando las *Opciones para la aplicación del Plan de Acción Integral sobre Salud Mental 2013-2030* de la OMS por la "despenalización del suicidio, los intentos de suicidio y otras conductas autolesivas" (p. 22). Concretamente, en la legislación mercantil del contrato de seguro, caso del art. 93 Ley 50/1980, de 8 de octubre, de Contrato de Seguro (BOE, 17-X).

[4] Gunnell D., Appleby L., Arensman E. *et al*. (2020), "Suicide risk and prevention during the Covid-19 pandemic", *Lancet Psychiatry*, 7: 468-471.

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presentan un claro descenso en los últimos años. Y si el número de suicidios resulta difícil de conocer, más en relación con el trabajo, ni qué decir tiene que esta dificultad crece exponencialmente si pensamos en todas las conductas vinculadas al mismo.

La Clasificación Internacional de Enfermedades CIE-11 del año 2018 ofrece un amplio repertorio del mundo conceptual del suicidio. Habla de *suicidio, intento de suicidio, comportamiento suicida, ideación suicida o autolesión sin intento suicida*. La doctrina repara en el concepto de *crisis suicida* para definir el "*intervalo entre el pensamiento del suicidio y su puesta en práctica*", advirtiendo que raramente este periodo supera unas pocas semanas y que comprende cinco fases: *prueba, destello suicida, ideación suicida, rumiación suicida y cristalización*[5]. Y habla también de "*espectro de conductas suicidas*"[6]. Y ofrece datos escalofriantes, llegando a cifrar en Francia en el 20% de su población las personas que en algún momento presentan ideación suicida[7].

Difíciles de conocer, en fin, por la necesidad de mejorar los sistemas de recogida de datos relativos a las defunciones, partiendo de sus tres elementos fundamentales: la vigilancia estadística, la vigilancia clínica y la vigilancia jurídica"[8], asistida ésta policialmente. Insuficiencia estadística, y resultante infradeclaración, apreciada en el *Plan de Acción Integral sobre Salud Mental 2013-2030* de la OMS (en adelante, *PAI 2013-2030*). Y que explicó, por ejemplo, la implantación de la certificación de defunción electrónica en Francia mediante el Decreto n. 2017-602, del 21 de abril.

Una realidad que, en fin, continúa siendo muy trascendente, como una de las principales causas de muerte en el mundo por delante de la malaria, los homicidios o el cáncer de pulmón, y cuantitativa, significando el 1,3% de las muertes mundiales[9].

[5] Debout M., Delgènes J.C. (2020), *Suicide, un cri silencieux. Mieux comprendre pour mieux prévenir*, Bruxelles: Le cavalier bleu Editions, cit., pp. 9-10.

[6] Fouchault J. (2017), "L'autopsie psychologique: revue de la littérature, état des connaissances actuelles et propositions pour une harmonisation des pratiques", *Médecine humaine et pathologie*, 64, cit., p. 12.

[7] Debout, Delgènes (2020), *op. cit.*, pp. 11-16.

[8] Veloso, Corradi, Canales (2016), "Suicidio y Trabajo: Desafíos para la investigación estadística, teórico-clínica y jurídica", *Revista Sul Americana de Psicología*, 4(1): 60-119, cit., p. 77.

[9] Concretamente, entre el año 2000 y el año 2019 la tasa mundial estandarizada de suicidio por edad decreció un 36%, un 47% en la Región Europea. WHO (2021), *Suicide worldwide in 2019. Global Health Estimates*, Ginebra: WHO, pp. 1, 11. La OMS ha venido realizando un seguimiento de la salud mental y del suicidio, presentando una serie de datos de gran interés. Departamento de Salud Mental y Abuso de Sustancias OMS (2006), *Prevención del suicidio. Un instrumento en el trabajo*, Ginebra: Organización Mundial de la Salud, Véase, en especial, p. 8.

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Una realidad, la del suicidio, que presenta una cara oculta, especialmente en su vinculación con el trabajo. Y que afortunadamente, no sin una diversidad de posicionamientos, es admitida en la actualidad gracias a los postulados de Durkheim[10], que concibió el carácter de fenómeno social del suicidio, de algo que trasciende lo meramente individual.

Un vínculo que se enmarca, en definitiva, en la evolución desde el capitalismo industrial hacia el capitalismo financiero y sus perniciosos efectos sobre los trabajadores[11]. Que se precipitó como consecuencia del giro copernicano en la organización del trabajo en la empresa de los años 80 que borra la ayuda mutua y la solidaridad como elemento preventivo de las costumbres ordinarias de la vida laboral, que dificulta la reacción colectiva. Una nueva organización del trabajo que agrava la salud mental por tres factores[12]: el privilegio concedido a la dirección a costa del trabajo; una nueva forma de organizar el trabajo, la evaluación individualizada del desempeño; y la calidad total. Una situación agravada con una nueva vuelta de tuerca en los años 2000[13]. Una relación aceptada comparadamente en Europa.

2. Suicidio y causalidad

Identificar esa causalidad del trabajo en el suicidio ante una contingencia – accidente o enfermedad – específica constituye, sin embargo, una tarea de extraordinaria complejidad. Compleja porque, de entrada, el trabajo se presupone *"por lo general* […] *bueno tanto para la salud mental como para la salud física*"[14]. En segundo lugar, por – orillado un modelo estrictamente biológico[15] – su multifactorialidad, a resultas de la cual el comportamiento

[10] Durkheim E. (1897), *Le suicide*, Paris: Félix Alcán Editeur, 462 pp. (más XII del prefacio). Para una aproximación a esta reflexión en particular, y a su obra, en general, es útil la lectura de Departamento de Sociología de la Universidad de Barcelona (1999), *Centenario de "El suicidio", de Émile Durkheim (1897-1997)*, papers 57, pp. 39-72.

[11] Seguimos en este punto y a la hora describir los hechos, básicamente, a Waters S. (2014), "A capitalism that kills", *French Politics, Culture & Society*, 32(3): 128 ss.

[12] Dejours C., Begué F. (2009), *Suicide et travail: que faire?*, Paris: Presses Universitaires de France, pp. 19-22, 32-42.

[13] Desprat D., Baudelot C., DeboutM., Waters S., Lerouge L. (2020), "Les suicides liés au travail et au chômage", in Observatoire National du Suicide (2020), *Suicide. Quels liens avec le travail et le chômage ? Penser la prévention et les systèmes d'information*, IV rapport, pp. 35-36.

[14] Wynne R., De Broeck V., Vandenbroek K., Leka S., Jain A, Houtman I., Mcdaid D., Park Ah-La (2017), *Promover la salud mental en el puesto de trabajo. Guía para la aplicación de un enfoque integral*, Luxemburgo: Oficina de Publicaciones de la UE, p. 12.

[15] La más cualificada doctrina apunta tres concepciones opuestas sobre la interpretación

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suicida puede ser visto "*como la consecuencia de una interacción entre factores biológicos, psicológicos, sociales y psiquiátricos*"[16]. Compleja, en tercer lugar, porque este "*vínculo causal es, por otra parte, tanto más difícil de establecer cuanto que se convertirá, a veces incluso ante los tribunales, en una cuestión moral y financiera*"[17] que contrapone como pocas instituciones el interés del trabajador suicida y su familia a los de la empresa.

La conceptuación del suicidio como contingencia profesional, usualmente como accidente de trabajo, resulta difícil. La *causalidad residual* de la enfermedad común[18] y la falta de proyección de la salud mental en los listados de enfermedades profesionales lo favorece. Así, los problemas de salud mental "*que suelen estar detrás del suicidio*" son tradicionalmente calificados, de manera mayoritaria, como enfermedades comunes[19]. Amén de ello, los modelos cerrados, no mixtos ni de determinación judicial de la enfermedad profesional no favorecen la consideración como tal cuando no son permeables a la salud mental[20]. Y esta dificultad, la de calificar el

de la relación entre suicidio y trabajo: el enfoque del "estrés", el análisis "estructuralista" y el análisis "sociogenético". Dejours C., Bégue F. (2009), *op. cit.*, pp. 24 ss. Modelos que corresponden a una evolución que no se da al unísono en las distintas realidades estatales.

[16] Dumon E., Portky G. (2014), *Prevención y manejo de la conducta suicida. Recomendaciones para el ámbito laboral*, Proyecto EUREGENAS (European Regions Enforcing Actions Against Suicide), p. 7.

[17] Baudelot C. (2020), "Suicides au travail: portée et significations", in Observatoire National du Suicide (2020), *Suicide. Quels liens avec le travail et le chômage? Penser la prévention et les systèmes d'information*, IV rapport, p. 48.

[18] Enfermedad de trabajo, enfermedad profesional y enfermedad común presentan distintas causalidades: la primera con una relación de causalidad abierta, la segunda cerrada y fomalizada y la tercera para aqu. ellas no incluibles en las categorías anteriores Escudero Rodríguez R., Nogueira Guastavino M. (2024), "Acción protectora (I). Contingencias Protegidas", in Aa.Vv. (2024), *Derecho de la Seguridad Social*, Valencia: Tirant Lo Blanch, IV ed., p. 328.

[19] Comisión de Personas Expertas sobre el Impacto de la Precariedad Laboral en la Salud Mental en España (2023), *Resumen del Informe PRESME Precariedad laboral y salud mental*, MTES, 92 pp., cit. p. 43.

[20] Sistema mixto acogido en el Convenio n. 121 OIT y en su Recomendación n. 194 de 2002 sobre la lista de enfermedades profesionales, que no obstante establecer un listado legal, incluye una cláusula para abrir éste mediante la analogía o valoración judicial. López Gandía J. (2007), "El nuevo régimen jurídico de las enfermedades profesionales (Comentarios al RD 1299/2006, de 10 de noviembre)", in López Gandía J., Agudo Díaz J. (2007), *Nueva regulación de las enfermedades profesionales*, Albacete (BOMARZO), III ed., pp. 16-18. Sistema de lista acogido desde la Recomendación comunitaria de 23 de julio de 1962 a la actual pasando por la 90/326/CEE de la Comisión, de 22 de mayo de 1990, relativa a la adopción de una lista europea de enfermedades profesionales, inclinándose por eliminar los "limites imperativos" o "condiciones limitativas" propios de ésta sin abrirse a la intervención judicial a tales efectos. Modelos y listado de ventajas e inconvenientes igualmente incluidos en AMAT, *El nuevo cuadro de enfermedades profesionales. Lo que el empresario debe saber*, Madrid (AMAT), 2007, 151 pp., cit. p. 37.

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suicidio como profesional, "*incide directamente en la ausencia de políticas de prevención específicas en el ámbito laboral*"[21].

La causalidad requerida no es una mera correlación[22]. Y resulta especialmente compleja más allá de las presunciones de algunos ordenamientos como el nuestro (art. 156 LGSS) aplicables al accidente ocurrido en tiempo y lugar de trabajo (elección que podría apuntar hacia un *sucidio vengativo*[23]). Son, desde luego, los suicidios cometidos fuera del lugar de trabajo y sin la existencia de indicios, "*sin un registro escrito de los motivos*", los que presentan mayor dificultad en la identificación de este vínculo[24].

Surgen en este contexto la española doctrina de la *ocasionalidad relevante.* Doctrina visible en la importante STSJ de Cantabria (Social) n. 118/2023, de 27 febrero[25], que considera la presencia de un elemento sustantivo de vinculación con el trabajo y de un elemento temporal, ya que "*los problemas de índole laboral tienen una clara conexión temporal con el acto suicida*". Y también la doctrina francesa de la "f*aute inexcusable de l'employeur*" como causante última de la conducta suicida. Culpa inexcusable en cuya construcción jugaron un papel fundamental las sentencias sobre el amianto de 28 de febrero de 2002, confirmadas por la "Cour de Cassation" reunida en pleno el 24 de junio de 2005[26]. Doctrina que, no obstante, presenta un cierto retroceso el 25 de noviembre de 2015, y debido al artículo L. 4121-1 del Código del Trabajo, iniciándose "*un movimiento de retirada de la referencia a la obligación de garantía de resultado*"[27]. En Italia para poder afirmar la

[21] Seren Novoa G.A. (2023), "Suicidio y salud mental en el ámbito laboral (ley y jurisprudencia argentina)", *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*, 11(3), p. 181.

[22] Distinción claramente apreciada en los estudios sociológicos sobre el suicidio. A título de ejemplo, Dagenais D. (2007), "Le suicide au Québec comme révélateur de la signification du suicide contemporain Daniel", *Recherches sociographiques*, XLVIII(3): 12 ss.

[23] Fue el etnólogo británico B. Malinowski quien ofreció la primera descripción del mismo en las islas Trobriand en 1926 y le dio nombre. Según Baudelot C. (2020), *op. cit.*, p. 51.

[24] Como se afirma para el caso francés, pero perfectamente extrapolable más allá de aquella realidad, por Dejours C., Bègue F. (2009), *op. cit.*, p. 23.

[25] El Auto del Tribunal Supremo (Sala de lo Social), de 22 de marzo de 2024 (Rec. Ud. 1707/2023) inadmite el recurso contra la misma por falta de contradicción con la sentencia aducida de contraste.

[26] Pignarre G. (2014), "L'extension de la réparation des atteintes à la sécurité des travailleurs en cas de faute inexcusable de l'employeur", *Revue de droit du travail*, pp. 764 ss.

[27] Lerouge, L. (2020), "Le suicide lié au travail à la lumière du droit social", in Observatoire National du Suicide (2020), *Suicide. Quels liens avec le travail et le chômage? Penser la prévention et les systèmes d'information*, IV rapport, p. 70.

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laboralidad del suicidio se precisa "*al menos un papel de concausa en la aparición del trastorno mental*" (Corte di Cassazione, 23 febrero 2000, n. 2037), atendiendo al denominado *principio de la causalidad humana*[28].

Una acreditación de la causalidad que, en el proceso, llama a la relevancia de dos nombres propios. Por un lado, la Psicodinámica del Trabajo, que ofrece un "*análisis clínico y teórico de las relaciones entre trabajo y salud mental que busca identificar las condiciones según las cuales la relación psicológica con el trabajo evoluciona hacia la patología o, por el contrario, hacia la construcción de la salud mental*"[29]. Y, por otro, la autopsia psicológica[30], que ha adquirido una notoriedad en España en nuestros días gracias a la citada sentencia de la Sala cántabra[31]. Y conocida a nivel mundial por su uso en el proceso de la Sentencia del Tribunal de Apelación de Versailles de 19 de mayo de 2011, "asunto Touzet", relacionado con la empresa Renault.

En otros ordenamientos, el suicidio parece no estar – o no haber estado – reconocido, sin más, como accidente laboral, tal es el caso de la normativa del Reino Unido. Así, su Dirección de Seguridad y Salud, organismo responsable de todas las normas de seguridad en el trabajo, define una lista de todos los accidentes que deben serle comunicados. Esta lista excluye explícitamente el suicidio. En el Reino Unido, un suicidio, incluso si ocurre en el lugar de trabajo, se presume – o al menos se presumía hasta recientemente, considerando la datación de la reflexión de referencia – un acto voluntario ajeno al trabajo[32].

Una voluntariedad que ha pesado y mucho en los pronunciamientos de

[28] Pigliarmi G., Serrani L. (2023), "El suicidio del trabajador entre accidente y enfermedad profesional: un itinerario en la jurisprudencia italiana", *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*, 11(3), pp. 126-127.

[29] Dejours C. (2016), *Situations du travail*, Paris: Presses universitaires de France.

[30] Que ha de practicarse con la inesquivable observancia de una serie de garantías, con una metodología, sea la de la *American Association of Suicidology* (AAS), el español "Modelo de Autopsia Psicológica Integrado (MAPI)" que se está tratando de adaptar al ámbito laboral (MAPI-L) según manifiesta Terán Villagra N. (2023), "La autopsia psicológica como herramienta de prueba en el suicidio de causa laboral", *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*, 11(3), pp. 218-219. O, por ejemplo, la metodología resultante de las conclusiones del año 2005 del análisis puesto en marcha en su día por la Dirección General de Salud francesa. Badoc R., Batt A., Bellivier F., Debout M., Delatte B. *et al*. (2008), *Autopsie psychologique: mise en oeuvre et démarches associées*, Institut national de la santé et de la recherche médicale (INSERM), p. XII. Metodología necesaria en todo caso pero sobre la que se dice existe poco consenso lo que pone ciertos límites a su valor, formulándose propuestas para su armonización Fouchault J. (2017), *op. cit.*, pp. 38 ss.

[31] La obra clásica citada al efecto es Faerberow N., Shneidman E. (1961), *The Cry for Help*, New York: McGraw-Hill.

[32] Waters S., *op. cit.*, p. 64.

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los tribunales en los que *mutatis mutandi* se observa una evolución paralela entre Francia[33] y España hacia el atemperamiento de su importancia por atender a su real presencia. En España la señera STS (Sala de lo Social, Sección 1ª) de 25 de septiembre de 2007 (Rec. Ud. núm. 5452/2005) explica de forma sucinta y clara el estado de la cuestión aún hoy en día existente en torno a la calificación del suicidio como accidente laboral, así como la evolución jurisprudencial habida hasta el momento al respecto.

3. El trascendente e inaprehensible concepto de riesgo psicosocial

Los *factores de riesgo psicosocial* en el trabajo fueron ya definidos por el Informe del Comité Mixto de la OIT y la OMS de 1984[34]. Y, pensamos, fruto de la evolución habida, mejor aún en las *Directrices básicas para la gestión de los riesgos psicosociales,* elaboradas por el español Instituto Nacional de la Seguridad y Salud en el Trabajo en el año 2022, que diferencian factores psicosociales y factores de riesgo psicosocial y que toman como base la clasificación del denominado Marco Europeo para la Gestión del Riesgo Psicosocial o *European Framework for Psychosocial Risk Management (PRI-MA-EF)*, propuesto por un consorcio en el que participan distintos institutos europeos además de la OIT y la OMS[35].

Más allá de ello la imprecisión conceptual acompaña a esta categoría sumándose a las dificultades de acotación de la figura a estudio, del suicidio "*laboral*", y dificultando el abordaje de su ordenación. Nuestro parecer al margen, la doctrina califica esta categoría como jurídicamente "*atípica*" e "*innominada*". Y precisa que en EEUU o Canadá se desconoce tal concepto genérico, haciendo referencia a sus "*especies*" más relevantes, como el estrés laboral, el acoso, la violencia, las adicciones[36].

Particularmente relevante es el *burnout* o "*síndrome del quemado*", que presenta cuatro etapas – compromiso, sobrecompromiso, frenética determinación y colapso[37] – considerado por la OMS como una patología, al

[33] Según se puede constatar en Lerouge L. (2014), "État de la recherche sur le suicide au travail en France: une perspective juridique", *Dans Travailler*, 1(31): 11-29.

[34] OIT, OMS (1984), *Factores psicosociales en el trabajo. Naturaleza, incidencia y prevención*, Informe del Comité Mixto OIT-OMS sobre Medicina del Trabajo, p. 12.

[35] Se refiere el INSST, más concretamente, a Leka S., Cox T. (2008), *European Framework for Psychosocial Risk Management (PRIMA-EF)*, Nottingham: I-WHO publications.

[36] Molina Navarrete C. (2011), "El recargo de prestaciones por infracción del deber de evaluar los riesgos psicosociales: la doctrina judicial hace 'justicia disuasoria'", *Revista Doctrinal Aranzadi Social*, 22, pp. 2-3.

[37] Debout M., Delgènes J.C. (2020), *op. cit.*, pp. 107-113.

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incluirla en su Manual de Clasificación Internacional de Enfermedades (CIE-11) como resultado de un estrés crónico. Y también es muy importante el acoso, acreditado que las personas que padecen *bullying* en el trabajo tienen un mayor riesgo de ideación suicida y comportamiento suicida[38]. Mención más extensa y autónoma merece, por su trascendencia y también mayor novedad, el denominado *acoso moral institucional* consagrado en la mundialmente conocida – y recurrida – Sentencia "France Télécom", de 20 de diciembre de 2019, de la 31 Chambre Correctionnelle del Tribunal de Grande Instance de Paris. Empresa, France Télécom[39]. Acoso moral institucional que consiste en la repetición de acciones "*que tengan por objeto o efecto el deterioro de sus condiciones de trabajo y que pueda vulnerar sus derechos y dignidad, o perjudicar su salud fisico o mental o comprometer su futuro profesional*"[40].

Riesgos que han de ser objeto de una evaluación de riesgos sustantiva – no de manera meramente formal – objeto de evaluación, como se evidencia en la SAN 9/2014, de 14 de mayo, confirmada por la STS de 16 de febrero de 2016, Rec. 250/2014. Pronunciamiento analizado por cualificada doctrina que recuerda, por cierto, que los métodos de evaluación de riesgos psicosociales más utilizados en España – ISTAS21 y F-Psico – no se refieren al suicidio de forma clara y directa[41].

La atención a estos riesgos psicosociales se ha acentuado enormemente en los últimos tiempos. En el plano internacional, contamos con carácter general con la Norma ISO 45003[42] y específicamente con el Convenio OIT n. 190 de 2019, sobre la violencia y acoso en el trabajo y su R.206, que confieren una especial importancia a esta materia. En el ámbito europeo, referencia general es la atención prestada por el Marco estratégico de la UE en materia de salud y seguridad en el trabajo 2021-2027, mientras que las específicas las encontramos, por ejemplo, en los Acuerdos sobre estrés laboral (2004) y acoso y violencia en el trabajo (2007).

[38] Nielsen M.B., Nielsen G.H., Notalaers G., Einersen S. (2015), "Workplace bullying and suicidal ideation: A 3-way longitudinal Norwegian study", *American Journal of Public Health*, 105(11): e23-e28.

[39] Waters S., *op. cit.*, pp. 130 ss.

[40] Lerouge L. (2021), "Le jugement France Télécom: contribution à l'étude de la démonstration juridique fondant l'incrimination pénale de 'harcèlement moral institutionnel'", *Travailler*, 2(46): 39-55.

[41] Olarte Encabo S. (2023), "Trabajo, salud mental y suicidio: criterios técnicos para su consideración laboral", *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*, 11(3): 57-58.

[42] Norma ISO 45003 "Gestión de la seguridad y salud en el trabajo. Seguridad y salud psicológicas en el trabajo. Directrices para la gestión de los riesgos psicosociales". Disponible en *www.une.org/*.

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En el ámbito estatal, algunos ordenamientos como el belga y, en especial, los países nórdicos (Dinamarca, Suecia Noruega, Finlandia e Islandia) "*han liderado el reconocimiento de los riesgos psicosociales y los problemas de salud mental vinculados al trabajo, a través del desarrollo de leyes sobre el medio ambiente de trabajo, instauradas desde fines de la década del 70 hasta la fecha*"[43]. En otros, como España, contamos, desprovistos de naturaleza normativa, con el *Criterio Técnico ITSS 104/2021* aborda las actuaciones de control de la gestión preventiva de los riesgos psicosociales y las mencionadas *Directrices básicas para la gestión de los riesgos psicosociales*.

Pero estimamos que, pese a esta atención, la falta de una adecuada delimitación conceptual del riesgo psicosocial, no de sus concreciones, y su correcta evaluación, permanecen. Con ello la posibilidad de prevenir el suicidio "*laboral*" decrece.

4. La prestación laboral expuesta a factores de riesgo conducentes al suicidio

La idea del mundo laboral que mejor define la mayor exposición al riesgo de suicidio es, posiblemente, la de precariedad. Sea esta social, motivada en lo que nos interesa, desde la óptica del Derecho del Trabajo, por el desempleo. Incrementada en las situaciones de crisis económica por la mayor inestabilidad social como punto de partida. Sea ésta estrictamente una *precariedad laboral,* que acentúa el riesgo cuando se trata de una crisis generalizada en el ámbito de la empresa que conduce a una reestructuración empresarial. El suicidio muestra, en primer lugar, una clara relación con el desempleo y sus tasas[44]. Desempleados en los que doctrina francesa[45] advierte diferentes situaciones suicidas: *retiro suicida*; *protesta por suicidio*; y *el sacrificio suicida*. El desempleo conlleva, en definitiva, un riesgo de *desocialización* que tiene consecuencias en todos los ámbitos de la vida (familia, salud, relaciones sociales) y que conduce a "*un deterioro de la salud mental que puede ir desde la ansiedad hasta la depresión o, en su forma más dramática, el suicidio*"[46].

Relación que no es exclusiva atendiendo a elementos culturales. Existen, eso sí, grados y variaciones de unas sociedades a otras en el grupo de edad

[43] Veloso, Corradi, Canales, *op. cit.*, p. 88.

[44] Un estudio en profundidad sobre esta cuestión en García Ormaza J. (2016), *Suicidio y Desempleo: Barakaldo 2003-2014*, Tesis Doctoral, Universidad del País Vasco, 2016, 152 pp.

[45] Debout M., Delgènes, J.C, *op. cit.*, pp. 115-121.

[46] Desprat D., Baudelot C., Debout M., Waters S., Lerouge L. (2020), *op. cit.*, p. 37.

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en mayor medida afectado. Así, en Japón afecta en mayor medida al grupo de edad comprendida entre 50 y 59 años[47]. Sin embargo, en Francia se apunta que el riesgo de muerte por suicidio entre los desempleados es mayor que el de la población activa particularmente entre los hombres entre 25 y 49 años y en el desempleo de larga duración[48].

Riesgo que aumenta cuando se asocia con otras adversidades[49] y que puede partir o acentuarse como consecuencia de una debilidad generalizada de toda la población motivada por crisis económicas, como se advirtiera ya en la gran crisis de 1929, particularmente en los Estados Unidos[50].

El desempleo forma parte de una precariedad social. La precariedad laboral, en el empleo, también constituye un elemento a considerar. El dictamen europeo del CESE acoge, entre las varias posibles, la definición de precariedad incluida en la Resolución del Parlamento Europeo, de 4 de julio de 2017, sobre condiciones de trabajo y empleo precario (2016/2221(INI)), como "*las formas de empleo* [que] *no cumplen las normas y leyes nacionales, internacionales y de la Unión o que no ofrecen recursos suficientes para una vida digna o una protección social adecuada*". Señala este Dictamen, entre otros interesantes datos, que el alto nivel de inseguridad laboral percibida que caracteriza el trabajo precario aumenta en la UE un 61% las posibilidades de padecer depresión, en un 77% las posibilidades de padecer ansiedad y, sobre todo, en un 51% las posibilidades de suicidio[51].

Por otra parte, dado que la organización del trabajo en la empresa está relacionada con el suicidio, en este inciden no solo cambios a nivel macro acaecidos en el modelo productivo a partir de los años 80, sino otros generalizados si bien en el contexto de la organización de una específica empresa. Cuanto más general sea el efecto de este cambio organizativo mayor, cabe pensar – aunque, por otra parte, el sentimiento de aislamiento pueda ser menor –, es su potencialidad para concluir en suicidio/s. De ahí que

[47] Asgari B., Pickar P., Garay V. (2016), "Karoshi and Karou-jisatsu in Japan: causes, statistics and prevention mechanisms", *Asia Pacific Business & Economics Perspectives*, 4(2), pp. 53, 55-56.

[48] Desprat D., Baudelot C., Debout M., Waters S., Lerouge L. (2020), *op. cit.*, p. 37.

[49] *Ibid.*, p. 38.

[50] Debout M. (2020), "Chômage et suicide: construire la prevention", in Observatoire National du Suicide (2020), *Suicide. Quels liens avec le travail et le chômage? Penser la prévention et les systèmes d'information*, IV rapport, p. 56.

[51] Comité Económico y Social Europeo (2022) *Trabajo precario y salud mental* (Dictamen exploratorio a petición de la Presidencia española) SOC/745. Ponente: José Antonio Moreno Díaz. Consulta de la Presidencia española del Consejo Carta, 27/07/2022. Base jurídica Artículo 304 del Tratado de Funcionamiento de la Unión Europea Dictamen exploratorio Sección competente Empleo, Asuntos Sociales y Ciudadanía. Aprobado en sección 03/04/2023. Aprobado en el pleno 27/04/2023 Pleno n. 578.

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decisiones en principio temporales como las reestructuraciones empresariales sean de especial importancia. Decisiones que, sin embargo, producen efectos permanentes.

Reestructuraciones relevantes, en particular, por cuanto estas implican extinciones contractuales, y resultante desempleo, y movilidades. Así, partiendo de un estudio de la relación entre el suicidio y los efectos de la reestructuración empresarial en tres empresas francesas (France Telecom/ Orange, La Poste y Renault) la profesora Sarah Waters observa que "*los suicidios tuvieron lugar en un período preciso y bien definido que siguió a la implementación de un plan de reestructuración que transformó profundamente las condiciones de trabajo y, simultáneamente, el significado y el valor del trabajo*"[52].

Alejados de la anterior óptica, centrados en la profesión, esta se contempla en relación con el suicidio desde un doble ángulo, no excluyente sino todo lo contrario. Por un lado, el de las profesiones implicadas en su evitación, caso de las sanitarias e integrantes de las fuerzas y cuerpos de seguridad del Estado. Por otro, el de las que presentan mayores tasas de suicidio, entre las que paradójicamente se encuentran aquellas en la UE. Aunque también se hable de otras como agricultores o artistas[53].

Una radiografía difícil de efectuar porque, en primer lugar, precisaría disponer de una clasificación para los factores de exposición ocupacional que se relacionan de forma directa, al menos con las enfermedades mentales, que no parece exista en la mayoría de los países, pese a esfuerzos habidos, por ejemplo, en Francia[54]. Y, en segundo lugar, porque "*solo en algunas profesiones se cuantifica el número de suicidios*"[55]. Cualificada doctrina advierte, eso sí, la pluralidad de entornos sociales, y consecuentemente, sectores de actividad (hospitales, escuelas, construcción y obras públicas, industria electrónica, banca, nuevas tecnologías, departamentos de ventas de empresas multinacionales, etc.) en que estos suicidios se llevan a cabo[56].

A nivel mundial, la OMS agrupa las ocupaciones con altas tasas de suicidio por causalidad, incluyendo las siguientes: médicos, algunos trabajadores

[52] Waters S. (2020), "Suicides au travail et restructuration de l'entreprise: analyser les lettres de suicide", in Observatoire National du Suicide (2020), *Suicide. Quels liens avec le travail et le chômage ? Penser la prévention et les systèmes d'information*, IV rapport, pp. 61-68.

[53] Dumon E., Portky G. (2014), *op. cit.*, p. 10.

[54] Herrero V., Teófila M., Ruiz-Flores Bistuer M., Torres Vicente A. (2023), "Las enfermedades mentales y el suicidio. Una perspectiva médico legal desde Salud Laboral", *Academic Journal of Health Sciences*, 38(6), p. 40.

[55] Baudelot C. (2020), *op. cit.*, p. 47.

[56] Dejours C., Bègue F. (2009), *op. cit.*, pp. 8-11.

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químicos y farmaceutas (debido en parte a la mayor disponibilidad de químicos y drogas letales); abogados, maestros, consejeros y secretarios (debido en parte a la mayor prevalencia de depresión en estos grupos), agricultores (que tienen altas tasas de depresión, ambientes de trabajo peligrosos, estrés laboral debido a presiones económicas y aislamiento social, acceso a grandes cantidades de pesticidas y acceso limitado a los servicios de emergencia) y algunos oficiales de policía (tales como aquellos que están jubilados o que sufren los efectos de trauma psicológico)[57].

Analizando la razón de estas altas tasas, que afectan paradójicamente a empleados públicos protegidos por la inseparabilidad del servicio o análoga garantía, alejados de cierta precariedad, se apunta hacia la dificultad de conciliar la vida personal y familiar con la laboral y la promoción en ésta; el más fácil acceso a medios letales (armas incendio, medicación, etc.) para agentes de policía y profesiones médicas y paramédicas; la fuerte implicación personal demandada; la pertenencia a un colectivo particularmente vulnerable; la condición de superviviente del suicidio; o la soledad propia del ejercicio de la profesión. Un aislamiento social distintamente gestionado por hombres y mujeres, trascendente además por la correlación muy significativa entre suicidio y crisis familiar[58] y por la galopante digitalización y la acentuación de esta necesaria falta de comunicación presencial que crece, además, al compás del teletrabajo.

Para estas profesiones con alta tasa de suicidio se demanda "*un nuevo enfoque de sus condiciones de trabajo, que a menudo provocan un riesgo de fragilidad psicológica*", un enfoque conjunto orientado a entender su realidad profesional y a "*comprender lo que es común en sus respectivos trabajos y, por lo tanto, a tomar medidas globales que contribuyan a su calidad de vida en el trabajo*". Un enfoque que evite vacíos provocados por la estanqueidad de estos compartimentos ya que "*con demasiada frecuencia, las políticas de prevención se elaboran en silos*" en los que el programa de prevención de un cuerpo ministerial no se extiende en sus recomendaciones a otros que pueden presentar similitudes (como del personal de las Fuerzas Armadas a la policía)[59].

5. Sobre la regulación del suicidio vinculado al trabajo

El abordaje normativo del suicidio vinculado al trabajo puede ser acometido desde un plano general, abordando el suicidio en general. O

[57] Departamento de Salud Mental y Abuso de Sustancias OMS (2006), *op. cit.*, pp. 13-14.
[58] Dagenais D. (2007), *op. cit.*, pp. 16-19.
[59] Debout M., Delgènes J.C. (2020), *op. cit.*, pp. 151-153.

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desde un plano específico que atienda a su vinculación con el trabajo. No excluyentes. Y desde distintas fuentes, normativas o no.

La realidad europea no parece haya sido proclive a atender normativamente al suicidio "*laboral*" con la misma intensidad, y especificidad, con la que lo hace Japón. Sin olvidar referencias generales como la francesa Ley n° 806-2004 *relative à la politique de santé publique,* de 9 de agosto, que incluyó además entre sus objetivos plurianuales la reducción del 20% del suicidio[60].

En Japón se diferencia el *Karoshi* o "*muerte por exceso de trabajo*", en entornos laborales muy exigentes, por razones de producción y productividad; el *Karo-jisatsu,* resultado de "*una combinación de dolencias físicas y psicológicas como el incumplimiento de las expectativas del empleador, el aumento de la responsabilidad laboral o el trabajo relacionado con el estrés, que desembocan en el suicidio por exceso de trabajo*"[61]; y el *karo-jikoshi* (como en el célebre caso Green Display) o muerte por accidentes ocasionados por el exceso de trabajo[62].

El *karoshi* se observa por primera vez en el año 1969, si bien se conceptúa como tal a finales de los años 70[63]. La doctrina explica el *karoshi,* y el desbordado modelo de "*productividad competitiva*" que lo ha generado. Y trata de elaborar un modelo biopsicosocial que integre todo tipo de factores, de los cuales los exógenos (culturales, climáticos, geográficos, etc.) parecen determinar la diferencia – y mayor gravedad de la situación – de Japón y el Este Asiático respecto de otras realidades[64]. En particular, en Japón, el cultural, habiéndose expresado que esta situación japonesa hunde sus raíces en un tránsito entre la "*have generation*" y la "*do o workaholic generation*", primera en sufrir *Karoshi* y *Karo-jisatsu*, y consiguiente tránsito del débito hacia el Estado hacia el débito hacia la empresa, y entrega a ésta como forma de promoción en su seno.

En el año 2002 el Ministerio de Salud, Trabajo y Bienestar de Japón puso en marcha el primer programa integral de prevención del deterioro de la

[60] Badoc R., Batt A., Bellivier F., Debout M., Delatte B. *et al*. (2008), *op. cit.*, p. XI.

[61] Asagari B., Pickar P., Garay V. (2016), *op. cit.*, p. 50.

[62] Punto de partida esencial en este análisis de la legislación japonesa es la publicación Lantarón Barquín D. (2022), "Apuntes sobre el suicidio del trabajador: realidades antagónicas y claves de una estrategia preventive", in Aa.Vv. (Barcelón Cobedo, Carrero Domínguez y De Soto Rioja, coordinadores), *Estudios de Derecho del Trabajo y de la Seguridad Social Homenaje al Profesor Santiago González Ortega, Monografías de Temas Laborales*, pp. 415-426.

[63] Asagari B., Pickar P., Garay V. (2016), *op. cit*., pp. 53, 55-56.

[64] Timming A.R. (2021), "Why competitive productivity sometimes goes too far: a multilevel evolutionary model of 'karoshi'", *Cross Cultural & Strategic Management*, 28(1): 96-107.

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salud causado por el exceso de trabajo. Y ante, parece, su ineficiencia, se aprobó en su día de la *Ley para Promover Medidas Preventivas contra el Karoshi y otros trastornos de la salud derivados del exceso de trabajo*, en el año 2014. La muerte de las personas trabajadoras opera como estímulo de la actuación normativa pero su enfoque se centra en la causa, el exceso de trabajo y no directamente en el suicidio que se pretende evitar. Ley que tampoco ha solventado el problema[65] y cuyo artículo 2 parece integrar el *Karou-jisatsu* como una modalidad de *Karoshi*.

Si volvemos nuestra mirada nuevamente hacia Europa y su negociación colectiva, encontramos en España un, diría, desalentador panorama. Un panorama que parte de una pobre mirada del propio nivel sectorial estatal hacia los riesgos resultantes de la organización del trabajo o del medio productivo. Y son escasísimas las referencias expresas al suicidio en nuestros convenios colectivos, claramente partícipes en su inmensa mayoría de una mirada negativa sobre esta realidad. Una mirada desde el ámbito de la Seguridad Social complementaria, bien a efectos de propiciar un tratamiento de lo que puede ser entendido como sospecha de fraude al seguro, usualmente en un periodo temporal de referencia que tiene como *dies a quo* la concertación del seguro o el inicio de la contratación laboral del trabajador[66]; bien, en los más de los casos, excluyendo directamente de la prestación originada en el Convenio los casos de suicidio o intento de suicidio del trabajador u otras conductas semejantes[67].

Una situación similar en sus orígenes a la de nuestros vecinos franceses, cuya negociación colectiva sectorial se ha comportado clásicamente, diríamos, de modo muy semejante a la española. Esto es, el suicidio se contemplaba fundamentalmente a los efectos de evitar el fraude en la percepción de prestaciones erigidas como seguridad social complementaria en el propio texto del acuerdo[68].

Francia reaccionó sin embargo ante los datos manejados por la OMS,

[65] De hecho, de abril de 2018 a marzo de 2019, el Ministerio de Salud, Trabajo y Bienestar de Japón (2019) informó de 2.697 solicitudes de indemnización de trabajadores relacionadas con el karoshi, 877 solicitudes por enfermedad cerebral y 1.820 solicitudes por enfermedad mental; el número real puede ser considerablemente mayor. Timming A.R. (2021), *op. cit.*, p. 97.

[66] Sirva, como botón de muestra, el art. 27 *Convenio colectivo del Sector Hospedaje de la Comunidad Autónoma de Madrid* (BOE, 28 de abril de 2018).

[67] Por ejemplo, el art. 39 *Convenio colectivo provincial de obradores de pastelería, confiterías y despachos de Cádiz* (BO Cádiz de 12 de febrero de 2016).

[68] Sobre la base de una búsqueda realizada en *www.legifrance.gouv.fr/*, en fecha 11 de diciembre de 2023, de la que se obtuvo un resultado de 50 convenios colectivos de empresa y de sector con referencias al suicidio.

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mostrando dicho Estado como uno de los más castigados por el suicidio. Tanto su Dirección General de Salud Pública como, en lo que ahora nos interesa, la negociación colectiva. El protagonismo de la salud laboral en la negociación colectiva se vio también favorecido por la oleada de suicidios de *France Télécom*, aprobando el Gobierno el 9 de octubre de 2009 un plan de emergencia contra los riesgos psicosociales. A resultas de ello más de 600 acuerdos o planes de acción de grandes empresas fueron aprobados. Planes que, es cierto, se han juzgado en su inmensa mayoría excesivamente formales, metodológicos, no operativos en realidad[69].

Pero, al contrario que al inicio, los convenios más modernos tienden – desde el último tramo de la década pasada aproximadamente, a exceptuar el suicidio de la exclusión de prestaciones por actos voluntarios o, lo que es lo mismo, a incluirlo expresamente a efectos de la cobertura que dispensan. En su negociación colectiva empresarial, el enfoque es más rico en matices y más ajustado, en nuestra opinión, al deseable tratamiento del suicidio. Negociación que en ocasiones se plasma, por descontado, en protocolos que parten del reconocimiento de la importancia de los riesgos psicosociales y del suicidio como consecuencia posible de la exposición a los mismos.

El tratamiento normativo del suicidio abre, en fin, numerosas interrogantes. Muchas compartidas *mutatis mutandi* con la ordenación de cualquier otra materia. ¿Es necesaria una regulación específica del suicidio laboral? ¿La regulación laboral del suicidio, caso de abordarse, ha de ser autónoma o no? Caso de no serlo, ¿cuáles serían las modificaciones normativas a operar? ¿Basta para atender debidamente esta materia un régimen convencional y la previsión de una serie de protocolos o directrices de prevención de riesgos? ¿Qué contenido habrían de tener unos u otros?

Cualificada doctrina demanda una actividad normativa modificativa para incorporar la salud mental a la conceptuación de las contingencias profesionales o favorecer, en sintonía con las presidencias de turno española y belga del Consejo de la UE o el propio *ETUI*, un tratamiento específico de los riesgos psicosociales, modificar la instrucción penal o mejorar el sistema de compensaciones económicas[70]. En nuestro parecer, los dos primeros cambios son particularmente necesarios en los modelos donde la discrecionalidad judicial en esta calificación profesional de la contingencia es menor.

[69] Lerouge L. (2020), "Risques psychosociaux et qualité de vie au travail: une articulation au prisme du droit et d'une approche éthique", *Sciences & Bonheur, Bien-être au travail: Concepts, méthodes et pluridisciplinarité*, 4: 73-85.

[70] Profundo conocedor de esta materia, véase Sánchez Pérez J. (2023), "Suicidio y trabajo: la insoportable realidad pendiente de una reforma inaplazable", *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*, 11(3): 37-40.

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Y, en todo caso, priorizamos como primera medida en adoptar la prevención a la que destinaremos el siguiente apartado. Y un mayor protagonismo por parte de la negociación colectiva al máximo nivel – sin excluir adiciones enriquecedoras de otros –, que ha de ofrecer una serie de pautas al efecto, algunas de las cuales tratamos de desvelar.

6. Planificación preventiva del suicidio vinculado al trabajo y sus claves

Es necesario en todo caso planificar la prevención, fortalecer sus niveles primarios y, en menor medida, secundario. Siendo de recordar que a los tres niveles clásicos se suma hoy en día la prevención cuaternaria, orientada a evitar la iatrogenia del sistema.

Una planificación que, en cualquier caso, ha de venir informada por el conocimiento de aquella realidad, que demanda la señalada mejora del sistema de recogida de datos, de afinarlo, coordinarlo y, en su caso completarlo.

Y que lo es en dos niveles, público, incluyendo aquí en la exposición la negociación colectiva, incluso en aquellas realidades en las que adolezca de naturaleza normativa. Y empresarial. En aquel primero, además, en la época del constitucionalismo multinivel y, más allá del mismo, según la forma de Estado como en el nuestro de las Autonomías, suelen concurrir una pluralidad de estrategias, que, naturalmente, han de actuar coordinadamente, entre ellas y con las empresariales. Y también en concordancia con otras estrategias como p.e. recursos humanos, promoción de la salud mental, prevención del acoso laboral, prevención del "*síndrome del trabajador quemado*", etc.[71].

En otras palabras, para crear una fuerza laboral mentalmente saludable se precisan, entre otros requisitos, programas de prevención y promoción apropiados[72] desde todos los ámbitos.

Estrategias que pueden ser *universales, selectivas* e *indicadas o pautadas*[73]. Estas dos últimas las que más nos interesan desde la óptica laboral. Cabría sumar una cierta *universalidad relativa* orientada a los trabajadores como clase. Y que no han de ser específicamente destinadas a la prevención del suicidio laboral, si bien resulta imprescindible que se integre la perspectiva de la seguridad y salud en el trabajo con cierta entidad y conocimiento de causa.

El PAI 2013-2020 de la OMS hace referencia a esta necesidad de

[71] Dumon E., Portky G. (2014), *op. cit.*, p. 11.
[72] Departamento de Salud Mental y Abuso de Sustancias OMS (2006), *op. cit.*, p. 16.
[73] WHO (2014), *Preventing suicide. A global imperative*, Ginebra: WHO, p. 11.

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"*elaborar y poner en práctica estrategias nacionales integrales de prevención del suicidio, prestando especial atención a los colectivos en que se haya detectado un mayor riesgo de suicidio*", refiriendo la "*promoción de iniciativas de prevención del suicidio en el lugar de trabajo*"[74]. Necesidad sentida porque en el año 2014, sólo 28 países contaban con esta estrategia – no específicamente laboral –, de todo punto deseable, si bien su inexistencia no debiera ser óbice para abordar programas específicos[75].

La española Estrategia de Salud Mental del Sistema Nacional de Salud para el periodo 2022-2026, incorpora una línea estratégica 3 destinada a la "*Prevención, detección precoz y atención a la conducta suicida*". Y ello sin olvidar que su línea estratégica 9, "*formación*", incluye en su apartado 9.3 un objetivo general consistente en "*establecer planes formativos en relación a la atención de las personas con riesgo suicida para los diferentes sectores implicados*", entre otras referencias como las relativas a los indicadores. La Estrategia, eso sí, no atiende específicamente el hecho laboral, auque incorpora la previsión de intervenir en colectivos vulnerables y habla de la necesidad de desarrollar protocolos de prevención que incluyan, entre otras, pautas relacionadas con el suicidio. Protocolos a implantar también en los lugares de trabajo. Mención, en realidad, muy pobre. En su desarrollo, el Plan de Acción de Salud Mental 2022-2024 incorpora el desarrollo de registros que permitan conocer las tentativas de suicidio y de los casos consumados que facilite identificar la población con mayor riesgo. Y también el desarrollo de acciones sobre "Salud Mental y Trabajo" orientadas a conocer el impacto de las condiciones de empleo y de trabajo en la salud mental y prevenir los riesgos psicosociales en los lugares de trabajo.

Además de las estrategias públicas o, en todo caso, supraempresariales, se precisa, atendiendo a sus recursos y capacidades, una planificación empresarial. Es decir, se precisa la adaptación de las políticas públicas y acordadas a la concreta realidad empresarial. Una adaptación para las situaciones ordinarias del trabajo en dicho específico ámbito, difrenciando los colectivos más vulnerables, y, especialmente, una adaptación para las situaciones de crisis. Atender en este ámbito el principio *de planificación de la prevención* en la empresa contemplado en el art. 6.2.g) de la Directiva marco 183/1989 integrando, entre otros elementos, "*la organización del trabajo*".

A título de ejemplo de estas actuaciones "*empresariales*" en la realidad española, la Resolución de 5 de noviembre de 2020, de la Dirección General de Policía, acuerda la publicación del Plan de Promoción de la Salud Mental

[74] OMS (2013), *op. cit.*, pp. 14, 31.
[75] WHO (2014), *op. cit.*, pp. 11-12.

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y Prevención de la Conducta Suicida en la Dirección General de Policía[76]. Adicional botón de muestra, el ATS (Sala de lo Social, Sección 1ª) de 11 de enero de 2018 (Rec. Ud. 1077/2017) expone los mecanismos y medidas de prevención existentes en la policía autonómica vasca con un área de salud mental que incluye labores de "*prevención y vigilancia de la salud psicológica*".

Una planificación que, en fin, ha de diferenciar acciones de emergencia, de cumplimiento de obligaciones legales, de información, en favor de la familia y de atención psicológica para los empleados[77]. Y que es particularmente necesaria en situaciones de crisis en la empresa[78], pudiendo contar con una unidad de crisis, cuya intervención, magistralmente descrita por Dejours y Bègue, y composición diferirá según el tamaño de la empresa y sector, privado o público, al que pertenezca y consiguientes riesgos[79].

[76] Estructurado en 14 objetivos generales siguiendo las tres clases de actividad preventiva, primaria, objetivos 1 a 6 (medidas generales o de amplio espectro destinadas a evitar que aparezca la patología); secundaria, objetivos 7 a 9 (detección del daño psicológico en sus fases iniciales de manera que la adopción de medidas adecuadas puede frenar o impedir su progresión), y terciaria, objetivos 10 a 14 (conjunto de programas e intervenciones especializadas centrados en la prestación de atención y ayuda psicosocial a funcionarios que presenten vulnerabilidad psíquica, hayan protagonizado un intento de suicidio o muestren indicios de una voluntad autolítica). Contempla medidas dirigidas al colectivo en general, y otras a determinados grupos o individuos, siguiendo lo establecido por la OMS. Objetivos para cuya consecución establece 45 medidas concretas. Entre otras situaciones, se contempla la especial vulnerabilidad tras la participación en intervenciones sensibles, la mejora en las capacidades de afrontamiento de los funcionarios que desarrollan determinadas actividades de fuerte impacto psicológico o la atención a las personas más allegadas, compañeros o familiares, ante las tentativas o ante suicidios consumados. Contempla la existencia de un Equipo de Intervención Psicosocial integrado en el Servicio de Prevención de Riesgos Laborales a nivel central, que prestará atención siguiendo un protocolo de prestación de asistencia psicológica, y con la ayuda de un teléfono de atención de 24 horas. Además, a nivel periférico se cuenta con las Unidades Básicas Sanitarias donde estuvieren implantadas (que parece es en las Jefatura Superiores de Policía con mayor población policial – Madrid, Andalucía Occidental, Andalucía Oriental, Valencia y Galicia) con el fin de realizar tareas preventivas y de apoyo en materia psicológica en su demarcación territorial, que servirán de refuerzo para el equipo de intervención psicosocial y se apoyarán en el mismo. Se crea un grupo de seguimiento del plan con al menos una reunión anual.

[77] Según se explica en detalle y con claridad en Debout M., Delgènes J.C. (2020), *op. cit.*, pp. 163-171.

[78] Dumon E., Portky G. (2014), *op. cit.*, p. 33.

[79] A raíz de la intervención de Florence Bègue, con el apoyo del Director de Recursos Humanos, ante la crítica situación acaecida en los talleres aeronáuticos de Mermot tras una reestructuración empresarial. Dejours C., Bègue F. (2009), *op. cit.*, pp. 57 ss. Trabajo que en su integridad es un referente en esta materia de la intervención en situación de crisis por suicidio.

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Los nueve principios sintetizados por Dejours y Begué reiterando que constituyen un "*marco para la intervención*", no un protocolo estándar[80], o el Informe del Proyecto Euregenas[81], aportan ideas clave para construir estrategias de prevención del suicidio centradas en el ámbito laboral[82], es decir, estrategias "selectivas", y una serie de herramientas prácticas. Unas estrategias en las que, en definitiva, confluyen elementos subjetivos, objetivos, temporales y de comunicación.

Desde el punto de vista subjetivo, destacar tres pilares que calificamos de humanos y que son los profesionales de la salud, los voluntarios de la red asociativa y las familias afectadas por un gesto suicida en su entorno[83]. Nos centraremos ahora en los profesionales de la salud.

En primer lugar, en la empresa. Es necesario favorecer recursos preventivos, humanos, orientados a fortalecer el valor de la prevención de riesgos para la salud mental en la empresa. No solo en los omnipresentes reconocimientos médicos sino mediante el incremento de psicólogos adscritos a los servicios de prevención, como sucede en nuestro país con las Unidades de Prevención de Riesgos Laborales en las FCSE[84].

Elemento subjetivo que también se aprecia en la importancia de las redes de apoyo o en la necesidad de fortalecer el entramado orgánico especializado en esta materia, bien empoderando la representación especial en materia de seguridad y salud a la que dirigirse, por ejemplo mediante la creación de representaciones usualmente territoriales que también están en el debate

[80] A saber: referencias teóricas bien dominadas para abordar el campo; la independencia del clínico en su enfoque; el trabajo de la solicitud, un paso esencial en la investigación; la formación de un "equipo de respuesta"; el "Equipo de Apoyo Externo"; el "colectivo de dirección interna"; entrevistas individuales; entrevistas grupales; la indagación como acción. Autores que concluyen que "para desbloquear los bloqueos de una organización del trabajo que se ha vuelto perjudicial para la salud, es necesario aumentar la capacidad de pensamiento de los trabajadores y su capacidad de debate en el espacio de deliberación dentro de la organización". Dejours C., Bègue F. (2009), *op. cit.*, pp. 124 ss.

[81] Que incluye las siguientes estrategias: proporcionar y mantener un ámbito laboral seguro y saludable; ampliar la oferta de apoyo psicológico, con sistemas de cribado de empleados, desarrollo de programas de atención específicos, derivación para el tratamiento y seguimiento y apoyo a la reintegración en el lugar de trabajo; educar y formar a directivos y personal, desarrollando redes de apoyo y la colaboración de recursos internos y externos; y, por último, restringir el acceso a medios letales.

[82] Destacar también otras fuentes, doctrinales, Fernández Avilés J.A., Martínez Ortíz S. (2019), "El suicidio en el trabajo como riesgo a prevenir", *Boletín informativo. Observatorio de Riesgos Psicosociales*, 31, pp. 6-7, 18-19.

[83] Debout M., Delgènes J.C. (2020), *op. cit.*, pp. 145 ss.

[84] También se adscriben armeros en todas las unidades y se pretende la garantía de que las bajas psicológicas no afecten a la carrera profesional del guardia civil Sánchez Pérez J., *op. cit.*, p. 28.

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español, y en algunos convenios colectivos, como sucede en Suecia[85]; bien mediante el belga *asesor de prevención* o la figura de la *persona de confianza*, que contribuye de alguna forma a recuperar la debilitada solidaridad de la clase trabajadora. La segunda clave, objetiva, incluye como hemos visto la evitación en lo posible en la exposición a los factores de riesgo, la adecuada evaluación de los riesgos psicosociales, y, en particular, obstaculizar el acceso a los medios utilizables al efecto atendiendo al tipo de trabajo a desempeñar. En este sentido el *PAI 2013-2030* de la OMS advierte, con carácter general, que "*pueden ser eficaces medidas como la reducción del acceso a medios para autolesionarse o suicidarse (en particular armas de fuego, plaguicidas, y acceso a medicamentos tóxicos que se puedan tomar en sobredosis)*"[86]. A los medios disponibles por su cercanía con el posible suicida o por su discurso[87]. Unos medios que presentan una cierta universalización, pero cuyo grado presenta también, por ende, relación con la actividad profesional y realidad de los sectores de actividad de un país.

Una tercera clave reside, participando de un enfoque colectivo, en el carácter *temporáneo* de la prevención. El tiempo es, como suele suceder, un elemento esencial a considerar. *En el antes, en el durante y en el después*. Tiempo relevante pues la prevención ha de abordarse "*sobre todo en una fase temprana a la hora de evaluar los riesgos que puede inducir un proyecto de reorganización del trabajo organización del trabajo, un nuevo método de evaluación del personal o una reestructuración*"[88]. Importante también por la relevancia de conocer el periodo de la denominada *crisis suicida* y sus fases, e "*identificarlo para dar la respuesta más adecuada al estado psicológico y relacional de todas las personas que están en riesgo de suicidio*". Y relevante, en tercer lugar, de alguna manera, porque contribuye a la prevención del suicidio la vigilancia de la salud tras la reincorporación al puesto de trabajo y también tras un suicidio previo pues uno de los elementos que necesariamente han de considerarse es el *suicidio mimético*, también llamado "efecto Werther". Recordar que debe procurar evitarse el primer acto de violencia suicida, su repetición y la onda expansiva del suicidio del círculo personal[89].

Un cuarto elemento clave es la comunicación y la existencia de directrices en la misma. Una comunicación sobre la interesa destacar una serie de

[85] Lerouge L., Grafteaux G. (2015), "Santé au travail, risques psychosociaux et petites entreprises", *Revue de Droit du Travail*, 11: 705-714.

[86] OMS, *op. cit.*, p. 13.

[87] Debout M., Delgènes J.C. (2020), *op. cit.*, pp. 128-129, 131-138.

[88] Lerouge L. (2014), *op. cit.*, p. 20.

[89] Debout M., Delgènes J.C. (2020), *op. cit.*, pp. 182-184. Entrecomillado, *op. cit.*, pp. 123-124.

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reflexiones evidenciadas por la doctrina científica: para evitar los suicidios por contagio se requiere el dominio del vocabulario, evitando asociar al suicidio términos a los que quepa atribuir una interpretación positiva; considerar que el empleador se ve condicionado por el ánimo de evitar responsabilidades, lo que puede conllevar un riesgo de proceder a "*una comunicación muy restrictiva y sesgada, cuando no manipuladora*"; el carácter usualmente positivo de la comunicación individual y del entorno colectivo en tanto que perjudicial de la difusión pública[90].

7. Recapitulación y conclusiones

Definido por la OMS, el suicidio ha sido clásicamente abordada por normativa penal o mercantil, no así laboral en nuestra realidad española y, posiblemente, a nivel comparado europeo. Y ello a pesar de que el descenso en el número de suicidios no oculta su sostenida trascendencia, cuantitativa y cualitativa.

La dificultad de visibilizar el suicidio, más el suicidio vinculado al trabajo, puede explicarlo. En particular si consideramos que una adecuada política preventiva demandaría el afloramiento estadístico no solo del suicidio consumado, sino de comportamientos e ideaciones suicidas, más alejados de los registros públicos. En fin, un mejor conocimiento estadístico del suicidio, y del suicidio vinculado al trabajo, en todo el mundo conceptual reflejado en la CIE-11 es necesario.

La aceptación del suicidio vinculado al trabajo, de su carácter también social, gracias a los postulados de Durhkeim, la evolución del capitalismo industrial hacia uno financiero, y el giro copernicano en la organización del trabajo en la empresa acaecido en muchos países en los años 80, constituyen un cedazo que demanda el conocimiento de esa realidad, su ordenación y su prevención.

No obstante, acreditar la causalidad laboral de específica contingencia es tarea compleja por el tratamiento de la salud mental como común y por la causalidad residual de las contingencias comunes, entre otros factores. También por una concepción de la voluntariedad y su trascendencia superada en algunos ordenamientos, pero no en otros. En particular, difícil, claro está, en los suicidios cometidos fuera del lugar de trabajo y sin existencia de indicios que apunten a la relevancia del elemento laboral.

Pese a que algunos ordenamientos se muestren impermeables a su admisión, la española doctrina de la *ocasionalidad relevante,* la francesa *falta*

[90] Debout M., Delgènes J.C. (2020), *op. cit.*, pp. 139 ss.

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inexcusable del empleador o el italiano *principio de la causalidad humana* ayudan a ello. En el proceso, la Psicodinámica del Trabajo y la autopsia psicológica favorecen la acreditación de esta causalidad.

El vínculo del suicidio con la salud mental y la relación de ésta con los riesgos psicosociales, determinan la importancia de estos. Una delimitación conceptual de esta genérica categoría, que la deslinde adecuadamente de otro tipo de riesgos, y un tratamiento normativo de los mismos parecen necesarios. Una mayor trascendencia, en general, de la salud mental en la normativa sanitaria general, en la salud pública y en la regulación de la seguridad y salud en el trabajo.

En la específica concreción de estos riesgos psicosociales el *síndrome del quemado – burnout* – por acogerse en la CIE-11, entre otras razones, y el acoso, con particular referencia al *acoso moral institucional,* concepto éste en cuya construcción y puesta en práctica se ha de avanzar en la realidad europea, merecen una especial mención.

La evaluación de estos riesgos psicosociales ha de ser sustantiva, necesidad acrecentada por la cuestionable evaluación a distancia de los riesgos de los teletrabajadores, y la actualización de los métodos y adecuación a la pequeña y mediana empresa parecen también caminos por recorrer en la atención que últimamente están suscitando. Una atención que debe repensarse en su naturaleza, normativa o no, y en su necesaria focalización de los objetivos.

La idea del mundo laboral que mejor define la mayor exposición al riesgo de suicidio es, posiblemente, la de precariedad. Sea esta social, motivada en lo que nos interesa por el desempleo. Sea ésta estrictamente una *precariedad laboral.* Acentuadas ambas, y con ellas el riesgo de suicidio, en situaciones de crisis económica general por la mayor inestabilidad social como punto de partida. Y de crisis generalizada en el ámbito de la empresa, que conduce a una reestructuración empresarial. Todas estas circunstancias y la mayor tasa de suicidio presente en ciertas profesiones (paradójicamente algunas de ellas adornadas con garantías que fortalecen la seguridad del vínculo laboral y correspondientes a profesiones que también han de atender a los suicidas) han de ser consideradas a la hora de valorar la necesidad y nivel de detalle de una política de prevención de riesgos adecuada y que específicamente contemple el suicidio laboral.

Una radiografía difícil de efectuar porque, en primer lugar, precisaría disponer de una clasificación de los factores de exposición ocupacional que se relacionan de forma directa, al menos, con las enfermedades mentales. Y que resulta necesaria partiendo del diagnóstico de estas altas tasas expuesto. Que ha de partir también de la necesidad de compartir buenas prácticas y aprendizajes.

El tratamiento normativo del suicidio abre, en fin, numerosas interrogantes.

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Una legislación específica como la japonesa no parece necesaria. Sí algunas modificaciones normativas, como permitir que las contingencias profesionales acojan la salud mental, en particular cuando su modelo es cerrado. Y también parece necesaria una mayor involucración de la negociación colectiva en la atención a los riesgos psicosociales y en la específica al suicidio vinculado al trabajo.

Es necesario en todo caso planificar la prevención, fortalecer sus niveles primarios y, en menor medida, secundario. Una planificación que, en cualquier caso, demanda la señalada mejora del sistema de recogida de datos. Y que lo es en todos los ámbitos: constitucionalismo multinivel público, incluyendo aquí en la exposición la negociación colectiva, incluso en aquellas realidades en las que adolezca de naturaleza normativa; y empresarial. Concurren, en definitiva, una pluralidad de estrategias, no solo preventivas, que, naturalmente, han de actuar coordinadamente. Y reducir sus objetivos a los esenciales y factibles.

Una planificación que, en fin, ha de diferenciar las acciones de emergencia a emprender en situaciones de "*crisis suicida*". Y en la que, en definitiva, confluyen elementos subjetivos, objetivos, temporales y de comunicación que han de ser estructurados en un marco de actuación dotado de cierta flexibilidad. Significar, en estas claves, la importancia de contar con psicólogos, la relevancia de la figura de la *persona de confianza*, la necesidad de evaluar los riesgos adecuadamente y de dificultar el acceso a los medios letales existentes en la empresa, el adecuado manejo de los tiempos (antes, durante y después de un suicidio) y la importancia de una comunicación perspicaz, responsable, especializada y selectiva.

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Governance by numbers and workers mental health

Jorge Cavalcanti Boucinhas Filho[1]

1. Introduction

Among Brazilian psychiatrists, psychologists, writers, and artists, Depression is widely regarded as the malady of the 20th century, despite the fact that the 20th century also witnessed the emergence of AIDS, the Spanish flu, Ebola, and many other diseases. This designation reflects the increasing prevalence of depression and its significant impact on individuals' quality of life. The notion conveyed by this term is that, amidst technological advancements, urbanization, and social changes, depression has become an increasingly common mental health condition.

However, it is important to clarify that depression and other mental disorders are not exclusive to a specific century and did not emerge recently. They affect individuals across all eras and cultures. The term "*malady of the century*" was merely a poetic way of expressing this reality and drawing attention to the importance of mental health.

Mental disorders have been recorded and described since ancient times in various cultures. In the past, many societies firmly believed that mental disorders were caused by demons and malevolent spirits. Greeks, Romans, Babylonians, Chinese, and Egyptians associated depression with demonic possession and evil forces. Consequently, treatments often involved beatings, physical restraint, and even starvation in an attempt to expel the perceived demons. Fortunately, understanding of mental disorders has evolved significantly over time, leading to more refined treatment approaches.

Mental illnesses impact diverse aspects of human life. Education, work, emotional relationships, and social interactions are all influenced by manifestations of mental disorders. Work is no exception to this phenomenon.

While it is indisputable that psychosocial issues hinder job performance,

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it is equally true that the workplace itself can also be a cause of psychosocial disorders. Identifying when such a situation occurs has been a challenge for medical professionals, legal practitioners, psychologists, and social workers.

Occupational mental disorders do not manifest visible signs like typical work-related accidents that result in physical injuries, which alone makes diagnosis significantly more complex. Mental disorders can have multiple causes and contributing factors, further complicating the determination that the employment relationship was the sole and exclusive cause of these disorders. Genetic predisposition may influence the development of mental disorders, as certain genes can increase susceptibility to psychiatric conditions. Physical factors, such as brain imbalances, can also contribute to mental illnesses. For example, neurotransmitter imbalances can affect mood and behavior. Trauma, chronic stress, negative thought patterns, and emotional experiences can trigger the onset of mental illnesses. Finally, though not less significant, the environment we live in, including social, cultural, and economic factors, can also play a crucial role in the emergence of these disorders. Stressful lifestyles, inadequate working conditions, and dietary habits can affect mental health.

Therefore, this study cannot present a categorical assertion that the use of numbers as a managerial strategy is a direct cause of the increase in work-related mental disorders. Instead, the objective of this essay is to develop the hypothesis that the management approach known as "governance by numbers" contributes to the rise in work-related mental health issues.

2. From Typical Work Accidents to Work-Related Mental Disorders

As society transitions towards a more knowledge and technology-based economy, there is a noticeable shift from physical risks to psychosocial risks.

During the First Industrial Revolution, marked by James Watt's invention of the steam engine and its application in textile production, workers were frequently exposed to dangerous conditions, unprotected machinery, and long working hours, which led to typical work accidents such as machine injuries and other physical hazards. In this historical context, the causes of work-related absences were closely associated with minor distractions, often caused by fatigue from grueling work schedules, resulting in burns, amputations, disabilities, and, in the worst cases, fatalities.

This reality persisted through the Second Industrial Revolution, characterized by the invention and mass production of the electric generator, electric motor, and internal combustion engine, as well as advancements in

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telegraph communication and the transportation revolution through airplanes and motor vehicles. Despite notable technological advancements separating this era from the First Industrial Revolution, typical work accidents remained the primary concern of occupational health and safety policies.

The Third Industrial Revolution, known as the Technoscientific Revolution, marked by the use of the internet, satellites, biotechnology, and various other technologies, began shifting the focus of occupational health and safety from physical mutilation risks to psychosocial issues. With the increase in automation and technological advancements leading to more effective safety equipment and machinery with sensors and preventive devices, the incidence of work-related accidents causing mutilations and loss of limbs started to decline, but mental issues emerged as a factor of worries.

Although not all historians agree that a Fourth Industrial Revolution is occurring, those who do believe it began in the early 21st century, driven by smartphones, high-speed internet, renewable energy sources, and cloud information storage. In this historical moment, all evidence suggests that the focus on psychosocial issues must be even greater.

The World Health Organization's World Mental Health Report, published in June 2022, demonstrated that in 2019, before the Covid-19 pandemic, one billion people lived with mental disorders, and 15% of working-age adults experienced some form of mental disorder.

3. Data Showing an Increase in Work-Related Mental Health Disorders

In 2021, the Brazilian Labor Justice system reported that Work-Related Mental Disorders (WRMDs) are the third leading cause of work absences and medical leaves[2]. The Occupational Safety and Health Observatory (*Observatório de Segurança e Saúde do Trabalho*)[3], a platform monitoring work absences in Brazil using various public databases, found that over 13,000 Brazilians received social security benefits for mental, behavioral, and neurological conditions. When combined with musculoskeletal disorders, mental disorders could be considered the second leading cause of work absences in the country. The trend is upward; in Brazil, the number of

[2] Transtornos mentais são a terceira maior causa de afastamento do trabalho no Brasil. Retrieved July, 15, 2024, text available at: *www.trt13.jus.br/informe-se/noticias/transtornos-mentais-sao-a-terceira-maior-causa-de-afastamento-do-trabalho-no-brasil*.

[3] This observatory can be studied in the text available at: : *smartlabbr.org/sst/localidade/0?dimensao=frequenciaAfastamentos*.

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absences due to mental disorders increased by more than 50% from 2015, when 170,830 workers were absent due to depression, anxiety, and other mental disorders, to 2020, when this number rose to 289,677[4].

In its 342nd Ordinary Meeting, the National Health Council presented alarming data on how anxiety, stress, and suicide are affecting Brazil's economically active population. The meeting underscored the urgency of developing public policies for mental health that address the stigma of psychological suffering in the workplace[5].

The 2019 National Health Survey (PNS) conducted by the Brazilian Institute of Geography and Statistics (IBGE) reported that 10.2% of individuals aged 18 and older were diagnosed with depression. Data from the death registration system indicates that suicide rates are rising exponentially, with work-related illness being a notable factor: in the same year, there were 13,000 reported suicides in the country, nearly 12,000 of which were among individuals aged 14 to 65, with 10,000 cases occurring among working individuals. Of these suicides, 77% were among men[6].

4. What should we understand by "governance by numbers"?

According to the great professor and jurist Alain Supiot (2020), "governance by numbers" refers to a shift from traditional governance through laws to a model where governance is driven by quantification and numerical objectives. In his opinion in the last few decades the organization of human action has become increasingly governed by numbers and quantification than law and, due to that, the main function of constitutional orders has changed from government to governance.

Since the aim of this work is not to discuss general theory of the state nor is it a study of constitutional law, I will proceed with the premise that there is currently an overemphasis on numbers, in order to demonstrate that this overemphasis is also changing the way people are managed.

[4] Em 5 anos, número de afastamentos por transtornos mentais cresce mais de 50%. Retrieved July, 15, 2024, text available at: *www.cut.org.br/noticia/em-5-anos-numero-de-afastamentos-por-transtornos-mentais-cresce-mais-de-50-7fe5*.

[5] Sofrimento psíquico no ambiente de trabalho: pesquisadoras apontam situação epidêmica na Saúde Mental no Brasil. Retrieved July 15, 2024: text available at:*conselho.saude.gov.br/ultimas-noticias-cns/3001-sofrimento-psiquico.*

[6] The Whole Brazilian National Health Survey can be downloaded in the site of the Brazilian's Institute of Geography and Statistics (IBGE) on the world wide web, text available at: *biblioteca.ibge.gov.br/index.php/biblioteca-catalogo?view=detalhes&id=210758*.

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4.1. The First Major Overemphasis on Numbers: Performance Targets for Workers

The first major hypertrophy in the use of numerical metrics emerged with the imposition of performance targets on workers. What we refer to as performance targets are objectives to be achieved over a specific period, whether in sales or in the production of units of a given product, as a means of ensuring a portion of remuneration, a bonus or reward, or simply to maintain one's employment.

These performance targets are not a creation of large corporations but rather an adaptation by them of practices originally from the sports arena. Coaches, especially in individual sports such as swimming and athletics, would track their athletes' performance to ensure that once a proposed goal was achieved, a new and more challenging one would be set. This strategy of establishing successive challenges was employed to ensure continuous improvement in athletes' performance.

In Brazil, the private sector adopted this strategy by setting a slightly higher target for employees who met the goal for the current month, thus creating a continuous performance improvement cycle.

However, when some employers excessively increased performance targets to the point of setting unattainable goals and threatened workers with various forms of detriment, dismissal, or significant reductions in their remuneration, for instance, by linking the failure to meet the target to the threat of dismissal or loss of a significant portion of their pay, placing workers in a position of potential emotional harm, Brazilian courts recognized such situations as instances of moral harassment.

At the turn of the 20th century into the 21st century, especially following certain administrative reforms and the increasingly frequent use of statistics for evaluating the performance of public servants, performance targets became notably common in the Brazilian public sector, including within the Judiciary. For instance, the National Justice Council (Conselho Nacional de Justiça) began imposing performance targets on Brazilian judges and courts concerning the number of cases adjudicated and resolved through settlements. In terms of effectiveness in judicial administration, this measure has been highly successful. The annual numerical reports reveal an ever-increasing efficiency of the judicial bodies.

However, it is crucial to reflect on what lies behind the coldness of numbers. The significant risk of overemphasizing numerical results is the tendency to treat dissimilar situations as if they were equivalent. In the statistical analyses conducted by the National Justice Council, for example, the adjudication of a labor claim by a young worker who worked only three months for a company

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and was denied ten hours of overtime would be numerically equivalent to that of a worker who was unjustly and discriminatorily dismissed after thirty-three years of dedicated service, who also faced a false claim of just cause that prevented him from receiving severance pay and accessing unemployment benefits. Similarly, it would hold the same numerical weight as the case of an employee who was sexually harassed by a superior, whose relationship ended as her partner failed to acknowledge her victimization, leading to the development of depression and panic disorder as a result of this convergence of misfortunes.

In Portuguese, some critics of the hypertrophy of numbers, especially their excessive use as a form of management, humorously but also critically repeat the saying that "*statistics is the art of torturing numbers until they confess*" and that "*statistics show almost everything but hide the main thing*". However, the truth is that good statistical analyses cannot be disregarded. For instance, in proving cases of what is known as discrimination by statistical disparity, they are essential. Quantitative research, a crucial science in contemporary times, should not be discredited, but rather its limitations should be acknowledged, and one should be aware that in some cases, very relevant aspects of the employment relationship cannot be translated into numbers.

To substantiate this assertion, I will employ a bit of storytelling. I will share with you two significant experiences from the beginning of my professional life as a bank employee. My first job was at Banco do Brasil, a bicentennial public institution of my country. At one of the two agencies where I worked, I met the colleague I admired most as a banker. His name was Bismarck. We were at the turn of the century, I believe in 1999. In my view as a young person about to turn twenty, Bismarck was the most important figure in the agency. The bank still used a computerized system reliant on commands, similar to the old Microsoft DOS. There were so many commands that there was a thick book available for consultation, either within the system itself or as a specially printed version meant to facilitate our tasks. Naturally, we all memorized the most frequently used commands. However, when we needed to perform something different, we had three options: search the saved instructions in the system, look up the command in the thick printed book, or call Bismarck, who, with his prodigious memory, knew all commands by heart. The latter option was always the easiest, and he always assisted us with great courtesy and kindness.

Despite our reliance on him, he was consistently overlooked for internal managerial positions, which caused me a great sense of injustice. I felt enraged by what I saw happening to him. On one occasion, I asked him if he knew why this was happening. I have never forgotten his response: "*My*

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dear friend, the bank only sees us as numbers. They will never promote me just because I have a good heart and I help my colleagues. To be promoted, I would need to have good sales numbers, and I am not a good salesperson". That statement has echoed in my mind ever since. Our employer saw us only as numbers.

Because of that conversation and other personal circumstances, I decided to leave Banco do Brasil some time later. On my last day at work, I said goodbye to all my colleagues, both the bank employees and those formally contracted by service companies. I was deeply moved when I was embraced by the oldest and longest-serving worker at that workplace, the janitor named Severino. He was not an employee of Banco do Brasil but of a company contracted to provide cleaning services. He had been cleaning the same bank branch for over thirty years, even though his employment records showed that he had worked for five different employers. All these employers were companies hired by Banco do Brasil to clean the same agency.

I was moved when saying goodbye to him because he thanked me for greeting him every day upon arriving and leaving the agency. I did not understand why he was grateful until he explained that, in his more than thirty years at that workplace, I was the only one who had greeted him every day.

That statement changed my life. Until that moment, I had greeted people naturally. From then on, I made it a point to do so because these small gestures, which cost us nothing, can mean a lot to those who receive them.

And this type of human relationship, of empathy, is something that is unlikely to be quantified in numbers. This is what governance by numbers deprives us of – the very essence of what makes us human and distinguishes us from robots. Since the first one appeared, it has been very adept at handling numbers. The first computers and robots were built based on binary codes. But the comfort we feel from a hug, a smile, or a compliment will never be fully captured by a numerical code.

In Portuguese, some critics of the hypertrophy of numbers, especially their excessive use as a form of management, humorously but also critically state that "*statistics is the art of torturing numbers until they confess*" and that "*statistics show almost everything but hide the main thing*". The truth is that good statistical analyses are indispensable and cannot be dismissed. For example, in legal contexts such as proving instances of statistical disparity discrimination, they are crucial. Quantitative research, an important field in modern times, should not be disregarded, but one must acknowledge its limitations and recognize that certain critical aspects of the employment relationship cannot always be quantified.

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5. The Second Major Form of Overemphasis on Numbers: The Use of Algorithms for Task Distribution, Performance Monitoring, and Punishment

I will not delve into the legal framework of platform-based work. This is a subject of such complexity that it requires a dedicated and exclusive study. However, what I wish to share with you is the perception that digital platform work dehumanizes us by replacing human beings with algorithms. As scholars of labor law and employment relations, we have always been deeply concerned with how technological advancements replace subordinate workers. Over the past few decades, we have witnessed the disappearance of many job categories and the destruction of numerous job positions, while new ones emerge as a consequence of what Joseph Schumpeter referred to as the "creative destruction" of capitalism. For Schumpeter, creative destruction occurs whenever innovations, such as new products or production methods, emerge and thrive, causing significant changes in the economy.

When analyzing digital platform work as a phenomenon, while striving not to yet express my concerns about worker protection, the first thing that strikes me is that it consists of a wide range of new business models built on the premise that it is possible to utilize someone's labor without the need to form an employment contract. Ride-sharing apps, food and product delivery services – just to name a few well-known examples – have invested heavily in hiring legal experts and consultants to develop a model that allows them to engage labor without formalizing an employment relationship and incurring its associated costs.

The second thing that has always caught my attention is that the way these platforms attempt to convince everyone that this is a non-subordinate work relationship is by eliminating the figure of the boss or hierarchical superior. Platforms do not try to evade employment costs by eliminating the worker, but rather by substituting the boss with algorithms.

If we analyze a ride-sharing app, we will see that the managerial power previously exercised directly by the employer or by legal representatives and sometimes delegated to managers and directors – whom we can refer to here as "*supervisors*" – is now exercised by artificial intelligence, or an algorithm. One of the primary tasks of an employer or supervisor is to assign tasks to subordinates deemed most capable of performing that function. In a ride-sharing app, this task is performed by the algorithm, which matches the spatial location data and driver ratings to determine who will be offered the ride first. After assigning the task using criteria of opportunity (geographic location) and meritocracy (best rating), the

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artificial intelligence then monitors whether the task is being properly performed through tracking the route and time and assessing the driver's rating from the customer.

Recently, I booked a ride to the airport through a ride-sharing app, and shortly after we left home, my wife realized that we had forgotten our baby's stroller. We asked the driver to return to our house to retrieve the forgotten item, and the driver informed us that he would not wait for us but would prefer to leave and accept another ride, suggesting that we book a new car. As soon as we exited the car, I received a message asking if something had happened. Upon noticing that we had returned to the starting point and that the ride had been significantly shorter than planned, the artificial intelligence suspected that something was wrong with the driver, whom it refers to as a "*partner*". In other words, there was oversight being conducted, but it was not by a human being.

Finally, it must be acknowledged that the punitive power once exercised by the employer or supervisor is also now performed by algorithms. When a driver is repeatedly poorly rated, cancels many rides, or fails to log into the app, they are demoted in the ride preference queue and are eventually punished by being unable to receive ride requests for a certain period. Just as in the traditional employment relationship, a worker criticized by customers or who performed poorly might have been warned or relegated to less desirable tasks, in the digital platform context, the algorithm applies similar forms of discipline.

The hypothesis I propose for reflection in this work is that this form of control over labor – whether we consider it as independent work, partnership, or an employment relationship – based exclusively on numerical analysis is cold, inhumane, and impersonal, and this may contribute to an increased incidence of work-related mental disorders.

A positive review from a customer might make a driver happy, but it is unlikely to evoke the same sense of satisfaction that one might feel from receiving a heartfelt compliment from a supervisor in person. The joy of receiving many good ride requests throughout the day will never match the satisfaction of feeling trusted by an employer who entrusts you with the most challenging tasks and rejoices in maintaining a good reputation with them.

Conversely, a silent reduction in work opportunities due to poor evaluations – without the chance to explain them – certainly has a much more devastating effect on workers' emotional well-being than a conversation where the employer demands more effort and dedication while promising another chance, even if it is the last one.

The importance of personal interaction, even in the most delicate moments of the employment relationship, was masterfully explored in the

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American film *Up in the Air*[7]. Various scenes in the film demonstrate how a touch of humanity in communicating the end of an employment relationship can greatly ease the pain of receiving such unwelcome news.

6. Conclusion

In establishing its Comprehensive Mental Health Action Plan 2013-2030, endorsed by all 194 of its Member States, the World Health Organization set out what it referred to as three pathways for transformation. These pathways are: (i) to deepen the value and commitment we place on mental health; (ii) to reorganize the environments that influence mental health, including homes, communities, schools, workplaces, and health services; and (iii) to strengthen mental health care by changing the places, modalities, and people involved in delivering and receiving services. As we can see, the preservation of global mental health is a collective endeavor that involves not only a specific sector of society or a professional category.

Just as mental disorders can have diverse origins and triggering factors, the policies developed to prevent them must be multidisciplinary. To prevent psychosocial issues from becoming a major affliction of humanity in our times, it is essential that all stakeholders contribute within their areas of expertise. Nutritionists should explore how contemporary diets, laden with pesticides and chemicals, may contribute to the exacerbation of mental health issues. Physicians should investigate how genetic, physical, and biochemical factors may play a role in increasing the incidence of mental health problems. Psychologists can contribute by examining how trauma, chronic stress, negative thinking, and unpleasant experiences may trigger mental health issues.

What this work proposes is that we, as labor law scholars, begin to analyze to what extent people management practices based on numbers, which increasingly neglect "*soft skills*" and dehumanize various forms of service provision, may also be a triggering factor for emotional problems.

If the hypothesis that these new forms of management contribute to the growth of mental health issues is confirmed, we must start to consider measures to restore humanity to service provision and prevent number-based management from stripping us of what makes us human.

[7] *Up in the Air*: Directed by Jason Reitman. With George Clooney, Vera Farmiga, Anna Kendrick, Jason Bateman.

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Part 5
Digitalization, AI and employment

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Towards an international standard for regulating algorithmic management: a blueprint

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This is a reprint of a paper initially prepared for presentation at the "8th Conference of the Regulating for Decent Work Network" on Ensuring decent work in times of uncertainty at the International Labour Office Geneva, Switzerland 10-12 July 2023

Abstract

Algorithmic management systems have been deployed all over the economy in recent years: software on knowledge workers' computers monitor their keystrokes and mouse movements, take screenshots of their screens, and take photos through their webcams; the movements of in-person workers are monitored with fine-grained location tracking; and workers in warehouses and logistics face algorithmically-enforced work quotas. Algorithmic systems have also become crucial to hiring: industry research suggests over 95% of the Fortune 500 have adopted automated systems that rank applicants by scanning their CVs; some companies have also adopted machine learning-based video interview software. While these technologies can help employers process large quantities of information, they are new and in some cases flawed. They may therefore not always deliver the hoped-for benefits; and they also pose serious risks.

We report three main findings from a two-year interdisciplinary review

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of literature on algorithmic management in economics, policy, and law, including investigative journalism and legislative developments. First, algorithmic management poses significant new risks to workers, managers, employers, decent work, and labour market institutions. We identify the dynamics producing these risks: increased privacy harms; widening of information asymmetries; and loss of human agency – especially, but not only, managerial agency – in workplace decision-making. Second, existing regulations do not adequately address these risks, even in jurisdictions with robust protections. Third, a range of policies can serve as interlocking elements of a regulatory strategy for addressing these risks, including: prohibitions on specific practices, including automated termination; restriction of legal bases; individual and collective notice obligations and data access rights; rights to explanation and human intervention; and impact assessment and information and consultation obligations.

These findings raise the question of whether an international labour standard on workplace data processing and algorithmic management may be desirable. The paper outlines some elements of a research agenda for answering this question.

Keywords: algorithmic management, artificial intelligence, fundamental rights, international labour standards, workplace data processing and privacy.

1. Introduction[2]

As the first wave of lockdowns swept the globe, the least fortunate workers simply lost their jobs (see e.g. ILO, 2021, pp. 11-12). Of those who kept them, many "knowledge workers" were permitted to work from home (see e.g. ILO, 2021, p. 97), while many "essential workers" – e.g., in healthcare, food production, and public services – had to continue working in person (see e.g. ILO, 2021, pp. 93-95). Both groups, however, experienced rapid growth in fine-grained monitoring and "algorithmic management" technologies (see e.g. Mateescu, Nguyen, 2019). Employers installed software to monitor remote workers' keystrokes and mouse movements, take screenshots of their screens, and take photos through their webcams (see e.g. Cyphers, Gullo, 2020; Corbyn, 2022; Tweedie, Wild, 2022). Some of these systems were so disruptive that a market in "mouse mover" devices developed to

[2] This paper draws extensively on materials previously published by the same authors; in particular, some material in Part 5 of this paper is reproduced verbatim from a previous publication (Adams-Prassl *et al*., 2023).

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let remote workers leave their computers to take bathroom breaks (Cole, 2021). In-person employers also intensified surveillance, deploying finer-grained worker location-tracking and work quotas – in some cases even firing workers algorithmically, with no action by human managers (Lecher, 2019). Some workers reported being unable to take bathroom breaks because of algorithmically-increasing quotas (Bloodworth, 2018; Liao, 2018). Algorithmic systems have also been used in hiring. Industry research suggests over 95% of the Fortune 500 have adopted automated systems that rank applicants by scanning their CVs (Hu, 2019); some companies have also adopted machine learning-based video interview software (Chen, 2019).

The efficiency pressures on employers make it easy to understand the motivations for adopting these technologies. But these technologies are new and largely untested. Regulation, technical standards, and best practices for their design and use are just starting to be developed. Technical research has revealed that many of these systems are error-prone or even fundamentally flawed. Wall and Schellmann (2021), for example, found that machine learning-based video interview systems they tested scored an interviewee high on English language proficiency – when she was speaking German. Similarly, Rhea *et al*. (2022) found that machine learning-based hiring systems claiming to provide personality analyses of applicants provided different scores based on the file formats of applicants' CVs. As a result of these and other deficiencies, algorithmic management systems may not deliver the hoped-for benefits. And they pose risks – to line workers, managers, and employers.

In some jurisdictions, existing regulations, such as discrimination law, data protection law, labour law, and occupational safety and health (OSH) law, address some of the risks. However, even in jurisdictions in which these laws are well-developed, such as the European Union, not all of them are well-enforced[3]. The 'patchwork' of regulation creates complexity and legal uncertainty for workers, worker representatives, employers, technology vendors, and regulators – and some risks remain largely unaddressed. Globally, the regulatory situation varies widely across jurisdictions.

[3] Enforcement of data protection law, often considered central to effective regulation of algorithmic management because of its dependence on processing of personal data, offers an important case. Even in the EU – the jurisdiction with perhaps the most well-developed body of data protection law and the most elaborate system of enforcement – journalists, researchers, and regulators have noted significant deficiencies in enforcement, especially in cases relating to large multinational technology companies (see e.g. Massé, 2021; Bertuzzi, 2022; Lomas, 2022; Goujard, 2023). In response, the European Commission has begun the process of developing a new Regulation "further specifying procedural rules relating to the enforcement of the General Data Protection Regulation" (European Commission, 2023; see also Lomas, 2023).

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This paper reports three main findings from a two-year interdisciplinary review of literature on algorithmic management in economics, policy, and law, including investigative journalism and legislative developments. First, algorithmic management poses a range of significant new risks to workers, managers, employers, decent work, and labour market institutions. While existing literature documents these risks, our review identifies the underlying dynamics producing them: increased privacy harms; widening information asymmetries; and loss of human agency – especially managerial agency – in workplace decision-making. Second, existing regulations do not adequately address these risks. Third, a range of policies can serve as interlocking elements of a regulatory strategy for addressing these risks. These policies include prohibitions on specific practices, such as automated termination; restriction of the legal bases for workplace data processing, including the exclusion of consent as a permissible legal basis; individual and collective notice obligations and data access rights; a right to explanation of algorithmically taken or supported decisions, and a right to human intervention in the event of potentially erroneous or inappropriate decisions; and impact assessment and information and consultation obligations.

The paper proceeds as follows. Part 2 outlines the motivations for employers adopting algorithmic management systems, the benefits they offer, and the harms and risks they pose. Part 3 details the dynamics driving the significant *new* harms and risks: new privacy harms, occasioned by algorithmic management systems' need for more, more granular, more comprehensive, and more intimate data about workers and their behaviour; widening of already-existing information asymmetries – not only between employers and workers, but also between employers and technology vendors; and loss of human agency – especially, but not only, *managerial* agency – in workplace decision-making.

Part 4 reviews existing regulation applicable to algorithmic management. The bulk of this part comprises a brief case study of one jurisdiction: the European Union. In the EU, discrimination law, data protection law, labour law, and OSH law all apply to algorithmic management systems, as will the proposed Platform Work Directive and AI Act once enacted. Despite this extensive and complex regime, existing regulation fails to address the major harms and risks we identify. Following examination of the EU situation, the paper briefly assesses the broader global picture. Despite increasing legislative action around data protection and platform work, instruments regulating algorithmic management in *all* sectors of the economy are needed.

Part 5 outlines appropriate content for such an instrument. It comprises at least nine interlocking elements. First, some algorithmic management practices, such as prediction of the exercise of legal rights, should be

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prohibited. Second, specific acceptable legal bases for the use of algorithmic management systems should be established – and these should not include worker consent. Third, employers should be required to provide information to individual workers regarding the use, functioning, purposes, and potential consequences of algorithmic management systems. Fourth, employers should be required to provide similar information, as well as access to data relevant to individual decisions, to worker representatives. Fifth, automated termination should be prohibited. Sixth, a right to human review of decisions made or supported by algorithmic systems should be established. Seventh, existing "information and consultation" rights afforded to worker representatives should be extended to include decisions regarding algorithmic management systems throughout their life-cycle, including deployment, configuration, and evolution. Eighth, comprehensive impact assessment obligations should be established for employers deploying algorithmic management systems. Ninth and finally, humans exercising these rights – including workers, worker representatives, and managers – must be protected against retaliation.

Part 6 concludes with a discussion of open areas for research and tripartite action. The paper's findings raise the question of whether an international labour standard on workplace data processing and algorithmic management may be desirable. This part notes five areas where further research could help clarify appropriate options for tripartite action: technical validity of algorithmic management systems; risks to employers of algorithmic management; organisational best practices for design and deployment of algorithmic management; possible roles for technical standards; and possible roles for professional and organisational certification of developers and operators.

2. Algorithmic Management: Motivations, Benefits, Harms, and Risks

2.1. Motivations and Benefits

Given the challenges faced by organisations in the volatile economic conditions of the last few years (e.g., ILO, 2021, pp. 91-92; Golubeva, 2021), the rise in algorithmic management is understandable. Algorithmic management systems can help organisations manage and process large quantities of information. For example, industry research over the period 2015-2021 reports that when well-known companies post advertisements for open job positions, they often receive hundreds of applications (e.g., Glassdoor, 2015). Algorithmic systems can help process this large quantity of information; indeed, industry research indicates that most large companies

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now use so-called "applicant tracking systems" for this purpose (e.g., Hu, 2019). Algorithmic systems, such as the advertising features of social networking platforms, are also used by organisations to publicise open job positions to specific audiences for which they may be relevant (e.g., Karácsony *et al*., 2020; Kingsley *et al*., 2020).

Some research in computer science has attempted to distinguish between appropriate and inappropriate uses of complex algorithmic systems. Narayanan (2019) and Kapoor and Narayanan (2022), for example, note that while machine learning systems often excel in some applications, such as content identification (e.g., song identification, reverse image search, spam filtering, detection of copyrighted material), they are often poor at predicting social outcomes (e.g., job success, crime risk). Machine learning systems typically do not outperform human experts in these areas, and Kapoor and Narayanan's work suggests there may be fundamental reasons to expect this will not change much.

This distinction is a starting point for considering the kinds of organisational decisions algorithmic systems can make reliably or predictably, and potentially even improve the quality of. Consider for instance algorithmic decision-making systems in transportation and logistics. In this sector, route planning involves the precisely choreographed movement of cargo, passengers, vehicles, and personnel to meet strict delivery commitments, fleet maintenance schedules, and staffing regulations. While these requirements are extremely complex, they are mostly well-known, quantifiable, and digitisable. The decisions must be made quickly and repeatedly and admit relatively little decision-level discretion based on social or cultural context. Perhaps as a result, algorithmic systems have successfully supported complex decision-making in many areas of the transportation and logistics industry for decades (see e.g. Yu, 1998; Delling *et al*., 2009; Bast *et al*., 2016). It could reasonably be hypothesized that algorithmic decision-making can be expected to bring organizational benefits when the decisions involved have many input and/or output variables; when the relevant input data can be collected, quantified, and digitised easily and accurately; when many decisions must be made quickly and repeatedly; and when tacit or culturally or socially context-specific knowledge is of limited relevance.

2.2. The Complexity of Human Resource Decisions

In theory, algorithmic systems supporting hiring, performance evaluation and promotion, and work allocation could reduce bias and discrimination by age, gender, race or ethnicity, citizenship, socioeconomic status or

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background, and other axes of discrimination, and help organisations focus on hiring and evaluating workers only by the criteria relevant for their jobs, and on allocating tasks to those workers best suited to them (see e.g. Houser, 2019). However, hiring, performance evaluation, and work allocation – i.e., human resource decisions – are qualitatively different types of decisions than route planning decisions. The requirements in human resource decisions are complex, but they may not be well-known or easily digitisable or quanitifiable. For example, "cultural fit" and other relatively subjective factors often play an important (if contested) role in hiring and performance evaluation (e.g., Rivera, 2012; Rothman, 2013; Filipowski, 2015; Hora, 2020; Scepura, 2020). In large organisations, human resource decisions may be made often, but tacit or context-specific social or cultural knowledge may also play important, and varying, roles; broadly, research in management and organisational behavior indicates that "emotional intelligence" is important to successful managerial performance (e.g., Kerr *et al*. 2006; McCleskey, 2014; see relatedly Worline, Dutton, 2017; Brennan, Rajan, 2020). These difficult-to-quantity, difficult-to-standardise, subjective or intersubjective, tacit, and/or complexly varying socially- and culturally-specific factors pose significant, but to our knowledge thus far underaddressed, challenges to achieving the goal of using algorithmic systems to reduce bias and discrimination in, and reliably improve the quality of, human resource decisions. Additionally, poor human resource decisions can have significant negative consequences for the individuals affected by them, such as job loss. As a result, the average human resource decision poses higher risks – both for affected individuals and for organisations, which may face regulatory and reputational risks – than, for example, the average route planning decision in the logistics sector.

2.3. Harms and Risks

Research and investigative journalism have documented a broad range of harms and risks associated with algorithmic systems in human resource decision-making. This section briefly outlines these phenomena. They can be divided into four rough categories: harms and risks to line workers; to managers; to organisations; and to workplace governance and labour market institutions.

Harms and risks to line workers include economic risks (e.g., job loss, loss of within-job economic opportunities), physical risks (e.g., injury due to accident or repetitive strain, illness due to stress), and psychosocial risks. These may be caused by a range of processes, which may be occasioned or exacerbated by algorithmic management systems. Harms documented in the

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literature include *loss of privacy* and *violations of legal rights to privacy and data protection*; *work intensification*; *schedule unpredictability*; *invalid or harmful hiring, work allocation, or performance evaluation systems and procedures*; and *bias and discrimination* (see e.g., Future of Privacy Forum, 2018; Citron, Solove, 2022; Bernhardt *et al*., 2023). Regarding loss of privacy, for example, some algorithmic management systems rely on techniques that are expected to produce better decisions when supplied with more data, such as machine learning. This may motivate the collection of large quantities of data about workers and their behaviour – including along previously unmonitored axes, such as the number of minutes a worker sits at their desk, the number of keystrokes they type during a workday, and health and fitness behaviour such as steps walked (e.g., Rowland, 2019; Christl, 2021). This expansion of surveillance into previously unmonitored – and in some cases deeply intimate – areas imposes a potentially medically significant psychological burden (see e.g. Akhtar, Moore, 2016; Cefaliello, Moore, Donoghue, 2023).

Harms and risks to managers and organisations (i.e., employers) are to our knowledge relatively understudied. However, a growing body of computer science research documents significant technical deficiencies in algorithmic systems being used for human resource decisions (e.g., Narayanan, 2019; Rhea *et al*., 2022; Kapoor, Narayanan, 2022). This raises questions about whether technology vendors *knowingly* or more often *unwittingly* lead managers and organisations to purchase deficient or even fundamentally flawed algorithmic decision-making systems. More broadly, harms and risks to managers may include *loss of insight into, and control over, day-to-day operations* and *erosion of trust*. Erosion of trust may occur *among* line workers under a single manager's supervision, especially in workplaces in which competitive performance evaluation systems have been deployed – or between line workers and managers, for example when line workers do not understand the reasoning for decisions being made, and lose confidence that management shares their interests. For example, research conducted by the CIPD, the UK industry association for human resource professionals, found that a majority of employees surveyed believed that "*introducing workplace monitoring would damage trust between workers and their employers*" (Houghton, Baczor, 2020).

At the organisational level, harms and risks may include *poor decision-making*, especially when the limits and flaws of algorithmic systems are unknown due to lack of transparency; *more adversarial labour-management relations*, leading to impaired organisational performance; *unexpected costs involved in addressing technical deficiencies of algorithmic systems*; and *reputational and legal (compliance) risks*. Harms and risks to workplace

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governance and labour market institutions may include *disruptions to established, mutually beneficial patterns of negotiation and bargaining*, especially through widening information asymmetries between line workers and managers, and between employers and technology vendors; and *chilling effects on the exercise of legal rights* (see e.g. Mateescu, Nguyen, 2019; Bernhardt *et al*., 2023).

3. Dynamics Driving Algorithmic Management Harms and Risks

On the basis of a detailed review of the literature across economics, policy, and law, including investigative journalism and legislative initiatives, we identify three major dynamics underlying the significant *new* harms and risks posed by algorithmic management. First, data-intensive algorithmic management systems occasion significant new *privacy harms*. Second, data-intensive algorithmic management systems widen existing *information asymmetries*, especially but not only between employers and workers. Third, algorithmic management systems reduce the scope for *human agency* in organisational decision-making – especially, but not only, *managerial* decision-making.

3.1. New Privacy Harms

As noted above (Section 2.3), data-intensive algorithmic management systems are often designed and deployed on the – sometimes implicit – theory that if they are provided with more data, they will produce better decisions. This may be especially the case when the systems are based on machine learning techniques. The promise of better decisions may therefore motivate employers to collect more, more comprehensive, and more intimate data about workers and their behaviour. Minute, intimate surveillance, especially when workers are aware of it – and when they are aware that the information it captures will be used for decision-making with significant potential impacts on their livelihood possibilities, including career development, performance evaluation, and even job loss – creates potentially medically significant stress and negatively impacts psychological well-being through the erosion of autonomy (see e.g. Bernhardt *et al*., 2023). Additionally, because of the 'compliance gaps' and 'enforcement deficits' of data protection law in the workplace (see e.g. Nogarede, 2021), even in jurisdictions such as the EU with well-developed laws 'on the books', such surveillance may constitute a violation of data protection rights – a violation of a fundamental human right and therefore an additional harm in itself: a legal harm.

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3.2. Widening Information Asymmetries

Data-intensive algorithmic management systems in particular widen already existing information asymmetries between employers and workers (Mateescu, Nguyen, 2019). A manager is likely to know more than the average co-worker about a given worker's performance record, pay, career prospects, and even interests and career aspirations, as a result of having access to the worker's 'file'. The average worker, on the other hand, has no such information about their manager beyond what the manager freely discloses. This information asymmetry already provides managers with additional bargaining power in negotiations with workers over pay, work assignments, working conditions, and other matters: if a manager knows what a worker wants and is in a position to give it to them (e.g., a recommendation for a particular assignment, or a pay raise), they can use that information to incentivise the worker to comply with requests they might otherwise prefer to decline. Some such requests may be unproblematic and even beneficial for both parties. However, the possibility affords managers with more power – above and beyond the formal decision-making power afforded them by their position – that can be used to influence negotiations over matters under social dialogue, such as pay and other working conditions. Put shortly, data-intensive algorithmic management systems may disrupt the existing balance of bargaining power between the social partners.

However, the employer-worker relationship is not the only relationship affected by information asymmetry when algorithmic management systems are introduced into the workplace. Managers responsible for purchasing and deploying algorithmic management systems may not always fully understand the capabilities – and 'non-capabilities' – of the systems they purchase. Indeed some algorithmic management systems, especially those purporting to use machine learning techniques to improve hiring and performance evaluations, have been found to have major technical failings (see e.g. Rhea *et al*., 2022). That is, there may be an information asymmetry between *vendors* of algorithmic management systems and the organisations purchasing those systems (see e.g. Calacci, Stein, 2023). Put less delicately, some vendors appear to be deceiving their customers – including customers in major firms. Whether they are doing this *knowingly and intentionally* is a more complex question than it may at first appear. Especially in startups, small technology firms, and small product units under intense time pressure to sell services, the sales teams responsible for communicating with potential customers may not have the same technical understanding as the technicians building and operating the software systems. As a result, miscommunications may occur *within the vendor firms themselves*. That is, there may be a "mutual

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information asymmetry" between sales and development teams *within* vendor firms: developers may have a better idea of what the systems they are building can and cannot do (although this also should not be overstated; developers may not be human resource experts, after all) than the salespeople responsible for communicating with customers; on the other hand, the salespeople may have a better idea of what use cases the customers intend to use the systems for, and what they hope to achieve by using them. As a result, developers may build a system for one purpose, only for customers to deploy it for a different purpose. While 'best practices' in software engineering aim to reduce this kind of miscommunication (see e.g. van Lamsweerde, 2009), small firms and teams may not have the capacity or time to follow such best practices.

3.3. Loss of Human Agency

As decisions are 'taken over' by algorithmic systems, the scope for human decision-making in organisational operations narrows. This loss of human agency has costs and risks, including the loss of deep understanding of the firm's day-to-day operations on the part of line workers and middle managers; loss of skill and confidence in decision-making, rendering the firm vulnerable to poor decisions if the algorithmic system should become unavailable or unable to make a particular decision; moral deskilling, in which human workers no longer have the skills or confidence to make decisions with potentially significant consequences for co-workers, customers, or other stakeholders; and 'maloptimisation', in which workers who know their performance will be evaluated according to quantitative, algorithmically computed metrics plan their work effort not to achieve appropriate organisational goals but to 'get a good score' on the metrics (see e.g. Nogarede, 2021).

4. Current Regulation is Complex but Inadequate

This section reviews some legislation relevant to addressing the harms and risks reviewed above and ensuring that algorithmic management systems are used in ways that yield benefits. The section has two parts. The first examines legislation in one jurisdiction – the European Union – while the second considers the global situation, including evolving approaches to regulating platform work. Overall, however, it can be said that current – and, for the most part, proposed – legislation is not adequate.

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4.1. Jurisdictional Case Study: Regulating Algorithmic Management in the European Union

We examine the EU for three reasons. First, the EU has well-developed regimes in the four main relevant areas of law: discrimination, data protection, labour, and OSH. Second, the EU's data protection instrument, the GDPR, has informed data protection laws in other jurisdictions (e.g., Erickson, 2019; Kessler, 2019). Third, at least four other pieces of already-enacted or proposed EU legislation are also relevant to algorithmic management: the already-enacted Transparent and Predictable Working Conditions Directive and Platform-to-Business Regulation (see e.g. Adams-Prassl, 2022) and the proposed Platform Work Directive and AI Act. Yet even this extensive regime does not fully address algorithmic management's risks.

4.1.1. Discrimination Law: Good Laws, But Algorithmic Systems Present Enforcement Challenges

Legal research analysing the application of existing law to algorithmic management systems finds that while these systems pose challenges to EU antidiscrimination law, most of these challenges are not substantively novel. Rather, they fall largely into one of two categories: variations on long-standing problems in antidiscrimination law; or matters of judicial interpretation. Algorithmic decision-making systems do, however, present novel challenges to *enforcement* that interact with other areas of law, especially data protection law. "Algorithmic opacity" means potential claimaints in algorithmic discrimination cases face difficulty gathering the evidence that would enable them to litigate. Because the "burden of uncovering discrimination" lies with the claimant, lack of information about algorithmic decision-making impedes enforcement of existing law (see e.g. Kelly-Lyth, 2023). Poor enforcement of EU data protection law's transparency provisions compound this problem.

4.1.2. Data Protection Law: Good Foundations – But Too Generic and Inadequately Enforced

The core of EU data protection law is the General Data Protection Regulation (GDPR), which affords rights relevant to algorithmic management (see e.g. Abraha, 2023). These include a right to information about processing of one's personal data (Arts. 13-14); to receive a copy of personal data being processed (Art. 15); to correct inaccurate personal data (Art. 16); and to

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human review, and to know the "logic involved", in 'significant' automated decision-making (Art. 22). These rights apply in all contexts, including the workplace. However, two categories of difficulty limit the effectiveness of GDPR's protections for workers under algorithmic management.

First, GDPR has deficiencies as an instrument for *workplace* data protection. The legal basis of 'consent' poses difficulties in the workplace. For consent to be valid, it must be given 'freely'; however, it is questionable how often workers can 'freely' give consent at work (e.g., Article 29 Data Protection Working Party, 2017; Däubler-Gmelin *et al*., 2022, p. 7). The legal basis of 'legitimate interests' also poses problems. GDPR does not specify what conditions a controller's interests must fulfil to be 'legitimate', or how to balance those interests with data subjects' interests in data protection (see e.g. Däubler-Gmelin *et al*., 2022, pp. 4-5). The lack of clarity regarding the meaning of 'legitimate' in 'legitimate interests' interacts further with the lack of clarity regarding the meaning of 'necessary' in Art. 6(1)(b) GDPR. This has created legal uncertainty in at least one significant recent case (see e.g. Landesbeauftragte für den Datenschutz Niedersachsen, 2023). And workplace data processing gives rise to *collective* interests, but GDPR's focus is on *individual* rights (see e.g. Aloisi, Gramano, 2019; Abraha, 2023; Adams, Wenckebach, 2023; Calacci, Stein, 2023). While Art. 88 GDPR allows Member States to create collective data protection rights in the workplace, few Member States so far have attempted to do so (see e.g. Abraha, 2022). Second, like discrimination law, EU data protection law generally faces significant enforcement challenges; *workplace* enforcement specifically appears to be taking a 'back seat' to enforcement in the consumer realm (see e.g. Nogarede, 2021).

4.1.3. Labour Law: Collective but Insufficient Protections

The key EU instrument providing collective workplace rights is the Information and Consultation Directive (Directive 2002/14/EC). However, the details of 'information and consultation' are regulated nationally; there is a wide range of rights and structures across Member States (see e.g. Carley, Hall, 2009). And even in jurisdictions where information and consultation rights are strong, the complexities of algorithmic management combine with other demands on the limited time and resources of worker representative bodies to create barriers to workers influence over workplace technology (see e.g. Adams, Wenckebach, 2023; Calacci, Stein, 2023). In labour law, therefore, as in other bodies of law, there is a gap between the law and workplace practice.

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4.1.4. Occupational Safety and Health Law: The Limits of "Safety by Design"

A central concept in EU OSH law is "safety by design": technology designers should foresee likely risks associated with the technology's use. However, this poses difficulties in the context of algorithmic management, where, due both to the dynamic and varied nature of workplaces and to the 'learning' of the systems themselves, unforeseen circumstances and risks may arise. This has prompted OSH scholars to call for a new paradigm for OSH regulation of algorithmic management: "design for responsibility". In this paradigm, consultation structures and processes should be created within workplaces to surface and address algorithmic management risks not foreseen during design (see further Cefaliello *et al*., 2023).

4.1.5. Proposed Legislation: The Platform Work Directive and the AI Act

Two pieces of proposed EU legislation are worth noting: the proposed Platform Work Directive and the proposed AI Act. The proposed Platform Work Directive contains novel and largely well-designed provisions on algorithmic management (see e.g. Veale *et al*., 2023). However, the Directive applies only to workers on digital labour platforms, which excludes workers in 'traditional' firms. The proposed AI Act, on the other hand, applies broadly, and algorithmic management would be included in its definition of 'high risk' AI systems. However, the AI Act follows a paradigm of 'risk mitigation' (see e.g. Aloisi, De Stefano, 2023); a more 'dynamic' and context-sensitive approach is needed for algorithmic management (see e.g. Cefaliello *et al*., 2023).

4.2. Regulating Algorithmic Management Globally: A Complex, Evolving Regulatory Landscape

Four themes can be noted globally regarding algorithmic management regulation. First, in the area of discrimination law, lessons can be learned from sophisticated approaches to discrimination taken by some Majority World/'Global South' jurisdictions, especially India and South Africa (see e.g. Sambasivan *et al*., 2021, for implications for algorithmic fairness). Second, the global outlook regarding data protection, especially workplace data protection, is relatively poor, and merits attention. An update to the

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1997 ILO Code of Practice on the Protection of Workers' Personal Data, for example, could be beneficial. Third, legislators in many jurisdictions have begun to take up the task of regulating algorithmic management in "digital labour platforms" ("platform work"); however, algorithmic management has spread beyond platform work. Fourth, none of these efforts fully addresses the new risks and harms arising across the economy – not only to workers but also to managers and organisations – from algorithmic management. Especially underexamined is the risk *to employers* from deficient or 'invalid' systems. Instruments regulating algorithmic management in *all* sectors of the economy are therefore needed.

5. Regulating Algorithmic Management

This part of the paper presents content for such an instrument. It includes nine interlocking elements of a policy strategy for addressing the various risks and harms posed by algorithmic management – to workers, worker representatives, managers, employers, and labour market institutions. Extended rationales for each element are presented in Adams-Prassl *et al*. (2023).

5.1. Prohibitions

Contexts in which monitoring of workers, or collection of worker personal data, is prohibited should be clearly established. Employers should be prohibited from monitoring workers and collecting worker data outside of working hours; outside the workplace; and in physical or relational contexts at work where data collection or monitoring poses risks to human dignity or the exercise of legal rights. This includes private spaces, such as bathrooms and rest areas, and private communications, such as with worker representatives. Employers should also be prohibited from monitoring workers or collecting any data (personal or non-personal) for purposes that pose risks to human dignity and/or fundamental rights, including emotional or psychological manipulation or the prediction of and/or persuasion against the exercise of legal rights, including especially the right to organise.

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5.2. Specific and Limited Legal Bases

Specific and limited legal bases should be established for the permissibility of algorithmic management systems. In particular, algorithmic management should be lawful only if it:

- Meets one of the following requirements:
  - It is intrinsically connected to and strictly necessary for the performance of the contract of employment or in order to take steps which are strictly necessary for entering into a contract of employment;
  - It is necessary for compliance with a legal obligation to which the employer is subject; or
  - It is necessary in order to protect the vital interests of the worker or of another natural person
- Is capable of meeting the goals for which it is deployed (i.e., the system is 'valid').

Achieves these goals in a proportionate manner (i.e., potential risks or threats to fundamental rights posed by the system must not be disproportionately large given the purpose of its deployment).

5.3. Individual Notice Obligations

Obligations should be established for employers to notify affected individuals of the existence of algorithmic systems used for monitoring, evaluating, or managing them, including for example fully automated decision-making systems as well as scoring or evaluation systems whose outputs are used by human decision-makers.

Notices should indicate the nature, purpose, and scope of the systems used; all inputs, criteria, variables, correlations and parameters used by the systems in producing their outputs; the logic used, including for example weightings of parameters and inputs; the outputs produced; the potential consequences for affected individuals; the existence and extent of human involvement and the competence, authority, and accountability of the involved humans; information about the source of the technology/ies (e.g., vendors or software packages); and rights of the affected individuals and contact information for competent authorities.

The notices should be concise, transparent, and intelligible, using clear and plain language, and made available in an easily and continuously accessible electronic format.

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5.4. Collective Notice and Data Access Obligations

Additional notice obligations and data access rights should be established with respect to worker representatives. Specifically, employers should be obligated to provide the same information to worker representatives that is provided to affected individuals about the use of algorithmic management systems (see Section 5.3). Worker representatives should have a right to request and receive additional information. A right of access to individual-level data should also be established for worker representatives. Worker representatives should have the right to receive this data on an ongoing basis in machine-readable format, including via a secure automated electronic data transfer. Finally, worker representatives should have the right to initiate collective litigation or complaints to relevant authorities on behalf of groups of workers affected by algorithmic management systems.

5.5. Prohibition of Automated Termination

Automated termination of an employment contract should be prohibited. Meaningful human involvement of an authorised, competent, and accountable human decision-maker should be mandated in termination decisions.

While other proposals have advocated for more general "human in the loop" provisions (i.e., general human involvement in, or oversight of, 'significant' automated decisions), the termination decision is uniquely harmful. Additionally, existing law in many jurisdictions already makes it necessary to identify a specific moment in which the termination decision is 'made'.

5.6. Right to Human Review

Rights regarding decisions taken or supported by algorithmic management systems should be established for affected individuals. Specifically, an affected person should have the right to request and receive a written explanation of the facts, circumstances, and reasons leading to the decision; contest the decision; discuss, supplement, and clarify these facts, circumstances, and reasons with a competent and authorised human; request and receive a human review of the decision in light of the foregoing; and have the decision rectified if the facts, circumstances, and/or reasons leading to it are found to be erroneous or unlawful.

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5.7. Information and Consultation

Formal rights for worker representatives to information, consultation – and, where possible, co-determination – should be established with respect to the design, configuration, deployment, and ongoing use and evolution of algorithmic management systems.

5.8. Impact Assessment

An obligation for employers to conduct annual impacts assessments of algorithmic management systems should be established. The impact assessment should include at least the following: all 'system-level' information to be provided to affected individuals; descriptions and evaluations of impacts and risks, with quantitative details where relevant; descriptions and assessments of safeguards adopted to mitigate those impacts and risks; descriptions of consultations carried out with workers and their representatives, and changes made in response to views expressed by workers and their representatives. Employers should be obligated to consult workers and their representatives when identifying impacts, risks, and possible safeguards, and when preparing the written impact assessment. Finally, a version of the written impacts assessment should be made public, with confidential technical and commercial details redacted. The full unredacted impact assessment should be made available to worker representatives and regulatory bodies.

5.9. Protections and Capacity Assurance

Protections should be established for line workers, managers, worker representatives, persons involved in impact assessments and human review of algorithmic decisions, and other involved parties exercising the rights established by this regulation, or other relevant rights. Such individuals should be legally protected from disproportionate consequences or arbitrary retaliation, including dismissal, disciplinary action, or other adverse consequences. Additionally, employers should be obligated to ensure that worker representatives, persons involved in impact assessments and human review of algorithmic decisions, and other knowledge-reliant roles required for oversight of algorithmic management systems have adequate training and information to carry out those roles.

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6. Conclusion: What Now? What Role for the ILO?

The findings presented in this paper can be summarised under five headlines. First, algorithmic management is on the rise globally, across varied sectors of the economy. Second, while the motivations for deploying algorithmic management systems are understandable, the technology is new and relatively untested, the industry producing it relatively immature, and the governing framework (laws, standards, and best practices) nascent. Incentives within both vendor and customer organisations seem to be contributing to pressures to deploy algorithmic management systems even when they are defective, fundamentally unfit for purpose, or unlawful. As a result, algorithmic management systems as currently developed and deployed are creating significant harms and risks – for line workers, managers, employers, workplace governance, labour market institutions, and decent work. Third, the current regulatory framework is inadequate to mitigate against these harms and risks, even in jurisdictions such as the EU where a range of laws already apply to algorithmic systems. This is due both to gaps in the "laws on the books" and poor enforcement of existing laws. Fourth, these risks and harms are being driven by three main dynamics: new privacy harms; widening information asymmetries; and the erosion of human agency. Fifth and finally, new legislation, perhaps alongside other governance mechanisms, can address these dynamics – and, by doing so, help shape algorithmic management so that harms and risks are minimised and the promised benefits can be realised.

Having documented the elements of this legislation above, a new question arises: what is the role for international labour standards in ensuring that workers and employers are protected from poorly designed or deployed algorithmic management systems? Is a new international labour standard on algorithmic management desirable? If so, what might be the scope of such a standard? The interaction between a notional standard on algorithmic management and existing and currently proposed instruments, such as the Code of Practice on Employee Data Protection and a possible standard on platform work, would need to be clarified. Our review of the literature across economics, policy, and law, including investigative journalism and legislative initiatives, has led us to the conclusion that an international labour standard on "work-related data processing and algorithmic management" is very likely desirable. To advance the discussion on this possibility, we can identify now five underexamined topics that could benefit from research led by the ILO and/or the RDW network. These are:

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- *Technical and organisational validity of algorithmic management systems.* While this topic is starting to gain traction in the computer science literature (e.g., Rhea et al. 2022), it is still a nascent field of inquiry, and would benefit from interdisciplinary research designed to produce outputs relevant for governments, worker organisations, and employers, and for tripartite standard-setting discussions. For example: What are common technical or organisational (i.e., social-scientific) deficiencies of algorithmic management systems? What impacts do these deficiencies have on line workers, managers, organisations, workplace governance, and labour market institutions? How can these deficiencies be identified (if possible, before deployment) and their impacts avoided or mitigated? Can best practices be distilled for organisations? Are there clear implications for policy?
- *Risks to employers of algorithmic management systems.* While a growing literature addresses harms and risks to workers of deficient or unskilfully deployed algorithmic management systems, the risks to organisations are less well-studied. Organisations are assumed to benefit from greater information processing capacity and operational efficiency, but the growing body of technical research revealing fundamental flaws in algorithmic management systems calls this into question. Organisations may not benefit from faster decision-making if the cost of speed is lower-quality decisions. In addition to impaired organisational performance, personnel and reputational risks may also be significant. The situation is complicated significantly by the fact that technology vendors may have incentives to deceive purchasing organisations about the capabilities of their technologies – and such deception may even occur without malicious intent, as sales teams, especially in newer companies, may not fully understand the capabilities and limitations of the technology they are selling. Further, middle managers making purchasing decisions may face internal incentives to adopt new technology, even if the benefits promised by the technology do not materialise in the long run. This complex landscape of information and organisational incentives deserves careful study.
- *Organisational best practices for design, deployment, and operation of algorithmic management systems.* Taken together, the above lines of research could produce guidance for employers and organisations on how to avoid purchasing technically deficient algorithmic management systems and how to ensure that their internal deployment procedures secure the benefits of the technology while minimising risks and harms.
- *Possible roles for technical standards (including management standards) in regulating algorithmic management.* In the EU context, proposed

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legislation – perhaps most notably the proposed AI Act – envisions an increasing role for technical standards in governing the deployment of algorithmic systems in specific domains. However, this has been criticised by some legal research as being inadequate or inappropriate to the workplace context, especially given opaque and under-inclusive standard-setting processes. The potential advantages and disadvantages of technical standards in governing algorithmic management should be investigated, and suggestions developed as to what their content should be.

– *Possible roles for professional and organisational certification of developers and operators of algorithmic management systems.* In other engineering domains with significant potential safety risks such as civil, automotive, and aerospace engineering, regulation and technical standards govern not only the development of products (e.g., through the requirement that an engineer with a currently valid professional licence must 'sign off' on building plans, thereby accepting personal liability for engineering defects) but also their operation (e.g., driver and pilot licencing). Notably, software engineering, a much younger engineering field, has almost no comparable professional governance practices. A similar model is however imaginable in the domain of automated decision-making systems with significant consequences for data subjects – both in algorithmic management and, for example, in public sector automated decision-making. Individuals and organisations developing algorithmic systems could be required to meet specific licencing standards and to accept personal liability regarding specific risks potentially entailed in their deployment. Individuals deploying them in 'customer' organisations (e.g., employers purchasing algorithmic management software systems from third-party software vendors) could be required to possess other certifications, just as commercial truck drivers are required to possess commercial driver licences. The potential benefits and risks of, and recommendations for, such a regulatory 'ecosystem' should be investigated and developed, including in light of the advantages and disadvantages of professional governance in other fields such as civil, automotive, and aerospace engineering.

Algorithmic management systems, it seems, are here to stay – worldwide, for "knowledge workers" working from home and in the office, and for in-person workers in manufacturing, essential services, and other sectors. Policy and research can guide the maturation of these technologies, and of the "algorithmic management industry", to reduce the increasingly well-documented harms and risks and secure the hoped-for benefits.

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Plenary session on Digitalisation, AI and employment. Human and Artificial Intelligence: a challenge of our time

Antonella Occhino[1]

The quest for labour rights and social justice is highly concerned with impacts of digitalisation and AI effects on employment, from the perspective of both technologycal tools evolution and personal workers' contribution to work, so to economic development, finally to social progress.

Industrial Revolutions, since the end of the XVIII century, have been always influencing significative transformations in organisational and professional approaches to work studies, from both the perspectives of how persons are asked to contribute to enterprises objectives and how employers are asked to protect workers in such a way that their useful capabilities make them contribute by safeguarding at the same time the equilibrium between personal and professional life.

Eventually, new skills asked by labour markets, now ever more technologically oriented, are the passpartout for a win-win equilibrium between capital and labour. As a consequence, labour law is called to adapt and evolve with the aim not to impede, but to help new best practices through which human intelligence may keep its priority on artificial intelligence in working processes.

The challenge of AI will make all employment theories reshape the approach to describing and understanding the present of work and to building its future.

Because the true nature of any human contribution to economic activities has to be found in the personal involvement of everybody in any requested task, the impact of AI on the production and distribution of goods and services needs to be analysed following a new framework which should take

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into consideration four scenario features and make labour analysts to pay new attention to four real changing processes.

Main scenario features are concerned with work-life balance, equal opportunities (and decent work conditions), digital enterprises, legal framework to shared responsibilities. Responsibility is the key word to sum up how artificial intelligence (AI) may help human intelligence (HI) to better develop rather than collapse.

Main changing processes are linked to machine learning, training for capabilities, big data managing, supply chains defining.

The major topic of the issue about human versus artificial intelligence may be envisaged through the changing intersection of both skills and work-time/work-place perspectives.

From the skills perspective, education and training call for the insertion of new languages in work processes, that is a new quest for a blended implementation of litteral and numerical elements in all work activities.

From the work-time/work-place perspective, to increase employment (rather than to fight unemployment) a growing flexibility in any organisation, so far just limited to flexi-time and remote-work, should develop in line with the change of perspective in performance measurement, from a relatively simple result-based approach to a more complex redefinition of responsibilities.

Professional engagement and personal involvement in work processes are being reshaped by these perspectives, in coherence with the global need for a really widespread effective protection in terms of decent work conditions, that depend on a self-evident priority, i.e. both on the enlargement of opportunities and the enrichment of capabilities. The challenge of dignity at work is strictly linked to these two processes.

About people at work, because of technological change, a set of critical issues have to be faced in terms of privacy versus control powers and well-being at work versus health risks. Moreover, health at work has to be protected also in relation to the psychological need for good relationships in any working context. Efforts towards the insertion of inclusion and sustainable values, also at work, could help to remedy to risks that technological impacts on organisational processes produce. The promotion of ethical behaviours at work is the only way to make enterprises translate sets of values from words to facts.

Knowledge is the key word to try to put past, present and future together. Technology, from digitalisation to robots, ask for new capabilities and new languages, to help the transition to a new employment framework founded on the primacy of HI rather than on confining persons to a secondary role.

In this really complex context, the generative AI put the whole world of

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work in front of a challenge: either to focus on inputs or to focus on outputs of economic and social impact on personal and professional life.

Knowledge and technology (including digitalisation) require a new employment culture.

The link between knowledge and technology is very similar to the link between HI and AI. The major assumption is that AI is not a substitute, but a tool for HI. The major interconnection depends on the fact that HI is constantly called to intervene on AI.

Digitalisation and AI could not be confused. Digitalisation consists of the evolution of methods of collecting and managing data, and so is concerned with information about what is happened in the past, to reshape economic processes in view of enterprises' policies. It needs digital skills, and increases the quest for responsibility in terms of the best use of all elements which may help to know the past and analyse the present.

The impact of digitalisation on employment should be measured not only in terms of statistical increasing or decreasing of job positions numbers, but also and better in terms of the substitution effect of different kinds of jobs.

AI consists of the evolution of machine technology in view of giving machines the power of making decisions instead of persons, and so it is concerned with the generation of praxes which depend on the results of algorithmic applications, without the intervention, in terms of impact, of a real human decision at any steps. It requires coding skills, and increases the quest for responsibility in terms of initial input and the need for control procedures on the results, since it may help to simplify the future.

AI impact on employment should be analysed and measured in terms of changes not just in the number and types of job positions but also in organisational reshaping of different tasks, at any level, in line with the responsibility of any worker, which needs to be known in advance under a set of criteria. Namely, ethical inputs oriented to the equal distribution of profit among internal and external stakeholders in any economic actitivity should be seriously implemented ex ante to counterbalance natural inputs aiming at profit ex post.

Eventually, social justice is not only a fundamental and universal principle which has to be realised, but also the guideline to orient coding experts to support employers' decisions either where they are made personally or where they rely on the mechanic functioning of algorithms.

This is why, looking to the matter of technology improvement and its implementation in economic processes, skills ever more necessary for the labour market in the future are not only those related to coding, but also, increasingly, those related to thinking. The mirror of the well being of the whole society will depend on how many digital skills will be governed by

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human skills, and any educational program will be successful only if it has been organised in coherence with the speed and the strenght of machine learning, so that the final success will depend on the alternative whether it will be the critical human thinking to be used and prevail over the technical one, or just the opposite. This may be considered as the major challenge of our time, as any future, not only past, change in our lives oblige us to solve the eternal issue about téchnique and work, now about artificial or not artificial intelligence, in favour of human intelligence.

Arguing about this deeply challenging conclusion makes law and policy makers recognize that any action to defend the priority of human capability to manage both the origins and the consequences of artificial, mechanical and technical methods has to be encouraged, preserved, sustained, so that the useful improvement of economic and social processes due to the radical changes of our extraordinary times may have as a result real benefits for the humankind, in terms of well being at work and well doing in life.

Labour legislations, and collective protections, all over the world, are asked to pay most attention to this crucial question, as it involves work and, as a consequence, persons.

The efforts made to facilitate life in a technologically advanced society, and the high speedy revolution of life styles and behaviours in the very recent past, should make us express great admiration to so many minds and so many hands involved in the long way of technological reached steps, till robots.

Last, but not least, those efforts should not make us forget persons and peoples who have become weaker because they live and work, or do not work, with or without capabilities and opportunities offered by the progress.

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El derecho laboral en las plataformas digitales de trabajo

Hugo Barretto Ghione[1]

1. Derecho y trabajo en las plataformas digitales: la preferencia por el "test de aplicabilidad" como método

Es un tópico de la economía de plataformas digitales referir a su efecto disruptivo respecto de las regulaciones legales y administrativas, discurso que pone foco, en particular, en la inaplicabilidad de las normas de protección social y laboral propias del trabajo subordinado en ese sector de la actividad económica.

Entre las rupturas que se atribuyen al trabajo prestado a partir de la utilización de plataformas figura de manera principal, pero no única, la afirmación de que se trata de trabajo enteramente autónomo, desprovisto de todo signo de dependencia, perfil que habría quedado arrumbado en un cajón de herramientas taylor/fordista casi en desuso.

Este sesgo autonómico de la labor no sería decisivo si se asumiera una noción amplia de la actividad laboral tal como se ha discutido desde el pasado por parte de la doctrina internacional (Supiot *et al*., 1999; Freedland, 2007), pero en cosmovisiones jurídicas más formalistas como son muchas de las latinoamericanas el planteo es más complejo.

En concreto, las definiciones contenidas en los ordenamientos jurídicos laborales nacionales se circunscriben al elemento "*subordinación*" como dato principal para dirimir la cuestión de la determinación de la existencia de contrato de trabajo, pese a que la tradición de los códigos laborales de la región también receptan la figura de la "relación de trabajo" como vínculo prescindente de la autonomía de la voluntad, conociendo inclusive estos ordenamientos dispositivos como la presunción de laboralidad.

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En esta cultura jurídica, el componente de la mayor flexibilidad que presenta el trabajo en empresas que utilizan plataformas (fundamentalmente en lo concerniente al tiempo de trabajo) suele asumir un papel relevante en la opinión de un sector del laboralismo.

Sin embargo, decantarse ab initio en favor de la inexistencia de la relación laboral significa un apresuramiento, un error metodológico que se traduce en última instancia en un renunciamiento al estudio en profundidad de la relación entre derecho y trabajo en el caso del prestado para empresas que utilizan medios tecnológicos digitales e incorporan inteligencia artificial para la toma de ciertas decisiones que tienen que ver con la gestión del trabajo.

Esta solución apriorística es más propia de la práctica judicial de defensa del interés de ese tipo de empresas – donde esta estrategia puede ser legítima – que de una aproximación científica.

Por ello se entiende que un método pertinente para no decaer en pura ideología jurídica y evitar tomar un atajo rápido reside en estudiar analíticamente la adecuación de cada instituto del derecho laboral mediante una especie de "*test de aplicabilidad*" respecto del trabajo realizado en empresas de plataformas, tarea consistente en verificar las condiciones de aplicación de una serie de variables (tiempo de trabajo, remuneración, control, poder del empleador, etc.) a la esfera de la referida actividad.

El método indicado dista de ser original, puesto que es el que ha ensayado recientemente la Organización Internacional del Trabajo (2024) como parte del proceso preparatorio de la discusión normativa que tendrá lugar en la 113° reunión de la Conferencia en 2025.

Como de alguna forma el método de estudio tiene siempre algún grado de incidencia en el producto de lo investigado, se entiende precisamente que no debería prescindirse del empleo de un punto de partida propiamente jurídico que permita comparar la pertinencia de los institutos normativos del derecho laboral frente a la realidad actuante del trabajo en empresas que utilizan plataformas digitales, de tal modo de componer/mantener un marco de derechos para alcanzar a un modo de trabajar que se pretende innovador.

Este último aspecto, vinculado justamente a la nota de novedad que comporta el elemento tecnológico algorítmico como fundamento del discurso que promueve una retirada en masa de los dispositivos normativos laborales, será puesto en cuestión en esta contribución a efectos de valorar si no corresponde restar significación a ese imaginario.

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2. ¿Qué es lo verdaderamente nuevo del trabajo en empresas que utilizan plataformas?

El discurso opuesto a la aplicación de las reglas del derecho del trabajo se asienta en suponer que existe una suerte de poder de arrastre en masa de la tecnología sobre las instituciones jurídicas clásicas.

Hay sin embargo dos razones para someter a la crítica a esa presunta capacidad del fenómeno.

De una parte, la relación entre innovación tecnológica y regulación del trabajo es dinámica, en ocasiones conflictiva, pero constituye el acta de nacimiento mismo de la disciplina jurídica, su modo de ser, que tuvo origen con el impulso científico aplicado a la producción y al trabajo (Hopenhayn, 2001).

Esto no implica minimizar el cambio en proceso, ya que "*el salto contemporáneo en la capacidad de manejar información puede compararse al salto en la capacidad para disponer de energía que marcó el comienzo de la industrialización*" (Arocena, 1995), ni tampoco significa desconocer que el rumbo que presenta el actual cambio tecnológico impacta en el trabajo no únicamente en cuanto a que los sistemas informáticos y la automatización asumen tareas que hasta hace poco tiempo se pensaba que solo los humanos podían realizar, en un proceso de desplazamiento hacia las máquinas, sino también tiene efecto en la subjetividad de las personas que trabajan.

Por ello se ha dicho que el impacto no es solo cuantitativo, sino cualitativo: es el sentido mismo del trabajo lo que está en juego, ya que no es real que el límite de la tecnología sea únicamente afectar o sustituir tareas repetitivas o aburridas (Susskind, 2023), ya que la inteligencia artificial no parece detenerse en su capacidad de "*aprender*" (Deep Learning) y día a día sorprende con un nuevo avance sobre territorios que se entendían eran propios de la actividad humana.

En cualquier caso, debe anotarse que la tensión entre tecnología y legislación laboral y sus sucesivas síntesis ha sido el resultado permanente del devenir histórico del modo de producción capitalista, tanto se piense en la finalidad "*protectora*" o en la "*igualadora*" del derecho del trabajo, dependiendo de concepciones de fondo que no es esta la oportunidad de discutir.

En segundo lugar, el modelo de empleo típico surgido del trabajo en la economía industrial capitalista nunca fue pacífico, ya que ha estado asediado por impulsos que bascularon entre el mayor peso de la libertad de empresa y la regulación legislativa de tipo intervencionista limitadora de la libertad contractual.

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Así, Cordova (1986) verificaba a mediados del decenio de los ochenta del siglo pasado un avance de las modalidades atípicas de contratación respecto del modo de "empleo total" característico de la gran industria, que se había desarrollado con base a requerimientos de la legislación laboral y la acción sindical y cuyos principales perfiles eran el trabajo por cuenta ajena, mediante el pago de un salario y en relación de dependencia.

A su vez, Bronstein (2005) distinguía dos etapas de la evolución en el decenio siguiente, signadas por la flexibilidad y la desregulación, mientras que los avatares políticos posteriores en América Latina dieron cuenta, luego del avance liberalizador de los años noventa, de un direccionamiento a concepciones más intervencionistas y protectoras.

Una observación muy general y básica de la ecuación que se establece en el trabajo prestado para empresas que emplean plataformas digitales (esencialmente en el caso del reparto de mercaderías y el transporte de personas) permite apreciar que se trata de relaciones radicalmente desiguales desde el lado del poder de negociación entre "*la plataforma*" (una especie de eufemismo para referir, en casi todos los casos, a una empresa multinacional) y el "*proveedor de servicios*".

Quizá la demostración más palmaria y puntual de esta diferenciación sea una cláusula de precepto utilizada en los contratos que celebran ciertas empresas que emplean plataformas digitales para servicios de transporte de pasajeros como mecanismo de solución de controversias mediante tribunales arbitrales que pueden estar situados a miles de kilómetros de distancia del lugar de ejecución de la obligación laboral, sometiendo a los tribunales laborales a una previa dilucidación de su competencia para conocer en los casos que se le remiten.

En su conjunto, el uso de plataformas digitales en el mundo del trabajo no ha hecho otra cosa que agudizar en la desigualdad respecto del trabajador, llevándola a un límite hasta ahora desconocido y puede decirse, inconmensurable.

De manera más general, la desigualdad como objeto de estudio ha resurgido en los últimos años (Milanovic, 2024) y resulta oportuno recordar ahora que los instrumentos de técnica jurídica que emplean los juristas y operadores del mundo del trabajo, como sucede con la noción de "*subordinación*", no son otra cosa que una expresión puntual de la desigualdad, situada en ese confín que configuran las relaciones individuales de trabajo.

Queda fuera de tema de esta contribución la inequidad que ello comporta, en tanto afecta fundamentalmente a personas que desempeñan servicios claves para la comunidad, dato evidenciado en el período de reclusión por la pandemia del Covid-19 (OIT, 2023).

Parece oportuno recordar también que la reflexión filosófica ha

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desmitificado la tecnología como valor absoluto siendo muy crítica de las consecuencias de la falta de control axiológico y político sobre su producción y aplicación, considerándola parte de la tempestad que impulsa hacia el futuro sin ocuparse de lo que deja a su paso, según la conocida alegoría de Walter Benjamin (Löwy, 2002) o como parte de una imposición de un pretendido universalismo de la modernidad que no es otra cosa que un particularismo de ciertos países que ocupan posiciones centrales según ha dicho Enrique Dussel (2011).

Finalmente, en este ejercicio crítico del discurso que afirma el cambio radical que comporta el trabajo en empresas que emplean plataformas, conviene contextualizar el proceso y vincular o verlo como estadio superior que se sirve de una cadena global de suministro cuyo último (o primer) eslabón es la extracción de los minerales necesarios para su producción – por ejemplo el litio – que se obtiene de países del sur como Bolivia, en una expresión en nada distinta al desarrollo industrial capitalista convencional.

Por otra parte, el tipo de actividad que se presta a través de las plataformas, como el reparto de mercaderías y el transporte de personas (para hablar de los medios más corrientes de trabajo geolocalizado y de trabajo a domicilio) se asienta, como puede verse, en servicios tradicionales que se sirven de un tipo de tecnología que intermedia para automatizar los vínculos entre oferta y demanda para hacerlos más efectivos.

En el siguiente apartado volveremos sobre esta cuestión para desvelar algunos aspectos estructurales que pueden dejar ver con mayor claridad la hipótesis que defendemos en esta contribución:

1) que más que discutir sobre los indicios de la subordinación jurídica como técnica específica de calificación del vínculo, debemos observar el dato esencial de la realidad en el sentido de si la relación de trabajo mediante plataformas denota desigualdad entre las partes;
2) dando por hecho que estamos en relaciones sociales y jurídicas de una radical desigualdad, la investigación debería dirigirse en cada ordenamiento jurídico hacia la verificación de un "*test de aplicabilidad*" de las normas existentes y su eventual adaptación por la vía interpretativa o mediante negociación colectiva, en torno a la cual el Estado tiene obligaciones internacionales que cumplir en orden a su promoción (art. 4° del CIT n. 98).

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3. Marco estructural de las relaciones de trabajo en las empresas que utilizan plataformas digitales

Proponemos por tanto en esta parte descomponer el trabajo en plataformas digitales en alguno de sus elementos estructurales para adicionar así otro modo de abordaje al estudio de las relaciones laborales en el sector, sumando en cada caso consideraciones acerca de la pertinencia de los institutos del derecho del trabajo.

En concreto trataremos acerca de: a) cuales son las particularidades en la configuración de los actores; b) cómo se organizan las funciones y tareas en el reparto y transporte; y c) cómo se ejerce el control del trabajo.

El telón de fondo de estas preocupaciones estará presidido por la cuestión fundamental acerca de si estos elementos estructurales de la organización del trabajo distan tanto de las comunes relaciones de trabajo como para poner en cuestión la aplicación, en todo o en parte, de los derechos que integran, por ejemplo, la noción de libertad sindical.

4. Particularidades en la configuración de los actores

En oportunidad del proceso de elaboración de la Recomendación N° 198 sobre la determinación de la relación de trabajo, la Oficina Internacional del Trabajo produjo un informe sobre la vigencia de la relación de trabajo, a la que consideraba un "concepto universal" que se aplicaba de manera predominante en los países para la protección de los trabajadores (2003). En dicho informe el organismo formulaba dos preguntas fundamentales con miras a los cambios que venían operándose en el mundo del trabajo a través de lo que llamaba "*relaciones triangulares de trabajo*": ¿Quién es el empleador? y ¿Quién es el trabajador?

Las preguntas son absolutamente pertinentes al caso presente en tanto, por un lado, la des/materialización del empresario y por otro, el trabajo por cuenta propia, parecen constituir los dos ejes de la práctica desaparición de los actores del mundo del trabajo, como si se tratara de la puesta en escena del "desierto de lo real" de que hablaba Baudrillard.

La realidad compacta del trabajo dependiente; el conflicto propio del trabajo subalterno; la incontrastable presencia del sujeto empleador; y toda otra materialidad desaparece por el ocultamiento del titular de la plataforma tras la inteligencia artificial y el algoritmo, y por la paralela desaparición del trabajador tras la figura del colaborador o el autónomo prestador de servicios.

En esta operación, el fenómeno del poder en la empresa y la desigualdad de las partes también desaparecen, adquiriendo el primero la omnisciencia

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propia de los fenómenos inmateriales, lo cual lo hace inabordable, incuestionable e indestructible.

Importa en este punto realizar una vez más un operativo deconstructivo.

Así Paschier (2021) pone el foco de su crítica en la "neolengua" empleada por las plataformas, cuya clave encuentra en el choque entre la nueva semántica y las prácticas muy antiguas de descentralización empresarial.

Para el autor, en coincidencia con enfoques de la doctrina latinoamericana (Ermida Uriarte, Hernández Alvarez, 2002; Hernández Alvarez, 2022) no es necesario siquiera construir una ampliación o resignificación de la noción de subordinación, sino que parece caberle como un traje a medida al trabajo en plataformas la más estricta concepción tradicional de dicho término para hacerlo funcional como criterio distintivo, con eje en la dirección y el control del trabajo por las jerarquías de la empresa.

En su opinión no es la realidad sino los "*montajes jurídicos*" (así los llama), lo que deja oculta la figura del empleador, que no es otro que la persona moral propietaria del algoritmo.

El recurso retórico de la "desaparición" de la figura del empleador tiene otras derivas, como es la auto/percepción del trabajador como independiente o por cuenta propia. El llamado "emprendedurismo" es la causa y efecto, el proceso y producto del artificio discursivo.

Con todo, esa mutación radical en el plano de la "conciencia" del asalariado no pude adjudicarse a una simple manipulación de tipo ideológico y menos aún a un declive hacia la desaparición del conflicto en las relaciones laborales.

La desigualdad social y económica no cesa pero convive, en extraño maridaje, con el aumento de la percepción de la autonomía y autodeterminación de los sujetos.

Así, algunos autores indican que la principal paradoja de la actualidad en el mundo del trabajo radica, por un lado, en la profundización de la desigualdad social y económica y a la vez, en el "*declive del régimen de clases*", fenómeno cultural provocado por las "*mutaciones del capitalismo mundial*" que determinan una yuxtaposición de sistemas productivos que reproducen a su interior la desigualdad entre los miembros productores. Estas mutaciones muestran que "*unos participan directamente de la globalización de los intercambios y el desarrollo de las tecnologías de punta, mientras que otros permanecen en mercados nacionales y nichos locales, y otros, todavía, enfrentan el desempleo, la precariedad y exclusión*". A ello ha de sumarse el "*estallido de las calificaciones y los estatus*" y la multiplicación de sensibilidades (de género, etc) en el seno mismo de la clase. Esta dispersión "*abre el espacio de las desigualdades a la multiplicación de los grupos*" (migrantes, precarizados, género, edad, etc) "*ninguno de los cuales puede definirse verdaderamente como una clase social*" (Dubet, 2021).

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La dificultad siquiera de visualizar a las partes de la relación de trabajo acarrea consecuencias predecibles en el plano de las relaciones colectivas de trabajo.

La OIT ha verificado "*obstáculos prácticos que coartan la organización y la negociación colectiva en representación de los trabajadores de la economía de plataformas* […] [como son] l*a dispersión geográfica de estos trabajadores en lugares de trabajo aislados, como sus propios vehículos o domicilios particulares o los de sus clientes; las dificultades que ello crea para generar una conciencia colectiva, agravadas por el fomento de una imagen individualista y empresarial del trabajo en la cultura de la plataforma; la frecuente rotación de trabajadores; y el temor a las represalias contra los trabajadores que intentan sindicarse sin protecciones efectivas*" (Hadwiger, 2023).

Sin embargo, este rasgo no parece tampoco tratarse de un reto diverso al que ya hubo de atravesar el movimiento de los trabajadores desde su mismo surgimiento: así, se ha dicho que "*son los que llevan enfrentando las organizaciones de trabajadores desde que el trabajo industrial fordista empieza a coexistir con otras actividades productivas y realidades empresariales diversas, y, sobre todo, con un mercado de trabajo cada vez más segmentado*".

El desafío por tanto consiste en "*identificar el interés colectivo propio del grupo de que se trate en cada caso y encauzar adecuadamente su tutela y protección; y hacerlo, justamente, dando vigor al poder y los medios de acción sindical – representación colectiva, negociación y medidas de conflicto – más idóneos*" (Martínrez Moreno, 2020).

Una historia conocida.

La operación desmitificadora de la organización del trabajo en plataformas emprendida en esta contribución ubica al problema de la representación colectiva en el marco de las disyuntivas tradicionales del derecho del trabajo y de las estrategias sindicales para perfeccionar sus herramientas de incidencia en lo laboral y económico social.

Si los obstáculos fácticos a la aplicación del derecho a la libertad sindical no son determinantes, porque obedecen a determinaciones comunes a otros trabajos y a la misma historia del sindicalismo, la cuestión se desplaza a verificar si existen obstáculos jurídicos.

Las cortapisas jurídicas al ejercicio de la libertad sindical que enfrenta el trabajo en plataformas son en principio también comunes a todo el mundo del trabajo, y para ello basta con revisar los informes anuales de la Comisión de Expertos en la Aplicación de Convenios y Recomendaciones de la OIT, que tapizan la realidad de los países de la región latinoamericana.

Así ocurre en países como Guatemala y Ecuador, por ejemplo: toda

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la estructura normativa dedicada a reglar la creación de organizaciones sindicales (requisitos de número de trabajadores de la empresa para constituir un sindicato, o porcentajes de afiliación sobre el total de trabajadores, o imposibilidad de acción sindical inter/empresa) afectan igualmente a las personas que trabajan en plataformas y al resto de quienes trabajan, con independencia de las características tecnológicas que emplee en todo o en parte la empresa.

El aislamiento, la precariedad y la utilización de ciertas herramientas de trabajo de propiedad del/a trabajador/as tampoco son determinantes ni exclusivas de las labores para las plataformas digitales.

Frente a las restricciones ya reseñadas contenidas en la legislación latinoamericana (limitaciones derivadas de imposición de mínimos de trabajadores para organizarse sindicalmente a nivel de empresa y/o actividad, controles de mayorías para convocar asambleas o adoptar decisiones, etc), se desliza otra traba que, sin ser tampoco exclusiva de las plataformas, según ya se dijo, resulta acentuada en ese ámbito.

Se trata de la calificación de los trabajadores como autónomos, lo que se considera – equivocadamente – como una imposibilidad para su sindicalización.

Ciertamente, en esta vertiente del estudio cobra relieve y visibilidad la maniobra retórica de cómo se hacen "cosas con palabras", como pregonaba J.L. Austin.

Sin embargo a esa sanata es posible oponer una serie de circunstancias fácticas, que demuestran que la libertad sindical y la negociación colectiva son una realidad espontánea aunque de lento alumbramiento, tal como ocurrió inicialmente en los albores de las relaciones de trabajo durante el maquinismo: la génesis está en el conflicto y la organización sindical, y recién luego aparece la normativa, que reaccionó receptando, reconociendo y disciplinando esos fenómenos puramente sociales.

El derecho del trabajo tiene su origen en el conflicto y no en la norma jurídica, y como tal debe estudiarse (Barretto Ghione, 2018).

El conflicto, por otra parte, se configura con independencia de la percepción de los actores del mundo del trabajo; la autocalificación de los trabajadores como independientes no deja de ser una "cuestión de palabas" y no una realidad material.

En síntesis, tampoco en el plano jurídico aparecen obstáculos novedosos ni determinantes como para impedir el ejercicio de la libertad sindical en el trabajo en el ámbito de las plataformas aun cuando se tratase de trabajadores independientes.

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5. ¿Nuevas formas de trabajar? Funciones y tareas en empresas que emplean plataformas digitales

Como ya quedó dicho, la materialidad del servicio que se presta en la actividad de reparto y transporte no trasunta novedad alguna, pero el efecto del uso de la plataforma genera la oportunidad de fragmentar, parcelar y aislar el trabajo en mayor medida de lo imaginable en cualquier proceso de descentralización y tercerización, y esto enancado mediante redes digitales que coordinan transacciones a través del uso de inteligencia artificial y algoritmos.

¿Cómo realiza esa operación? Nada muy distinto a la externalización de servicios ya implementada para la organización de la producción: en este caso, la empresa que emplea plataformas digitales asume la prestación de un servicio de tipo tradicional (traslado, etc) y lo descentraliza al encargarlo a un trabajador que se encuentra a la espera de recibir el ofrecimiento.

Por esa sola circunstancia de "conectar" un cliente con un prestador de tareas, la empresa que emplea algoritmos se pretende intermediaria entre oferta y demanda de servicios y ajena a toda responsabilidad. Se concibe como un mero "entorno" digital que facilita el encuentro de clientes y prestadores de servicios.

La forma ciertamente es novedosa, pero estrictamente no hace otra cosa que seguir el patrón tradicional de la tercerización de servicios, donde una empresa principal delega o encarga tareas a una tercera, con la diferencia de que por esa mera intermediación tecnológica concluyen que existen "*lagunas legales*" que las dejan al margen de la regulación del trabajo que no obstante utilizan y a través del cual se posicionan como beneficiarias finales del resultado económico del negocio.

Un informe de OIT (Berg *et al*., 2019) amplía estas consideraciones e indica coincidentemente que "*A veces se considera que trabajar en las plataformas digitales es una 'nueva' forma de trabajo: una transformación del trabajo basada en el desarrollo de Internet y las plataformas digitales que actualmente le dan soporte. El argumento de que estas plataformas son 'nuevas', algo que no es del todo igual al 'trabajo' tradicional, es una de las formas en que las plataformas digitales de trabajo han intentado evadir la normativa laboral vigente. Sin embargo* […]*, usar a un 'grupo de personas' (es decir, la gente en general) para que contribuyan con pedacitos de información en proyectos más grandes no es nada nuevo. Lo que difiere hoy es el uso de un nuevo medio tecnológico, es decir, Internet y los sitios web diseñados para Internet, para coordinar estos proyectos, reemplazando algunos aspectos de la organización por una plataforma informática. Es más, al desagregar los puestos de trabajo por 'tareas', las plataformas*

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facilitan nuevas formas de mercantilización del trabajo mediante su venta 'a pedido' a empresas y a otros terceros que buscan externalizar determinados aspectos de la carga de trabajo a un costo más bajo".

Y añade: "*Como ya han mencionado otras personas, el trabajo en plataformas digitales se asemeja a muchas modalidades laborales de vieja data, que en este caso agregan simplemente una herramienta digital como intermediaria*".

El trabajo en plataformas en muchos casos se desagrega en múltiples tareas en unidades pequeñas que se asignan a trabajadores no calificados, lo que, de acuerdo a estas opiniones, parece ser una regresión a sistemas industriales de tipo taylorfordistas pero sin el componente de seguridad en el trabajo.

Hasta llega a decirse que el trabajo en plataformas puede vincularse con formas precapitalistas, en tanto "*La estructura de pagos por tarea en lugar de por tiempo también parecería asemejarse a las modalidades preindustriales de trabajo a destajo*".

Bruno Trentin (2012) introducía una interesante disquisición entre la dispar sobrevivencia del fordismo y el taylorismo al interior de los nuevos modelos productivos.

Decía a este respecto que "*mientras las nuevas tecnologías causan golpes mortales a los pilares del modelo fordista – como la producción en serie estandarizada y la fungibilidad de las tareas – este proceso no determina automáticamente la superación del núcleo duro del taylorismo*", o sea, mantiene incólume la "*organización científica del trabajo y la estructura jerárquica centralizada de saberes y decisiones*".

Finalmente, Berg y otros indican que "*La eventualidad del trabajo en plataformas digitales junto con la desagregación de tareas grandes en piezas más pequeñas no parece tan diferente de las modalidades laborales temporales que aún existen en la industria textil y de ropa, ya sea en talleres clandestinos o en el hogar del trabajador que trata de compensar sueldos bajos con trabajos adicionales que acepta a modo de 'trabajo a domicilio'. Además, los servicios de búsqueda que brindan algunas plataformas a clientes y trabajadores parecen ser, en la práctica, bastante similares al trabajo de las agencias de colocación o empleo temporal,* […] [pese a reconocer que] *hoy se están produciendo transformaciones en las modalidades laborales y que trabajar en plataformas digitales podría comprenderse mejor como parte de un giro más pronunciado hacia un trabajo más eventual y precario, y hacia procesos de contratación y gestión más automatizados*".

Esta mirada sociológica se complementa con la observación igualmente aguda de que la modalidad altamente tecnologizada de trabajo no es en definitiva muy distinta al intento de los empresarios de reducir su dependencia

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de los asalariados minimizando los conocimientos cualificados necesarios para realizar ciertas tareas, tal como ocurrió al inicio del maquinismo en un fenómeno que se denominó "*expropiación de los saberes profesionales*".

6. Gestión y control del trabajo

Uno de los aspectos distintivos del uso de la inteligencia artificial y los algoritmos aplicados al trabajo radica en la forma de ejercer el control y la disciplina en la relación laboral, en un arco que va de la etapa de selección del personal, la evaluación del desempeño y el cumplimiento de los resultados hasta la decisión de poner término a la misma.

En su estado de evolución actual, el "deep learning" (aprendizaje profundo) permite a la inteligencia artificial "*aprender*" y clasificar identificando patrones, volviéndose el sistema cada vez más experto mediante el consumo incesante de datos, muchos de los cuales son proporcionados "*voluntariamente*" por los usuarios de redes y de internet. A medida que procesan datos, mejoran sus previsiones y como consecuencia, las empresas dejan de ser poderosas por el tamaño de sus bienes de capital, para sostenerse en su capacidad de apropiarse de intangibles y utilizarlos en su beneficio (Rikap, 2023).

El conjunto de conocimientos de la base de datos y su operación a través de algoritmos potencia superlativamente la posición de poder de la empresa de plataformas en la relación de trabajo, y por ello ha surgido la preocupación sobre el uso desproporcionado y la eventual afectación de la privacidad del trabajador/a y las posibilidades de discriminación por el sesgo de los algoritmos.

Este control ejercido a través de algoritmos funciona de manera diversa al que operaba en la llamada "sociedad disciplinaria", que imponía comportamientos regulares con base en cierto tipo de institución, entre las que la fábrica se ubicaba como central para modelar la producción y hacerla previsible. En la cibernética, en cambio, la máquina detecta regularidades y con base en eso pronostica probabilidades, y los trabajadores ya no son solamente objeto de vigilancia para que cumplan una rutina de labor, sino que ellos mismos contribuyen al enriquecimiento de los datos a partir de los cuales son controlados merced a sus acciones digitales desarrolladas incluso en su vida privada. "*Trabajan*" y contribuyen al control externo sin saber que lo están haciendo (Scavino, 2022).

La contribución espontánea del trabajador al sistema que lo controla y su retroalimentación constante y automatizada constituye uno de los rasgos más salientes del trabajo y del control social en general, generando las

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condiciones para que se someta "*la acción de uno, o de muchos o de todo el mundo a la palabra de alguien*" (Sadín, 2023).

Esta intensificación del poder de control sobre los trabajadores ha sido una de las preocupaciones de la OIT al pensar en la estructura que podría tener una futura norma internacional del trabajo.

En el cuestionario que remitió a los gobiernos para dar tratamiento al punto normativo del orden del día de la Conferencia de 2025 referida al "Trabajo decente en la economía de plataformas" interroga en el núm. 40 acerca de si debería disponerse en el instrumento o los instrumentos "*que todo Miembro debería exigir a las plataformas digitales de trabajo que informen a los trabajadores de dichas plataformas, antes de ser empleados o contratados, y a sus representantes o a las organizaciones representativas de trabajadores y cuando existan a las organizaciones que representen a trabajadores de plataformas digitales, acerca del uso de algoritmos con fines de organización, supervisión, y evaluación del trabajo, y la medida en que su uso incide en las condiciones de trabajo de los trabajadores en plataformas digitales*".

7. Consideraciones finales

Al término de esta contribución conviene tener presente el doble objetivo de desmontar el discurso de la radical novedad del trabajo mediante plataformas digitales y la necesidad de descartar todo punto de vista apriorístico sobre la calificación del vínculo como no laboral y en su lugar ingresar al estudio de los institutos que regulan el trabajo prestado en condiciones de radical (ahora sí el término es apropiado) desigualdad, que es en todo caso el fenómenos más general que envuelve y contiene al instrumento puntual de la subordinación laboral.

Si bien la situación parece clara desde la perspectiva de la posición desigual de las partes, lo que demandaría la aplicación del estatuto laboral, lo cierto es que las instituciones jurídicas laborales están sometidas al albur del conflicto y las manifestaciones del poder a nivel político y social.

Así, Deakin (2023) ha subrayado que "*la determinación legal del estatus laboral no está predeterminada por las circunstancias del caso, sino que es, en última instancia, una cuestión de distribución de riesgos, y por lo tanto, del proceso político*", ya que los productos normativos son muchas veces, dice el autor, "*testimonio no tanto de la novedad o no del modelo de plataforma como del enorme poder de presión de que disponen las empresas de plataformas*".

Con independencia de este horizonte que marca Deakin, no debe dejar de reconocerse que las aplicaciones tecnológicas permiten un uso desmesurado

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del poder de control y de disciplinamiento del proceso de trabajo que agudiza la desigualdad.

Llevado al nivel de la relación individual de trabajo el fenómeno se traduce, por ejemplo, en una variación de las obligaciones del trabajador, cuyo epicentro pasa a ser "*estar a la orden*" y demostrar permanente disposición a cumplir con los encargos si no quiere verse sancionado por una cancelación o desactivación de su cuenta. La empresa que utiliza plataformas se desembraza definitivamente del compromiso con el trabajador (o su compromiso se licúa, al decir de Bauman) y solo administra un paquete de tiempo de trabajo (Fisher, 2016) que tiene a su disposición para cumplir con los clientes, quienes además en una acción casi de prestidigitación, aparecen como clientes del prestador de servicio que opera de manera "*autónoma*".

En el plano de las relaciones colectivas de trabajo, las limitaciones de los trabajadores de la economía de plataformas para su sindicación no son, en definitiva, cualitativamente muy distintas que las que sufren otros trabajadores que se desempeñan, con dificultades similares, en situaciones de aislamiento o fragmentación de las unidades productivas debido, por ejemplo, a los procesos de tercerización.

La aceptación – que parece incontrastable – de la aplicación del derecho a la libertad sindical y negociación colectiva a los trabajadores autónomos según las normas internacionales (De Stefano, 2021), suele colidir con un obstáculo venido de otro orden de derechos, como el de la libertad de empresa. En efecto, Villavicencio (2021) anota, controvirtiéndola, la aducida "incompatibilidad" de la negociación colectiva de los trabajadores no asalariados con el derecho de la competencia civil o comercial.

De acuerdo al autor, la interacción entre ambos derechos produciría un efecto irreconciliable en tanto la negociación colectiva "*interferiría ilegalmente en el libre mercado y sus fuerzas, a través de la concertación ilegal de prestadores de servicios, quienes se coludirían para obtener mejores precios por su trabajo. Luego, esta concertación ilegal de prestadores afectaría también a los clientes finales mediante la alteración del precio de las cosas y, más en particular, a través del aumento del valor del trabajo y sus resultados*".

En atención a que el trabajador en la economía de plataformas no tiene la posibilidad de "*determinar de forma independiente su posición en el mercado debido a su dependencia con la empresa principal*", Villavicencio concluye que se está simplemente frente a un auxiliar de una empresa principal y no frente a un trabajador verdaderamente autónomo.

El ejemplo es demostrativo de cómo soslayar toda consideración de la hiposuficiencia del trabajador sumerge al debate en un laberinto formalista que termina desconociendo la desigualdad rampante de los vínculos de trabajo en la economía de plataformas.

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Digitalisation of work: challenges and legislative answers

Tamás Gyulavári[1]

Digitalisation of work is a complex, gradual process, which happens through various digital tools, such as computers, smart phones, GPS, algorithms and AI. First, the meaning of digital transformation of work and its implications on labour law will be addressed. Second, the challenges deriving from this digitalisation process is investigated. Third, legal responses and related reforms will be identified. Overall, the paper makes an attempt to summarise challenges and legislative answers concerning digital transformation of work.

1. Meaning and implications of digital transformation of work

New digital technologies have rapidly spread all over the world in the last decades in organisation and performance of work, and their future seems to be even brighter. We must reasonably expect that its role in work relations will increase in the short and long term at the present speed. Digital technologies have been introduced gradually (extending over the last decades), starting from the use of computers to organising work by algorithms and Artificial Intelligence (AI). Their time of introduction, present importance and arising problems at workplaces are quite different.

At the outset of this digitalisation process, personal computers ensured digital work performance, but also enhanced employer control and surveillance. This initial digitalisation phase created the basis for later digital revolutions. Smart phones, for instance, helped to simplify and generalize digital work. Computerised performance and organisation of work has had

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varying effects. Primarily, it freed the worker from the employer's premises as the dominant workplace, which also brought about flexibilisation of working time. These changes have necessitated the regulation of telework as work out of the workplace (remote work). At the same time, electronic legal statements have also generated practical problems.

Constantly improving electronic surveillance, in particular GPS based technologies, have resulted in a high level of access to employee data and private information. Therefore, data protection had to be improved by introducing specific rules regarding digital data processing. Privacy of workers are also in a bigger danger than ever, thus, regulation and especially court practice has to reflect the new developments jeopardizing private life.

The widespread use of algorithms and AI in organising and performing work has meant so far the last and probably the most radical step in this digitalisation process, since the new face of the employer is a screen. An algorithm is the description of a finite and unambiguous sequence of instructions for producing results (output) from initial data (input)[2]. The use of algorithms as decision support tools is not new, but the capacity of computers and the volume, speed and flexibility of data processing are fundamentally changing the role of algorithms in all aspects of decision-making[3]. Algorithms are best manifested in platform work, and principally in on-demand work via apps. Platform work (as part of non-standard work) poses challenges to labour law primarily regarding its personal scope. However, it also raises several specific labour law concerns, such as flexibilisation of working time, respectively the disruption of collective rights.

AI is the development of machines and computer programs that can execute tasks that normally require human intelligence. It is a group of algorithms, which can modify them and create new ones, so it can change, adapt and grow based on data. Therefore, AI may take over employer functions, such as control, direction, supervision and rating of work performance, which transforms the entire decision-making in employment production processes. This has a special relevance, for instance, in workplace dialogue.

Overall, digital transformation of work performance and organisation is not a single challenge, but rather a source of various legal confrontations with traditional labour law. Above all, digitalization has given a new impetus

[2] CNIL (2017), *How can humans keep the upper hand? The ethical matters raised by algorithms and artificial intelligence*, Report on the public debate led by the French Data Protection Authority (CNIL) as part of the ethical discussion assignment set by the Digital Republic Bill, text available at: *www.cnil.fr/sites/default/files/atoms/files/cnil_rapport_ai_gb_web.pdfb*.

[3] Laulom S. (2022), *Discrimination by algorithms at work*, in Gyulavári, Tamás, Menegatti (eds.), *Decent Work in the Digital Age*, Oxford: Hart Publishing, p. 272.

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to the expansion of non-standard forms of work and a rearrangement of standard employment. There are many other fields beyond labour law which are affected by these changes, such as competition, freedom of speech, data protection and privacy, therefore, digitalization must be seen in an interdisciplinary scenario. In the next chapter, I will cluster and scrutinise the potential legal challenges.

2. Digital challenges in labour law

2.1. Personal scope of employment protection – challenged by non-standard work

Labour law is built on the premise that protected workers are employees in an employment relationship, and their status is primarily regulated by statutory labour law. Non-standard forms of work question this fundament, as many of them are in need of employment protection, but they fall out of the scope of statutory protection. Self-employment is used as an umbrella notion (including various groups of dependent workers) to exclude them from employment protection. This structural failure of full scope particularly effects platform workers, who are formally non-employees, but on-demand work via apps are characterized by economically dependent work very similar to employment.

2.2. Liberalisation of the workplace – distancing workers and employers

Remote work (telework) is performed outside the business premises and the employer's usual control. It calls for special regulation of working conditions, such as health and safety, liability for damages, working time, privacy.

2.3. Increased autonomy of workers – flexible work performance and its digital control

Distancing worker and employer leads to more autonomy in performing work. Platform and remote work arrangements are characterised by increased autonomy for workers, including working time flexibility. This may require special regulation of flexible forms of working time and balanced employer control.

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2.4. Digital dangers to personal data and privacy

Never seen quantity and quality of personal data may be accessed by employers, and this is the very essence of digitalized work. Therefore, the importance of data protection has increased, and it requires new rules.

Privacy of the worker is also curtailed by digitalisation. Personal monitoring, facilitated by digital technologies can compromise the dignity of the workers[4]. The legal problems concern surveillance over employees, privacy, freedom of speech and algorithmic discrimination. They are generated by the use of GPS, web camera, e-mail communication and internet through social media. Remarkably, these digital tools are able to intrude into work performance as well as rest periods and leisure time. This risk affects standard employees as well, whose work is performed by digital devices/tools.

2.5. Control and decision-making transferred to algorithms and AI

Exercising the managerial prerogative by an algorithm is at the core of the business model created by gig-work platforms, even if on-demand work via app often involves traditional work on the spot. Digitalization in support of traditional business operations has permitted algorithm to dictate the organization and the conditions of work performance. The recourse to AI and algorithmic decision-making can jeopardise human involvement[5], and it is a potential source of non-transparent, discriminatory decisions. It might also result in the intensification of workloads, posing potential threat to human physical and psychological integrity, especially if it does not follow the human-in-control principle.

2.6. Collective bargaining goes online

The classical trade union operation, organising workers at large factories, has dramatically changed by digital tools. Trade unions must also move to the web, and use electronic ways to organise. Not only the way of interest representation has changed, but the topics and the partner to negotiate with, as a consequence of digitalised management. In addition, the traditional

[4] European Social Partner Agreement on Digitalisation (n. 19).

[5] European Social Partner Agreement on Digitalisation, June 2020, 11, text available at: *www.etuc.org/system/files/document/file2020-06/Final 22 06 20_Agreement on Digitalisation 2020.pdf*.

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personal scope of collective rights (employee) should be extended over to several groups of non-standard workers.

2.7. Unilateral regulation replaces statutory standards

Platform workers are typically not employees, and their status is not specifically regulated by statutory law. Thus, the importance of employers' self-regulation (terms and conditions) has increased and took over the role of statutory standards in shaping working conditions. Similarly, internal regulation has also expanded in regulating telework, and the derogations from statutory law are often not clarified in legislation. The competence of company (unilateral) regulation and its role in the hierarchy of sources raises serious questions.

The legal challenges entailed by digitalization are colourful and different in relation to the various forms of work. Unsurprisingly, the answers of labour law are inevitably heterogeneous too, which will be approached in the next chapter.

3. Legislative answers

3.1. Implemented reforms

There have been several reforms to address the above-mentioned challenges. These legislative changes may be divided into three categories. First, the application of the employee status, or some employee rights (e.g. collective bargaining) to platform and other non-standard workers belongs to the category, when existing legal framework is automatically applied through the extension of the personal scope. Second, the legal and particularly judicial framework has started to adjust to digital challenges in freedom of speech and privacy, and flexibility of working time. Third, the protection of personal data (GDPR), and transparency of algorithms and AI (Platform Work Directive) has been improved by new rules in international labour law.

3.1.1. Extending the personal scope of labour law

During the 20th century labour legislation has elaborated a comprehensive and high-quality framework of protection for workers, thus, it has a long-standing, traditional institutional architecture and logic. The entire body of

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this protection has been built on the abstract model of the 'employee' in the standard employment relationship. The scope of labour law was targeted on workers belonging to the industrial economy and their need of protection resulting from a condition of legal subordination and weak bargaining power[6]. The employment relationship was a real success in this regard for almost the entire 20th century. However, in the last decades, the switch to the post-industrial economy, accompanied by de-verticalization of companies in the framework of enhanced global competition, favoured the headway of non-standard (precarious) employment[7]. It brought about the shrinking coverage of the employee status, and the weakening of associated protections[8].

Nonetheless, many workers, not matching the traditional "employee" paradigm, present similar or even higher need for protection, because of their economical, functional and operational dependence from a client's business[9]. Dependent and bogus self-employment have become a survival strategy for those who are not able to get a "regular" job through an employment contract. This has led many to question the adequacy of the binary dichotomy between employee and self-employed and the attached logic of all-or-nothing in term of employment protection and social security rights. The changes brought by digitalization emphasized even more this issue[10]. Platform work, especially, has become the typical area of the debates on the personal scope of existing employment protection.

There have been four kinds of legislative answers to the personal scope challenge:

1) The third category of economically dependent work have been regulated

[6] Davidov G. (2016), *A purposive approach to labour law*, Oxford: Oxford Scholarship, p. 14.

[7] ILO (2013), "Meeting the challenge of precarious work: A worker's agenda", *International Journal of Labour Research*, text available at: *www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_216282.pdf*, pp. 30, 42.

[8] Countouris N. (2011), "The Employment Relationship: A Comparative Analysis of National Judicial Approaches", in Casale G. (ed.), *The Employment Relationship: A Comparative Overview*, Oxford: Hart Publishing, pp. 35-68.

[9] Collins H. (1986), "Market Power, Bureaucratic Power and the Contract of Employment", *Industrial Relations Journal*, p. 15, defines this dependence as "bureaucratic": independent contractors' activities are integrated into the client's "bureaucratic structure", which gives the latter a "bureaucratic control" – something *de facto* similar to direction and supervision – over the former.

[10] Supiot A. (2000), "Les nouveaux visages de la subordination", *Droit Social*, pp. 131-145; Freedland M. (2007), "Application of Labour and Employment Law Beyond the Contract of Employment", *International Labour Review*, (3); Freedland M. (2003), *The Personal Employment Contract*, Oxford: Oxford University Press.

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in some countries, which third status, between employment and self-employment, ensures some protection for, among others, platform workers. The UK and Spanish legislations are clear examples of this approach. In both countries, several Courts' decisions recognised the intermediate category status of some platform workers[11]. This option has some flaws, because it comes up with a narrow scope and weaker rights than that of employees, and it also adds a new frontline to the litigation on the personal scope.

2) Judicial interpretation has been playing the primary role in expanding the personal scope of labour law both at EU and national level. The national interpretation of the employment relationship has been broadened by CJEU case law on the notion of worker regarding the implementation of EU law[12]. Furthermore, the latest EU legislation addressing the issues of non-standard workers, such as the directive on transparent and predictable working conditions, make use of the CJEU's elaboration on the concept of worker to determine the scope of application, though in a rather ambiguous way[13]. These solutions have advantages, since employment standards may be automatically applied to non-standard, including platform workers, and it involves the full application of employment standards. However, this legislative expansion is hampered by the distinctive features of these new forms, therefore, the employee status may not provide a solution for all affected workers.
3) Presumption of employment of platform workers has been introduced in national (California Bill No. 5[14]), and international labour law (EU Platform work Directive[15]). This legal solution, also resulting in the full application of employment standards, intervenes in case law by obliging labour courts to apply a set of compulsory employment tests.
4) The universal application of certain employee rights to non-employees

[11] Aslam and Farrar vs. Uber B.V, Uber London Ltd. and Uber Brittania Ltd, Case No. 2202550/2015.

[12] Countouris N. (2017), "The concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope", *Industrial Law Journal*, 47-202; Risak M., Dullinger T. (2018), "The Concept of 'Worker' in EU Law: Status Quo and Potential for Change", *ETUI Research Paper*, report 140; Menegatti E. (2020), "Taking EU labour law beyond the employment contract: The role played by the European Court of Justice", *European Labour Law Journal*, 11, p. 26.

[13] Article 1.2 of the Directive 2019/1152; Bednarowicz B. (2019), "Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union", *Industrial Law Journal*, (4), p. 609.

[14] Available at: *theabctest.com/index.php/laws-codes-and-rulings/ab5-law-text-assembly-bill-5*.

[15] Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work. COM/2021/762 final.

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provides a partial solution. In some national laws (e.g. France, Poland), a few employment rights (trade union membership, collective bargaining, minimum wage) are provided for self-employed as well[16].

3.1.2. Broader scope of collective bargaining

The CJEU has made steps towards the wider right to collective bargaining as an exception to antitrust law through the interpretation of the concept of worker[17]. This EU approach has been strengthened by the European Commission's Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed people. The Guidelines clarify, that collective agreements by solo self-employed persons comparable to workers fall outside the scope of EU anti-trust rules[18].

3.1.3. Adjusting the judicial test on freedom of speech and privacy

Improved protection against digital surveillance involves the adaptation of existing rules to the new issues stemming from the digital revolution. The surveillance over workers, including private lives, may now take place via many ways, including monitoring of social network activities. These aspects have not significantly been addressed at this point neither by legislations nor by case law. Nonetheless, existing practice has been improved by national and international courts, which judicial tests may contribute to the strengthening of employee protection in the digital setting[19].

[16] Daugareilh I., Degryse D., Pochet P. (eds.) (2019), *The platform economy and social law: Key issues in comparative perspective*, Brussels: ETUI, text available at: *www.etui.org/sites/default/files/WP-2019.10-EN-v3-WEB.pdf*, p. 55; Pisarczyk L. (2020), "Collective Bargaining in the Shadow of Legislation: Labour Law Sources in Poland", in Gyulavári T., Menegatti E. (eds.), *The Sources of Labour Law*, Alphen aan den Rijn, Kluwer Law International, pp. 281-298, cit. 285.

[17] Case 413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden*, ECLI: EU: C:2014:241. See the chapter of Tihamér Tóth on details of this case law and the related competition law rules and case law.

[18] Communication from the Commission. Guidelines on the application of union competition law to collective agreements regarding the working conditions of solo self-employed persons (2022/C 374/02).

[19] Mangan D. (2022), "From monitoring of the workplace to surveillance of the workforce", in Gyulavári, Tamás, Menegatti, *Decent Work in the Digital Age*, Oxford: Hart Publishing.

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3.1.4. Adjustment of working time rules

Another important example of adjustment of existing labour provisions to digital challenges is working time. There have been developments at national[20] and EU level[21] in an effective implementation of the right to disconnect to prevent workers from checking and answering emails 24/7, and also working time rules in promoting work-life balance[22].

3.1.5. Protection of personal data

The General Data Protection Regulation (GDPR)[23] is a crucial development, as it introduced new, detailed EU regulation. It may serve as an example for other regional and universal organizations to elaborate a comprehensive regulation of data protection with special emphasis on digital data processing.

3.1.6. Ensuring transparency of algorithms and AI

Implementation of Chapter III of the Platform Work Directive and the EU Artificial Intelligence Act[24] will be a test, if these new EU laws are able to ensure transparency of algorithms and AI. It will happen through a set of obligations on employers to guarantee human monitoring and review, limitations on data processing, information rights of employees and their representatives regarding automated monitoring and decision-making systems.

[20] Lerouge L., Trujillo Pons F. (2022), "Contribution to the study on the 'right to disconnect' from work. Are France and Spain examples for other countries and EU law?", *European Labour Law Journal*, 13(3): 450-465.

[21] European Parliament, "Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect" 2019/2181(INL).

[22] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 june 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

[23] Available at: *eur-lex.europa.eu/eli/reg/2016/679/oj*.

[24] Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (artificial intelligence act) and amending certain union legislative acts. COM/2021/206 Final.

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3.2. Further steps to be taken

We can state, that there has been important legal developments in adjusting the classic labour law framework to the digital challenge, both in national and international laws. Remarkably, the EU has been a forerunner in this work, which is understandable due to the higher importance of the gig-challenge and the existence of a sophisticated legal framework. These changes are spread over many legal fields to comply with the complex and structural nature of the task.

However, further legislative measures are necessary, both in national and international labour laws, to tackle the following challenges:

- The implementation of the Platform Work Directive will be an experiment in applying the full body of employment law to a part of on-demand workers. The first open question is how many non-standard workers will be covered and not covered by the extended employee status. Secondly, the automatic application of the employee status to platform workers may necessitate the elaboration of specific (atypical) provisions. This raises the old theoretical question, whether the employee status solves all the problems.
- The universalization of employee rights can be a parallel way to extend some protection to all workers in need.
- The role of employers' internal regulation in the hierarchy of labour law sources should be regulated to avoid replacement of statutory standards by unilateral rules.
- Improvement of the international standards (e.g. new EU Telework Directive) could strengthen the protection of teleworkers' employment rights (disconnect, equal pay, privacy etc.).
- National and international courts, with amendments in national laws, could further precise the judicial test on freedom of speech and privacy in a digital work environment.
- The implementation of the Platform Work Directive and the EU Artificial Intelligence Act will be an attempt (with new provisions going beyond the former framework) to ensure transparency of algorithmic management. This experience must be closely monitored with a view to further improvements.

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4. Conclusions

The spread of new and new generations of digital devices brought about varying legal concerns at the workplace: computers with flexibilisation of workplace and working time; electronic surveillance with data protection and privacy; algorithms and AI with platform work and algorithmic management. Thus, the digital transformation of labour law is a complex task with many fields to intervene: extend the personal scope of employment protection and collective bargaining; improve protection against digital surveillance; adjust working time rules; protect personal data; ensure transparency of algorithms and AI.

The legislative answers also show a colourful picture. The first group of reforms aim at extending the personal scope of existing employment laws or some employee rights to non-standard, especially platform workers: presumption of employment; concept of worker; self-employed rights; third status. The second solution is based on adjusting the present rules and judicial practice to the digital workplace, such as working time, freedom of speech and privacy. The third group includes new international rules on data protection and transparency of algorithms and AI.

There is a need for further steps though. The extension of the personal scope of employee rights, and the new rules on transparency of automated decision-making will require additional legislative measures. Furthermore, there are several remaining fields, where legislation still has to seek for new solutions (universalisation, unilateral regulation etc.). The game has just started.

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Part 6
Innovative approaches to researching and teaching labour law

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Methodological challenges in studying labor regulation in global supply chains

Sarosh Kuruvilla[1]

1. Introduction

There has been a long tradition of research in industrial and labor relations focusing on labor and human rights and labor management relationships. Industrial relations became an academic discipline in the early 1900s, resulting from the seminal work of Sidney and Beatrice Webb who founded London School of Economics. In *Industrial Democracy* (1897), they argued that conflict between capital and labor was inevitable in industrialization. The solution to conflict rested on "the device of the common rule" (legislation on minimum standards of work) and labor unions (to equate the power of labor with that of capital). Industrial relations was established at the London School of Economics, and gradually spread to other Anglo-Saxon countries. In the USA the variety of writings of John R. Commons established the discipline in in Wisconsin, and the field flourished thereafter. Industrial relations as an academic discipline can also be found in other anglo-saxon countries (e.g. Australia, Canada, New Zealand) as well as countries colonized by the British (e.g., India, Malaysia, Ghana, Nigeria).

In continental Europe, labor rights and labor relationships were heavily influenced by World War 1. At the treaty of Versailles, the International Labour Organization (ILO) was founded on the belief that universal and lasting peace can be accomplished only if it's based on social justice. In different European countries, the study of labor, social justice and social dialogue was carried out primarily by political scientists and sociologists. Therefore, it is no surprise that this tradition continues in countries colonized by European countries as well. Over time however, even in Europe, industrial relations (henceforth IR) have become a popular term used for the study of work, labor, social justice, and labor-management relationships. The founding of

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the European journal of industrial relations in 1995 is emblematic of the merging of Anglo-Saxon and European nomenclature for the study of work and labor.

The study of IR is distinguished by several features (Kochan, 1998). First, it has a problem-centered orientation, where problems are generally framed with a societal or public interest point of view. Therefore, the focus has generally always been on the problems of the day, whether it was wages, or working conditions, or labor rights. Second, IR is at the same time multi-disciplinary and holistic. Because of its problem centered focus, IR researchers attempt to provide a complete or practical solution to the problem. This requires an approach that goes beyond the narrower confines and methodologies of single disciplines. Hence IR scholars tend to draw on multiple disciplines in their problem centered research. Third, the IR field has an appreciation for the role of history, which, as Jacoby (1990) has noted, derives from the nineteenth-century German school of economics, which placed a high value on history and inductive approaches to economic analysis in contrast to the more deductive and mathematically oriented Austrian school. Indeed, the Webbs, Commons and Karl Marx all demonstrated through their work the importance of putting any contemporary problem or theoretical insight in its proper historical perspective (Kochan, 1988). Thus, understanding historical origins of contemporary problems, whether at the level of countries, firms, or workplaces, is an essential part of IR scholarship. Fourth, IR is multi method as well. The analysis of workplace problems could often require qualitative interviewing and participant observation as well as historical analysis and quantitative analysis of survey data.

Although it is multi-method, there is a tendency for IR to follow inductive rather than deductive approaches. In part, this is a function of the problem centered focus of the field, and a proper understanding of the problem requires field-based research rather than desk-based data analysis. This is exemplified by the Oxford School (Flanders, Fox, and Clegg) who talked about a "*pound of facts, and an ounce of theory*", in sharp contrast to applied management journals in the UK today, whose obsession with theory is, in my view, stultifying research in our field. Finally, IR places great emphasis on understanding institutions. IR researchers are encouraged to combine the use of multiple methods so as to interpret how individual-level data are influenced by the context in which these data are collected. As Kochan (1998) notes in his review, "*this perspective flows directly from the core proposition of institutional theory – namely, individual and collective attitudes, interests, and behavior are mediated and, over time, shaped by the institutional structures and processes in which they are situated*".

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In sum, IR's problem centered focus plays great weightage on the analysis of institutions (at multiple levels (nation state, companies, unions, industry associations, bargaining institutions and most significantly, workplaces), and how institutions work at those levels, and that understanding requires inductive field research, using generally qualitative methods. Aside from obtaining an insight into historical processes, these techniques also allow one to see how stakeholders view their world. Qualitative techniques are an advantage when trying to uncover the many hidden features of the employment relationship (Strauss, 1998). As he notes "*informal or even illicit behavior can be examined as a result of the trust that may develop in association with interviewing or the use of ethnographic methods*". And Burawoy (1985) has demonstrated that shop-floor organization can be sophisticated, even if entirely informal within workplaces. Finally, qualitative methods allow for an examination of a problem in great depth, and over time, as opposed to surveys which seeks to capture reality at a fixed point in time.

2. Comparative Industrial Relations

The interconnected nature of the world gave rise to the comparison of industrial relations systems and phenomena across countries. Indeed, in the 1960s, a key hypothesis was that industrial relations around the developed world would converge (Kerr, Dunlop, Harbison, Myers, 1960). This convergence hypothesis stimulated more comparative research, leading to a rich vein of empirical investigations over several decades. The integration of European markets and the free movement of people since 1992 was a second moment that further stimulated cross-national research at multiple levels i.e. EU level, across and within firms, across and within unions and at various bargaining levels. While earlier, the Dunlop framework was used to compare how industrial relations differed across countries, there has been a tendency by European researchers to use the more explicit Varieties of Capitalism framework (Hall, Soskice, 2001) to structure their studies.

But even in comparative IR research the core characteristics of industrial relations remained the same – a focus on how institutions work, and inductive, field-based problem centered research using primarily qualitative methods at multiple levels. Given that the ISSLSL World congress is dominated by lawyers, it is important to distinguish IR research with that of legal research. Traditional legal research methods are derived from the practices and reasoning of the legal system and are generally not in sync with the objectives of empirical social science. It seems that legal research is largely concerned with the exegesis of legal doctrine. As such, as Hammond

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and Ronfeldt (1988) note, legal research "*begins and ends at the door of the law library*". But there is a rich tradition of comparative legal research which compares legal systems and laws across countries, that is a little closer to comparative IR research. Hammond and Ronfeldt suggested in 1998 that labor law researchers must reconceptualize research their approach to fuse an understanding of the nature and law and legal doctrine with the questions asked by IR scholars. To a large extent, the two disciplines have begun to converge methodologically, especially when it is necessary to study the effect of laws on the behavior of industrial relations actors within and across countries. Laws too, after all, are institutions. This melding is exemplified by the research exhibited at the Law and Policy Association conferences – especially the 2024 one in Denver, which showcases the intersection between law and empirical social science in numerous domains.

3. Global Value Chain Research: A New Frontier for Comparative Industrial Relations

Whereas national industrial relations research focused on the analysis of institutions and their effect on behavior of managers, workers and policy makers in relation to human rights, social justice and labor-management relations, and comparative IR internationalized the analysis, studying these subjects in the context of global supply chains constitutes significantly new and complex terrain for industrial relations scholars. This complexity is evident in terms of the unit of analyses, the complexity of studying one single value chain across multiple locations in both highly developed IR systems as well as poorly developed ones, the interplay between a lead firm and large numbers of suppliers, the interplay between private and public regulation and the interplay between universally accepted labor rights and a variety of national legislation regarding various labor standards. Before I address the methodological challenges of labor regulation in global supply chains, it may be useful to understand the development of attempts to regulate labor conditions in supply chains.

4. The lack of international 'hard' regulation

The 1980s demonstrated well the lack of an effective international regulatory system to hold multinational corporations accountable for harm to people or the environmental through their operations in other countries. They have been well regulated in their own national contexts, but poorly

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regulated in developing country contexts, where local governments may not enforce their own laws or are complicit in some way through their relationships with multinationals. For example, in the case of the Bhopal gas leak tragedy that killed more than 5000 workers in 1984 in India, Union Carbide Corporation was the American multinational who owned the local Indian factory, which was also part owned by the government of India. Hence, the Indian government did not hold UCC to account in India, while the US courts did not entertain lawsuits filed by Indian NGOs and workers in US courts, arguing that it was a case of "*forum nonconveniens*" i.e. the US courts were not the right forum for adjudicating these cases – it must need to be done in India. In the case of Omai river disaster in Guyana, the walls of a pond constructed to contain cyanide utilized in the gold-mining industry for leaching gold, accidentally breached. More than 400 million gallons of cyanide-laced material spilled into the Omai River and subsequently, into the Essequibo, the country's largest river. The spill resulted in environmental, ecological, social, economic and political consequences for the Guyanese community. The mine, owned by Canadian and US multinationals was also co-owned by the government of Guyana. Efforts to seek recompense in Guyana failed, and efforts to sue the US and Canadian owners in the US courts also failed due to the *forum nonconveniens* argument. Incidences like this led to a growing consensus regarding the need for some form of global regulation, exemplified by the anti-globalization protests that occurred at the WTO meetings in Seattle in 1999 – often referred to as the "battle in Seattle".

The question of why developing country governments do not enforce their own labor and environmental laws also needs explication. Most, if not all exporting countries that are at the back end of low-cost supply chains like garments and electronics (for many countries, the path to economic development is through capitalizing on their comparative advantage of low costs and abundant labor) are members of the ILO, and have adopted many of its conventions and have labor laws consistent with those conventions. Yet the ability and/or willingness of apparel exporting countries (as an example) to enforce their laws has been a key problem. Some view low labor costs and standards as a source of competitive advantage and a key means of attracting the low-cost focused apparel industry; in some cases, the economic argument is correlated with the suppression of labor rights and standards for political control. And in yet other cases, the state has been captured by elites who are also owners of apparel factories. Finally, many apparel exporting countries are poor and do not have the administrative and financial capacity for effective law enforcement (e.g., to sustain a good labor inspection regime with well-trained labor inspectors).

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5. The development of 'soft' and private regulation

Given the inability to develop 'hard' international regulation, attention turned to "soft regulation". Linking labor standards to trade was one option, followed mostly by the US, but an increasingly popular option was that of private regulation. Naming and shaming campaigns by nongovernmental organizations (NGOs) tying Kathie Lee Gifford and Nike to sweatshops and the use of child labor in the early 1990s in the USA provided one impetus for the development of private regulatory efforts by global athletic shoe and apparel retailers. Global brands sought legitimacy with their critics and consumers in developed country markets through private regulation policies to fill the regulatory void in exporting countries. Corporations also realized the need to do something to counter the anti-globalization movement, and private regulation was seen as a pre-emptive strategy to keep at bay international efforts at more stringent hard regulation. Companies like Nike, Reebok and Gap spearheaded the development of private regulation, but both governments and NGOs also helped organize companies to join multi-stakeholder institutions in private regulation (Bartley, 2007). For example, the Clinton administration provided both leadership and funding to start the Apparel Industry Partnership, which later became the Fair Labor Association; NGOs such as Social Accountability International, the International Labor Rights Fund, and American labor unions were also involved in that effort.

The most common form of private regulation model has three elements: setting of standards regarding labor practices in global supply chains through a corporate code of conduct generally based on the core labor rights conventions of the International Labour Organization (ILO); "auditing" or "social auditing" that involves monitoring whether supplier factories comply with the code of conduct; and incentives for suppliers to improve compliance by linking future sourcing decisions to their compliance records (penalizing or dropping noncompliant suppliers and rewarding more compliant ones).

We have seen explosive growth in the adoption of private regulation since the 1990s. From its beginnings in apparel and footwear (e.g., Nike, Gap Inc., Reebok), it has diffused to many other industries over the past two decades – horticulture, home furnishings, furniture, fish, lumber, fair trade coffee, and others (Riisgaard, 2009). One study found that more than 40 percent of publicly listed companies in food, textiles, and wood products had adopted the private regulation model.

This diffusion has created a large and growing ecosystem of actors and institutions. Multi-stakeholder initiatives have led to a "collective fora" for private regulation (Short, Toffel, Hugill, 2018). A large and growing number of auditing organizations – Verite, Intertek, and ELEVATE, for example –

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do social auditing for global companies and multi-stakeholder initiatives, claiming their services help improve private regulation and labor conditions in global supply chains. Social auditing is an $80 billion industry, and "*hundreds of thousands of audits are conducted on behalf of individual firms and multi-stakeholder initiatives each year*" (Short, Toffell, Hugill, 2018). There are well over two hundred different auditing programs (apart from those run by the brands themselves). A rough estimate suggests that the top ten auditing firms account for more than 10 percent of this total (Kuruvilla, 2021).

The growing private regulation industry has given birth to critical NGOs that use investigative reporting to pressure brands to improve their performance on labor standards (e.g., Oxfam, Labour Behind the Label). Other organizations facilitate the exchange of audit information among global companies (e.g., Sedex). There are many consulting companies serving global brands and supplier factories. There has also been growth in international organizations and institutions seeking to foster improvements in labor conditions in global supply chains, such as the ILO's Better Work program (a collaboration between the ILO and the International Finance Corporation), the UN's Global Compact, and a variety of business and human rights organizations. And a steadily increasing number of organizations, such as the Sustainable Apparel Coalition and the Better Buying Initiative, work to improve the efficacy of private regulation by layering new policies onto the basic model. A number of socially responsible investment companies are also actively engaged in evaluating private regulation programs. University centers have emerged that are devoted to private regulation and workers' rights, and the number of scholarly books, special issues of journals, and articles devoted to the subject continues to grow.

6. Methodological Challenges

There are five key methodological challenges facing researchers who wish to examine the effect of private regulation in supply chains, which I discuss serially below. These problems are largely based on my experience of conducting research in global supply chains.

7. The problem of research access

Since private regulation of labor in global supply chains is 'private', it is difficult to access the data to analyze from lead firms and their suppliers. Corporations rarely share their supply chain data, either because they don't

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have very good data, or because the data does not support the various claims that that they have made in their codes of conduct and in their annual CSR/ sustainability reports. And the data that corporations do disclose in their sustainability reports tend to be in the aggregate, and not factory by factory. But researchers are interested in labor rights and working conditions in each factory, so aggregate data is of little use here. Thus, assessing whether private regulation is working to improve labor conditions in global supply chains has been difficult because there is no access to corporate data, nor is there access to suppliers – since their contracts with global buyers often prevent them from sharing information with third parties, including academics.

This is why the question of whether private regulation brought about meaningful improvements in working conditions in the global supply chain over the last 25 years is so difficult to answer. Our answers to these questions are woefully inadequate, as we are dependent on a few case studies, and left to draw inferences from actual events such as tragic factory disasters in Pakistan & Bangladesh in which many workers have been killed. While there have been case studies, these are idiosyncratic rather than a systematic sample of the population of global supply chain factories. Case studies, done by researchers and/or NGOs tend to be unbalanced in that they rely on interviews with workers or unions, but almost never from factory management or global brands. In addition, these case studies are not always based on actual supplier data or sustainability data from companies although there are some exceptions that are listed in Kuruvilla (2021). Supply chain factory management will rarely cooperate with researchers given that their contracts with global brands prevent them from disclosing any information about their factories. Although the number of case studies have been growing gradually, they constitute only a tiny percentage of all the supply chains (even in the apparel industry) which has been best studied. Hence, our ability to understand how private regulation is working is very limited and the evidence is contradictory. For instance, rich evidence from one case study of Nike by Locke (2013) indicates some positive effects, but also that factories cycle in and out of compliance. Other case studies show limited improvements in workers' rights, but some improvement in some labor standards such as health and safety. More recently, Kuruvilla (2021) reports on cases where there is improvement in compliance, but many cases in which there is no change over time. Thus, the lack of access to research sites, either within lead firms or suppliers, limits the generalizability of findings. For every one case study with limited access there are 1000s of lead firms and supplier factories in multiple industries that we know nothing about!

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Further, if lead firms and suppliers are unwilling to share data publicly or with researchers, so are the other various actors in the supply chain and labor eco-system. A number of multi-stakeholder institutions and standard setting institutions exist. Those that are controlled completely by corporates (such as WRAP) do not share any data. Organizations such as Sedex keep data from multiple audits for their members to access, but do not allow that data to be used by researchers. Multi-stakeholder institutions such as ETI and FLA do have information about how their member brands supply chain labor performance, but they do not share that information with researchers either (although FLA published a small percentage of their members factory audits on their website). Then there are those like Fair Factories Clearinghouse that maintain a lot of audit data from numerous organizations, but also do not share their data publicly. This, this is a case of "*data data everywhere, but not available to researchers to analyze*".

8. The difficulties in executing qualitative research on labor in supply chains

The problem of research access makes doing research on labor issues in global supply chains difficult, to be sure. But lately, a few companies have started providing researchers access as long as non-disclosure agreements are signed. Recall that industrial relations scholars tend to favor field based qualitative research methods in order to truly understand what is going on. But getting access to companies is not enough – one needs access to their Tier 1 suppliers, and if possible, tier 2 suppliers and so forth down the value chain. So, obtaining access at multiple levels of the supply chain is a key challenge. Even with access to the lead firm, engaging in interviews with regard to sourcing practices is generally not possible, as companies refuse to share sourcing data on the grounds that it is a "trade secret" and a source of competitive advantage. For example, it is necessary for companies to integrate their sourcing strategies with their compliance strategies. Doing research into lead firms requires interviews with sourcing and logistics managers and the analysis of merged sourcing and compliance data. However, in most lead firms even sustainability managers who deal with compliance may not have access to sourcing data. Our research thus far reveals that in most apparel companies, sourcing and compliance are rarely integrated.

And if one were to secure access to first tier suppliers, there is a tendency, at least in the garment industry, for workers to be coached by factory owners to give the researcher 'preferred' answers when interviews are conducted at the factories. Further, the cost involved in doing research across far

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flung supply chains is prohibitive. Consider that for example, Gap Inc had about 1200 factories that it sourced from in 2015, spread across 26 countries (approximately). Those factories sourced their cloth from fabric mills, concentrated mostly in China and India, and the fabric mills sourced their thread from spinning mills distributed all over the global south. Those spinning mills in turn used cotton sourced from Texas, Xinjiang, India, and Uzbekistan. To obtain more reliable information from supply chain workers requires that one conducts interviews in the communities where they live, further making it difficult for a single researcher based in the west to obtain access to worker communities in the garment exporting countries. And shrinking research budgets preclude large scale research projects employing teams of researchers that is necessary to study all the different nodes in supply chains. Thus, the ability to engage in traditional IR style qualitative research is quite limited.

9. The problem of limited, low quality quantitative data

As noted, the supply chain labor field is awash with data held by firms, multi-stakeholder institutions, auditing companies, data repositories, and so forth, but none of that data is available for scholars to analyze. But even more importantly, the data is not of great quality. When we talk about supply chain labor data, we refer particularly to data from audits conducted at factories to see whether factories comply with the code. The first problem is that the data is incomplete – there are audit results but not enough contextual information such as factory worker demographics, products, business models, costs, and a range of information that would help analysis.

The second problem is that audit data, limited as it is, could itself be suspect. Data obtained from auditing (or called social auditing) has been criticized for a variety of reasons. Audits are deemed too short to uncover violations, (the typical audit is less than two days in a large factory), and auditing is a commoditized, low paid, outsourced activity. Therefore, auditors, who are typically not well trained in all aspects (for e.g., in both labor rights and chemicals handling) satisfice by "checking the box" but do not get to understand the root cause of the violations.

Although interviews with workers are a required component of the auditing process, most of those involve workers who have been coached "coached" to provide "desirable answers". There is also considerable fraud and bribery, with auditors "*willing to turn a blind eye when necessary to please factory managers*" (Bartley, *et al*., 2015). Kuruvilla (2021) provides detailed data that shows that information provided to auditors is often falsified, (in some

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countries and industries audit falsification is rampant). He also demonstrates the existence and activities of a number of consulting companies in China that helps factories "pass" audits of global companies through falsification of data and other methods – which makes for interesting reading. Further, there is audit multiplicity – where factories servicing a number of brands face "audit fatigue" – far too many audits in a year. What complicates the large number of audits is also that brands use different auditing protocols and different rating scales, such that it is possible for a factory to "pass" one brands' audit while failing a second brands' audit on the same day or during the same week (Kuruvilla, 2021). Thus, the many problems with social audits are a key reason why data maybe unreliable.

10. The problem of varying standards

Another problem that makes auditing data non-comparable is due to differences in standards. For example, there is a multiplicity of codes across companies and multi-stakeholder initiatives, that may focus on the same standards, but differ as to the thresholds of acceptable behavior. For example, companies belonging to Worldwide Responsible Accredited Production (WRAP) – a factory-based certification that certifies facilities for compliance with the 12 WRAP Principles which assure safe, legal and ethical manufacturing processes – requires its members to ensure that minimum wages are paid to supply chain workers, whereas the Fair Labor Association (a multi-stakeholder association) requires its corporate members to ensure that wages paid in the supply chain are sufficient to cover basic needs and some disposable income for workers. Similarly, although most companies and multi-stakeholder institutions adopt the same core human rights specified by the ILO, they differ in how these are operationalized. For instance, in case of one of the core human rights – the right to freedom of association and collective bargaining – different codes have different requirements. Some codes require that suppliers adopt a position of neutrality when faced with a union organizing effort in their factories Others require that suppliers adopt a more positive attitude towards union organization, educate workers about their freedom of association rights and about collective bargaining. The variation in health and safety standards is even greater. Thes variation results in multiplicity of auditing protocols that make comparisons problematic – a key problem for supply chain labor researchers.

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11. The Problem of Multi-Brand suppliers

A particular obstacle problem is that many suppliers supply to multiple global brands in the apparel industry. It is rare to find suppliers who dedicate all their production to only one global buyer in part because that would constitute significant risk as consumer preferences could change year to year. Hence suppliers like to spread the risk. But this creates a huge challenge for researchers, since labor practices in that supplier factory is a function of the sourcing practices of a multiplicity of buyers. For example, it is possible that one or two buyers might provide orders a little late, reducing lead time for the supplier, such that the only way the supplier can meet the target is to use more overtime, or engage in subcontracting – both of which are limited by the code of conduct of various buyers. Thus, even if the supplier provides research access, the data required to trace labor practices to purchasing practices of a particular buyer is highly detailed, and very few suppliers are willing to share detailed order data from their buyers (in fact their contracts with buyers do not allow them to share this information).

To conclude, engaging in research on labor practices in global supply chains presents a range of methodological problems that are often difficult for researchers to overcome. I have presented five problems here – but they are not by any means an exhaustive list. But research in multi-brand suppliers is quite crucial, since that is the norm in the global apparel industry.

12. The Future: Mandatory Due Diligence in Global Supply Chains and Research

It is possible that there might be increased transparency of supply chains in the future which may make research on labor practices easier. This is in large part due to new laws in Europe that mandate supply chain due diligence. These laws require covered companies to engage in due diligence with regard to labor and environmental practices in their value chains. They represent an effort to hold companies accountable, through administrative penalties and civil liability, for harms to people and planet anywhere in their value chain. The first of these was enacted in France in 2017 (*French Duty of Vigilance Law*), the second was enacted in Germany in 2021 (*German Act on Corporate Due Diligence in Supply Chain*) and implemented in 2023. The Norwegian *Supply Chain Transparency Act* came into force in 2022, and the European Union passed the *Corporate Supply Chain Due Diligence legislation* in May 2024, although it will take two years before this law comes into force in each country in the Union. In general, these laws obligate

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covered companies to engage in due diligence, by assessing risks of causing harm to people and planet in their value chains and to publish these risk analyses on their websites. This could usher in a new era of transparency that could stimulate more research and make it easier for researchers to study labor rights and social justice in global supply chains.

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AI and legal professions: the role of law school

David Carvalho Martins[1]

Introduction

Artificial intelligence (AI) is changing our lives in unprecedented ways. From document analysis to contract drafting and automation, from litigation support to legal research, AI tools are increasingly being used to systematize and enhance various aspects of legal practice not only for lawyers, but also for judges. But what does this mean for law students who would like to become lawyers or judges soon? How can they prepare themselves for the challenges and opportunities that AI will bring to their near future? And what is the role for the law school?

We believe that law schools should play a crucial role in preparing students for the intensive use of AI in the legal profession. This is an essay based on our empirical experience either as professor or lawyer.

The essay has four sections:

1) the first part is to identify three main categories of AI application that we have tried or that we are currently using;
2) the second part is a list of 10 main reasons why we believe that we should start using AI intensively;
3) the third part is also a list of six main ethics concerns and five pedagogical challenges, which apply in education, but we also think that, *mutatis mutandis*, are applicable to any legal profession;
4) the fourth part is to give three main reasons why employers will mostly prefer to hire AI driven students.

This essay is not an academic paper that relies on rigorous research methods and empirical data. Rather, it is a personal reflection based on the

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practical experience and observation of a lawyer and a professor who have been involved in using AI tools in legal practice, is an enthusiastic of AI among their colleagues and is starting to use it in the education field. It aims to share some insights and perspectives on how AI is already changing the legal profession and why law students should prepare themselves for this inevitable change.

1. Three main categories of AI applications for the legal sector

We can find AI applications for different purposes, as such: (i) legal research and analysis, (ii) legal document generation and review, and (iii) legal prediction and decision making[2]. They involve different types of AI systems, methods or techniques, in particular natural language processing, machine learning, and different levels of human involvement: supervision, collaboration or delegation.

The first group – legal research and analysis – is the most common and widespread use of AI in the legal profession. AI tools can help lawyers find relevant legal information, such as legislation, regulations, statutes, bills, templates, case law and scholarly articles, from various sources and jurisdictions. AI tools can also help lawyers analyse legal information, such as extracting key facts, identifying legal issues, summarizing arguments, and comparing outcomes. Some examples of AI tools for legal research and analysis are (i) LexisNexis[3], (ii) Casetext[4], (iii) ROSS Intelligence[5] and (iv) Copilot Pro[6].

The second group – legal document generation and review – is another important use of AI in the legal profession. AI tools can help lawyers draft, edit, and review legal documents, such as contracts, pleadings, wills, and legal opinions, but also judges to summarize cases, to verify evidence and to draft court decisions. AI tools can also help lawyers check the quality, consistency, and compliance of legal documents, as well as detect errors, anomalies, and risks. Some examples of AI tools for legal document generation and

[2] Cfr. Kapoor S., Henderson P., Narayanan A., (2024), "Promises and pitfalls of artificial intelligence for legal applications", text available at: *www.cs.princeton.edu/~sayashk/papers/crcl-kapoor-henderson-narayanan.pdf*, p. 2; Kauffman M.E., Negri Soares M. (2024), "AI in legal services: new trends in AI-enable legal services", text available at: *link.springer.com/article/10.1007/s11761-020-00305-x*, (last visit on 14.07.2024).

[3] Text available at: *www.lexisnexis.com/en-us/home.page* (last visit on 14.07.2024).

[4] Text available at: *casetext.com/* (last visit on 14.07.2024).

[5] Text available at: *blog.rossintelligence.com/* (last visit on 14.07.2024).

[6] Text available at: *www.microsoft.com/en-us/store/b/copilotpro* (last visit on 14.07.2024).

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review are (i) Contract Express[7], (ii) LegalSifter[8], (iii) NetDocuments with PatternBuilder Max[9], (iv) Kira Systems[10] and (v) Relativity[11].

The third group – legal prediction and decision making – is the most advanced and controversial use of AI in the legal profession. It could be also the field where the risk of failure is bigger, because it will rely on the quality of data collected, but also it will differ from one legal system to another legal system. AI tools can help lawyers predict the likely outcomes and consequences of legal actions, such as litigation, arbitration, mediation, and negotiation. AI tools can also help lawyers make informed and optimal decisions based on data, evidence, and preferences. Some examples of AI tools for legal prediction and decision making are (i) Lex Machina[12], (ii) Premonition[13], (iii) Cleanlab[14] and (iv) Luminance[15].

We can now imagine two different lawyers, one without using AI and the other with using AI, to illustrate the potential impact and implications of AI in the legal profession.

We would say that the lawyer without using AI may face several difficulties, such as: (i) to spend more time and resources on legal tasks that could be automated or augmented by AI tools, such as research, analysis, document generation and review, prediction and decision making, (ii) to miss relevant legal information, insights, or opportunities that could be provided or suggested by AI tools, such as new precedents, arguments, strategies, or solutions, (iii) to produce lower quality or less creative legal work that could be improved or enhanced by AI tools, such as reducing errors, inconsistencies, or risks, or generating novel or diverse options or perspectives, (iv) to lose clients or cases to competitors who use AI tools and can offer faster, efficient, or better legal services, or who can demonstrate their expertise, efficiency, or innovation.

On the other hand, the lawyer with using AI may enjoy several benefits, such as: (i) to save time and resources on legal tasks that can be automated or augmented by AI tools, such as research, analysis, document generation

[7] Text available at: *www.thomsonreuters.in/en/products-services/legal/contract-express.html* (last visit on 14.07.2024).

[8] Text available at: *www.legalsifter.com/* (last visit on 14.07.2024).

[9] Text available at: *www.netdocuments.com/press-releases/netdocuments-patternbuilder-max-globally-available* (last visit on 14.07.2024).

[10] Text available at: *kirasystems.com/* (last visit on 14.07.2024).

[11] Text available at: *www.relativity.com/artificial-intelligence* (last visit on 14.07.2024).

[12] Text available at: *lexmachina.com/* (last visit on 14.07.2024).

[13] Text available at: *premonition.ai/* (last visit on 14.07.2024).

[14] Text available at: *cleanlab.ai/solutions/law/* (last visit on 14.07.2024).

[15] Text available at: *www.luminance.com/* (last visit on 14.07.2024).

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and review, and prediction and decision making, (ii) to have access to relevant legal information, insights, or opportunities that are provided or suggested by AI tools, such as new precedents, arguments, strategies, or solutions, (iii) to produce higher quality or more creative legal work that is improved or enhanced by AI tools, such as reducing errors, inconsistencies, or risks, or generating novel or diverse options or perspectives, (iv) to attract or retain clients or cases by using AI tools and offering faster, efficient, or better legal services, or by demonstrating his expertise, efficiency, or innovation.

Please note that these are empirical scenarios. It could always be addressed that a machine could never become a lawyer, because it will never have (i) human judgement and creativity, (ii) ethical and moral values and (iii) interpersonal skills. At this stage, one never say never.

In any case, these pros and cons are not inevitable, but rather depend on the availability, accessibility, affordability, accuracy, and appropriateness of AI tools, as well as the willingness, readiness, and ability of lawyers and judges to use them effectively and responsibly. The future of the legal profession will likely be shaped by the interaction and integration of human and AI, which will require law students to develop both technical and non-technical skills, such as data literacy, critical thinking, and ethical reasoning. Therefore, students should be prepared for the intensive use of AI, notably through (i) the contact with different AI tools and (ii) learning the benefits and risks of AI. Any other option to restrict or prohibit the use of AI will end up like trying to stop the wind with our own hands.

2. Ten main reasons to use AI intensively

Exclusively based on our experience either as lawyer and as law professor, we would like to address 10 main reasons why we believe that law schools – but also, for example, management schools with law disciplines – should prepare students for the intensive use of AI in their future professions (either exclusively based on law or related or influenced by the Law): (i) efficiency, (ii) accuracy, (iii) cost-effectiveness, (iv) competitive advantage, (v) innovation, (vi) global perspective, (vii) risk management, (viii) ethical considerations, (ix) cross-border legal issues and (x) future readiness.

1) First, AI can automate repetitive tasks, allowing lawyers to focus on more complex and critical legal issues or on questions where the human interaction or emotional intelligence are highly required. AI technology can modernise legal research, document review, and other repetitive

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tasks, allowing lawyers to focus their time and expertise on higher-value work, but will also improve work-life balance. By familiarizing students with AI tools during their academic career, law schools can help them develop the skills needed to leverage technology for increased efficiency in their future career.

2) Second, AI algorithms can analyse and process large volumes of legal information quickly and accurately, reducing the likelihood of human error in legal research and analysis. By teaching students how to use AI tools effectively, law schools can help them achieve more precise and reliable results in their future work.
3) Third, AI can help law firms reduce costs by rationalisation processes and increasing productivity. By automating routine tasks, AI can help law firms reduce operational costs and improve overall productivity. Law schools play also a role in this field: anticipating this trend will help future lawyers and judges to bring cost-effective solutions to their profession, making them more competitive and more productive, with significant effects to the Society.
4) Forth, lawyers who are proficient in AI technology will have a competitive edge in the job market and attract and retain more clients. In an increasingly tech-driven legal industry, lawyers who are proficient in AI technology will have a competitive edge over their peers. By integrating AI education into their curriculum, law schools can empower students to stand out in the job market and attract the best employers and clients seeking innovative and tech-savvy legal professionals.
5) Fifth, embracing AI in legal education encourages innovation and keeps students abreast of the latest technological advancements in the legal field. AI technology is driving innovation in the legal sector, enabling new approaches to legal research, case analysis, and client services. By exposing students to AI tools and applications, law schools can foster a culture of innovation and provide the skills needed to the future lawyers to adapt to and drive technological advancements in this sector.
6) Sixth, AI is being used in legal systems worldwide and reshaping them, and students who understand AI will be better equipped to work in a globalized legal environment. Law schools can better prepare their students to navigate the complexities of international legal work and collaborate effectively with peers from diverse legal backgrounds.
7) Seventh, knowledge of AI in law can help lawyers and judges identify and manage legal risks associated with AI technology. AI technology presents unique legal and ethical challenges, including issues related to data privacy, bias in algorithms, and liability for AI-generated decisions. By teaching students about the legal risks associated with AI, law schools

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can help future lawyers and judges identify and mitigate potential pitfalls in the use of AI tools in legal practice.

8) Eighth, as AI technology becomes more prevalent in the legal profession, it is important for lawyers and judges to understand the ethical implications of using AI in their practice. By integrating discussions on AI ethics into their curriculum, law schools can prepare students to navigate the ethical complexities of AI-driven legal work and make informed decisions that uphold professional standards.
9) Nineth, AI can assist in dealing with complex cross-border legal issues by providing efficient solutions and by facilitating the resolution of complex cross-border legal issues with insights and solutions that transcend jurisdictional boundaries. Law schools that train students to leverage AI tools for cross-border legal work can equip them with the knowledge and skills needed to address international legal challenges effectively and efficiently.
10) Tenth, as AI becomes more integrated into the legal industry, students who are well-versed in AI will be better prepared for the future of legal practice and will have better job opportunities. Law is traditionally seen as a local knowledge or culture. It is not common to get a law degree in one country and to start working as a lawyer or judge in a different country. We believe that the incorporation of AI in the curriculum will ensure that law students will be well-prepared to navigate the evolving landscape of the legal profession in different countries or cultures. As AI continues to transform the legal landscape, students who are proficient in AI technology will be well-positioned to succeed in a rapidly evolving legal industry. By equipping students with a solid foundation in AI during their academic career, law schools can ensure that future lawyers are prepared to embrace the opportunities and challenges presented by AI in the practice of law.

However, despite these compelling reasons to use AI intensively at law schools, there are also significant ethics concerns and pedagogical challenges that need to be considered. Therefore, it also requires careful and deliberate consideration of the ethics and pedagogy involved.

3. Six main ethics concerns and five pedagogical challenges

As mentioned above, AI is a powerful and disruptive technology that can transform the legal industry and the practice of law; besides, law schools have a crucial role in preparing students for the exercise of legal professions

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in the age of AI. However, using AI at law schools is not without ethical and pedagogical challenges that need to be carefully considered and addressed.

As for ethics concerns, we may identify the following: (i) transparency and accountability, (ii) data privacy and security, (iii) bias and fairness, (iv) professional responsibility, (v) informed consent and autonomy and (vi) originality. On the other hand, as for pedagogical challenges we mention the following: (i) access to technology, (ii) integration with traditional teaching methods, (iii) curriculum development, (iv) skill development and (v) evaluation and assessment.

One of the main ethics concerns related to AI in law schools is the lack of transparency in AI algorithms and decision-making processes. Students and practitioners should be aware of how AI systems arrive at their conclusions to ensure accountability and guard against potential biases. To address this concern, law schools should teach students how to critically evaluate AI tools and their outputs, how to explain the rationale and limitations of AI systems to clients and courts, and how to challenge AI decisions that are inaccurate, unjust, or unlawful.

Regarding the second ethic concern, AI tools used in legal education may process sensitive and confidential information, raising concerns about data privacy and security. Safeguards must be in place to protect the confidentiality of student data and prevent unauthorized access or misuse of personal information. Law schools should teach students about the applicable laws and regulations regarding data protection and security, such as the General Data Protection Regulation (GDPR) and the local or national regulations. Law schools should also inform students about the potential risks and benefits of using AI tools, such as data breaches, identity theft, or improved efficiency and accuracy. Furthermore, law schools should provide students with clear and transparent policies and guidelines on how to handle and store data when using AI tools, such as encryption, anonymization, or deletion.

As for the third ethic concern, AI algorithms can perpetuate and amplify biases inherent to the data they are trained on, leading to unfair or discriminatory outcomes. Law schools using AI should address concerns about bias in AI systems and educate students on how to identify and mitigate bias in legal decision-making processes. For example, law schools could teach students (i) how to evaluate the quality and representativeness of the data used to train AI systems, (ii) how to apply fairness metrics and techniques to assess and reduce bias in AI outputs, and (iii) how to monitor and audit AI systems for potential bias over time. Law schools could also (i) expose students to different perspectives and values that may affect the design and use of AI systems, such as human rights, social justice, and cultural diversity, (ii) encourage students to participate in interdisciplinary

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and collaborative projects that involve AI and law, and to engage with stakeholders and communities that may be affected by AI decisions.

Concerning the fourth ethic concern, as AI technology becomes more integrated into the legal profession, lawyers and judges have a professional responsibility to ensure that AI tools are used ethically and in compliance with legal and ethical standards. Law schools should instil a strong sense of professional responsibility in students when using AI in their legal practice. In particular, law schools could address this ethical concern by (i) teaching students the basics of intellectual property law and how it applies to AI-generated works, such as the criteria for copyright, patent, and trademark protection, the exceptions and limitations to intellectual property rights, and the ownership and licensing issues of AI-generated works, (ii) providing students with examples and case studies of how AI tools can be used to create, enhance, or analyse legal works, such as contracts, briefs, opinions, or research papers, and how to properly cite and acknowledge the sources and contributions of AI tools, (iii) developing clear and consistent policies and guidelines for the use of AI tools in academic assignments and assessments, such as the acceptable and unacceptable uses of AI tools, the requirements for disclosure and consent, and the penalties for plagiarism and other forms of academic misconduct, (iv) implementing effective tools and methods to detect and prevent plagiarism and other forms of academic misconduct, such as plagiarism detection software, peer review, or oral defence and (v) encouraging students to develop their own critical thinking, creativity, and writing skills, and to use AI tools as a supplement and not a substitute for their own work.

About the fifth ethic concern, AI systems can make decisions that impact individuals' legal rights and interests, raising questions about informed consent and autonomy. Law schools should train students to consider the implications of using AI in legal practice and uphold clients' rights to make informed decisions about the use of AI technology in their cases. They could also address the topic of using AI tools responsibly and with proper attribution in legal research and writing by following some strategies mentioned in the fourth ethic concern, but also (i) providing students with examples and case studies of ethical and unethical uses of AI tools in legal research and writing, and discussing the potential consequences and implications of such uses, (ii) engaging students in ethical reflection and dialogue on the benefits and challenges of using AI tools in legal research and writing, and the values and principles that should guide their use.

As a development of the fourth concern, one should mention the need to guarantee the originality of the work produced by AI and to avoid breaches of intellectual property rights. It is important to teach students how to use AI

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tools responsibly and with proper attribution, and how to respect the rights of authors and creators of original works. Besides, it is also critical to foster a culture of academic integrity and discourage plagiarism and other forms of academic misconduct. This concern could be addressed by (i) incorporating ethical principles and guidelines for using AI tools in legal research and writing courses, and emphasizing the importance of originality, attribution, and respect for intellectual property rights, (ii) providing students with clear and consistent policies and procedures for academic integrity and plagiarism, and enforcing them rigorously and fairly, (iii) educating students on how to use citation and referencing tools and software, and how to avoid common pitfalls and mistakes when using AI tools for legal research and writing, (iv) encouraging students to critically evaluate the quality and reliability of the sources and information generated by AI tools, and to verify and cross-check them with other sources and methods and (v) creating opportunities for students to collaborate and exchange feedback on their work, and to learn from each other's best practices and challenges when using AI tools in legal education and practice.

The next step is to analyse some pedagogical challenges, as such: (i) access to technology, (ii) integration with traditional teaching methods, (iii) curriculum development, (iv) skill development and (v) evaluation and assessment.

The first challenge is ensuring equal access to technology for all students. Law schools must provide the necessary resources and support to ensure that professors and students from diverse backgrounds can learn and develop skills in AI technology.

The challenge of ensuring equal access to technology for all professors and students is crucial for promoting equity and inclusion in legal education. AI technology can offer many benefits for enhancing learning outcomes and preparing professors and students for the future of law, but it can also create or exacerbate digital divisions and educational disparities among professors and students from different socioeconomic, geographic, and cultural backgrounds. They must ensure that all professors and students can learn and develop skills in AI technology, regardless of their access to devices, internet, software, or other resources. Some possible strategies to address this challenge are the following: (i) providing professors and students with access to devices, internet, software, and other resources that they need to use AI tools in their courses, either by loaning or subsidizing them, or by creating accessible computer labs or learning centres, (ii) offering flexible and alternative modes of delivery and assessment for students who face barriers or difficulties in accessing or using AI technology, such as online, hybrid, or blended learning, or paper-based or oral assignments, (iii) creating awareness

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and sensitivity among faculty and staff about the challenges and needs of students from diverse backgrounds and providing them with guidance and support to accommodate and assist them, (iv) encouraging peer support and collaboration among students and creating a learning community that fosters mutual respect and understanding and (v) monitoring and evaluating the impact of AI technology on students' learning outcomes and experiences, and identifying and addressing any gaps or issues that arise.

The integration of AI into the curriculum alongside traditional teaching methods can be challenging for law schools. Faculty members may require training and support to effectively incorporate AI tools into their courses and ensure a seamless integration with existing teaching practices. Some possible strategies to address this challenge are the following: (i) providing professional development workshops and resources for faculty members to learn about the benefits and limitations of AI technology and how to use it in their teaching, (ii) creating a collaborative environment among faculty members to share best practices and experiences in using AI tools and to provide feedback and suggestions for improvement, (iii) establishing clear learning objectives and outcomes for each course that incorporate AI education and align with the overall curriculum goals and standards, (iv) designing engaging and interactive learning activities that use AI tools to enhance students' understanding and application of legal concepts and principles, (v) assessing and evaluating students' learning progress and performance using AI tools and providing timely and constructive feedback.

Regarding the third challenge, developing a comprehensive and up-to-date curriculum that includes AI education can be a significant challenge for law schools. These institutions must continually review and update their course offerings to reflect the latest advancements in AI technology and prepare students for the evolving demands of the legal profession. Some possible strategies to address this challenge are the following: (i) conducting regular surveys and consultations with legal practitioners, academics, and students to identify the current and future needs and expectations of the legal profession regarding AI technology, (ii) collaborating with other law schools, professional associations, and AI experts to share best practices and resources for integrating AI education into the curriculum, (iii) designing flexible and modular courses that can be easily adapted and updated to incorporate new developments and applications of AI technology in the legal field, (iv) providing a variety of elective courses and specializations that cover different aspects and domains of AI technology and its relevance to legal practice, (v) incorporating interdisciplinary and cross-cultural perspectives and insights into the curriculum to expose students to the broader social, ethical, and legal implications of AI technology.

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As for the fourth challenge, teaching students how to use AI tools effectively and ethically requires dedicated training and hands-on experience. Law schools must provide opportunities for students to develop practical skills in working with AI technology and apply their knowledge to real-world legal scenarios. Some possible strategies to achieve this are the following: (i) integrating AI tools into existing courses and assignments, such as legal research, drafting, analysis, and advocacy, and providing feedback and guidance on how to use them appropriately and critically, (ii) creating new courses or modules that focus on specific AI tools or applications, such as natural language processing, machine learning, predictive analytics, or blockchain, and how they can be used to enhance legal practice and service delivery, and (iii) offering experiential learning opportunities, such as clinics, internships, or projects, that allow students to work with real clients, data, and problems, and to collaborate with AI experts, developers, and practitioners from different fields and sectors.

Finally, as for the fifth challenge, assessing students' proficiency in AI technology and its application to legal practice poses a challenge for law schools. Schools must develop appropriate evaluation methods that accurately measure students' understanding and readiness to use AI in their future legal careers. Some possible strategies are the following: (i) using formative and summative assessments that test students' ability to explain, justify, and critique the use of AI tools and their outputs, rather than relying on objective or multiple-choice questions that only test factual knowledge, (ii) incorporating peer review and feedback mechanisms that encourage students to share their work, learn from each other, and identify the strengths and weaknesses of different AI approaches and solutions, (iii) creating authentic and realistic scenarios and problems that require students to apply AI tools and techniques to legal issues, and to reflect on the ethical, social, and legal implications of their choices and actions and (iv) providing rubrics and criteria that clearly define the learning outcomes and expectations for students' use of AI, and that emphasize the importance of critical thinking, creativity, and communication skills, as well as technical competence.

By addressing these ethics concerns and pedagogical challenges, these institutions can effectively incorporate AI education into their curriculum and prepare students to navigate the ethical and practical considerations of using AI in the legal profession.

At this stage, you would be wondering the law school model advocated in this paper is purely utopic or it will never exist. It could be. However, at least in this essay we may dream with a better education, taking into account that the traditional way of teaching shall be revised and adapted to the use of AI. Besides, the ideas shared in this paper highlight the indispensability of the Human Being.

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4. Why will employers look for AI driven students and future trainees?

At this stage, we could give three main reasons why employers will look for AI driven students as future trainees (and future CEO's).

First, AI driven students and future trainees have the skills and knowledge to use AI tools and techniques to enhance their legal practice and provide better services to their clients.

Second, AI driven students and future trainees can critically evaluate and challenge the use of AI tools and their outputs, and to identify and address the ethical, social, and legal implications of using AI in the legal profession.

Third, AI driven students and future trainees have the creativity and communication skills to collaborate with other legal professionals, clients, and stakeholders, and to explain and justify their use of AI in a clear and transparent manner.

5. Final remarks

In conclusion, AI driven students and future trainees are not only expected to master the technical skills and knowledge required to use AI tools in the legal profession, but also to develop the critical thinking, creativity, and communication skills that are essential for ethical, responsible, and effective use of AI. These skills will enable them to leverage the potential of AI to enhance their professions, while also being aware of the limitations, risks, and challenges that AI poses for the Society. Therefore, legal education and training should foster and support the development of these skills and prepare the next generation of legal professionals for the AI driven future. Being this said, a new and big challenge is at our door: how to deeply foster the training of the current professors, lawyers, judges and office clerks, for example, to this New World. We should look for the education system and new generations, without forgetting the entire labour market in the law sector.

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Some notes on teaching generations Y and Z. Approaches, methods and technology

Beryl ter Haar[1]

1. Introducing generations Y and Z

To understand how we can best teach students from generations Y and Z, we have to understand them by their stereotypes. These stereotypes are formed by the epoch in which the generations are raised. These epochs are characterized by the social, political, and economic atmosphere that beget values, wants, and needs in adulthood[2]. Thus, if we, as university teachers, want to prepare our students for their future jobs and lives, we have to adjust our teaching accordingly[3]. To understand what and how to adjust our teaching, we also need to understand the difference between the previous generation, generation X, and the current generations, Y and Z.

There are many (online) texts that stereotype these generations, with each a different focus depending on why the generations are stereotyped[4]. However,

[1] UW Prof and head of the Centre for International and European Labour Law Studies (CIELLS) at the University of Warsaw; and Endowed Prof. for European and Comparative Labour Law at the University of Groningen.

[2] Cf. Odukoya A. (2022), "The Changing Generational Values. Examining Workplace Values from Baby Boomers to Generation Z", *Blog John Hopkins University*, 17 November.

[3] Cf. Allen R.N., Jackson A.R. (2017), "Contemporary Teaching Strategies: Effectively Engaging Millennials Across the Curriculum", *University of Detroit Mercy Law Review*, 95: 1-33, at 2.

[4] Among many others: *www.iberdrola.com/talent/generation-x-y-z*; *socialmarketing.org/archives/generations-xy-z-and-the-others/*; *www.repsol.com/en/energy-and-the-future/people/generation-x-y-z/index.cshtml*; and more scientific: Berkup S.B. (2014), "Working With Generations X And Y In Generation Z Period: Management Of Different Generations In Business Life", *Mediterranean Journal of Social Sciences*, 5(19): 218-229; McCrindle M., Wolfinger E. (2009), *The ABC of XYZ: Understanding the Global Generations*, UNSW Press Book.

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in general, they all come down to similar stereotypes comprised of elements that reflect the values, wants, and needs in adulthood[5]. *Table 1* presents a convenient summary of these stereotypes comprised by the following five elements:

1) general stereotypes that indicate a general attitude in life;
2) major historical events that had a major impact on childhood and determine societal and political debates and concerns;
3) communication preferences that determine social and professional contacts;
4) work preferences that determine expectations of work, employers and colleagues;
5) perspectives about the future that determine life values and expectations in general.

Tab. 1. Stereotypes generations X, Y, and Z[6]

Stereotypes	*Gen X (1964-1980)*	*Gen Y (1981-1996)*	*Gen Z (1997-2010)*
General stereotypes	Flexible, independent	Teamwork, overqualified, confident, immature	Multitasking, concentration problems, lack of commitment
Major historical events	Fall of the Berlin wall End of the cold war First computers	9-11 terrorist attacks PlayStation First social networks Helicopter parenting	Global warming Arab Spring Cloud computing Helicopter parenting
Communication preferences	E-mail Text messaging	Instant messaging Social networks E-mail	Video calls Instant messaging Social Networks
Work	Work-life balance	Flexibility and online working	Stability
Perspectives	Little hope for the future Job for working-life	Pragmatic idealism Drive to change the world to improve it	Mobility at work Worries about the future

[5] See for an elaborate study related to teaching: Chan C.K.Y., Lee K.K.W. (2023), "The AI generation gap: Are Gen Z students more interested in adopting generative AI such as ChatGPT in teaching and learning than their Gen X and millennial generation teachers?", *Smart Learning Environments*, 10(60).

[6] The content of the table is based on: *www.iberdrola.com/talent/generation-x-y-z* (accessed 7 July 2024), the table presented by Chan and Lee, *The AI generation gap*, cit., p. 4; and section 1 of the paper Allen R.N., Jackson A.R. (2017), *Contemporary Teaching Strategies*, cit., pp. 3-7.

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2. Meaning of the stereotypes for teaching in general

Three elements in these stereotypes are of particular relevance for teaching: 1) general stereotypes; 2) communication preferences; and 3) perspectives.

The first element (general stereotypes) provides information about the general attitude students will bring into the classroom. Thus, generation X which is stereotyped as flexible and independent will thrive well with forms of self-study in which they are challenged to examine various case positions. Generation Y, on the other hand, thrives better with group assignments, which hold elements of gamification for example by role-playing, in which they are challenged. Generation Z thrives best with short assignments underpinned by a multitude of sources they can consult, which preferably should resonate with their ideas about the future to raise interest and commitment.

The second element (communication preferences) informs us about the best tools to use in teaching. Generation X, which prefers email and text messages, can deal with longer texts, which means that using books, journal articles and full jurisprudence to read will work. However, Generation Y prefers a more direct and interactive form of communication (instant messaging and social media), which means that shorter texts that require some interaction or activity will work better. This could still be a book, but then complemented by assignments directly linked to the text, preferably in an online form. Miriam Cherry's book *Work in the Digital Age: A Coursebook on Labor, Technology, and Regulation* (Aspen Publishing 2022), makes a good example of what could work well with generation Y. Generation Z is more difficult to serve, because the forms of communication they prefer, especially video calls, reflected also in watching short videos on Instagram, TikTok, and YouTube, are not well established forms of communication in academia. At least not in law, in natural sciences video journals exist[7]. Academically based videos like TEDx Talks[8] can sometimes be useful as additional material to deepen a certain topic, but they are designed to share ideas and not for teaching purposes. Since both, generations Y and Z, are used to quick answers generated by the internet, the development of critical legal thinking skills may get stifled since this challenges engagement in deep learning[9].

[7] See for an overview of such journals at: *www.edoriumjournals.com/video-journals/* (accessed 7 July 2024).

[8] *www.ted.com/talks* (accessed 7 July 2024).

[9] Allen R.N., Jackson A.R. (2017), *Contemporary Teaching Strategies*, cit., p. 5, with reference to: Benfer E.A., Shanahan C.F. (2013), "Educating the Invincibles: Strategies for Teaching the Millennial Generation in Law School", *Clinical Law Review*, 20(1).

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Regarding the third element (perspectives about the future) generation X seems to be rather impassive, with a rather pessimistic view and no activities or ideas to make changes for the better. An attitude that is reflected in the idea of work for life (staying for a long time with the same employer), which translates for learning into a need of gaining basic skills and knowledge that prepare for the job, followed by occasional upskilling and retraining on the job when absolutely necessary to keep the job. Generation Y is significantly different. This generation is driven by pragmatic idealism (or values) and want to change the world for the better. As Chan and Lee analysed, this idealism is comprised by words as flexibility, mobility, broad but superficial knowledge, success orientation, creativity, and freedom of information, which comes with a strong entrepreneurial spirit[10]. This creates a need for lifelong learning to excel constantly and develop talents to the fullest[11]. It also comes with a learning attitude that requires a lot of (instant) feedback from professionals and peers, or at least confirmation about the level of performance[12]. The latter can be linked to the effects of responses on social media which can be considered as forms of confirmation (likes) or disapproval (dislikes/ hate speech). Generation Z is the first generation that has grown up with unlimited access to internet and technological devises as integral part of their lives. It has made the world at the same time small (being connected with everyone all the time and everywhere) and infinite (like books on Amazon and music on Spotify)[13], and therefore it comes with a feeling of unlimited opportunities for work. At the same time, generation Z is less opportunistic than generation Y about the future in general and that of their personal lives in particular. When learning, generation Z relies on technology and social media platforms, which makes them rather self-sufficient and creates a feeling of a personal sphere because these activities are conducted on their personal devices. For teaching this means that they prefer an intrapersonal approach in short, instant contacts with the teacher, whereas engagement in group discussions is acceptable when absolutely necessary[14]. The strong reliance on technology and internet resources, including regenerative AI such as ChatGPT, makes traditional in class lectures less comfortable for this generation.

[10] Chan and Lee, *The AI generation gap*, cit., pp. 4-5.

[11] As understood by Amartya Sen, see: Langille B. (2019), *The Capability Approach to Labour Law*, OUP.

[12] Allen R.N., Jackson A.R. (2017), *Contemporary Teaching Strategies*, cit., pp. 4-5, indicate that this is a consequence of "helicopter parenting".

[13] See for an interesting analysis on this: Barrico A. (2020), *The Game: A digital turning point*, McSweeny's.

[14] Chan and Lee, *The AI generation gap*, cit., p. 6.

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Table 2 is an excerpt from the table created by Chan and Lee and summarises the above-described learning preferences for the three generations. Understanding these learning preferences helps to understand the consequences for teaching objectives and methods, which will be addressed in the next section.

Tab. 2. Learning preferences of Generations X, Y, and Z based on their stereotypes

Characteristics	*Gen X (1964-1980)*	*Gen Y (1981-1996)*	*Gen Z (1997-2010)*
Teaching preference	Traditional in-class lectures and memorizing, combined with technology based methods	Interactive, self-paced, technology-based methods	Hybrid (blended) learning, technology-focused
Learning style	Collaborative, project-based, real-world application	Collaborative and networked, technology based	Learn through images/ videos/audio, Experiential active Learning
Feedback	Weekly/daily	On demand	Consistent, immediate and frequent
Knowledge sharing	Based on mutuality and cooperation	Only in cases of self-interest or if forced	On virtual level, easily and rapidly, no stake, publicly
Attitude towards career	Early "portfolio" careers – loyal to profession, not necessarily to employer	Digital entrepreneurs – work "with" organisations and not "for" organisations	Career multitaskers – will move seamlessly between organisations and "pop up" businesses

Additionally, Allen and Jackson, note at a more meta-level that since generations Y and Z are constantly connected to technology, social media, and each other, they are the first generations that are "*truly insulated by their horizontal peer group*"[15]. Consequently, generation Y and Z students are less likely to value the professor as a primary source of information[16]. This is something that we, as teachers, should keep into mind when choosing our teaching methods.

[15] Allen R.N., Jackson A.R. (2017), *Contemporary Teaching Strategies*, cit., p. 5.

[16] Ibid., with reference to: Bohl J.C. (2008), "Generations X and Y in Law School: Practical Strategies for Teaching the MTV/Google Generation", *Loyala Law Review*, 775(54), p. 782.

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3. Teaching objectives for generations Y and Z

In general, the main objective of teaching in law is to teach students to think like a lawyer. But what does that mean: thinking like a lawyer? Surprisingly little thought is given to this in the literature about teaching in law. Maybe, because there are different legal traditions, that require different skills. Nonetheless, at the basic level, thinking like a lawyer has some universal elements. What these are is analysed by Venter[17], who distinguished three elements and linked those to teaching.

The first element is that thinking like a lawyer means understanding the conventions and practices of the law and how those are used in a variety of contexts. That means that students need to be socialised in the discourse and practiced of law which can be achieved by exposing them as much as possible to the system and the process of the law[18].

The second element is that thinking like a lawyer means thinking rhetorically within a problem-solving context. To think rhetorically, students have to learn to select the appropriate mode of response from those that are available, which depends on the context, audience, relations, limits, constraints, and values of the represented party. Thinking rhetorically is a conscious act, and to be able to do that student have to learn to think strategically. The problem-solving context requires students to learn logical reasoning based on deductive and analogical applications of legal provisions and case law to the facts of the conflictual situation[19].

The third element is that thinking like a lawyer means acting like an analysist in various situations. These situations include explaining and evaluate the implications of new legislation and case law for the practice, predict how a court may respond to a certain legal problem, but also more generally strategize, advocate, mediate, and evaluate. For students to perform all these task and engage in these different roles, this means they have to develop analytical skills[20].

For convenience's sake, the elements of thinking like a lawyer and what that means for teaching are summarised in *Table 3*.

[17] Venter C.M. (2005), "Analyze This: Using Taxonomies to Scaffold Students' Legal Thinking and Writing Skills", *Mercer Law Review*, 57: 621-644.

[18] Venter C.M., *Analyze This*, cit., p. 627.

[19] Venter C.M., *Analyze This*, cit., p. 627, with reference to: White J.B. (1987), "Rhetoric and Law: The Arts of Cultural and Communal Life", in Nelson J.S., Megill A., McCloskey D.N. (eds.), *The Rhetoric of the Human Sciences: Language and Argument in Scholarship and Public Affairs*, The University of Wisconsin Press, p. 200; Levine L., Saunders K.M. (1993), "Thinking Like a Rhetor", *Journal of Legal Education*, 43(108), p. 112.

[20] Venter C.M., *Analyze This*, cit., p. 627-628.

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Tab. 3. Thinking like a lawyer: elements and teaching objectives

Element of thinking like a lawyer	*Teaching objectives*
1. Understanding the conventions and practices of the law and how those are used by lawyers in a variety of contexts.	a. Socialising students in the discourse and practices of law through exposure to the system and the process of the law
2. Thinking rhetorically within a problem-solving context.	b. Selecting the appropriate mode of response from those that are available depending on the context, audience, relations, limits, constraints, and values of the represented party. c. Strategic thinking. d. Logical reasoning based on deductive applications of rules and jurisprudence to facts
3. Acting as analysist to explain new legislation, case law, predict court responses, strategize, advocate, mediate, and evaluate.	e. Developing analytical skills

Teaching students to think like a lawyer is merely a first step in the teaching. As Venter explains, it makes them novices in legal thinking, not experts, even though the latter is what we teachers aim for. Lustbader suggests that the transition from novice to expert is an evolution "*that occurs when students have acquired sufficient content knowledge, judgment in problem solving, experience, and have built schemata to help them respond appropriately to different problems*"[21]. Allen and Jackson stress in this context the importance of lifelong learning and that students need to be equipped with the tools for this. For them reflection is an essential tool for lifelong learning, because it involves several cognitive activities, such as "*retrieving knowledge and earlier training from memory, connecting these to new experiences, and visualizing and mentally rehearsing what you might do differently next time*"[22].

To achieve these teaching goals, the role of a teaching taxonomy becomes important.

[21] Venter C.M., *Analyze This*, cit., p. 630, referencing Lustbader P. (1997), "Themes in Academic Support for Law Schools: Construction Sites, Building Types and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students", *Willamette Law Review*, 33(315), p. 326.

[22] Allen R.N., Jackson A.R. (2017), *Contemporary Teaching Strategies*, cit., p. 16.

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4. The (revised) taxonomy of Bloom

The most universally used taxonomy in teaching in the taxonomy of Bloom. Bloom's original taxonomy formed a pyramid of orders of learning with nouns, beginning with knowledge, and rising to comprehension, application, analysis, synthesis, and evaluation[23]. However, the use of nouns made the taxonomy too abstract and one-dimensional, which made it less easy to apply[24]. For those reasons, it was revised in 2001. The revised version of Bloom's taxonomy uses verbs to describe the orders of learning and reversed the top two orders of learning, resulting in the following taxonomy: remembering, understanding, applying, analysing and evaluating, and creating as its summit[25]. Each of these learning orders have a knowledge dimension and a cognitive process dimension. The knowledge dimension contains four subcategories of knowledge: a) factual knowledge; b) conceptual knowledge; c) procedural knowledge; d) metacognitive knowledge[26]. Text boxes 1 and 2 provide summaries on the structures of the knowledge and cognitive process dimensions. Furthermore, the subcategories of the knowledge dimension overlap with the multiple cognitive processes, which makes Bloom's taxonomy two-dimensional (see *Table 4*).

Textbox 1: *Structure of the knowledge dimension*[27]

1. Factual knowledge
The basic elements that students must know to be acquainted with a discipline or solve problems in it.
Knowledge of terminology; specific details and elements

2. Conceptual knowledge
The interrelationships among the basic elements within a larger structure that enable them to function together.
Knowledge of classifications and categories; principles and generalizations; theories, models, and structures

3. Procedural Knowledge
How to do something; methods of inquiry, and criteria for using skills, algorithms, techniques, and methods.
Knowledge of subject-specific skills and algorithms; subject-specific techniques and methods; criteria for determining when to use appropriate procedures

4. Metacognitive Knowledge
Knowledge of cognition in general as well as awareness and knowledge of one's own cognition.
Knowledge: strategic knowledge; about cognitive tasks, including appropriate contextual and conditional knowledge; self-knowledge

[23] *Bloom's Taxonomy: The Ultimate Guide* (version May 2024), available at: *bloomstaxonomy.net/* (accessed 9 July 2024).

[24] Cf. Allen R.N., Jackson A.R. (2017), *Contemporary Teaching Strategies*, cit., p. 23; Krathwohl D.R. (2002), *A Revision of Bloom's Taxonomy: An Overview*, *Theory Into Practice*, 41(4): 212-218, p. 213.

[25] *Bloom's Taxonomy: The Ultimate Guide*, cit., p. 3.

[26] Krathwohl, *A Revision of Bloom's Taxonomy*, cit., p. 214.

[27] Based on: Krathwohl, *A Revision of Bloom's Taxon*omy, cit., p. 214, table 2.

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Textbox 2: *Structure of the cognitive process dimension*[28]

1. Remember
Retrieving relevant knowledge from long-term memory.
Activities: recognize; recall; define, duplicate, list; memorize; repeat; state

2. Understand
Determining the meaning of instructional messages, including oral, written, and graphic communication.
Activities: interpret; exemplify; classify; identify; summarise; infer; compare; explain; describe; discuss; locate; predict; report; translate

3. Apply
Carrying out or using a procedure in a given situation.
Activities: execute; implement; solve; use; demonstrate; interpret; operate; schedule; sketch

4. Analyse
Breaking material into its constituent parts and detecting how the parts relate to one another and to an overall structure or purpose.
Activities: differentiate; organize; attribute; relate; compare; contrast; distinguish; examine; experiment; question; test

5. Evaluate
Making judgments based on criteria and standards.
Activities: check; criticize; appraise; argue; defend; judge; select; support; value; weigh

6. Create
Putting elements together to form a novel, coherent whole or make an original product.
Activities: generate; plan; produce; design; assemble; construct; conjecture; develop; formulate; author; investigate

Tab. 4. Relationship between the cognitive process and the knowledge dimensions

		Cognitive process dimension					
		Remember	*Understand*	*Apply*	*Analyse*	*Evaluate*	*Create*
Knowledge dimension	*Factual*						
	Conceptual						
	Procedural						
	Meta-cognitive						

Source: Allen R.N., Jackson A.R. (2017), *Contemporary Teaching Strategies*, 24.

The cognitive process dimension of Bloom's taxonomy more or less overlaps with the teaching objectives formulated in *Table 3: Thinking like a lawyer*: elements *and teaching objectives*. The knowledge dimension resonates with the idea that during their studies, law students develop from novices in law into experts in law, including qualities needed for lifelong learning.

Bloom's revised taxonomy is a proven approach to 1) set learning

[28] Based on: Krathwohl, *A Revision of Bloom's Taxonomy*, cit., p. 215, table 3; *Bloom's Taxonomy: The Ultimate Gu*ide, cit., p. 4 (figure pyramid of the 2001 revised taxonomy).

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outcomes; 2) structure classroom activities; and 3) assess student's learning progress[29]. In this paper the focus will be on the second approach, to structure classroom activities when teaching generations Y and Z.

5. Teaching methods for generation Y and Z students

Before starting this section, I have to make a big disclaimer. This section is probably the least scientific, since it is based on my own teaching experiences. What I will present in this section is merely illustrative of what could be done. In no way I am claiming that it is "the" way or the "best" way to teach in general or to teach generations Y and Z, in particular. It is just one way out of many. Of course, I hope my examples will offer some inspiration. Feedback is always welcome. I have structured this section based on the learning preferences of generation Y and Z students as summarised in *Table 2* (see above). More particularly, I will focus on gaining authority, feedback, experiential learning, and the use of ChatGPT.

5.1. Gaining authority

Especially for generation Z, the teacher is not automatically a source of authoritative information. Instead, the teacher competes with the internet, AI/ChatGPT, influencers and peers. Consequently, any teacher must proof to the students to be a reliable source of information. To be successful in this, it is good to be aware of the students' learning preferences and to use those to gain the trust of students. Once trust is gained, it might be followed by also being accepted as an authoritative source of information. The latter cannot be gained in one meeting, nonetheless, in my opinion the first meeting is essential in gaining the trust of the students. Since it is known that continuous and instant feedback are important for generation Y and Z students, I make sure that this is part of the teaching methods from the beginning.

There are many ways in which this can be done, here I will share a positive experience I have by using a mixed-teaching methodology using a quiz, power point slides and open debate questions. How does this work?

1) The quiz enables me to test what students already know and what not.

[29] *Bloom's Taxonomy: The Ultimate Guide*, cit., p. 9-11.

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2) The quiz enables students to refresh their memories and recollect their knowledge.
3) Students answer anonymously on their own electronic devices (often their phone), which creates the safe space generation Y and Z students like. The anonymous answers are shown publicly with also instant feedback on what the correct answer was.
4) The instant feedback of the quiz is followed by an open question inviting students to elaborate on their choice of answer, especially when many students selected the wrong answer. Such not to shame students, but to understand their way of thinking to provide this with instant feedback why the thinking is interesting, but that the other answer is "more correct". The power point slides are used to elaborate on the answers, correct and incorrect ones.
5) In the quiz I vary with the type of questions. When I want to check factual knowledge, I use multiple choice, when I want to test what students know about a certain development or discussion, I use an agree/disagree question. The latter enables me to ask students why they agreed or disagreed. Of course, this cannot be done at the beginning of the quiz, because first some trust needs to be built. But towards the end of the quiz two or three of such questions work very well. For students that have little background in either EU or labour law, agree/disagree questions are nice from the quiz-competition perspective (they have a 50% chance to have it right). For students that have a stronger background in EU and/or labour law, these type of questions are nice, because they are challenged to show their analytical and evaluative skills/knowledge.
6) It is a quiz, so there is a form of game in it. I use Kahoot, which keeps track of scores (correct answer and the fastest). This motivates students for whom most of the information is repetitive/known to stay motivated and engaged.
7) The quiz also has as advantage that the information shared and tested is short. For one topic I can have three questions which equals three times five minutes or elaboration, instead of one time fifteen minutes elaboration. This helps students to stay concentrated. Also, the alteration between the quiz questions and the power point slides helps students to stay concentrated and engaged. Of course, I use the power point slides as fit. Thus, when all or most of the students answered correctly, there is no need to elaborate, when most of the students answered incorrectly, the elaboration is longer.
8) It is a quiz, so there is always a prize for the winner and something to share for the rest of the class.

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5.2. Feedback

Trained by social media with likes and instant comments on posts and digital training programmes, generation Y and Z students are used to receive continuous and instant feedback. This contributes to their confidence and therefore, they also seek this in their education. I think there are a couple of ways in which this can easily be incorporated into our teaching practices. I mention a few here that I have some experience with.

Blended learning is most commonly description as an approach to education that combines online educational materials and opportunities for interaction online with traditional place-based classroom methods. As described in section 2, this is something that is especially appreciated by generation Z students. I have little experience with this myself, but I can share the three methods that I have been using myself.

The first form of blended learning is the use of short videoclips (5-10 minutes) followed by a quiz. In the videoclip basic information, a doctrinal issue, or a classical case is explained. The quiz that follows tests the memorising of the students, which gives them instant feedback whether they have picked up on the most important aspects of the video. Students are expected to have watched these before coming to class. This matches with the students' learning preferences, because they can watch the videos in the comfort of their own place and the quiz can be done anonymous (no public risks). The advantage for the teaching is that in class less attention need to be paid to basic knowledge transfer and that all students come to class with a similar level of starting knowledge on the material topic.

The second form of blended learning is the use of a set of online multiple-choice questions about the reading materials that need to be answered before class is taking place. For students this is nice, because they get an instant feedback on whether they have understood the reading materials well enough. As a teacher I have used this to prepare my classes. The answers to the multiple-choice questions give me an impression of what students already know and what they struggle with and hence should get attention in class. Furthermore, like with the videoclips and quiz, students come more equally prepared to class.

Thirdly, in my course on international labour law, I have prescribed various self-guided online courses that are offered for free by the International Labour Organisation[30]. These courses are all set up with short videos followed by questions with instant feedback on the answers to the questions. Most of

[30] See at the website of the ILO's training centre, selection type, choice "free": *www.itcilo.org/courses?field_course_typology[187]=187* (accessed 10 July 2024).

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these courses address topics from various points of view that can be matched to the different learning levels in Bloom's taxonomy.

Student mini lectures. Being aware that especially generation Z has a preference for learning from their peers and instant feedback, I have good experiences with a form of flipped classroom by mini lectures prepared by students. Out of respect for each other, students listen to each other. But the mini lectures need to be on a well-defined topic and no longer than 5 minutes. Using the idea of instant feedback, I ask the class what they found interesting or remarkable (never what was good or bad; that makes the presenting student vulnerable which undermines the effect of the mini lectures). Students always mention two or three things and often the points that I had in mind to elaborate on in any case. Since the topics of elaboration come from the students themselves, they are more engaged to listen (this is especially true for generation Y), and because my elaborations are presented in a form of feedback on the mini lecture, students are also more engaged to listen (which applies for both, generations Y and Z). Additionally, this offers students an opportunity to practice their presentation and communication skills. For generation Y this works well when students can prepare the mini-lectures in small groups. For generation Z this is not the case, they prefer to work alone.

Student mini lecture in the form of a videoclip. Especially students from generation Z, prefer to use technology to prepare their assignments. Since most of them are already familiar with making videoclips for social media platforms (especially Instagram and TikTok), they are more comfortable with preparing the mini lecture in the form of a videoclip. I have experimented with this for the first time in the summer semester of 2024. I played the videoclips in class, which worked rather similar as the in-person mini lectures described above, but it was clearly uncomfortable for the students that made the videoclips (to watch themselves on the screen in presence of all the other students). Therefore, I will change this and will ask students to upload the videoclip on a cloud platform (Google Drive; Dropbox) at least one day before class is taking place and make watching the videoclips part of the assignments to be prepared for class. In class I will do the same as before and with the in-person mini lectures, namely asking what was interesting or remarkable and then elaborate on it in the form of feedback. From the learning preference of generation Z students, I understand that the mini lecture in the form of a videoclip offers the shelter of technology and their own environment in which they can record the video. It gives them also the chance to redo it until they are satisfied with it, similar to what they are used to do for social media posts. For me as a teacher it has the advantage that I can prepare better for class and will be less surprised by what a student presents in class.

Another teaching method that are good for creating instant feedback are

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quiz questions. This is not a new teaching method but will work especially well with generation Y and Z students. The idea is that students make quiz questions which are submitted at least one day before the class takes place. The teacher puts them in a quiz programme, like Kahoot, which is then presented in class. After students have answered the quiz question, the student that made the quiz question explains why it is an interesting question, why the correct answer is correct and why the other answers are wrong. The teacher can then complement information or elaborate on other issues related to the quiz question and answers. The teacher intervention will be experienced as feedback by the students. By the student that made the quiz question and answers it will be experienced as feedback on their work and by the other students as further feedback on their chosen answer. Additionally, asking students to prepare a quiz question and answers, offers them an opportunity to learn at the cognitive process levels apply, evaluate, and create of Bloom's taxonomy. For students that participate in the quiz it offers a chance to learn at the cognitive levels remember and understand of Bloom's taxonomy. Similar to the mini lectures, this works only when the topics for the quiz questions are well defined. Students respond positively to these kind of quizzes, because they are made by their peers, they are prepared in their comfort zone, they participate anonymously in the quiz with their own electronic devices, and they receive instant feedback in class.

5.3. Experiential

Experiential learning is a method of teaching that integrates theory and practice. It is based on the presumption that people learn through experience. Based on the description of the experiential learning cycle, which exists of four steps, namely experiencing, reflecting, thinking, and acting[31], it resembles some of the ideas that underpin the third and fourth knowledge subcategories of Bloom's taxonomy (procedural and metacognitive knowledge, see textbox 1 above). It resonates well with procedural knowledge since experiential learning is about linking the law in the books with the law in practice. It resonates well with the metacognitive knowledge, because experiential learning presumes that every person has their own learning style[32]. Like with

[31] See for more details on the website of the Institute for Experiential Learning: *experientiallearninginstitute.org/what-is-experiential-learning/* (accessed 11 July 2024).

[32] In total nine learning styles can be distinguished. See about these on the website of the Institute for Experiential Learning: *experientiallearninginstitute.org/what-is-experiential-learning/* (accessed 11 July 2024).

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metacognitive knowledge, being aware of one's own learning style, increases learning experiences, which is essential for the development from novice to expert and for lifelong learning experiences.

A typical example of experiential learning in the field of law are *law clinics* in which students get to work with actual cases under the supervision of a teacher. *Moot courts* can also be considered as a typical form of experiential learning. Personally, I have little experience with law clinics, but many law schools are running them. I do have extensive experience with moot courts. Firstly, because I am one of the founders and co-organisers of the Hugo Sinzheimer Moot Court Competition in European and international labour law[33]. Secondly, because I use moot courts as a form of exam since 2012. I use this form in the course on EU labour law. The reason to use a moot court as a form of exam is that many students find EU labour law difficult, because of the relationship between the EU legal order and the legal orders of the Member States. Especially in the field of labour law which is characterised by the use of directives that lack horizontal direct effect, students struggle with understanding how the two legal orders may work in practice. By practicing case positions where students have to work with the relationship between the national and European legal orders and the moot court as an exam, it becomes more concrete for them.

Of course, when using a moot court as exam, students need to be well prepared for it. The course assignments are an important part of that, but the teaching methods also. The moot court exam that I use exists of two parts: a written paper and an oral plea. To prepare students for the written paper, I give them various writing assignments throughout the course. By discussing these assignments in smaller groups in class (in *point-counterpoint* sessions), they give feedback on each other's writings (structure, quality of the argument, clear writing). In the presentation of the point-counterpoint sessions, students practice their oral skills and receive further feedback from me. In earlier sessions the attention is mainly on structure, which is discussed, explored and worked-out together with the students, based on their prepared written work complemented by what I think should also be considered. Through the discussion of *voting* and *polling* results (best argument; best oral presentation) after the point-counterpoint sessions, students give each other feedback on the quality and completeness of the arguments and how those have been presented orally.

Another method suitable for experiential learning is *role-playing*. The

[33] For more information see at the website of the University of Aarhus: *law.au.dk/en/research/research-activities/arrow-aarhus-research-on-regulation-of-work/hugo-sinzheimer-moot-court-competition* (accessed 15 July 2024).

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most obvious role-playing is with problem-solving assignments that are based on case positions, such as employee vs employer and trade union vs business management. But it can also be applied to the law-making process or the conclusion of a collective labour agreement or a company's sustainability policy. Of course, this needs to be well prepared, and students need to be instructed on the position they will be taking in the law-making process or negotiations. This takes time to prepare, but that is mostly for the first time this method is applied, in following years the same instructions can be used, with minor updates. The gain of the role playing for students is that concepts and procedures become less abstract, because the experience of the roleplaying has brought it closer to the students' world of imagination. I have used the method or roleplaying successfully to teach students about the adoption of an ILO Convention, the adoption of an EU directive, the negotiations for a Global Framework Agreement, and the negotiations for a mutual agreement to terminate an employment contract.

For any of these methods of teaching, the students need to feel comfortable with each other and the teacher. They are forced to work together, which both generations, Y and Z, do not like. Therefore, I apply it only towards the end of the course when students have had enough time to get to know each other and feel comfortable enough with me. From the perspective of teaching objectives, these methods are very interesting, because they include many of the categories of Bloom's taxonomy.

5.4. ChatGPT

Whether we like it or not, regenerative AI, like ChatGPT, will become an integral part of the work activities of lawyers. Therefore, we have to teach generations Y and Z how to work with a regenerative AI like ChatGPT. To understand such AI's better, we, as teachers, have to work with it as well. What I have experienced so far is that the value of what an AI like ChatGPT can generate depends on what sort of questions are asked. Translated to teaching this means that teaching students to ask the right questions is just as important as giving the right answer to a question. Since asking questions is already an important aspect of law teaching, especially when focusing on the cognitive processes "apply" and "analyse", I don't think this will be very influential on our teaching. Second, even when AI generates a high quality response, we need to have the tools to recognise it as such. For teaching this means that the knowledge dimension of Bloom's taxonomy needs to be well embedded in the teaching curriculum. This is particularly true for the fourth subcategory, metacognitive knowledge, which makes the student (and later

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worker) aware of its own cognition. Being aware of one's own cognition means that the person will also adopt a critical cognitive attitude towards the "knowledge" of AI.

Since the introduction of ChatGPT there is a debate whether students should be allowed to use it. This presumes that students want to use ChatGPT, however, so far, the students that I have been teaching are not that much interested in using ChatGPT. Not even in the specialised course on *New technologies and labour law* that I taught at the University of Łódż in the Autumn of 2023. And no, I am not naïve that students of course would never admit using ChatGPT to a teacher. In fact, for every meeting in the courses that I am teaching, I invite two to four students to prepare the assignments by using ChatGPT. The volunteering students cannot work together. They have to write down the questions they asked ChatGPT and what responses ChatGPT generated. The questions and responses are presented in class and discussed collectively. This method works in that it makes visible that the sort of questions addressed to ChatGPT matter for the quality of the response. It also works in making students aware to be critical about ChatGPT's responses and that the quality can only be evaluated when the evaluator is equipped with enough knowledge.

6. Conclusions on teaching generations Y and Z

This paper has made clear that students from generations Y and Z have significantly different learning preferences than students from generation X, which makes the biggest cohort of teachers at university. While the learning preferences of generation Y an Z students suggest that the X generation teacher should adapt their teaching methods, the underlying teaching objectives have not changed. Consequently, the adaptations in teaching methods are manageable. In fact, based on my own experiences with teaching methods that are fit for the learning preferences of generation Y and Z students, it makes the teaching more pleasurable and rewarding for both students and teachers.

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Part 7
Comparative labour law

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Reflections on comparative labour law

Manfred Weiss[1]

The closer the world is growing together and the more global trade and commerce are taking place, the more evident it is that comparative labour law plays a prominent role. The knowledge of other labour law systems is badly needed in order to save transaction costs if companies engage in transnational activities. Comparative labour law also is indispensable if inspiration is needed for legal reform. The wheel has not to be reinvented every time. This does not mean to transfer institutional arrangements, but to profit of ideas and experiences made elsewhere. And above all comparison is important to understand one's own system better. If by way of comparison different solutions for equal or similar problems are discovered, the search for the reasons for these differences starts and opens the door for new insights in the underlying reasons for the system as developed in one's home country. In short and to make the point: comparative labour law is important and will be even more important in the future.

Comparative labour law – as well as comparative law in general – does not mean to merely compare the law in the books, the legal norms and legal institutions. This would be useless since legal norms and institutions can have very different real effects in different legal, political, economic, sociological and cultural frameworks. And each system only can be understood as the result of the specific history of the respective country. Therefore, comparison has to go much beyond the normative level. It needs a functional approach to find out the real effects of the law, the law in action. This requires an interdisciplinary method to include the extra-legal factors which are relevant for results in actual practice. Comparison only makes sense if it's not only on the normative level but if it is looking into actual practice, if it's functional comparison.

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Functional comparison in an interdisciplinary way, however, does not mean that one has to be at the same time a lawyer, a social scientist or an economist. This of course would be impossible. But one has to learn to communicate with these other scholarly disciplines to understand the results of their research in order to integrate them in one's own research. This is very difficult. And it is getting even more difficult once we understand that it is not sufficient to study only an element of another system as an isolated phenomenon.

Taken all this together it is almost impossible for a single person to perform a decent comparison. Therefore, international teams might be the best solution for appropriate comparative work.

The approach of the session on comparative labour law will be to explore the potential of this field and – to quote from the title of a famous article by Otto Kahn-Freund – to reflect the "uses and abuses" of comparative labor law.

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Guidelines for research in Comparative Law. State regulation of collective bargaining in the South American experience

Juan Pablo Mugnolo[1]

1. Introduction. Comparative law

Labor relations have evolved considerably over time and vary significantly between countries and regions. The access to information that legal operators have had in recent decades has enhanced the comparatist instrument while relativizing the exercise of mere accumulation of information. In addition to the accumulation of information, the exercise consisting of the identification (or even construction) of legal parameters that correspond to local or regional realities must also be relativized and transposed to diverse societies (geographies and cultures).

Thus, a useful comparative exercise doesn't imply the mere accumulation of information nor the uncritical assimilation of the parameters. The functionality of the recourse to comparative experience lies precisely in the escape from the exercise of reproduction of the identical in dissimilar scenarios. On the contrary, compared experiences tend to contribute more and better in terms of legal adaptation to contexts, and the corroboration of absent aspects that stand out in a certain legal system. It is crucial to adapt the lessons learned to local realities and the specific needs of each context. In this line, comparative law offers a powerful tool for examining how different legal systems address fundamental issues.

However, based on this comparison between "what is different", Comparative Law also brings closer the possibility of focusing on similarities or convergences (Capelleti, 1993, p. 18). The theoretical problem has been from the comparatist method (Piña, Tello Roldan, 2023, p. 29) – in the

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conviction that Comparative Law turns out to be a method (Piña, 2023) – the grouping of legal identities. Been comparative law taxonomically a comparing systems method (basically norms and judicial precedents) (Cuniberti, 2020, p. 140) the blocks or families (Piña, 2019, p. 111) are usually a good start for the contextualization exercise because today, given the social complexity of the nations and regions of the world, is necessary the incorporation of pluralism as a legal value in itself (Somma, 2015, pp. 84-85).

Notwithstanding the relativity of legal families, it could be taking as an analytic starting point. The current academic paper proposes an outline of comparative analysis in South American key, which cannot ignore the influence exerted on "our" legal system by the *Roman tradition* received centrally by the Spanish colonial influence (Monateri, 2016, pp. 107 ss.). That will be the point of view (the Romanist "family") from which will be analyzed the result of regulatory legal intervention on collective bargaining. Specifically, the analytical approach contained in this paper focuses on an investigation into the legal regulation of collective bargaining. Specifically, on the contrasting characteristics of two major predominant models of collective bargaining structure in South America: centralized vs. decentralized bargaining structure models.

The common fact is that both dominant collective bargaining structure models in Sud America is the regulation with a strong presence of formal law (Romanesque tradition) yet starting from that common place reach opposite results. A methodological possibility could be to analyze both structures of collective bargaining in search of divergence (Mugnolo, 2014, p. 89). The other methodological possibility could find the common point of convergence, from which contrasting results are nevertheless obtained. This is the option contained in the current paper based on a Adrián Goldin thesis (Goldin, 2019) which will be taken as input – or sample – of an exercise of comparative "labor" law with a regional perspective.

2. State intervention through legal means in Latin America

The hypothesis of the indifferent State does not occur, in general terms, in Latin America and this could respond to corporate reasons that characterize the collective law that aims to maintain order and the preservation of public services, or the contradictions between state policies and union action, which turns the union issue into a problem of a political nature. This situation is enhanced in those cases in which the State becomes a "participant" in the economic system beyond its status as arbiter and as a party (De Buen Lozano, 1993, p. 121).

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Collective bargaining has been suspended by successive dictatorships that limited or annulled freedom of association in all its expressions. Since the democratic restoration – almost 30 years of uninterrupted collective bargaining –, the state intervention in Latam countries has been quite active with various modifications of the legal framework for the collective relations (with particularities). Such reforms to legal norms was aimed to a readjustment of the negotiating structure to the changing economic and productive realities revolving around the centralization/decentralization dialectic.

The intervention of the State in Latin America in matters of collective bargaining appears identified as only one part of the interventionism and regulation of the labor relations system. In this sense, it is necessary to differentiate the intervention, desirable and even inevitable, from interventionism as an excessive accentuation from that which disrupts and distorts, turning the State from an impartial arbiter into a committed and dominant party (De La Fuente, 1995). The interventionism justified in Individual Labor Law because of the inequality in contract relationship should not be confused with that other directed to control the union (collective bargaining and conflict) affecting union freedom. The dialectical flow (in terms of intervention and/or autonomy) of labor law in Latin America could be simplified as the search for "*the determination of the appropriate equation between the autonomous and the heteronomous*" (Morgado, 1993; Mugnolo, 2014, pp. 129-130).

The importance of state intervention on the system of collective relations in general, and the structure of collective bargaining in particular, should be complement – following the recommendations of the comparatist Somma (2015) – with the following factors:

1) the economic factor is noted as having a particular influence, understanding that the underdeveloped matrix of Latin American economies (predominantly mono producing natural resources) made it necessary to have a homogenizing intervention that, through static regulations, generalizes the application (Ermida Uriarte, 1993, p. 18);
2) the cultural-historical factor that influenced the configuration of a closed and written legal system tending to identify the right with the law (*Roman Law*);
3) political factors as a typical note of state intervention obsessed by the control of the union (Zachert, 1993, p. 133 ss.) with administrative acts;
4) the weakness of the union movement in some Latin American countries limited the power of resistance to the companies but also to State interventionist action. Have been some notorious cases in which these

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union organizations tried to be co-opted – then they were co-opted – or that they participate in the political system itself after establishing an intimate relationship with a government party or that it is a government option (Wedderburn, Sciarra, 1988).

The state intervention on collective bargaining in Latin America has been implemented without problems through the written legal norm, in a clear identification with the Law (Tradition of Roman Law). A common point among different countries.

The other relevant sociological and then legal-political data is the state intervention with the objective of exercising political control of the union. Second point in common among different countries.

The question: "*Is this a comparative exercise with a confirmatory bias?*" (Sacco, 2002, p. 43) or on the contrary, "*a rather plural and diverse journey?*". I understand that the latter. In my humble opinion – taking Goldin (2020) – the differentiating factor between national collective bargaining systems (and their consequent structures) is found in any case in the configuration of the union subject which will then reflect a kind of the collective bargaining structure (Clegg, 1985, p. 21).

The centrality that state regulation has on the union subject in South America, should be complement with other rules also of a state type (the point in common) that pursue objectives of either centralization or decentralization of the structure of collective bargaining. In these cases, the instruments used by the State contain elements such as: the regulation of the relationship between the law and the collective labor agreement, the rules of competition, articulation and succession of collective labor agreements, the regulation of the effectiveness of collective labor agreements (Mugnolo, 2014, p. 101).

Beyond the state legal resources of each national experience, there is a great coincidence regarding the interventionist "spirit" that is detected and explained, succinctly in the current academic paper, because of political control on the union. This state regulatory interventionism has resulted in two models of collective bargaining structure.

A decentralized (predominant) collective bargaining structure model, into the limits of the company to reduce the potential unionization inside to small productive units, without the presence of Federations or Confederations. Such is the case of the experience of Chile, Peru, and Colombia among the paradigmatic ones.

A model of the structure of collective bargaining that, on the contrary, is highly centralized because of a legal imposition of monopoly unions systems with nuances models of the European corporate experience of the 1930s and 1940. The copy of the experiences has never been better pointed out in a

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paper like this about Comparative Law. The countries that have experienced this reality are Argentina and Brazil.

Regarding both experiences of state regulation, the first – majority – model is that of control through imposed decentralization and in the second of control through imposed centralization, there is an impact on the principles of freedom of association that, with fluctuations, the respective countries have tried to resolve (Goldin, 2020).

Uruguay is a paradigmatic case where there is no typical state intervention on the union, being a country with a notable tradition of low state regulatory intervention. However, these high doses of freedom of association – basically non-legal state intervention – could be read as a disadvantage when generating instances for collective bargaining. In that case, the state law (and its management) that implements the *Consejos de Salarios* (Wage Councils) would be explained as a "state" solution to enhance collective bargaining. And the effects of said policy, at least in terms of wages, could be described as centralizing. In short, one more case of state intervention that would influence the structure of collective bargaining in the region, although it is a paradigmatic case of a particular logic.

3. Corollary

The contemplates reflections that were deepened by me (Mugnolo, 2014) are porpoise to review from a comparative law perspective to enrich the point of view and to consolidate the comparative law in Latin America (Bagni, Pavani, 2020, pp. 68-69). The simplification of the regional experience into a "juridical legal territory" standardized by the romanist tradition, does not prevent other investigations and new conclusions from being reached through the comparatist sieve. The route proposed in these *guidelines for an investigation* runs along those paths that range from the search for similarities (assimilable) to the detection of differences (non-assimilable) that Comparative Law generously proposes.

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Comparative law and contemporary labor issues viewed from comparative perspective

Takashi Araki[1]

1. Introduction: Significance of Comparative Legal Research and Importance of Functional Approaches

"Which country are you studying?" When you first meet someone at a law association meeting in Japan, the conversation usually starts with this phrase. Thus, it is taken for granted that Japanese legal scholars engage in comparative law research, and it is customary for graduate students to write their first thesis on the laws of a specific foreign country. This flourishing of comparative law is related to the fact that Japan has had to introduce a modern Western legal system since the Meiji Restoration of 1868 and has been strongly influenced initially by French law, then mainly by German law, and after World War II by American law[2].

In order to truly understand Japanese law itself, which was modeled on Western law, it is necessary first to understand original foreign law accurately. It has been considered an essential task of legal scholars to examine how to accept, localize, and develop a legal system that originates in a foreign country in a Japanese society that is historically, culturally, and politically different from their own.

When it comes to labor law, a comparative study has not only flourished as academic research, but has also had a significant impact on Japan's labor policy-making. In Japan, labor policy is institutionally expected to be discussed at the Labor Policy Council, a tripartite body consisting of public interest representatives (mainly academics), labor representatives, and

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[2] For a detailed discussion of these historical circumstances, see Takashi Araki (2002), "Labor Law Scholarship in Japan", *Comparative Labor Law & Policy Journal*, 23: 735-748.

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employer representatives[3]. The practice has been established that all labor legislation proposed by the government is submitted to the Diet based on recommendations made by the Labor Policy Council.

Naturally, within this tripartite Council, labor representatives tend to advocate for stricter regulations for labor protection, while employer representatives often oppose these measures, leading to intense disputes. Labor representatives sometimes refer to foreign systems as justifications for new legislation or amendments, arguing for similar systems to be introduced in Japan. However, these arguments often focus only on specific aspects of foreign systems. It is necessary to analyze and evaluate the systems of other countries objectively and functionally within the context of each country's entire legal system in order to constructively use them as a reference for Japan's legislative policy.

Thus, when Japan's Ministry of Labor (the Ministry of Health, Labor and Welfare – MHLW, since 2001) undertakes significant labor legislation or amendments, it typically organizes a study group composed solely of academics[4] before the tripartite council deliberation. This study group studies the laws, judicial precedents, and actual situations of disputes in foreign countries (often in Germany, France, the US, and the UK) regarding the issue in question. The study group report presents, from an expert's standpoint, the direction that Japan's policy should take. Although it does not directly bind the Council's discussions determining labor policy, it is highly referenced. The public interest members and the MHLW secretariat use the study group report as persuasive material to encourage the conflicting labor and employer members to compromise and aim for a consensus among the tripartite Council.

In comparative legal studies, it is crucial to "functionally" analyze the legal systems of other countries. There are several levels to this. First, this article confirms that functional analysis is necessary to derive valuable comparative insights using working hour regulations in the US, Germany, and Japan as examples (par. 2). Second, it highlights the importance of understanding and evaluating specific legal systems in relation to the entire labor law system of each country. Specifically, it examines how differences in dismissal regulations (par. 3.1) impact fixed-term contract systems

[3] Article 9, Item 1 of the Act for Establishment of the Ministry of Health, Labor and Welfare stipulates that the Labor Policy Council shall study and deliberate important matters concerning labor policy in response to consultations from the Minister of Health, Labor and Welfare.

[4] In addition to labor and employment law scholars, researchers in economics, industrial relations, human resource management, and other adjacent sciences often participate.

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(par. 3.2) and rules for changing working conditions (par. 3.3). Two models of "Flexicurity" regarding balancing flexibility and security in the overall employment system are also explored (par. 3.4).

Furthermore, this article focuses on the derogation system, which makes statutory standards more reflective of the conditions of diversified employees and workstyles through collective agreements. Significant differences exist between the parties responsible for the derogation in Germany and Japan, leading to Japan's current labor law reform discussion (par. 4). In conclusion, the importance of a comparative legal study that also considers broader perspectives, including social and cultural backgrounds, will be mentioned (par. 5).

Thus, this paper examines the importance of comparative legal research and contemporary labor policy issues that many countries currently face: working hour regulations, non-standard employment, rules for changing working conditions, balancing flexibility and security in employment, and derogation system.

2. Working Hour Regulations and the White-Collar Exemption

In Japan, there have been calls from the business community for white-collar workers who are currently not exempt from working hour regulations to be exempted, in the same way as the US's white-collar exemption. They argue that as white-collar workers work in a discretionary manner, there is no need to regulate working hours, and in particular, it is not reasonable to pay overtime premiums in proportion to the length of hours worked because their output is not necessarily increased with the overtime hours. However, this is an inappropriate argument that focuses on only one aspect of the foreign law system without examining the characteristics of respective countries' working hour regulations from a comparative legal perspective.

German working hour regulations set the maximum daily working hours at 8 hours and allow for up to ten hours (two additional hours per day) of overtime, provided the average over six months or 24 weeks does not exceed eight hours per day (Article 3, Working Hour Law). This working hour regulation regulates the upper limit of actual hours worked. The German Working Hour Act also regulates work release time: breaks (*Ruhepausen*) [30 minutes for work from 6 to 9 hours, 45 minutes for work hours exceeding 9 hours], 11-hour rest periods (*Rurezeit*), and Sundays and national holidays (Articles 4, 5, and 9 of the Working Hour Law). The regulation of overtime premium, which existed in the 1938 Working Hour Ordinance, disappeared in the 1994 Working Hour Law, and is now entrusted to collective bargaining

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agreements. In other words, German working hour law regulates maximum working hours and work release time.

In contrast, the US Fair Labor Standards Act (FLSA) does not regulate maximum working hours or free time, focusing solely on overtime premiums. Although Section 7 of the FLSA is titled "Maximum hours", Section 7(a)(1) states that "*no employer shall employ any of his employees* […] *for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed*". Thus, as long as employers pay overtime premiums, there are no legal limits on overtime. The maximum working hours are only indirectly regulated at best by imposing the economic burden of making the employer pay premium wages. The FLSA does not regulate work release time, such as breaks and holidays. Hence, the FLSA, functionally viewed, regulates only premium wages, and the US white-collar exemption[5] on working hours is merely an exemption from the premium wage regulation.

Japan's Labor Standards Act (LSA) stipulates that employers must not make employees work more than 40 hours per week and 8 hours per day (Article 32, Paragraphs 1 and 2, LSA). Like Germany, it regulates maximum working hours, whose violation is sanctioned by criminal penalties. The LSA also regulates work release time (rest periods and one day off per week) (Articles 34 and 35, LSA). Overtime work is permissible when the employer concludes an agreement (labor-management agreement) with a representative of the majority of workers at the workplace. In such cases, overtime work in excess of 8 hours per day or 40 hours per week must be paid at a premium of 1.25 times the rate of pay, or 1.5 times the rate of pay if such overtime work exceeds 60 hours per month (Article 37, LSA). Therefore, Japan's Labor Standards Act encompasses three regulations: maximum working hours, work release time, and overtime premiums.

Japanese employers mainly call for white-collar exemption because they believe applying overtime premium regulations is unreasonable. However, unlike US regulations, Japanese working hour regulations not only regulate overtime premiums but also regulate maximum working hours and work release time. Therefore, if exemptions are granted, the maximum working hours and work release time regulations would be inapplicable. This requires

[5] FLSA Section 13(a)(1) and (a)(17) provides an exemption from overtime pay for executive, administrative, professional, outside sales, and computer FLSA Section 13(a)(1) and (a)(17) provides an exemption from overtime pay for executive, administrative, professional, outside sales, and computer employees who meet specific tests regarding their job duties and are paid on a salary basis at not less than $684 per week.

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careful consideration in Japan, where Karoshi (deaths from overtime) and Karo-jisatsu (suicides from overwork) are serious social problems.

Therefore, the 2018 amendment to the Labor Standards Act introduced the "Highly Professional System" (Article 41-2, LSA). Under this new system, employees who engage in five covered works[6] designated by the ministry ordinance as requiring a high level of expertise and for which the correlation between time spent on work and the result therefrom is ordinarily not high, and who earn an annual income of 10.75 million yen or more[7] are exempt from ordinary working hour regulations, on the condition that a labor-management committee[8] resolution allows such system and the consent of the individual covered by the system.

However, this is not a mere exemption. Instead of applying the maximum working hour regulations, the new system requires that the time spent at the office and the time worked outside the workplace (called health management time) be monitored to ensure health, that 104 days off per year (twice the number of days off for ordinary employees) be granted in place of work release time regulations, and that one out of four protective measures (granting 11 hours of rest period, setting a cap on health management time, two consecutive weeks off (in addition to ordinary annual leave), and special medical examinations) must be chosen by resolution of the labor-management committee. In addition, instead of overtime pay regulations, the new system imposes a considerably high annual income requirement for the covered employee. Therefore, the new system should be considered a special regulation[9] rather than a simple exemption.

[6] Five designated works are: financial product development, dealing of financial products, securities market analyst, consultant, and research and development of new technologies, products, and services (Article 34-2, Paragraph 3, Enforcement Ordinance, LSA).

[7] Article 41-2, Paragraph 1, Item 2(b) of the Labor Standards Law, which is set by the Ministry of Health, Labor and Welfare Ordinance as a level that is considerably higher than three times the average annual income of an employee. In 2018, 10.75 million yen was estimated to be an annual income that would place it in Japan's top 3% of all workers.

[8] A kind of employee representation system in an establishment consisting of an equal members designated by workers and management.

[9] Apart from the Highly Professional System, Japan has had a discretionary work scheme since 1987, a special regulation that falls between ordinary working hour regulations for ordinary employees and exemptions for supervisory employees. Under the discretionary work scheme, employees who have discretion to determine their working hours are considered to have worked the hours set by a labor-management agreement or a resolution of a labor-management committee, rather than the hours actually worked, under certain conditions. See Takashi Araki (2015), "Working Hour Regulation and its Reform in Japan", in Zbigniew Hajn/Dagmara Skupien (ed.), *Przyszlosc Prawa Pracy: Liber Amicorum w piecdziesieciolecie pracy naukowej profesora Michala Sewerynskiego* [*The future of labor law: Liber Amicorum*

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For highly professional workers with high salaries who should be treated differently from ordinary workers, the US approach simply exempts them from working hour regulations because the FLSA only regulates overtime premiums. Since Germany's working hour law does not regulate overtime premium pay, there is no need to discuss exempting highly paid professionals from such regulations as far as overtime pay is concerned. Unlike these countries, Japan's working hour regulations regulate maximum working hours, work release time, and overtime premiums. Thus, its entire exemption brings forth a significant legal effect. Considering these different outcomes of exemption, Japan adopted the new system with special protective regulations tailored to the working styles of the highly professionals[10] while exempting them from the working hour regulations applicable to ordinary workers. This can be considered an example of a policy decision based on functional comparative analysis.

3. Dismissal regulations, fixed-term labor contracts, and rules for changing working conditions

Next, when conducting a comparative legal study, it is essential not only to analyze each system precisely but also to evaluate it holistically within the entire legal system. This section examines how differences in dismissal regulations (1) affect other labor law systems, focusing on fixed-term contracts (2) and rules for changing working conditions (3). It also explores the two models of "flexicurity", balancing flexibility and security in the overall employment system (4).

The economists' arguments often influence recent labor law reforms in many countries. Their discussions often contain important points that lawyers should listen to. However, they frequently base their arguments unconsciously on the US labor market. From a comparative law perspective, it should be noted that the US is a peculiar country that does not require just cause for dismissal, making its labor market exceptional. Since dismissal regulations significantly influence a country's labor law system, it is essential to closely examine their relationship when conducting comparative studies of specific regulations.

in fifty years of scientific work work of Professor Michal Sewerynski], Lodz: Wydawnictwo Uniwersytetu Lodzkiego, pp. 655-673.

[10] However, the number of individuals subject to the Highly Professional System in Japan is limited, with 1340 people as to March 2024. The regulations may have been overly strict due to concerns about weakening worker protections. In this sense, the system is still in trial and error.

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3.1. Requirement of just cause for dismissal and the labor law system

Dismissal regulations can be categorized into three main areas: notice requirements, prohibitions on discriminatory or retaliatory dismissals, and regulations requiring just cause for dismissal[11]. The most significant is the just cause requirement.

The US is unique among developed countries in that it does not generally require just cause for dismissal. Except in specific cases restricted by laws (such as various anti-discrimination laws), collective agreements, or individual contracts, no just cause is needed for dismissal. There is considerable debate within the US about the significant modifications to the traditional employment-at-will doctrine. Though doctrines such as public policy, implied contract, and the covenant of good faith and fair dealing have substantially modified the classical at-will employment principle, it still fundamentally persists compared to the dismissal regulations in countries like Germany and Japan, which require just cause or objective reasonableness for dismissals. Montana, which has a state law requiring just cause for termination, is the only exception among the 50 states in the US. Despite facing opposition[12], the Restatement of Employment Law[13] completed in 2015 by the American Law Institute ultimately confirmed that the at-will employment principle is maintained as the default rule unless otherwise agreed upon[14].

In contrast, the German Dismissal Restriction Law invalidates dismissals that are not socially justified, including those made for economic reasons

[11] See Takashi Araki, "Dismissal", in Davidov G., Langille B., Lester G. (eds.), *he Oxford Handbook of the Law of Work, OUP (tape recording)*.

[12] See Dau-Schmidt K.G. (2017), "Introduction: The American Law Institute's Restatement of Employment Law: Comments and Critiques", *Employee Rights and Employment Policy Journal*, 21(245).

[13] Estreicher S., Bodie M.T., Harper M.C., Schwab S.J. (2015), *Restatement of the Law Third, Employment Law*, American Law Institute Publisher, pp. 49 ff. The Restatement is a compilation of current legal theories based on case law, presented in the form of articles. Although it does not have a binding effect as a source of law, it is often cited in court as an important document that reflects the state of case law.

[14] However, since the US is a country with strict discrimination regulations, dismissals that fall under prohibited grounds of discrimination are illegal. This may well function as a restriction on arbitrary dismissals in practice. The practical impact of discrimination regulations on dismissals is further related to the issue of how far agreements for employment arbitration, which handle employment disputes through arbitration rather than litigation, should be allowed. There is criticism that employment arbitration tends to favor employers in practice. See Colvin A. (2014), "Mandatory Arbitration and Inequality of Justice in Employment", *Berkeley Journal of Employment and Labor Law*, 35(71). In Japan, agreements for employment arbitration are considered invalid (Supplementary Provision Article 4, Arbitration Act).

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(Article 1, Paragraphs 1 and 3, Dismissal Restriction Law). Japan's Labor Contract Act also states that dismissals that lack objectively reasonable grounds and are not socially justifiable are invalid, and this rule also applies to economic dismissals (Article 16, Labor Contract Act).

3.2. Legal Policy on Fixed-term Employment Contracts

In the US, where just cause is not required for termination, employees employed by open-ended contracts can be terminated at any time, making fixed-term contracts an exception that offers job security for the contract period[15]. The typical case of fixed-term employment in the US is for higher-level employees whom the employer wishes to secure employment for a certain period. Using fixed-term contracts to ease employment adjustments does not exist in the US.

Conversely, in European countries and Japan, where just cause is required for dismissal, fixed-term contracts, which automatically terminate the employment relationship upon expiration of the term, are unstable employment that is not protected by dismissal regulations[16]. Therefore, many European countries require objective reasons to conclude fixed-term contracts or restrict the number of renewals and the total duration of fixed-term contracts. Since the 1960 Federal Labor Court decision[17], Germany has required objective reasons for concluding fixed-term contracts to prevent the evasion of dismissal regulations. However, recognizing that restricting the use of fixed-term contracts made the labor market rigid and hindered employment, Germany relaxed these regulations with the 1985 Employment Promotion Act, and now it is possible to conclude a fixed-term contract without objective reasons and renew it three times within two years. Exceeding two years or three renewals transforms the fixed-term contract into an indefinite-term contract (Section 14(2), Part-Time and Fixed-Term Employment Act).

In Japan, the share of non-regular employees increased from about 20% of all employees in 1990 to about 35% in 2010. The majority of non-regular employees were on a fixed-term contract basis. In Japan, objective reasons

[15] The Employment Restatement also lists fixed-term contracts as the first exception to at-will employment principle. Estreicher, *op. cit*., at 2.02(a).

[16] See Hiroya Nakakubo, Takashi Araki (ed.) (2010), "Regulation of Fixed-Term Employment Contracts: A Comparative View", *Bulletin of Comparative Labour Relations*, p. 76.

[17] BAG GS vom 12.10.1960, AP Nr. 16 zu §620 BGB Befristeter Arbeitsvertrag.

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were not required to conclude fixed-term contracts, and there were no regulations on the number of renewals. Protection against employers' refusal to renew fixed-term contracts was provided only through case law, which applied the dismissal rule requiring just cause by analogy when a fixed-term contract was repeatedly renewed and became indistinguishable from an open-ended contract or where the worker had reasonable expectations of renewal.

In such a situation, during the 2012 revision of the Labor Contract Act, there were arguments that Japan should also require objective reasons for concluding fixed-term contracts, as in European countries. However, comparative legal studies have revealed diverse attitudes among European countries. While some countries, such as France, Italy, and Spain, maintain the requirement of objective grounds for concluding fixed-term contracts, others, such as Germany and Sweden, have abolished this requirement to prevent legal disputes over the applicability of objective reasons and to facilitate the employment of the unemployed by allowing the conclusion of fixed-term contracts without justification. Additionally, countries like the Netherlands and the UK have never required objective reasons for fixed-term contracts. The requirement for objective reasons for fixed-term contracts in the EU Directive on fixed-term work (1999/70/EC) applies only to the renewal of fixed-term contracts to prevent abuse, and even this requirement is merely one of three measures that member states should introduce.

Based on these comparative legal studies, Japan decided not to adopt regulations requiring justifications for concluding employment contracts, which would set high barriers to employment. Instead, Japan deemed it important to first allow individuals without employability for permanent contracts, such as new graduates, to enter into employment relationships and provide them with opportunities to enhance their professional skills.

On the other hand, the repeated renewal of fixed-term contracts can place fixed-term employees in unstable employment, preventing them from exercising their legitimate rights due to fear of non-renewal of their contracts. Such renewals should be deemed abuse. Therefore, it was decided to introduce a rule that converts fixed-term contracts to indefinite-term contracts if they are repeatedly renewed over a certain period. The periods for conversion to indefinite-term contracts vary by country: one and a half years in France, two years in Germany and South Korea, three years in the Netherlands at the time, and four years in the UK[18]. In Japan, there was concern that forcing a conversion to indefinite-term employment in a relatively short period, such as two years, might prompt employers to terminate contracts

[18] See Nakakubo and Araki, *op. cit*.

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before two years had elapsed. Consequently, after seeking consensus among representatives of the public, labor, and management at the Council, a rule was established that grants fixed-term employees the right[19] to convert their contracts to indefinite-term contracts if they are repeatedly renewed for more than five years[20].

3.3. Dismissal Regulations and Rules for Changing Working Conditions

The differences in dismissal regulations also directly impact the issue of changes in working conditions. In the US, where the employment-at-will principle is maintained, employers can easily change the terms and conditions of employment. Employers propose changes; if employees do not accept

[19] If the right to indefinite conversion is not exercised, the contract will remain a fixed-term contract. This is different from a system of automatic conversion to an indefinite-term contract, as adopted in European countries. In Japan, it is assumed that some fixed-term contract employees have high working conditions because of their fixed-term contracts, like fixed-term contract employees in the US, and they do not wish to be converted to an indefinite-term contract.

[20] Principle of non-discrimination by reason of forms of employment: In addition to fixed-term contract work, two other Directives have been issued in the EU regarding non-standard employment in the form of part-time work (97/81/EC) and temporary agency work (2008/104/EC), and member states are prohibited from less favorable treatment due to these forms of employment. This is based on the premise that non-standard workers are "comparable" to standard workers, i.e., engaged in the same or similar work. Japan's Part-Time Work Act of 2007 once prohibited discrimination against part-time workers engaged in the same or similar work as full-time workers, but only 1.3% of part-time workers were protected by this measure. Thus, Japan changed its strategy. Since the 2012 revision of the Labor Contract Act, Japan adopted a unique rule that deems it illegal if the disparity in working conditions between non-standard and standard workers is unreasonable, even if the non-standard workers are not engaged in the same or similar work as the standard workers. In 2016, Prime Minister Abe declared that Japan would introduce an equal pay for equal work rule for standard and non-standard workers. However, the substance of his argument was not about introducing equal pay for equal work, but rather about strengthening the regulation prohibiting unreasonable disparities in working conditions between standard and non-standard employees. After examining legal systems, case law, field surveys, and operational practices in European countries as reported in the study by the Japan Institute for Labor Policy and Training ("Report of the Study Group on the Actual Conditions of Treatment of Non-regular Workers in Other Countries" (JILPT, 2016)), the unique rule prohibiting unreasonable disparities was maintained and reinforced in the Part-Time/Fixed-Term Employment Act of 2018. However, Japan's peculiar approach is misleadingly called the "Equal Pay for Equal Work" principle for political reasons. Numerous lawsuits have been filed under this rule, attracting significant attention, but this article will not delve further into this issue due to space constraints.

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them, they can be dismissed and replaced by those willing to accept the new conditions. Employers must raise the conditions if the proposed conditions are too low to attract applicants. Thus, in the US, the appropriateness of an employer's proposal to change working conditions is determined by the labor market rather than the courts. Consequently, procedures and legal theories for changing terms and conditions of employment are rarely discussed in the US, except in the context of collective bargaining[21]. This can be understood as a reflection of the basic freedom to dismiss in the US.

In contrast, in Germany and Japan, where just cause is required for dismissal, it is difficult to immediately dismiss a worker who does not agree to changes in working conditions. Therefore, Germany has legislated a unique legal system called "*Änderungskündigung*" (Dismissal to change working conditions). The point of this system is that it does not force employees to choose between either rejecting a proposed change in working conditions and being dismissed, or accepting the proposal unconditionally. Instead, it allows for a third option: employees can accept the proposal with the condition that it is not socially unjustified, while continuing their employment and challenging the social legitimacy of the proposal in court (Article 2, Dismissal Restrictions Law).

In Japan, when there is a need to reduce working conditions across a workplace uniformly, the employer changes the work rules (*Shūgyō Kisoku*) to the disadvantage of the employees. Whether such adverse changes to work rules bind employees who disagree with them was contested in court. A 1968 Supreme Court Grand Bench ruling determined that if the changes to the work rules are reasonable, employees who oppose them are also bound by these rules. When a uniform change in working conditions is necessary at a workplace (such as changing the start time from 9:00 AM to 8:30 AM), workers who disagree with the change may have to be dismissed. However, in Japan, dismissing employees solely for not agreeing to changes in working conditions is likely to be considered an abuse of the right to dismiss. If dismissal cannot resolve the issue and the necessity of changing working conditions is not denied, there is no choice but to seek a new resolution that balances the employer's needs with the protection of employees. Therefore, it can be understood that the Supreme Court decided to create a new rule whereby it judges the reasonableness of changes in working conditions, and if deemed reasonable, the amended work rules will be binding on everyone in the workplace.

[21] When exclusive bargaining representation exists, the rule is that the employer cannot unilaterally change working conditions until collective bargaining reaches an impasse on mandatory collective bargaining matters. Cf. NLRB v. Crompton-Highland Mills, Inc., 338 U.S. 217 (1949); NLRB v. Katz, 369 U.S. 736 (1962).

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It can be said that the Japanese Supreme Court created a rule allowing flexible changes in working conditions for the sake of employment security. Many labor law scholars criticized this as contrary to the fundamental principle of contract law, which holds that contract terms cannot be unilaterally changed without the agreement of both parties. However, the Supreme Court repeatedly upheld this case law for about 40 years. This principle of reasonable modification of work rules was legislated as Article 10 of the 2007 Labor Contract Act.

However, this doctrine applies only to collective and uniform changes in terms and conditions of employment and not to individually specified conditions. Therefore, Japanese academic theory argues for introducing a system such as Germany's Änderungskündigung, allowing disputes over the reasonableness of an employer's proposal to change employment conditions while maintaining the employment relationship[22]. However, this has yet to be legislated.

While dismissal regulations provide employment security, the doctrine of modification of working conditions permits flexible adjustment of working conditions under certain conditions (social justifiability or reasonableness of the modification). This leads to the issue of how to balance flexibility and security in the employment relationship.

3.4. Two models of "Flexicurity"

Under the at-will employment principle, US employers can adjust the quantity of employment and employment conditions with great flexibility, though this system may be viewed as lacking security from the workers' perspective. In contrast, European countries with just cause requirements for dismissals provide employment security but lack flexibility in adjusting employment quantities, contributing to high unemployment, especially among youth. In the mid-2000s, the EU coined the term "flexicurity", which combines the terms "flexibility" and "security", and advocated a policy to strike a balance between the two, with the Danish model as a reference.

The Danish model of flexicurity was an "external market-based flexicurity" in which economic layoffs were allowed leniently, and the state provided a safety net of job training and unemployment insurance for the unemployed.

[22] Takashi Araki (2001), *Koyo Shisutemu to Rodo Joken Henko Hori* [*A Comparative Analysis of Internal and External Flexibility in the United States, Germany and Japan*], Yuhikaku, pp. 302 ff; Study Group Report on the Future Direction of Labor Contract Legislation (2005).

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However, the Danish model lost its appeal when the unemployment rate soared due to the economic crisis after 2008, and the German model, which achieved high economic performance while keeping the unemployment rate low by maintaining employment through work sharing, came into the limelight. The German model is an "internal market-based flexicurity" that responds to changes in economic conditions while maintaining employment by increasing flexibility within the company through flexible work patterns and work hour adjustments.

Japan can be considered the country that developed the internal market-based flexicurity the most. The prohibition of abusive dismissal introduced employment security, and to compensate for the rigidity in adjusting the amount of employment, a legal doctrine of reasonable modification of work rules was established by case law, allowing for flexible adjustment of working conditions. Notably, this system balancing flexibility and security was created not by legislators but by the courts, specifically by ordinary courts rather than labor courts, as a case law. This internal market-based flexicurity system, which developed in the 1960s, was eventually institutionalized in law with the Labor Contract Act in 2007.

An employment system that lacks flexibility cannot respond to change. However, flexibility to cope with change includes not only adjusting employment volume by relaxing dismissal regulations, but also adjusting working conditions while maintaining employment relationships. The two flexicurity models described above demonstrate that there can be various approaches to balancing flexibility and security.

3.5. Diversification of Workers and Work Styles and Labor Legislation

The diversification of workers and work styles is prominent in every country. Legal regulations are norms set at the most centralized level, which means these legal norms may not be suitable for the diversified workers and employment forms at decentralized company or workplace levels. Establishing effective legal regulations for a diversified reality of employment is a common challenge for all countries.

When applying statutory labor standards universally to diversified workers is inappropriate, there can be several approaches. The first is to exempt certain workers from these regulations. The second approach is to diversify the regulations to accommodate various types of workers by creating special regulations (these two approaches are discussed in par. 2). The third approach is to allow deviations or derogations from the statutory minimum standards on the condition that there is a collective agreement between labor

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and management. In Germany, derogation that allows deviation from the statutory labor standards and norm-setting at a more decentralized level that differs from the legal norms is permitted when agreed upon by labor unions.

However, the nature and actual function of the parties to the collective agreement, such as labor unions, works councils, and majority representatives, differ from country to country. Particularly in Germany, derogations are, as a principle, permitted through collective bargaining agreements or workplace agreements based on collective bargaining agreements (e.g., Articles 7 and 12, Working Hours Law; Article 21a, Youth Employment Protection Law). In other words, the decision on whether derogations are permissible rests with the labor unions; in Germany, they are industrial or sector unions[23].

Derogation mechanisms based on collective agreement are frequently used, especially in working hour regulations. For instance, derogation from statutory maximum working hours, averaging work hour systems, and flextime systems are allowed if a labor-management agreement is concluded between the employer and the majority representative of workers at the establishment. A labor union that organizes the majority of the workers at an establishment (majority union) automatically becomes the majority representative. However, most labor unions in Japan are not industrial but enterprise-based, and some critics argue that they lack sufficient bargaining power against employers. Moreover, in establishments with no majority union, one worker, elected as the representative of the majority of workers, becomes the majority representative. The Japanese system, which allows derogations from statutory minimum standards through agreements between such majority representatives and employers, has faced intense criticism for being abused by employers. Government surveys have reported that about 30% of workers elected as majority representatives are, in reality, appointed by employers or inappropriately elected without following democratic procedures[24].

Even if derogation from the statutory standards is based on collective agreement, the system will function differently if the actual status of the group responsible for derogation is different. It must be said that the current system in Japan is not a system that can appropriately control deviations from the minimum standards, and reform of the system is currently being discussed in the government study group considering situations in foreign countries.

[23] Yumiko Kuwamura (2017), *Rodosha Hogo-ho no Kiso to Kozo* [*Toward a New Framework for Worker Protective Laws: A Comparative Study of Flexibilization of Minimum Labor Standards*], Yuhikaku.

[24] JILPT (2018), *Kahan-su Rodo Kumiai oyobi Kahan-su Daihyo-sha ni kansuru Chosa* [*Survey on majority labor unions and majority representative*], JILPT.

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4. Conclusion

In comparative law research, it is essential to analyze and understand the specific legal systems of each country from a functional perspective and evaluate these systems within the context of the overall legal system of that country. However, this alone is not sufficient. As Otto Kahn-Freund pointed out, using comparative law to refer to legal systems for practical purposes while ignoring their social and political contexts can lead to abuse[25]. In addition to functional analysis from a legal perspective, it is also important to conduct comparative legal studies considering the system's social, political, and cultural backgrounds. Interdisciplinary research becomes crucial for this purpose.

In Japanese labor policy, duty-to-endeavor clauses have been extensively used to realize new social values or norms. This soft law approach stems from the concern that directly regulating with hard law in situations where society has not yet accepted the new norms could lead to social confusion or actions to evade hard law regulations, potentially resulting in unintended consequences. A progressive approach has been adopted in many labor legislations, where the duty-to-endeavor clauses (soft law) were gradually converted into mandatory provisions (hard law) as new values and norms permeated and took root in society[26].

Why does soft law, which lacks legal sanctions for violations, still have the effect of changing social norms and corporate behavior in Japan? It is possible to point to factors such as active administrative campaigns and providing economic incentives through subsidies that encourage behavior in line with the duty to endeavor. However, a more persuasive explanation may be possible, considering recent cultural psychology research findings on various countries' behavioral norms[27]. There are limits to interdisciplinary research conducted by individuals. In this regard, it is noteworthy that the Ministry of Health, Labour and Welfare customarily establishes study groups composed of experts from various academic fields to discuss future labor

[25] Kahn-Freund O. (1974), "On the Uses and Misuses of Comparative Law", *Modern Law Review*, 37(1).

[26] Takashi Araki (2004), *Rodo Rippo ni oketu Doryoku-gimu no Kino* [*Functions of the Duty to Endeavor in Labor Legislation: Japanese-style Soft Law Approach?*]; Michio Tsuchida *et al*. (eds.) (2004), *Rodo Kankei Ho no Gendai-teki Tenkai* [*Modern Development of Labor Relations Law*], Shinzansha.

[27] E.g., Hazel R.M., Shinobu Kitayama (1991), "Culture and the Self: Implications for Cognition, Emotion, and Motivation", *Psychological Review*, 98(2): 224-253. This paper empirically explains the differences between Western independent self-construal and Eastern interdependent self-construal.

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law policy. It could be a valuable opportunity to reflect interdisciplinary considerations in labor legislation.

In any event, comparative labor law helps us understand the nature of our own legal system, reveals the existence of various approaches to similar social issues, and provides valuable insights for the development of labor law policies. Comparative labor law is an intellectually fascinating academic pursuit and, above all, it is interesting.

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SECTION 2

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Part I
The ways to achieve social justice in the world of work: current trends

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Social taxonomy and reporting standards: useful tools for progress in labor rights?

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1. Introducción

La UE ha declarado en reiteradas ocasiones, a través de documentos, informes y textos legales, su intención de convertirse en líder mundial en empleo socialmente responsable, potenciando el papel de las empresas europeas o que operen en Europa como generadoras de un trabajo digo e inclusivo[2]. Para la consecución de este objetivo se ha creado un conjunto normativo y declarativo algo disperso que atiende a materias como la diligencia debida, el cierre de fronteras a productos creados en condiciones de trabajo forzoso, el derecho a unas condiciones laborales transparentes y previsibles, el fomento de una contratación pública socialmente responsable[3], una política de preferencias comerciales[4] o la generación de obligaciones de reporte y transparencia en materia laboral, entre otras[5].

[1] Universidad de Alicante (Spain).

[2] Es innegable que la UE encabeza la transformación del sistema productivo hacia la sostenibilidad ambiental, y que ésta, a su vez, se ha convertido en un activo para las empresas. Pero la sostenibilidad tiene también una dimensión ética, y otra social y laboral, que no debe desvincularse ni quedar rezagada respecto a la ambiental.

[3] Comisión Europea, Una guía para considerar aspectos sociales en las contrataciones públicas (2021/C 237/01).

[4] *ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/index_en.htm*.

[5] Todo ello enmarcado en un conjunto asistemático de disposiciones relativas a la sostenibilidad: además de la intensa producción normativa en materia ambiental, financiación e inversión sostenible, la RSC y diligencia debida (Propuesta de resolución del parlamento europeo (2020/2129(INL), *oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=fr&reference=2020/2129(INL)*), el cumplimiento de los ODS (Examen voluntario de la UE de la aplicación de la Agenda 2030 para el Desarrollo Sostenible, *ec.europa.eu/info/*

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Su objetivo es la consecución del trabajo digno, extendiendo exigencias al respecto tanto a las actividades que las empresas europeas desarrollan fuera de Europa, como a las empresas que, radicadas fuera de Europa, pretenden producir o comercializar sus productos o servicios en el territorio de la Unión.

Para alcanzar este objetivo, la UE proporciona una serie de instrumentos que intentan dotar a la actividad voluntaria de las empresas relacionada con el trabajo digno[6] de un marco jurídico y de herramientas técnicas adecuadas, que aporten mayor transparencia y rigor en el reporte de los avances al respecto, evitando los riesgos de "greenwashing" en materia de derechos humanos laborales.

Entre dichos instrumentos, probablemente los más novedosos son, por una parte, los relativos a taxonomía social y, por otra parte, los estándares de reporte en materia laboral. La taxonomía social está vinculada a cuestiones de financiación e inversión sostenibles, las cuales tienen una dimensión ambiental evidente, pero también, y no de menos relevancia, laboral, generando un sistema de clasificación de actividades económicas que contribuyan a objetivos ambientales y sociales. Por su parte, los estándares de reporte en materia laboral son una parte de los denominados ESRS (European Sustainability Reporting Standards), vinculados a la Directiva sobre información corporativa en materia de sostenibilidad, cuyo objetivo es que la presentación de la información de la actividad de las empresas en materia de sostenibilidad, ambiental y social, resulte objetiva, comparable, y auditable. Todo ello, en beneficio de las personas trabajadoras, pero también de las propias empresas, que precisan de un marco legislativo más claro que el actual, y de la ciudadanía en su conjunto, que demanda productos no sólo sostenibles en lo ambiental, sino también generados en condiciones de trabajo dignas.

Ambas iniciativas, junto con el resto de normas europeas relativas a la sostenibilidad laboral, van a determinar el modelo de gestión del conjunto de recursos humanos que participan en el proceso productivo de las empresas europeas (o que producen o comercializan sus productos en Europa) en las próximas décadas, así como el reporte en materia de responsabilidad social

law/better-regulation/have-your-say/initiatives/13600-Examen-voluntario-de-la-UE-de-la-aplicacion-de-la-Agenda-2030-para-el-Desarrollo-Sostenible_es), la gobernanza sostenible, la igualdad de género (entre otras, Directiva sobre equilibrio de género en los consejos de administración de las empresas) o el diálogo con los grupos de interés.

[6] La conexión entre trabajo digno y sostenibilidad se pone especialmente de manifiesto en el hecho de que la Comunicación de la comisión sobre el trabajo digno para una transición justa a escala mundial y una recuperación sostenible, y la propuesta de Directiva sobre diligencia debida de las empresas comparten fecha de emisión, el 23 de febrero 2022.

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vinculada a las personas trabajadoras, por lo que su conocimiento resulta imprescindible[7].

En el presente estudio se analizan ambas herramientas, haciendo hincapié en las similitudes, conexiones y diferencias entre ambas, sus antecedentes, virtudes y defectos, así como los potenciales impactos positivos de su correcta implantación sobre la transparencia y fiabilidad de la información facilitada por las empresas en materia de inversión y gestión empresarial socialmente responsable vinculada a los derechos de las personas trabajadoras.

2. Breve aproximación a la taxonomía social

La Taxonomía Europea establece un sistema de clasificación de las actividades económicas que contribuyen a los objetivos de sostenibilidad de la UE. Estos objetivos contemplan dos ámbitos de clasificación: el medioambiental (Taxonomía Verde), y el social (Taxonomía Social).

Ciertamente, el ámbito que primera y más profundamente se ha desarrollado es el relativo a la Taxonomía verde, de la que la social sigue, lentamente, sus pasos. Así, es el Reglamento europeo sobre taxonomía verde (DO L 198, 22.6.2020) el que plantea la necesidad de ampliar el ámbito de aplicación de la taxonomía a otros objetivos de sostenibilidad, como son los objetivos sociales, exigiendo a la Comisión la publicación de un informe al respecto. De esta manera, las cuestiones ambientales quedarían completadas con otra taxonomía, la taxonomía social, vinculada a cuestiones de financiación e inversión socialmente responsable. Partiendo de esta base, la taxonomía social consensuada puede proporcionar directrices para inversiones con impacto social positivo y contribuiría a abordar el evidente peligro de blanqueo social (social washing) (Informe de la plataforma sobre finanzas sostenibles, 1.3).

De tal manera que la denominada taxonomía social cumpliría el objetivo de generar un sistema de clasificación de las actividades económicas que permitiría identificar aquellas que contribuyan a la consecución de objetivos sociales al objeto de canalizar las inversiones privadas hacia la misma[8].

[7] Como indica el Dictamen del CESE sobre la Comunicación, las empresas están sometidas a desafíos derivados de la pandemia, las transformaciones tecnológicas, el cambio climático, las presiones demográficas y migratorias y la globalización, que pueden impactar negativamente en el cumplimiento de las normas laborales y de protección social. Apartado 2, Conclusiones y recomendaciones del Dictamen del CESE sobre "Trabajo digno en todo el mundo" C/486/149, de 21 de diciembre de 2022.

[8] Entre otros motivos más humanistas, la necesidad de una taxonomía social se sustenta en la constatación objetiva de la existencia de una alta demanda de bonos sociales, que

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Ambas taxonomías, a su vez, quedarían integradas en la denominada Estrategia Renovada de Finanzas Sostenibles 2021[9], que trata de financiar la transición hacia la sostenibilidad de la economía real[10].

A día de hoy, el principal documento en materia de Taxonomía social es el Informe final sobre Taxonomía social, desarrollado por la Plataforma de Finanzas sostenibles y publicado en julio de 2023.

El Informe de la Plataforma presenta dos grandes referencias. Por una parte, en lo que se refiere a su estructura, es evidente la influencia de lo ya regulado en materia de taxonomía verde, de tal forma que la identificación de las finanzas socialmente sostenibles se lleva a cabo sobre la base de los siguientes cuatro pilares: 1) Objetivos sociales, 2) Tipos de contribuciones sustanciales; 3) No causar daños significativos; 4) y mantenimiento de unas garantías mínimas.

Pero, por otra parte, es obvio que el contexto de la taxonomía social es doble, puesto que no sólo se halla vinculada al conjunto de políticas de finanzas sostenibles, sino que también se integra en la política de sostenibilidad y responsabilidad social de la UE, motivo por el que, en el momento de identificar los objetivos sociales, así como los sub-objetivos que los integran, se han tenido en cuenta los diferentes grupos de interés que podrían verse afectados, tomando para ello como referencia la CRSD y distinguiendo entre:

1) trabajo decente/fuerza de trabajo (incluidas las personas trabajadoras implicadas en la cadena de valor);
2) usuarios finales y consumidores;
3) comunidades afectadas.

demuestra que el capital privado puede ser encauzado hacia actividades socialmente valiosas. Para el CESE, la utilidad de la Taxonomía social se encuentra en satisfacer las necesidades de inversión en el ámbito social como parte de la política global orientada a la equidad y la inclusión social (1.1), sin dejar de advertir de la necesidad de la inversión pública para el sostenimiento de los servicios públicos.

[9] Su antecedente inmediato, el Marco de financiación sostenible de la UE 2018, trataba de orientar los flujos financieros privados hacia actividades económicas sostenibles. En 2021, el objetivo es más ambicioso: la consecución de una financiación de la transición hacia la sostenibilidad de la economía real en su conjunto.

[10] Otras normas vinculadas al sector financiero serían: Reglamento (UE) 2020/852 del Parlamento Europeo y del Consejo de 18 de junio de 2020 relativo al establecimiento de un marco para facilitar las inversiones sostenibles y por el que se modifica el Reglamento (UE) 2019/2088. Y Reglamento (UE) 2021/1253 de 22 de abril de 2021 que modifica el Reglamento Delegado (UE) 2017/565 en relación con la integración de los factores, riesgos y preferencias de sostenibilidad en ciertos requisitos organizativos y condiciones operativas de las entidades que prestan servicios de inversión.

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De tal manera que se puede decir que la propuesta de taxonomía social trata de responder a su doble alma: por una parte, las normas y declaraciones sobre derechos humanos y sociales (Pilar Europeo de Derechos Sociales, Directiva diligencia debida, Directiva de informes de sostenibilidad corporativa, trabajo forzoso, etc.); y, por otra parte, el marco legislativo construido en la UE sobre finanzas y gobernanza sostenibles.

Desarrollando brevemente la estructura descrita, los objetivos sociales son tres: trabajo decente, incluidos todos los trabajadores que de alguna manera participan en la cadena de valor; estándares adecuados de vida y bienestar para los usuarios o consumidores finales, y comunidades y sociedades inclusivas y sostenibles. Los tres objetivos presentan, a su vez, sub-objetivos. Mencionando únicamente los relativos a trabajo decente, estos son: diálogo social, salarios dignos, salud y seguridad y aprendizaje a lo largo de la vida.

Respecto a los tipos de contribuciones, se entiende que la actividad (o una actividad) de la empresa puede ser considerada social (y, por tanto, susceptible de ser financiada desde una perspectiva de finanzas sostenibles), si realiza una contribución a alguno de los objetivos (o sub-objetivos enumerados) que pueda calificarse de sustancial. El informe aporta datos para la identificación de aquello que pueda considerarse "contribución sustancial", de manera que ésta se dará en tres circunstancias:

1) cuando la actividad de la empresa reduzca o elimine impactos negativos, especialmente en sectores de alto riesgo, como sería el caso de aquellos en los que se da una pérdida significativa de empleo, o aquellos en los que la competencia a nivel internacional genera el riesgo de pago de salarios no dignos;
2) cuando el impacto positivo inherente a la actividad de la empresa se incremente, especialmente relevante en sectores proveedores de bienes y servicios básicos, o en situaciones donde no se alcanza una base económica mínima, o ésta no es accesible para grupos vulnerables;
3) cuando la actividad económica de la empresa tiene el potencial de contribuir a una reducción sustancial de riesgos sociales en otros sectores económicos.

En tercer lugar, el criterio relativo a no dañar significativamente otros objetivos (identificado por sus siglas en inglés, DNSH), heredado de la taxonomía verde exige que una actividad que contribuye a un objetivo social no debe ejercer una influencia negativa que vaya en detrimento de alguno de los restantes objetivos. De hecho, el informe de EY sugiere integrar ambas taxonomías, la social y la verde en este criterio, de manera que el daño habría de evitarse de manera cruzada, teniendo en cuenta tanto objetivos sociales como ambientales.

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Por último, el conjunto de salvaguardas mínimas exige que el proceso productivo empleado por la empresa se encuentre en línea con los derechos humanos y libertades fundamentales, principios democráticos y estándares internacionales al respecto.

Al mismo tiempo, las salvaguardas ambientales mínimas deberían ser parte de la futura taxonomía social (por ejemplo, la parte ambiental de las directrices de la OCDE para empresas multinacionales (EMN), de la misma manera que las salvaguardas sociales y de gobernanza mínimas son parte de la taxonomía ambiental.

Sin duda, la Taxonomía social presenta numerosos aspectos positivos, entre los que cabría destacar el hecho de que los requerimientos en materia social se extienden tanto a actividades realizadas por empresas europeas fuera de Europa y a las empresas que, con sede fuera de Europa, pretendan producir o comercializar sus productos o servicios en el territorio de la Unión.

Por otra parte, a través de la taxonomía social se pueden proporcionar Métricas comunes, lo que genera mayor estandarización, brinda regularidad y permite un mejor control. Además, brindará mayor credibilidad, visibilidad y reconocimiento a las empresas.

3. Breve aproximación a los Estándares Sociales de la Unión Europea

La Directiva de la Unión Europea relativa a la información corporativa en materia de sostenibilidad (Directiva (UE) 2022/2464 contiene una serie de preceptos que especifican la información que necesariamente han de incluir las empresas en su informe de gestión para comprender tanto el impacto de las empresas en las cuestiones de sostenibilidad, como el impacto de las cuestiones de sostenibilidad en la evolución, resultados y situación de la empresa (arts. 19 bis y 29 ter y quarter).

Entre otras muchas cuestiones, relativas a medioambiente y gobernanza, dicha información se refiere a aspectos laborales, bien integrados en los denominados "*factores sociales y de derechos humanos*", bien relativos a cadena de valor y obligaciones de diligencia debida.

Así, en relación a esta última cuestión, el art. 19 bis 2.f. indica que se debe incluir una descripción del procedimiento de diligencia debida aplicado por la empresa, los principales efectos negativos reales o potenciales relacionados con las actividades de la empresa y con su cadena de valor, incluidos sus productos y servicios, sus relaciones comerciales y su cadena de suministro, las medidas adoptadas para detectar y vigilar dichos efectos,

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así como cualesquiera medidas adoptadas por la empresa para prevenir, mitigar, subsanar o poner fin a los efectos negativos, y el resultado de dichas medidas. Si bien el art. 29 ter, en su punto 4, matiza que las normas tendrán en cuenta las dificultades que las empresas pueden encontrar a la hora de recabar información de su cadena de valor, especialmente de proveedores de mercados y economías emergentes.

Por lo que se refiere a la información relativa a los "factores sociales y de derechos humanos", el art. 29 ter 2.f indica que las normas de presentación de información sobre sostenibilidad deberán especificar la información que las empresas deban divulgar sobre, entre otras cuestiones, la igualdad de trato y oportunidades (incluida la igualdad de género y la igualdad de retribución por un trabajo de igual valor), la formación, el empleo y la inclusión de personas con discapacidad, las medidas contra la violencia y el acoso en el lugar de trabajo, la diversidad, el empleo seguro, el tiempo de trabajo, la adecuación de los salarios, el diálogo social, la libertad de asociación, la negociación colectiva, los derechos de información, consulta y participación de los trabajadores, la conciliación y la salud y la seguridad, así como el respeto a la Declaración de la OIT relativa a los principios y derechos fundamentales en el trabajo y sus convenios fundamentales.

Todo ello se completa con la obligación de la empresa de informar a los representantes de los trabajadores y tratar con ellos la información pertinente y los medios que sean necesarios para obtener y comprobar la información sobre sostenibilidad (art. 19 bis 5).

Las normas de presentación de información sobre sostenibilidad a las que se refieren tanto el art. 19 bis como el 29 ter se corresponden con la obligación establecida en la Directiva a la Comisión de adoptar un primer conjunto de normas que especificaran la información a comunicar por parte de las empresas, y que en materia de derechos sociolaborales habrán de tener en cuenta (43) los principios y marcos reconocidos internacionalmente sobre conducta empresarial responsable, responsabilidad social de las empresas y desarrollo sostenible[11]. Se deberá garantizar la calidad de la información comunicada (art. 29 ter.2), exigiendo que sea comprensible, pertinente, verificable y comparable, evitando imponer una carga administrativa desproporcionada a las empresas, teniendo en cuenta el trabajo de las iniciativas mundiales de normalización (art. 29 ter.5a).

[11] Incluidos los ODS, los Principios Rectores sobre las Empresas y DDHH NU, las Líneas Directrices de la OCDE para Empresas Multinacionales, la Guía de la OCDE de Debida Diligencia y directrices sectoriales conexas, el Pacto Mundial, la Declaración de la OIT sobre Empresas Multinacionales y Política Social, la norma ISO 26000 y los Principios para la Inversión Responsable de UN.

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En base a todo ello, y previo asesoramiento del EFRAG[12], se adopta el Reglamento delegado (UE) 2023/2772 de la Comisión, de 31 de julio de 2023, por el que se completa la Directiva 2013/34/UE en lo que respecta a las normas de presentación de información sobre sostenibilidad, en el que se contienen los estándares que especifican la información que debe ser presentada por las empresas y el formato en el que la misma debe ser presentada, facilitando la estandarización del reporte en materia de sostenibilidad[13].

Efectivamente, se trata de doce estándares que aspiran a uniformar los reportes de sostenibilidad en la UE. Los dos primeros, de carácter general, especifican los requisitos a cumplir (ESRS 1) y la información que las empresas deben divulgar (ESRS 2), asegurando la comparabilidad y fiabilidad de los reportes en sostenibilidad.

Tab. 1. Estándares transversales

ESRS 1 **PRINCIPIOS GENERALES**	**ESRS 2** **INFORMACIÓN GENERAL**
Doble materialidad	Bases de preparación
Diligencia debida	Requisitos de gobernanza Estrategia
Cadena de valor	Gestión de impactos, riesgos y oportunidades
Horizontes temporales Preparación y presentación	Métricas y objetivos
Estructura	
Vínculos con otras partes de la información	
Empresarial	
Disposiciones transitorias	

Fuente: "ESRS: camino hacia los futuros estándares en materia de sostenibilidad". Anexo I Forética, enero 2023

[12] Grupo Consultivo Europeo en materia de Información Financiera, asociación sin ánimo de lucro que asesora a la comisión en la adopción de normas de presentación de información financiera, coordinadas con las iniciativas mundiales de normalización.

[13] El EFRAG desarrolló una propuesta de estándares que ha sido sustancialmente asumida por la Comisión, no sin matices (se han introducido modificaciones en cuestiones como la introducción paulatina de determinados requisitos y la conversión de algunos de ellos en voluntarios, la flexibilización de otros y modificaciones técnicas), y ha publicado guías que ayudan a las empresas a aplicar la normativa e informes de participación de grupos de interés en la elaboración de su propuesta.

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Los cinco siguientes (E1 a E5) se dedican a cuestiones ambientales (cambio climático, polución, agua y medios marinos, biodiversidad y uso de recursos y economía circular), mientras que los cuatro siguientes son relativos a cuestiones sociolaborales, bien relacionadas con la propia fuerza de trabajo (S1), bien con personas trabajadoras en la cadena de valor (S2), bien con la comunidad (S3) y consumidores y usuarios finales (S4). Un último conjunto de estándares se reserva para la gobernanza empresarial (G1), si bien esta última impregna la totalidad de las obligaciones de reporte, con independencia del concreto estándar que se esté abordando.

A excepción de los dos estándares generales que son de obligada cumplimentación, cada empresa adopta la decisión relativa a aquello sobre lo que reporta, teniendo en cuenta el principio de doble materialidad en la selección de lo reportable, de manera que no sólo se consideren cuestiones financieras, sino también cuestiones de impacto social y ambiental. Mas concretamente, las empresas deben calificar cada cuestión relacionada en los estándares como material o no material, y aportar una serie de datos mínimos en relación a cada cuestión calificada como material.

La empresa, por tanto, ha de tener en cuenta dichos impactos para elaborar su planificación estratégica y elegir su modelo de organización de negocio, bajo los parámetros de riesgos y oportunidades de sus acciones, tanto en relación a su propia prosperidad, como en relación a sus grupos de interés, incluido el entorno. Analizados los impactos, la empresa ha de fijar objetivos y definir las políticas y acciones concretas necesarias para alcanzarlos. Los estándares proporcionan, además, los parámetros a emplear para medir los progresos en la consecución de tales objetivos, siendo necesario proporcionar información cualitativa y cuantitativa al respecto.

El seguimiento de estándares uniformes para el reporte de sostenibilidad social resulta imprescindible si se desea disponer de una información clara, precisa, objetiva, homologable, comparable y auditable de las condiciones de trabajo existentes en toda la cadena de valor implicada en la actividad productiva y comercial de las empresas.

Concretamente, los estándares en materia social son los siguientes (*Tab. 2*).

El objetivo de los ESRS, en general, es ambicioso y se proyecta en una triple dirección: incrementar la transparencia en favor de los grupos de interés, especialmente personas trabajadoras (incluidas aquellas que participan en la cadena de valor) y consumidores; unificar el reporte en materia de sostenibilidad en el ámbito de la Unión Europea, e integrar la sostenibilidad en los planes estratégicos de las empresas.

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Tab. 2

ESRS S1		
Personal Propio	Condiciones laborales	Empleo seguro Tiempo de trabajoSalarios adecuados Diálogo social Libertad de asociación, existencia de comités y los derechos de información, consulta y participación de los trabajadoresNegociación colectiva, incluida la tasa de trabajadores cubiertos por convenios colectivos Conciliación de la vida laboral y familiarSalud y seguridad
	Igualdad de trato y oportunidades para todos	Igualdad de género e igualdad de retribución por un trabajo de igual valorFormación y desarrollo de competenciasEmpleo e inclusión de las personas con discapacidad Medidas contra la violencia y el acoso en ellugar de trabajo Diversidad
	Otros derechos laborales	Trabajo infantil Trabajo forzoso Vivienda adecuada Privacidad
ESRS S2		
Trabajadores en la cadena de valor	Condiciones laborales	Empleo seguro Tiempo de trabajoSalarios adecuados Diálogo social Libertad de asociación, existencia de comités y los derechos de información, consulta y participación de los trabajadoresNegociación colectiva Conciliación de la vida laboral y familiarSalud y seguridad
	Igualdad de trato y oportunidades para todos	Igualdad de género e igualdad de retribución por un trabajo de igual valorFormación y desarrollo de competenciasEmpleo e inclusión de las personas con discapacidad Medidas contra la violencia y el acoso en ellugar de trabajo Diversidad
	Otros derechos laborales	Trabajo infantil Trabajo forzoso Vivienda adecuada Agua y sanemamientoPrivacidad

No obstante, el Reglamento es consciente de las dificultades que puede suponer para las empresas el cumplimiento de la totalidad de las obligaciones de reporte en él contempladas, por lo que introduce un doble factor que permite hablar de una escalonada entrada en vigor de dichas obligaciones; por una parte, un factor cronológico que periodifica dicha entrada en vigor

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en función de la dimensión de las empresas; y, por otra parte, prorrogando el período de reporte sobre determinados estándares, especialmente por lo que se refiere a los trabajadores en la cadena de valor, que podrá omitirse por parte de las empresas durante los dos primeros años en los que haya entrado en vigor su obligación de reportar.

4. Reflexiones y conclusiones

Finanzas sostenibles y reportes de sostenibilidad de las empresas siguen, tradicionalmente, caminos paralelos, siendo así que las evidentes similitudes y zonas comunes no llegan a generar una verdadera intersección entre ambas.

La elaboración y aprobación de los estándares de reporte con carácter previo al desarrollo de una taxonomía social que se retrasa, ofrece la oportunidad de reflexionar en relación a la cuestión de hasta qué punto ambos sistemas deben asemejarse.

Se ha señalado que la propuesta de Taxonomía social se estructura de manera paralela a la taxonomía verde, pero el contenido de cada objetivo responde a la estructura prevista en la CSRD y estándares sociales de la norma reglamentaria de desarrollo. Lo cual pone de manifiesto la necesidad de encontrar un equilibrio entre el contexto de las finanzas sostenibles y el relativo al reporte de las empresas en materia de sostenibilidad.

El siguiente paso es, pues, desarrollar estándares para la Taxonomía social, respondiendo a la cuestión relativa a hasta qué punto el desarrollo de dicha taxonomía y los indicadores ESRS deben ser similares. Yendo más allá, incluso cabe preguntarse si tiene sentido desarrollar la taxonomía social cuando ya se ha alcanzado un alto nivel de desarrollo legislativo en materia de reporte social y taxonomía verde. ¿Quizá el desarrollo de la taxonomía social se haya detenido porque no resulta necesaria?

A la pregunta de si es necesaria la taxonomía social, la respuesta debe ser positiva, por varias razones. La primera de ellas es que el ámbito de las inversiones es tremendamente impactante sobre las personas. La actividad inversora no es una actividad productiva en sí misma, pero determina qué actividades productivas y de servicios prosperan y cuáles n. Al no producir directamente, puede considerarse ajeno a las exigencias que se contemplan para empleadores directos, pero no debe obviarse el hecho de que los inversores son parte de la cadena de valor, de la cadena de producción. No proporcionan materias primas, ni logística, ni maquinaria, no producen una parte del producto o del servicio, pero proporcionan los fondos imprescindibles para todo ello. La segunda es que el sector es suficientemente específico como para requerir de un marco normativo propio. La tercera es el potencial de

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la taxonomía social para generar un círculo virtuoso: la entidad financiera puede elegir a qué empresas financia en base a criterios de trabajo digno. Y las empresas, por su parte, pueden (si pueden) elegir la entidad financiera a la que se dirigen para solicitar financiación o gestionar sus beneficios en base a los mismos criterios. Adicionalmente, el mismo sistema que pueda servir a las entidades financieras para identificar inversiones sostenibles y responsables podría servir a los consumidores para decidir que comprar o contratar, a las administraciones públicas para decidir qué financiar o subvencionar, y a las empresas para decidir qué reportar[14]. Junto a lo anterior, el desarrollo de la taxonomía social puede constituir la oportunidad de integrar las cuestiones ambientales y sociales en un único sistema clasificatorio e identificativo. Una contribución sustancial a la transparencia.

Por todo ello, parece evidente que no sólo es conveniente el desarrollo de la taxonomía social, sino que además es necesario que se cree esa zona común, ese vínculo entre las obligaciones de reporte y la inversión socialmente responsable[15].

Así pues, si es necesaria una taxonomía social, ¿qué es lo que determina que su desarrollo se haya detenido? Probablemente no se trate de futilidad ni de dificultades técnicas, sino de cuestiones de interés.

En este sentido, cabe preguntarse y resulta especialmente llamativa la doble velocidad empleada por la UE en el desarrollo de las dos modalidades de Taxonomía, lo que lleva a una nueva pregunta:

¿Por qué los objetivos medioambientales van más rápido y más lejos? Sencillamente, el mensaje ha llegado mejor. Estamos sinceramente preocupados por el planeta (bueno, por nosotros en el planeta. El futuro del planeta no está en peligro. La vida de las personas está en peligro. El planeta sobrevivirá felizmente gracias a nosotros. Quien no va a sobrevivir gracias a nosotros, somos nosotros).

Así que es mucho más rentable reputacionalmente ser verde que ser justo. Por eso la taxonomía social debe seguir los pasos de la taxonomía verde, ya que hay muchas más posibilidades de impacto que de otra manera.

[14] Yendo más allá, la taxonomía europea podría extenderse a la selección de sus clientes; no sólo los fondos, empresas o sectores en los que invierten el dinero de sus clientes, sino los propios clientes. De esta forma, la taxonomía tomaría un doble camino: no sólo influiría en la selección de los productos en los que invierte o las empresas que financia, sino también en las empresas a las que presta servicios.

[15] En el informe de la plataforma sobre finanzas sostenibles se indica que la CSRD será un importante complemento de la taxonomía social con el que se podrían valorar y evaluar las medidas. Ello resulta, en mi opinión, insuficiente. La coordinación entre ambos documentos debe ir más allá de la simple inspiración. Se debe unificar y simplificar, en la medida en que sea posible y conveniente.

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El mensaje es claro: una transición verde no es posible sin una transición justa.

Sin embargo, para avanzar en esta transición justa, hay que romper con el cliché de que los objetivos medioambientales y climáticos son más visibles, comunes y tangibles. No es verdad que la visibilidad sea menor en lo social; es sencillo detectar la esclavitud moderna, el trabajo infantil, las condiciones de trabajo abusivas. Mucho más que detectar muchas formas diferentes de contaminación invisible, por ejemplo. En general, las condiciones climáticas son casi inasequibles e increíblemente diversas en todo el mundo. Las necesidades básicas humanas son siempre las mismas: acceso al agua y a la alimentación, educación, información, vivienda, atención sanitaria, transporte, cultura y respeto.

Por lo que respecta a lo intangible (es imposible medir los objetivos sociales), no es más difícil identificar las contribuciones sociales que las ambientales. Pensemos en algunos derechos laborales: huelga, negociación colectiva, salarios justos, descanso y desconexión, seguridad y atención sanitaria… Todos ellos son perfectamente mesurables.

A pesar de estas evidencias, la Comisión no ha presentado su propuesta en tiempo argumentando las dificultades para encontrar un consenso sobre las cuestiones sociales seleccionables entre los países miembros.

Pero, ¿hasta qué punto debería ser similar el desarrollo de la taxonomía social y los indicadores ESRS? ¿Es posible una identificación completa? La respuesta en mi opinión es n. No es posible, y tampoco sería totalmente útil.

Habrá una desviación inevitable, ya que la taxonomía social se genera para orientar las decisiones de financiación de las actividades, mientras que la actividad de información se plantea en relación con toda la empresa.

En otras palabras, mientras la taxonomía pone el foco en las actividades (si se financia o no una determinada actividad), el reporte es una obligación para las entidades. Para las decisiones financieras, debe obtener información adicional sobre la actividad específica que no se puede obtener del reporte, como datos no reportados aún, (p. ej., contratación de personal especializado o con ciertas habilidades, o actividades con riesgos específicos).

El objetivo también es diferente; mientras la taxonomía pretende responder a la pregunta de: en qué actividades es interesante invertir por su contribución social; el reporte es un ejercicio de transparencia: la empresa expone a qué se dedica, y cómo es su proceso de trabajo. Obviamente, ambos elementos son relevantes para tomar una decisión de inversión, pero también es necesario tener en cuenta otros elementos.

Sin embargo, las intersecciones también son evidentes: una empresa es principalmente su actividad, su objeto social, y una actividad empresarial no

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se desarrolla de forma aislada del resto de características de la empresa, ni puede ser considerada de forma aislada por los inversores. En este sentido, si hablamos de cuestiones laborales, ligadas al proceso productivo, las cuestiones relevantes se acercan considerablemente.

Si no es deseable una identificación completa, ¿es relevante la coordinación entre los estándares de presentación de informes y los indicadores de la taxonomía social? La respuesta es sí. Porque cuanta más información relevante para los inversores/financieros contenga el informe, más posibilidades tendrá la empresa de obtener financiación.

Es necesario crear ese espacio común, ese vínculo entre las obligaciones de informar y la inversión socialmente responsable. Será conveniente evitar, en la medida de lo posible, duplicidades y complejidad, integrando todo lo avanzado en taxonomía verde que sea extrapolable junto a todo lo avanzado en materia de reporte relativo a obligaciones sociales y laborales. Los Estándares pueden constituir un gran avance en la generación de vínculos.

En mi opinión, habrán de integrarse tres conjuntos con intersecciones evidentes: taxonomía social, taxonomía verde, sostenibilidad social. La taxonomía social tendrá intersecciones con ambas, mientras que habrán de identificarse qué intersecciones existen –que existen – entre la taxonomía ambiental y la sostenibilidad social. Será necesario, por tanto, encontrar un sistema que permita identificar aquellos indicadores de trabajo decente que afectan de forma general a toda la empresa y que son comunes a cualquier actividad (que podrá proporcionar el ESRS), y los indicadores esenciales y específicos de la actividad concreta a financiar (que proporcionará la taxonomía social), encontrando el necesario equilibrio entre ambos. Quizá las diferencias no estén tanto en lo que hay que preguntar, sino en la respuesta: específica respecto de la actividad en el caso de la financiación, completa respecto de la empresa en el caso del informe.

De esta forma, tanto la taxonomía como el reporte podrán alcanzar su máxima utilidad en relación al propósito de la UE de promover el trabajo decente.

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The EU "Corporate Sustainability Package" from a social dialogue perspective through a gender lens

Carla Spinelli[1]

1. Exploitation of workers in global supply chains

The 2030 Agenda for Sustainable Development, through its 17 Sustainable Development Goals (SDGs) and 169 accompanying targets, aims to "*take immediate and effective action to eradicate forced labour, end modern slavery and human trafficking, and ensure the prohibition and elimination of the worst forms of child labour*" by 2030 (target 8.7).

According to recent global surveys, approximately 27.6 million people worldwide are subjected to forced labour (ILO *et al*., 2022), generating an estimated $236 billion in illicit profits annually (ILO, 2024).

The problem is particularly pervasive in global supply chains (GSCs), where the vertical disintegration of companies and chains of contractors, subcontractors and sub-subcontractors often leaves workers at the bottom of the chain without the labour protections of those at the top.

Such disaggregation, coupled with the globalisation of production, has enabled multinational enterprises (MNEs) to evade responsibility for fundamental labour and social rights violations, as well as human rights abuses affecting workers further down the supply chain – especially the most vulnerable, such as children, women and migrants.

2. How can international corporate behaviour be regulated?

The most widely recognised public regulatory instruments for guiding companies' compliance with core labour standards include the 2011 United

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Nations Guiding Principles on Business and Human Rights (UNGPs), the 2011 OECD Guidelines for Multinational Enterprises (OECD Guidelines) and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO MNE Declaration), last revised in 2022.

Corporate social responsibility (CSR) mechanisms driven by private regulation include the adoption of ethical codes, social clauses in free trade agreements, adherence to ethical labels, and social or environmental reporting. However, all these soft law instruments have not led to sustainable improvements in working conditions or advances in workers' rights.

A shift towards the "juridification" of responsible business conduct has been seen as necessary, with an emphasis on hard law instruments. This shift imposes significant obligations on companies, such as transparency, due diligence and, in some cases, civil liability (Spinelli, 2021).

Developments in hard law can vary widely. In Europe, several countries have introduced their own national legislation on due diligence[2], well before the EU Parliament adopted a Recommendation for drawing up a Directive on Due Diligence and Corporate Accountability, then enacted in 2024.

In this context, two broad approaches to due diligence for responsible business conduct have been identified: the reporting model based on disclosure, exemplified by the UK Modern Slavery Act of 2015, and the mandatory human rights due diligence model exemplified by the French Duty of Vigilance Law of 2017 (Bright, 2021, 75 ff.).

The ongoing process of "juridification" also seeks to strengthen social dialogue and stakeholder involvement and consultation, as it is clear that the role that trade unions and workers' representatives can gain and play on their own in this area is too weak if it is not supported by specific legal provisions.

3. Supporting transnational social dialogue

"Social dialogue" means any form of negotiation, consultation or exchange of information between, or among, representatives of governments, employers and workers, on matters of common interest relating to economic,

[2] France, Loi n. 2017-399 of 27th March 2017, *Devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, NOR: ECFX1509096L, JORF n. 0074 of 28 March 2017; Netherlands, *Child Labour Duty of Care Act* of 24th October 2019, Official Gazette 13-11-2019, 401; Germany, *Supply Chain Due Diligence Act* (Lieferkettensorgfaltspflichtengesetz – LkSG), of 16 July 2021, BT-Drucksache 19/30505; Norway, *Act on Business Tansparency and Work with Basic Human Rights and Decent Working Conditions (Transparency Act)* 2021, LOV-2021-06-18-99.

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employment and social policy. It takes the form of bipartite relations between the social partners, including collective bargaining, or as a tripartite process, with the public authorities as formal party to the dialogue.

Transnational social dialogue works through joint declarations, framework agreements, and other cooperative mechanisms to enhance rights, equity, and sustainability worldwide.

Several studies in this area confirm that effective enforcement of mandatory human rights and environmental due diligence legislation, coupled with strengthened social dialogue, could contribute to a more equitable and sustainable industry in global supply chains consistent with the Green transition (Marshall *et al*., 2023).

In this respect, Global Framework Agreements (GFAs) exemplify the potential of transnational social dialogue (Guarriello, Stanzani, 2018). The GFAs are mostly signed between Global Union Federations (GUFs) and Multinational Enterprises (MNEs) and are based on voluntary and autonomous negotiations between the social partners, as a legitimate exercise of the freedom of association and the right to collective bargaining enshrined in the ILO Conventions (No. 98/1949; n. 154/1981) and the EU Charter of Fundamental Rights (Article 28).

At a minimum they ensure that workers in a company's global scale operations can exercise fundamental labour rights in accordance with the ILO Core Labour Standards on freedom of association and collective bargaining. The ILO has recognised that the freedom of association is an enabling right necessary for the enjoyment of the other fundamental rights.

Global Framework Agreements are considered by the OECD and the ILO to be particularly appropriate tools for strengthening the due diligence processes in supply chains and building trust between the various stakeholders (ILO, 2019).

This has been the case, for example, in the garment sector with the Bangladesh Fire and Building Safety Agreement in 2013, following the Rana Plaza tragedy, with the Honduras Labour Framework and with the Indonesia Protocol on Freedom of Association, as well as with the IFAs signed by the multinationals companies Inditex and H&M with the International Federation IndustriAll (Lowell Jackson, Burger, Judd, 2021).

The ILO reaffirmed the key role of social dialogue in formulating social protection responses to the Covid-19 crisis and joined the call for action made by the International Organisation of Employers (IOE), the ITUC and IndustriAll to support business continuity as well as the livelihoods of workers in the garment industry during that disruptive period.

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4. The social dialogue approach through a gender lens in the Dindigul Agreement

Transnational social dialogue can also provide an example of good practice in addressing gender-based violence against women at work.

In April 2022, the Tamil Nadu Textile and Common Labour Union (TTCU), led by Indian women and Dalit workers, signed a historic agreement with the garment and textile manufacturer Eastman Exports to end gender-based violence and harassment at Eastman's factories in Dindigul, in the southern state of Tamil Nadu in India.

The Dindigul Agreement is the first Enforceable Brand Agreement (EBA) in India, where garment manufacturing is the second largest employer of women after agriculture.

The Dindigul Agreement was the central demand of the Justice for Jeyasre campaign, led by TTCU, Asia Floor Wage Alliance (AFWA) and Global Labor Justice – International Labor Rights Forum (GLJ-ILRF). It honours the loss and legacy of Jeyasre Kathiravel, a Dalit woman and TTCU member who was murdered by her supervisor at Natchi Apparel in January 2021.

The Agreement is also the first EBA in the world to include both garment factories and factories that produce fabrics and textiles for use in garments, as Dindigul is a global hub for the production of textiles used in garment factories in India and around the world.

TTCU, GLJ-ILRF, and AFWA also signed a legally binding agreement, subject to arbitration, with multinational fashion company H&M, which has an ongoing business relationship with Eastman Exports. U.S. companies Gap Inc. and PVH also signed similar agreements later in 2022.

The Dindigul Agreement requires Brand Signatories to support and enforce the TTCU-Eastman Exports Agreement. Under the terms of the agreement, if Eastman Exports violates its commitments, the brand signatories are obliged to impose business consequences on Eastman Exports until Eastman comes into compliance.

Together, these interlocking agreements form the Dindigul Agreement, in which multinational companies legally commit to workers and allies to use their supply chain relationships to support a worker- or union-led programme in specific factories or workplaces.

The 2023 First Year Progress Report confirmed that the Dindigul Agreement has successfully transformed workplace culture by creating roles for brands, suppliers and the union, including the innovative "Safe Circle Approach" developed by AFWA. The Agreement has transformed working conditions where due diligence alone and other efforts led solely by fashion brands and suppliers have fallen short.

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Key clauses include the development of a worker-led Shop Floor Monitoring (SFM) system using a problem-solving model based on the structure of the work; a joint stakeholder commitment to protect against discrimination and retaliation based on caste and migration status; an independent grievance mechanism with business consequences; transparency and industry learning; and the inclusion of freedom of association and the right to form and join trade unions.

Reports from workers and data included in this report show that the impact of the Dindigul Agreement includes better jobs that promote fairness and a democratic workplace culture; prevention of rights violations; joint problem solving; meaningful redress as defined by women workers; and appropriate roles for unions, suppliers and fashion brands.

The Second Year Progress Report 2024, overseen by the Global Labor Institute (GLI) at Cornell University, concludes that there is "*overwhelming evidence that the Dindigul Agreement is achieving the goals for which it was created*". More broadly, the report demonstrates the role of freedom of association (FOA) in the elimination, remediation and prevention of gender-based violence and harassment (GBVH) against women.

Workers testified to the effectiveness of a multi-level grievance mechanism that takes into account the intersection of gender and caste to address both GBVH and non-GBVH related grievances. The strength of the FOA is also illustrated by the finding that the majority of GBVH-related grievances were resolved through fortnightly union-management meetings.

Workers raised 242 grievances during the year, 30 of which related to GBVH issues. Grievance resolution was exceptionally fast, with 76% of GBVH grievances resolved within two weeks. Interviews revealed that the grievance mechanism is trusted by workers and is seen as both accessible and fair.

The presence of the TTCU at the factory provides a strong monitoring mechanism, ensuring effective redress and deterring violations of both GBVH and FOA.

5. EU hard law instruments to combat gender-based violence against women

The year 2024 has marked two important anniversaries of legal instruments adopted at international level to combat gender-based violence against women.

The "Istanbul Convention", the Council of Europe Convention on preventing and combating violence against women and domestic violence,

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has celebrated 10 years since its entry into force on 1st August 2014; the ILO Convention n. 190/2019, the first international treaty to recognise the right of everyone to a world of work free from violence and harassment, including gender-based violence and harassment, has celebrated 5 years since its adoption.

At the EU level, the European Institute for Gender Equality (EIGE) is strongly committed to supporting the implementation of the Istanbul Convention, while the EU Council adopted a decision on 20th October 2024 calling on Member States to ratify the International Labour Organisation Convention on Violence and Harassment (ILO Convention 190/2019).

In addition, the first ever legislation to effectively combat violence against women and domestic violence at EU level, Directive (EU) 2024/1385, was adopted on 7 May 2024 as part of the ongoing European Strategy for Gender Equality 2020-2025. The Directive criminalises certain forms of violence against women, both offline and online, and requires Member States to put in place robust measures for prevention, protection, access to justice, support, coordination and cooperation between authorities.

6. The EU "Corporate Sustainability Package" from a social dialogue perspective through a gender lens

The above analysis has focused on international and supranational hard and soft law instruments that help to define the legal framework for combating the exploitation of workers in global supply chains. It is now interesting to assess what additional contribution, if any, the implementation of the EU "Corporate Sustainability Package" will really offer in terms of stronger support for strengthening social dialogue, promoting gender equality and combating gender-based violence and harassment at work.

6.1. The Corporate Sustainability Reporting Directive

The Corporate Sustainability Reporting Directive (CSRD), n. 2022/2464/UE, was adopted with the aim of amending the Non-Financial Reporting Directive 2014/95/EU (NFRD) and broadening the scope and breath of reporting obligations.

The NFRD already required large companies with more than 500 employees to disclose information on diversity, but the CSRD represents a significant step forward in considering women's equality alongside the other components of sustainability.

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In particular, CSRD reporting includes a gender perspective, covering workforce diversity, equal treatment and discrimination prevention, with specific requirements to disclose the gender composition of boards and to promote diversity in senior management.

The CSRD serves as a key driver for transparency and accountability in the private sector, emphasising the integration of gender perspectives and the promotion of equal opportunities for all. Complying with the CSRD and integrating gender perspectives into sustainability reporting enables companies to demonstrate their commitment to gender equality, thereby enhancing their competitiveness and reputation in the marketplace.

In this context, it is worth considering the Pay Transparency Directive, n. 2023/970/UE, as a complementary regulatory tool that should be duly taken into account.

The Pay Transparency Directive, adopted in spring 2023, aims to tackle the persistent gender pay gap by improving access to information and access to justice for victims of pay discrimination. Member States are required to transpose the Directive into national law by June 2026, ensuring its applicability in the private and public sectors across the EU.

At its core, the Directive addresses the principle of fair and non-discriminatory treatment of all women and men in the workplace, including equal pay and gender-sensitive recruitment practices. By requiring employers to disclose pay information and ensure transparency in recruitment processes, the Directive aims to reduce gender pay gaps and promote fair pay practices. In addition, promoting a culture of transparency and accountability in the workplace is essential for promoting equal pay and combating discrimination.

Under this Directive, employers are obliged to provide jobseekers with information on the starting wage (or wage range) of advertised jobs before interviews, thus promoting transparency from the outset. Workers have the right to ask their employers for information on average pay levels broken down by sex (for categories of employees doing the same work/work of equal value) and on the criteria used to determine pay and career progression.

Importantly, the Directive includes provisions for individual compensation for victims of pay discrimination. Member States are empowered to impose effective sanctions for non-compliance, including fines based on company turnover, thus reinforcing accountability measures.

The Directive also addresses intersectional discrimination, extending protection to workers with disabilities and requiring the use of gender-neutral language in job advertisements and job titles. Reporting obligations will require companies with more than 250 employees to disclose pay information annually to the relevant authorities from 2027, with data on pay gaps and remedial action to be made publicly available. Joint pay assessments

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will be carried out in cases where pay gaps exceed five per cent and cannot be justified, promoting cooperation between employers and employees' representatives to identify and implement remedies.

6.2. The Corporate Sustainability Due Diligence Directive

The EU Directive n. 2024/1760 on Corporate Sustainability Due Diligence (CSDDD) obliges large companies to structure a risk management system against social and environmental externalities related to their activities along the entire global supply chain, and requires States to adopt monitoring and control mechanisms and systems of sanctions. In order to safeguard this process, the introduction of an obligation to involve a qualified list of stakeholders, including workers and their representatives, and an unprecedented civil liability of companies and directors are envisaged (Bueno, 2024).

There are several critical aspects of the Directive, such as its scope of application, the regulation of the access to justice and the timing of its entry into force (Velluti, 2024; Vogt, Subasinghe 2024).

In addition, the human rights covered by the definition of "adverse human rights impact", as set forth in the Annex, is too narrow in at least one important respect relevant to work. The term covers the original eight ILO Fundamental Principles and Rights at Work, including explicitly the right to strike. However, it fails to refer to the relevant ILO instruments on occupational safety and health, namely Conventions 155 and 187, which became Fundamental Conventions in 2022. Moreover, according to the perspective adopted in this presentation, the absence of the most recent ILO convention, ILO Convention 190/2019 on Violence and Harassment in the World of Work, must also be highlighted.

Therefore, a participatory approach is essential to address systemic issues such as GBVH and forced labour.

The promotion of social dialogue is addressed in the Directive, albeit with a weaker approach than in the original proposal and in particular in the PE amendments (Cordella, 2023).

For the purpose of the CSDDD the definition of stakeholders includes "*the company's employees, the employees of its subsidiaries, trade unions and workers' representatives, [...] whose rights or interests are or could be affected by the products, services and operations of the company, its subsidiaries and its business partners, including the employees of the company's business partners and their trade unions and workers' representatives*" (Article 3, par. 1, let. n).

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A new legal obligation to consult with trade unions is foreseen in Article 13 of the CSDDD, which shall be carried on "*without prejudice to relevant Union and national law in the field of employment and social rights as well as to the applicable collective agreements*" (paragraph 7).

In order to carry out effective and transparent consultations, companies shall provide stakeholders with relevant and comprehensive information, as appropriate; with relevant additional information at their reasoned request, "*within a reasonable period of time and in an appropriate and comprehensible format*"; with a written justification, in the event of a refusal to provide the additional information requested (paragraph 2).

Stakeholders consultation shall take place at all the relevant stages of the due diligence process (paragraph 3)[3], but, where it is not reasonably practicable to do so, companies shall consult additionally with experts "*who can provide credible insights into actual or potential adverse impacts*" to meet the Directive requirements (paragraph 4).

Effective engagement requires overcoming barriers such as language, accessibility and fear of retaliation (paragraph 5). Multi-stakeholder initiatives can complement these efforts, but the Directive emphasises the importance of direct consultation with workers and their representatives (paragraph 6).

Great expectations are attached to the obligation of "meaningful engagement" with trade unions and workers' representatives throughout the supply chain introduced by the CSDDD, mainly in terms of a corresponding increase in collective bargaining coverage and, as a result, a reduction in labour rights violations (Giovannone, 2024; Vicente, 2024).

However, there are some drawbacks to the regulation: information shall be provided as "appropriate"; additional information can be refused if the request is not "reasonable"; experts can be consulted when it won't be "reasonably" possible to carry it out the consultation with the workers' representatives. It seems that companies still have a lot of discretion in fulfilling the obligation to consult.

Therefore, in order to assess the effectiveness of the EU Corporate

[3] According to Art. 13, par. 3: the consultation shall take place (a) when gathering the necessary information on actual or potential adverse impacts, in order to identify, assess and prioritise adverse impacts pursuant to Articles 8 and 9; (b) when developing prevention and corrective action plans pursuant to Article 10(2) and Article 11(3), and developing enhanced prevention and corrective action plans pursuant to Article 10(6) and Article 11(7); (c) when deciding to terminate or suspend a business relationship pursuant to Article 10(6) and Article 11(7); (d) when adopting appropriate measures to remediate adverse impacts pursuant to Article 12; (e) as appropriate, when developing qualitative and quantitative indicators for the monitoring required under Article 15.

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Sustainability Package in improving the protection of workers' fundamental rights, promoting gender equality and combating gender-based violence and harassment at work in global supply chains, it will be necessary to monitor both the implementation of the CSRD and the CSDDD at national level, through legislation and collective bargaining, and the development of transnational social dialogue practices.

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The effectiveness of due diligence legislation in the comparative analysis of European systems

Livia Tamburro[1]

1. Global Value Chains, protection of human rights and the environment: introductory reflections on the legal framework and the new Directive

The article intends to revisit the *Due Diligence Directive on Corporate Sustainability*[2] (*Directive CS3D o CSDDD*) published on July 25, 2024, focusing on the peculiar aspect of the effectiveness of regulation governing the spread of Global Value Chains, characterised by the participation of several businesses located in different areas for the production of a specific product.

It is well known the advantage of profit maximisation that the multinational companies of the most industrialised countries obtain from this production model, which has grown quickly in the last 20 years, also thanks to the globalisation of business activity that has triggered through outsourcing and vertical disintegration, international relocation processes of production stages.

The terms of this organisational model are significant. The term "*global*" reflects the fact of the territorial distribution of production over many countries with the assembly of the product in one location. On the other hand, the term "*value*" reflects the bigger economic utility that results from distributing the activity along different links in the chain.

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[2] On 25 July 2024, the *Directive on Corporate Sustainability Due Diligence* (Directive 2024/1760) entered into force. The aim of this Directive is to foster sustainable and responsible corporate behaviour in companies' operations and across their global value chains. The new rules will ensure that companies in scope identify and address adverse human rights and environmental impacts of their actions inside and outside Europe.

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The advantage consists of articulating the production of goods and services in large quantities over supply chains with low labour costs.

This is, however, counterbalanced by the possibility of environmental damage and the infringement of the fundamental rights of local populations.

In order to avoid this negative prospective, the directive operates broadly in terms of its subjective and objective sphere of effectiveness.

In fact, it identifies a very broad scope and imposes on the entities the obligation to act on both real and potential negative impacts.

The network of controls, both internal, which guarantee the possibility of complaint and the protection of whistleblowers, and external, by specific supervisory authorities.

This is contrasted by a sort of fragility of the sanctioning system left to the Member States, which clearly undermines the very effectiveness of the discipline.

2. The Netherlands: *The Child Labour Due Diligence Law*

In this framework, the comparative analysis of the solutions already adopted by the individual Member States may be relevant, useful in foreshowing the degree of implementation to which Community legislation will be able to draw on.

The overall picture shows different levels of regulation, in some cases narrow in scope as in the Netherlands, where the *Child Labor Due Diligence Law*[3] of 8 February 2017 only covers child labour.

The main objective is to induce companies to prevent children from being used as labour along their production chains, in harmony with the provisions of ILO Convention C138 of 1973 and Convention C182 of 1999[4].

The companies concerned and bound by the duty of vigilance are both those registered on Dutch territory and those based in a foreign territory that, however, sell and trade goods and services to Dutch consumers[5]. There is no restriction based on size or company form.

In detail, the Act obliges companies to publish a plan ("*actieplan*"[6]) in which they declare – after having identified potential risky activities (in

[3] *Wet Zorgplicht Kinderarbeid*, Full text 2019: *zoek.officielebekendmakingen.nl/stb-2019-401.html*.

[4] On this point, see *ergonassociates.net/dutch-take-the-lead-on-child-labour-with-new-due-diligence-law/*.

[5] *The Child Labour Due Diligence Law*, 2019, Art. 4.1.

[6] *The Child Labour Due Diligence Law*, 2019, Art 5.1.

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English "*a justified suspicion*") that might involve child labour – that the production of that good or service has taken place without child exploitation, respecting due diligence standards along the supply chain. At this point, the plan is submitted to the scrutiny of a public supervisory authority ("*toezichthouder*") which, after checking its correctness and compliance with regulatory provisions, publishes it on a public electronic register[7].

Three main criticisms are made of the Dutch law on compulsory due diligence.

Firstly, there is no possibility for victims to initiate a direct civil lawsuit against companies, in fact, if there is concrete evidence ("*concrete evidence of non-compliance*"[8]) that the company is in non-compliance, the parties concerned must address a complaint to the regulatory authority. Thus, only after the company has seen and counter-complained or after 6 months have passed without the victims having received a response[9], can the company be sued and judged by the authority.

Secondly, the sanction mechanisms are weak. Should the regulatory authority find a breach on the part of the company, an inaccuracy or inadequacy in the plan, a fine can be imposed on the company depending on the severity of the breach. If the fine is not considered adequate as a penalty, the company may be required to pay an additional "*10 per cent of the total proceeds that the parent company has produced, including through its subsidiaries, suppliers and subcontractors located all over the world*". A new element, on the other hand, is the introduction of the category of criminal sanctions, in fact, behaviour repeated in the five years following the first offence is punished with criminal sanctions, including imprisonment of the company's managers.

Thirdly, the declaration that is required from Dutch companies is not an annual and always up-to-date one, like the French supervisory plan, but a "*one-off*" one, and the content that the declaration must have is not described in detail by the legislator.

Undoubtedly, the *Dutch Child Labour Due Diligence Law* has a narrower object of protection than the French Loi de vigilance ("*Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*", n. 2017-399 of 27 March 2017)[10], where the due diligence process involves, human and environmental rights.

[7] *The Child Labour Due Diligence Law*, Art 4.5, and *Netherlands: Analysis of new child labour due diligence law outlines key features and potential shortcomings*: *www.business-humanrights.org/en/latest-news/netherlands-analysis-of-new-child-labour-due-diligence-law-outlines-key-features-and-potential-shortcomings/.*

[8] *The Child Labour Due Diligence Law,* 2019*,* Art 3.3.

[9] *The Child Labour Due Diligence Law*, 2019, Art 3.4.

[10] Law No. 2017-399 of 27 march 2017 on the Duty of Vigilance of Parent Companies and

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3. France: *la Loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre* (loi n. 2017-399 du 27 mars 2017).

With this in mind, the French Order adopted the so-called "*Vigilance Plan*", aimed at ensuring due diligence on all operations of parent and subsidiary companies, including those with extraterritorial production sectors, in order to exercise vigilance over the so-called "*global supply chains*", which can also be extended to subsidiaries, subcontractors, that hold commercial relations with companies with registered offices in France.

Active players are identified according to their size: large companies that, for two consecutive financial years, have more than 5,000 workers on French territory, or more than 10,000 workers employed in companies – directed and indirect – even not on French territory, will have to draw up a vigilance plan to identify the major risks externalised by their production activity and the preventive measures, in terms of workers' safety, health, human rights and environmental protection.

The devoir de vigilance thus extends not only to the close relationship between the parent company (or parent company) with its branches or subsidiaries, but also to the assessment of those risks arising from the production activities of even indirectly controlled companies, suppliers and subcontractors, with which the leading company establishes a stable business relationship[11].

The precise and exhaustive list of direct, but above all indirect, between the multinational and other companies shows that the scope of the supervisory obligation has extended to "*la sphère d'influence de la société dominante*".

The *Loi de Vigilance* represents that model which, while maintaining the personnalité morale[12] of each of the companies making up the chain,

instructing undertakings, cfr. Muir Watt H. (2017), "Devoir de vigilance et droit international privé", *Revue internationale de la Compliance et de l'Ethique des Affaires*; Pataut È. (2018), "Le devoir de vigilance. Aspects de droit international privé", *Droit Social*, p. 883; Savourey E., Brabant S. (2021), "The French Law on the Duty of Vigilance: Theoretical and Practical Challenges since its Adoption", *Business and Human Rights Journal*, p. 141-152; Brabant S., Bright C., Neitzel N., Schönfelder D. (2022), "Due Diligence Around the World: The Draft Directive on Corporate Sustainability Due Diligence (Part 1)", *VerfBlog*, 15.03.2022, *verfassungsblog.de/due-diligencearound-the-world/*.

[11] L225-102-4-I.

[12] This expression refers to the theory of the "corporate veil" provides that each company within the group or chain represents an independent, individual entity. Since this model prevents the parent company from recognising itself as responsible for the events that occur in its subsidiaries, then factor of the domination of one company over the other allows this obstacle to be circumvented and the devoir de vigilance to be affirmed.

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has decisive repercussions on the issue of the responsibility of the leading company.

The most important aspect of the European regulatory scenario, characterised by the spontaneous observance, devoid of sanctions, of corporate social responsibility measures (so-called "*Soft Law*"), lies, instead, in the binding nature of the plan itself – an obligation devoir de vigilance – with validity throughout the national territory and the entire production chain of multinationals.

The plan itself seems to shape a positivisation of the typical canons of corporate social responsibility both in content and procedural modalities, given that it is drawn up in collaboration with the different categories of stakeholders (subjects involved in the company's activity) and includes relevant Due Diligence measures.

4. Germany: *Lieferkettensorgfaltspflichtengesetz*

In the same vein, the *German Due Diligence Act* (LkSG) aims to protect human rights[13] and the environment[14] in every stage of the supply chains of companies operating in Germany[15].

In 2023, the law required companies with at least 3,000 employees to implement a supplier risk management system. As of January 2024, the law will extend to companies with more than 1,000 employees and will intervene with financial penalties of up to 2 per cent of annual turnover, as well as the exclusion of public procurement for up to three years.

The German due diligence process requires: a risk analysis ("*risk analysis*") drawn up annually, which must include threats "*to child labour, labour discrimination of any kind, or obstruction of trade union freedom,*

[13] For example: protection of minors; protection against slavery and forced labour; prohibition of discrimination (by origin, ethnicity, gender, disability, religious political orientation, etc.); occupational safety and health protection of workers; prohibition of illegal withholding of wages, guarantee of a "reasonable" wage; freedom of association with trade unions and workers' representative bodies; illegal appropriation of land, water, forests etc.; prevention of violent practices, which may harm the safety and dignity of workers.

[14] Compliance with the Minamata Convention: use of Mercury and its compounds in the production and treatment of Mercury waste; Compliance with the Stockholm Convention: ban on the production and use of POPs; Compliance with the Basel Convention: on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

[15] The legislation imposes obligations on large German companies that in essence had already been been introduced on a voluntary basis by the *NAP – Nationaler Aktionsplan Wirtschaft und Menschenrechte* (*National Action Plan for Business and Human Rights*).

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occupational safety, and the environment"[16], and which must cover the production activity of direct suppliers ('direct suppliers'). Only if there is proven knowledge that a violation by indirect suppliers is taking place, must the risk analysis cover the entire supply chain.

German due diligence also includes measures and policies that the parent company must implement to "*prevent, mitigate and remedy*"[17] negative impacts (including, but only as a last resort, severing the economic relationship between the parent company and the other link in the supply chain).

The obligation on companies is one of means as in the *Loi de vigilance* – so that companies must provide the necessary care and guarantee, through the principle of proportionality and reasonableness, the "*best efforts*"[18].

Finally, there is a monitoring process of the enterprise in which the protagonist is the Federal Office for Economics and Export Control, *Bundesamt für Wirtschaft und Ausfuhrkontrolle*, which will have the task of monitoring the implementation of due diligence within companies: it also has the power to prepare surprise inspections.

Penalties for non-compliance can be up to two per cent of a company's annual turnover, plus exclusion from public procurement for up to three years.

Currently, the German Supply Chain Act has some grey areas.

The German Draft's focus on the links, beyond tier 1 suppliers, of the supply chain only occurs when the violation (of human rights, workers' rights and the environment) has already occurred and only then is a risk analysis requested of the lead company.

However, it would be useful to provide remedy to the violation rather than an analysis of something that has already happened.

Furthermore, the German Draft implies that the greater the influence of the leading company, the higher the responsibly of due diligence.

In a globalised economy, large multinationals have tools that allow them to "*hide*" their influence, accepting this mechanism would mean making it easier for them to avoid their due diligence obligations.

[16] Germany: *Draft key points of a mandatory human rights due diligence law*, 2020, *www.businesshumanrights.org/en/latest-news/germany-draft-key-points-of-amandatory-human-rights-due-diligence-law/*.

[17] Germany, "Act on Corporate Due Diligence Obligations in Supply Chains (Lieferket tensorgfaltspflichtengesetz – LkSG)", section 3: "Due Diligence Obligations", *Federal Law Gazette*, I 2021, p. 2959, *www.gesetze-im-internet.de/lksg/__3.html*.

[18] Human Rights Due Diligence Legislation in Europe, 2021, *dlapiper.com*.

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5. England: The Modern Slavery Act

In common law systems and in England, the issue of due diligence is subordinate to the existence of a "*duty of care*", which the leading company has towards its subsidiaries. This is justified by the fact that common law systems are more reluctant to the logic of due diligence and prefer to introduce transparency obligations, which, however, place emphasis on corporate responsibility and thus remain intrinsically linked to due diligence.

Following the State of California[19], England enacted the Modern Slavery Act in 2015, which obliges parent companies to publicly disclose the actions taken to combat certain "*inhuman*" behaviour within their value chains.

Specifically, it is to counter two macrocategories of vunlnera: on the one hand, "[the] *slavery, servitude, forced and compulsory labour 'and on the other'* [the] *human traffickin*"[20].

The scope over which the transparency obligation extends is not made explicit but, in any case, the extraterritorial effect is clear: companies with a turnover of 36 million pounds or more are bound to detailed reporting that includes policies adopted to combat child labour and human trafficking in all areas in which they operate ("*in any part of its own business*"[21]).

Specifically, the information required by the duty to report is to describe in detail the structure of the business and the different links in its supply chain, map risks, refer to policies adopted to counteract forced labour and human trafficking that the business may cause, measures to evaluate policies and increase their effectiveness, including the training of employees. Thus, one can say that one gets a picture of the supply chain in its entirety.

However, some grey areas of the English Act must be acknowledged.

Indeed, there is no provision in the legislation for any kind of sanction or, in any case, any negative measure to be imposed on companies that fail to comply with the transparency obligation. On this point the Parliament is seeking solutions on this point, but to date the method most commonly used to enforce the provision is that of reputational reputational consequences, which a company may incur if it does not actively work to eliminate child labour or trafficking in its production policy: consumer opinion, NGO supervision and thus the active engagement of civil society contribute to the increasing implementation of this Act by companies.

The government has also, in recent years, set up *The Modern Slavery*

[19] *Californian Transparency in Supply Chains Act*, 2010.
[20] *The Modern Slavery Act*, 2015, *www.legislation.gov.uk/ukpga/2015/30/contents*.
[21] *The Modern Slavery Act*, 2015, art. 54, *www.legislation.gov.uk/ukpga/2015/30/section/54*.

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Registry[22], a public archive that can be freely consulted by anyone interested, which makes it possible to corroborate the principle of transparency of the *supply chain*. If The Modern Slavery Act belongs more to the logic of reporting, closer to the logic of due diligence is the UK's Bribary Act of 2010[23], an act that applies to English "*commercial organisations*" operating both within and outside the territory of England. They may be criminal liability if they fail to demonstrate that they have maintained "*adequate procedures*". Due diligence becomes a standard of conduct for assessing liability.

6. The Italian legislator's silence

In Italy, the process of implementing mandatory due diligence is way behind schedule.

The *National Action Plan on Business and Human Rights* (*NAP*) for the years 2021-2026 attempts to bring the Italian jurisdiction in line with the UN Guiding Principles, so that the productive activity of companies is more sensitive and ethical and therefore that human and environmental rights, and workers' rights, are respected in the long global value chains.

In the Plan, companies are called upon to respect human rights in their activities at home or abroad, in such a way as to prevent and avoid any potential direct or indirect negative impact on human rights both internally (with regard to employees and those included in the production cycle) and externally (with regard to the environment, surrounding communities, consumers, etc.). According to the "*Responsibility to Respect*", in order to prevent and avoid such negative impacts on human rights, companies must put in place processes to prevent the risk of causing (or contributing to) any negative impacts on human rights and to adopt specific measures to mitigate any harmful consequences produced.

This scenario can only be a first step towards a future goal.

This delay does not mean that Italy has never been interested in corporate accountability, on the contrary, there have been many voluntary initiatives that this country has joined: for example, it is worth mentioning the Action for Fair Production initiative (which took place immediately after the G7 in Berlin) with the aim of reinvigorating and aligning production processes along value chains "*with international labour, social and environmental policies and standards of the UN, OECD and ILO*".

[22] *modern-slavery-statement-registry.service.gov.uk/*.

[23] *The Bribery Act*, 2010, *www.legislation.gov.uk/ukpga/2010/23/contents*.

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Unfortunately, however, achieving a good level of due diligence in production activity is still a long way off, because binding initiatives are needed. In this regard, as early as 2019 a group of researchers, practitioners, and professors have proposed to guide the legislature on the long path to full Corporate Social Responsibility. The group expressed itself with these words. "*The time is ripe for Italy to start a policy process towards the adoption of effective legislation on human rights due diligence, in line with its international obligations and with the positive example of other European countries*"[24]. There has, however, been no follow-up.

7. Few words to conclude

The comparison made here between national legislations reveals a focus on compensatory measures rather than specific forms of protection (injunctive and restrictive measures), limiting the potential implementation of the directive on the sustainability of corporate due diligence.

The question then arises will Member States, through their legislation, be capable of implementing the directive to ensure the effective protection of human rights?

Thank you for your time.

This leads to significant doubts about the effectiveness of the directive in particular regarding the level of guarantee of human rights along the global value chain.

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Responsible disengagement: the termination of commercial relationships with value chain partners and consequent negative impacts on workers

Myriam De Lucia[1]

1. The social dimension of globalization

Globalization has undeniably revolutionized production models and labor markets, however, it has often clashed with legal frameworks designed to protect workers.

By promoting the free movement of people, capital, and services, key elements of liberal socio-economic ideologies, globalization has reshaped corporate practices. Many companies have outsourced parts of their production, evolving into multinational enterprises.

In recent years, the traditional model of multinational corporations, characterized by direct ownership ties between parent companies and subsidiaries, has increasingly been replaced by global value chains (GVCs). These modern networks are built on contractual arrangements, such as supply agreements, outsourcing, and subcontracting, rather than ownership-based relationships. This evolution has introduced a greater degree of formal separation between parent companies and their partners, complicating accountability and oversight within these networks. When considered from the perspective of identifying the parties for environmental and social harm, this dynamic significantly nor obligated to adhere to its corporate policies. Instead, it operates independently, though under the economic influence of the parent company, which lacks genuine control over its practices. Therefore, even though the parent company effectively benefits from the activities and outcomes achieved by the supplier company, which may be a direct result of, for instance, reduced environmental and social safeguards, it is not legally held accountable for any damages arising from such management. Legally,

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liability is attributed solely to the decisions and business activities of the secondary enterprise (Carella, 2022, pp. 12-13).

This has sparked a lively debate on the so-called "*social dimension of globalization*" (Accornero, 2013; Cottini, Lucifora, 2021). Within this context, the traditional approach, relying on voluntary measures and corporate self-regulation, commonly referred to as corporate social responsibility (CSR), has been deemed inadequate (on CSR, see Francioni, 2007, pp. 155-174; Acconci, 2009; Bonfanti, 2012; Pustorino, 2012, pp. 113-129; Malaguti, Salvati, 2017; Marrella, 2017, pp. 59-289; Castellaneta, Vessia, 2019).

Until recently, the prospect of mandatory *due diligence* legislation seemed a distant aspiration. However, thirteen years after the adoption of the voluntary United Nations Guiding Principles on Business and Human Rights (UNGPs) (A/HRC/17/31, March 21, 2011), that moment has finally arrived. On June 13, 2024, following final amendments by the European Parliament, the Corporate Sustainability Due Diligence Directive was officially approved by both the Parliament and the Council of the European Union. This landmark legislation establishes a binding obligation for companies to conduct *due diligence* on human rights and environmental risks within their value chains. It marks a pivotal step toward fostering greater equity, transparency, and accountability in global supply chains.

Value is attributed to the coordinating, directive, and managerial power exercised by the lead company over the entire group or network, which inherently carries a degree of responsibility for ensuring adherence to human rights obligations. This underpins the implementation by all companies of a *due diligence* policy, an approach that entails prudent actions aimed at identifying, eliminating, or mitigating risks of human rights violations, or addressing them if they occur (Carella, 2022, pp. 14-15). This duty applies both to the negative impacts directly caused by the lead company's activities and to those it contributes to through companies over which it exercises significant control or direction. This framework establishes the legal grounds necessary to recognize the lead company's direct liability, including in forms of civil liability, for violations arising within the entire value chain, violations that the lead company could have prevented or mitigated through the diligent exercise of *due diligence* (Carella, 2022, pp. 14-15).

That said, it is also essential to highlight certain due diligence obligations that had already been incorporated into various European instruments targeting specific sectors. Among these are Regulation (EU) 2010/995 (commonly referred to as the Timber Regulation), adopted in 2010, and Regulation (EU) 2017/821 (the Conflict Minerals Regulation), enacted in 2017. The Timber Regulation aims to combat the trade in illegally harvested timber and its derived products, while the Conflict Minerals Regulation

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focuses on the trade of four key minerals – tin, tantalum, tungsten, and gold. These minerals are often extracted under conditions involving forced labor or used to finance armed conflicts. Both regulations establish mandatory due diligence requirements for operators involved in these sectors, providing a model for legally binding measures to address unethical practices in global supply chains (Borzaga, Mussi, 2023, p. 496; Pertile, 2021, p. 391).

From a different perspective, the more recent Directive (EU) 2022/2464 (commonly known as the Corporate Sustainability Reporting Directive) imposes specific disclosure obligations on certain categories of companies. These obligations require reporting on risks and impacts related to the sustainability aspects of their business activities. On a broader level, numerous other directives address the organization and management of joint-stock companies, with an emphasis on *sustainable governance*. Notable examples include Directive (EU) 2017/828 (commonly referred to as Shareholders II) and Directive (EU) 2019/2121 (the Directive on Cross-Border Conversions, Mergers, and Divisions), both of which highlight the growing importance of integrating sustainability considerations into corporate governance practices.

With the exception of the aforementioned cases, all international instruments adopted to date regarding *due diligence* and the protection of human rights can be classified as "*soft law*". These instruments outline "*principles, norms, standards, and other elements that define expected behaviors, but without binding obligations*" (De Lucia, 2022; Brino, Perulli, 2015).

2. Directive 2024/1760: responsible disengagement

Directive 2024/1760, approved on June 13, 2024, as previously noted, was published in the Official Journal of the European Union (OJEU) on July 5, 2024. It officially entered into force "*on the twentieth day following its publication*" (article 38). Member States have been granted a two-year period to transpose it into national law.

This analysis focuses on a key aspect of the Directive that plays a fundamental role in its implementation: the principle of "responsible disengagement". The analysis focuses on the mandatory provisions imposed on European businesses to mitigate potential negative social impacts stemming from the termination of business relationships. These impacts can affect employees of partner companies, businesses reliant on the terminated partnership, or supply chains disrupted by such decisions. Key obligations include the preparation of a "prevention plan", to identify actual or potential adverse impacts on human rights and the environment;

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the temporary suspension of commercial relations and the engagment of a constructive dialogue, which means that, in cases where due diligence obligations are violated, companies are required to suspend relations temporarily and engage in constructive dialogue through a "Corrective Plan" aimed at mitigating negative impacts; and finally, only as a measure of last resort (*extrema ratio*), should the option of definitively terminating the business relationship be considered (articles 10, 11; recitals 46, 48, 49, 50, 53, 54, 55, 57).

The concept of "*responsible disengagement*" emphasizes the ethical and responsible conduct of companies when terminating business relationships. Initially introduced in the European Commission's draft text, the idea was refined and expanded after amendments made by the European Parliament. This revision underscores the importance of companies maintaining compliance with due diligence principles even when ending contracts or business engagements. Companies are expected to ensure that disengagement does not negatively impact stakeholders, particularly employees or communities that may be affected by such decisions.

In its final form, the Directive has been described as a "*risk management directive*" (Corgatelli, 2024), as it integrates a "*risk-based duty of care*" into the existing management systems of companies (article 7).

The overall objective of the Directive, as stated in recital 16, is to ensure that

> companies operating within the internal market contribute to sustainable development and the economic and social transition toward sustainability by identifying, and where necessary prioritizing, preventing, mitigating, halting, minimizing, and remedying negative impacts – whether actual or potential – on human rights and the environment. This applies not only to the companies' own activities but also to those of their subsidiaries and business partners within the value chains they engage in. Furthermore, it ensures that individuals affected by the failure to uphold these obligations have access to justice and effective remedy.

It is important to note that the due diligence obligations established by the Directive do not apply solely to the activities and operations of companies at the top of the production chain, also known as "lead firms" or parent companies. These obligations are also binding on subsidiaries and business partners throughout the supply chain. These entities are required to provide appropriate guarantees regarding their compliance with sustainability standards, typically through their own codes of conduct or corrective action plans. This "cascading system" ensures that the due diligence obligations have a far-reaching effect, even on smaller companies including contractual

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counterparts or subsidiaries of the lead company. In this way, the Directive ensures that the responsibilities of due diligence are reflected across the entire supply chain, compelling all companies, regardless of size, to uphold ethical practices in their operations (Degl'Innocenti, 2024, p. 44).

3.The operational prevention plan

The "operational prevention plan" is a vital tool for addressing and minimizing the negative impacts on human rights and the environment, particularly those identified under article 8 of the Directive. This plan serves to prevent potential harms, and when prevention is not feasible, it provides a framework to mitigate impacts that have already occurred.

The normative reference in this regard is articles 10 and 11, as well as recitals 46 and 48 of the text approved by the European Parliament.

It is important to highlight that the formulations of articles 10 and 11 are quite similar in their structure and objectives. While article 10 refers to the prevention of potential negative impacts, and article 11 addresses the cessation of actual negative impacts, both provisions require companies, when adopting the necessary measures, to evaluate certain key factors beforehand. These factors include: a) whether the damage was caused solely by the company, by a subsidiary, or by commercial partners, or jointly by all parties involved; b) whether the damage occurred within the activities of a subsidiary, a direct commercial partner, or an indirect commercial partner; c) the company's ability to influence the behavior of the commercial partner who may have caused, or contributed to, the potential/ actual negative impact (Ciacchi, 2024).

In recital 46, it is specified that, in addition to the obligation to establish and implement a prevention action plan, companies must make efforts to "*obtain contractual assurances from each direct business partner* (with whom there is a 'commercial agreement,' as defined in article 3, paragraph 1, letter f, sub. i) *regarding compliance with the code of conduct and, if necessary, the prevention action plan* (article 10, paragraph 2, letter b)". Furthermore, companies are required to ask their direct partners to, in turn, obtain equivalent contractual assurances from their own partners, insofar as their activities fall within the company's value chain. This mechanism, often referred to as the "cascade effect" in global value chains, must put in place adequate measures to verify compliance with these assurances. The same provision apply to indirect business partners as outlined in recital 48.

Moreover, in recital 50, the European legislator urges the companies involved to "*prioritize interaction with business partners within their value*

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chains" to ensure the effectiveness of the above mentioned measures and to reinforce compliance with contractual assurances and promote accountability throughout the entire value chain.

4. Corrective plan

Following the verification of a violation, there is an obligation to temporarily suspend commercial relations and establish a constructive dialogue (commonly referred to as a corrective plan).

In this regard, a significant guideline can be found in recital 50, which states that if, despite the adoption and implementation of preventive measures, violations of due diligence obligations occur, "*companies are required, as a last resort, to refrain from establishing a new relationship or extending an existing one with the partner in question*". However, before taking this step, if there is a reasonable prospect for change, companies are encouraged to "*use or enhance their leverage*" by implementing a temporary suspension of the business relationship for the activities concerned and developing and promptly adopting an enhanced preventive action plan to address the specific adverse impact. This plan should include a specific and appropriate timeline for the adoption and implementation of all necessary measures and, during this period, the company may also seek alternative business partners.

Compared to the Commission's proposal, the text adopted after the Parliament's intervention includes two additional articles that must be highlighted: article 12 and article 13.

Article 12, titled "Remediation of Actual Adverse Impacts", stipulates that a company that has caused an actual adverse impact, whether individually or jointly, is obligated to provide remediation to the victim. However, it also specifies that if the company did not contribute to causing the adverse impact, arising solely from the actions of its commercial partner, it may undertake voluntary remediation, and/or exercise commercial leverage on the culpable partner to ensure that the partner provides the necessary remediation.

Article 13, on the other hand, refers to "Constructive dialogue", emphasizing its strategic role in engaging stakeholders to adopt appropriate measures.

The decision to focus specifically on the tools of remediation and constructive dialogue aligns with the traditional international *soft law* framework regarding *due diligence* (Ciacchi, 2024).

In the Directive key terms such as the "*capacity of a company to influence*" its partners recur frequently. These are critical for determining the appropriate measures to prevent and halt adverse impacts (articles 10

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and 11). Another key concept is the "leverage effect", which serves as a mechanism to extend the new due diligence obligations across global value chains (Corgatelli, 2024). According to the directive, a company's capacity to influence its commercial partner should manifest in two main ways. On the one hand, in its capacity to encourage commercial partners to prevent adverse impacts, through means such as exercising market power, imposing preselection for partnerships, or tying commercial incentives to compliance with human rights and environmental standards. On the other, it could exercise leverage, by collaborating directly with the culpable partner, engaging with other companies that have direct business relationships with the offending partner, or participating in sectoral or multi-stakeholder initiatives to address systemic risks (recital 52) (Corgatelli, 2024, cons. 45-52)

5. *Extrema ratio*: termination of business relationship

Finally, the Directive identifies the definitive termination of a business relationship as the ultimate remedy for addressing adverse impacts. In this regard, it is important to recall the provisions of the Ruggie Guiding Principles, particularly the commentary to Principle 19, which states:

> If the company cannot prevent or mitigate adverse impacts and is unable to increase its leverage […], the company should consider the possibility of terminating the relationship, taking into account credible assessments of the potential adverse impacts on human rights. When the relationship is deemed "crucial" to the company, its termination raises additional concerns. A relationship can be considered crucial if it provides a product or service essential to the company's operations and for which no reasonable alternative source exists. In such cases, the severity of the adverse human rights impact must also be considered: the more severe the abuse, the quicker the company should expect to see change before deciding whether to terminate the relationship. In any event, for as long as the abuse continues and the company remains in the relationship, it must be able to demonstrate its ongoing efforts to mitigate the impact and be prepared to accept any reputational, financial, or legal consequences of maintaining the relationship.

The European legislator aligns with this reasoning, as reflected in recital 50 of the Directive, which states:

> Companies should suspend their business relationships with the commercial partner, which would increase their leverage and the likelihood of addressing the impact. If it is not reasonable to expect such initiatives to succeed – for instance, in cases of state-imposed forced labor – or if the implementation of the enhanced

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prevention action plan has failed to prevent or mitigate the adverse impact, the company should be required to terminate the business relationship for the activities in question if the potential adverse impact is severe. To enable companies to fulfill this obligation, each Member State should ensure that contracts governed by its national law include provisions allowing for the termination of business relationships. When deciding to terminate or suspend a business relationship, the company should assess whether it can reasonably foresee that the negative impacts of such termination or suspension would be demonstrably more severe than the adverse impact that could not be sufficiently prevented or mitigated. When temporarily suspending or terminating a business relationship, companies should adopt measures aimed at preventing, mitigating, or halting the impacts of the suspension or termination, provide reasonable notice to the commercial partner, and review the decision. Addressing adverse impacts in indirect business relationships may require collaboration with another entity. In some cases, collaboration with another company might be the only realistic way to prevent adverse impacts in indirect business relationships, particularly when the indirect commercial partner is unwilling to enter into a contract with the company.

The Directive limits the freedom of action of economic operators by providing them with the option to terminate the business relationship with the company that has breached the rules, but only after following a predetermined escalation process. This option is only available in specific circumstances where it has not been possible to prevent the potential negative impact or, at the very least, sufficiently mitigate it. This could involve, for example, obtaining the contractual guarantees (article 10, paragraph 2, letter b) or offering targeted and proportionate support to the business partner (article 10, paragraph 2, letter e).

The procedure outlined above is described in article 10, paragraph 6, and further specified in the Commission's guidelines on "responsible disengagement" (article 19, paragraph 2, letter a). Specifically, it is stipulated that "*as a last resort, the company is required to refrain from establishing a new relationship or extending an existing relationship with a business partner with whom, or in the supply chain of which, the impact has emerged*" (article 10, paragraph 6). Furthermore, "*if permitted by the law governing the relationship with the said partner*", and "*as a last resort*", the subsequent steps to follow are:

1) "*adoption and implementation, without undue delay, of an enhanced action plan for the specific negative impact, using or increasing the company's leverage through the temporary suspension of business relations concerning the relevant activities, provided that it is reasonably expected that these initiatives will succeed*" (article 10, paragraph 6, letter a);

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2) if "*it is not reasonable to expect that these initiatives will succeed*", the company "*must terminate the business relationship for the relevant activities if the potential negative impact is severe*" (article 10, paragraph 6, letter b).

The provision then clarifies that

> before temporarily suspending or terminating the relationship, the company must assess whether the negative impacts of such suspension or termination are likely to be manifestly more severe than the negative impact that could not be sufficiently prevented or mitigated. In such cases, the company is not required to suspend or terminate the business relationship.

The provision also allows the company to choose between suspending or terminating the relationship. However, in both cases, the company must "*take measures to prevent, mitigate, or stop the impacts of the suspension or termination*" (article 10, paragraph 6). On the other hand, if the company decides to continue the relationship, it must ensure continuous monitoring of the potential negative impact and periodically reassess the decision to determine whether additional appropriate measures are needed.

The escalation procedure described above, where termination of the business relationship remains as a "*last resort*", is designed to address both the prevention of potential negative impacts (article 10) and the cessation of actual negative impacts (article 11).

Once the decision has been made, after exhausting all other options, to definitively terminate the business relationship, it should be emphasized that, in line with *due diligence* obligations, companies must still take responsibility for and remedy any negative impacts they have directly caused or contributed to.

6. Conclusions

In conclusion, the Directive represents a significant advance in addressing some of the most pressing negative impacts of globalization, particularly concerning human rights and environmental protection: issues of paramount global importance. The legal obligations of *due diligence* outlined in the Directive, which bind companies, are pivotal in this context (Corvese, 2022).

The text of the Directive signifies a key step toward ensuring effective *due diligence*, requiring companies to terminate business relationships only as a last resort, and only after exploring all other potential solutions. Companies

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are compelled to develop a disengagement plan and use it, in cases of severe impacts and abuses that cannot be resolved, as a "threat" to compel affiliated businesses to rectify the illegal situation.

It is important to emphasize that these corporate obligations should always be viewed as part of a broader system that also includes, in parallel, the responsibility of states to protect human rights responsibilities that should not be substituted by the companies' obligations.

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EU norms on outsourcing: seeking a new dialogue between subcontracting and due diligence

José María Ruz López[1]

1. Introduction

The proposed research arises from a paradox that underscores the importance of its study. On the one hand, at a socioeconomic level, due to the synergies between outsourcing and globalization, subcontracting – an essential element of the current economic system – has expanded beyond national borders. On the other hand, at a legal level, there is a notable absence of regulation regarding the international impact of the phenomenon in question. This normative gap is evident in both national and international law.

According to national legal systems, the main countries in our European context provide labour law responses to subcontracting. However, these regulations do not explicitly address its international dimension. For instance, Article 42 of the Workers' Statute in Spain, along with equivalent provisions in France and Italy – Articles L8232-1 to L8232-3 of the French *Code du travail* and Article 29 of Legislative Decree n. 276 of September 10, 2003 (*legge Biagi*) – fail to consider the potential extraterritorial impact of outsourcing operations.

In the sphere of supranational law, it is equally impossible to identify any binding regulation specifically addressing labour subcontracting. At the end of the 20th century, a notable effort to establish regulation took place within the framework of the ILO. However, due to both technical-legal challenges, such as the definition of subcontracting, and political-programmatic issues, no consensus was achieved.

Given this paradigm, it is essential to examine the treatment of labour subcontracting within EU social law; a matter that constitutes the central focus of this study.

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2. Proposed methodology

2.1. Initial hypothesis

To begin with, it is important to highlight the limited scholarly attention that has been given to the question previously raised. In general, labour law doctrine has not focused on the existence or absence of EU regulation on subcontracting. This situation is particularly striking when considering, first, the abundant literature dedicated to this institution, and second, the significant role of European regulation in the field of labour through temporary work agencies, an institution closely related to subcontracting.

Given this context, the spanish and international literature that has addressed subcontracting from the perspective of EU social law has reached a unanimous conclusion: European Union law does not provide specific regulation on labour subcontracting. (Palli, Sánchez-Castañeda, Raynoso Castillo, 2011, p. 25; Gárate Castro, 2018, p. 12). This observation constitutes the initial hypothesis of the present study.

Consequently, this research aims to either confirm or refuse the previous hypothesis, that is, to determine whether EU social law indeed lacks specific regulation on subcontracting. Considering the likely absence of a specific provision on this matter, it may be worthwhile to question whether other EU regulations refer, either directly or indirectly, to the institution under analysis. Therefore, it is pertinent to examine the EU law in search of references or allusions to labour subcontracting. This approach would offer a sufficiently comprehensive picture of how subcontracting is addressed within EU social law.

2.2. Analysis method

From a methodological standpoint, it is essential, first, to identify and systematize the main labour regulations within EU law. It is important to consider not only the current legal framework but also its key normative antecedents, which will allow for an observation of the evolution and trends in the EU's legal treatment of the issue. Additionally, the study should include not only strictly labour-related provisions but also those cross-cutting regulations that touch on socio-labour issues.

Once the sample of relevant regulations has been identified, the next step is to conduct a detailed analysis of the content of these provisions, with particular attention to direct or brief mentions to subcontracting. The goal is not simply to present a juxtaposition of regulations that mention

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subcontracting. Rather, this study aims to provide a systematic and historical reading of how subcontracting has been addressed within the European Union, in order to understand the legal policies driving its development and evolution.

2.3. Legal corpus

Regarding primary law, that is, the founding Treaties (TEU and TFEU), as well as the Charter of Fundamental Rights of the EU, there are no references to subcontracting. Consequently, the present analysis focuses on secondary law and, more specifically, on the Directives, which have traditionally represented the primary legal channel for EU social law. More precisely, over thirty Directives have been analysed, including both current provisions and their antecedents. Given the broad scope of the legal *corpus*, it is advisable to systematize the analysis into three categories.

A first group brings together what could be called traditional labour-related Directives: a series of regulations addressing various core aspects of the employment relationship and its potential contingencies, approved between the late 20th century and the early 21st century. Within the same period, it is possible to identify a series of Directives that are particularly linked to outsourcing processes, thus forming a second category of Directives. The final set of regulations consists of those Directives issued in recent years that with relevance to the labour sphere[2]. These three groups stablish each of the following sections on the discussion of results.

3. Traditional labour-related Directives

Among the broad and heterogeneous set of Directives that make up this first group, three main approaches can be identified. Broadly speaking, the treatment of subcontracting ranges from a complete absence of regulation to the presence of certain specific provisions on the matter, with indirect or tangential references in between.

[2] Although it is evident, the aforementioned regulatory groups do not constitute airtight compartments, perfectly delineated by the European legislator. On the contrary, they represent a mere scientific categorization for the purposes of this study, which explains the various interrelations between the different regulations.

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3.1. Lack of regulation

A significant portion of these so-called traditional or classical Directives makes no reference, not only to subcontracting but to productive decentralization in general. This outcome may be expected in cases such as the Directive 2003/88/EC concerning working time or the Directive 87/81/EC on part-time work. However, the absence of any reference is striking in certain areas intricately linked to productive decentralization, such as collective dismissals, fixed-term contracts, or business transfers, respectively, Directive 98/59/EC, Directive 1999/70/EC, and Directive 2001/23/EC.

3.2. General or indirect references

Alongside the aforementioned provisions, it is possible to identify a second group of Directives that indirectly or tangentially approach the phenomenon of subcontracting. At this point, once again, two main approaches can be distinguished. On one hand, certain regulations acknowledge and, to some extent, address the outsourcing processes, but not subcontracting specifically. On the other hand, some regulations outline a legal framework that could potentially encompass this reality.

The Directive 89/391/EEC on health and safety at work represents the best example of the first category. Since then, health and safety labour regulations have given special attention to inter-company operations. The subsequent adoption of Directive 91/383/EEC on safety and health measures in cases involving fixed-term contracts or temporary agency work provides a good illustration of this.

Alongside the regulations just analysed, which expressly recognize the existence of outsourcing, there is a series of Directives that, without explicit acknowledgment, establish a legal framework that could potentially cover subcontracting operations. These include the Directive 2002/14/EC on informing and consulting employees and the Directive 2000/78/EC on equal treatment in employment and occupation.

3.3. Direct regulation on subcontracting

Finally, among the EU body of law from the end of the last century and the beginning of the present one, a direct reference to subcontracting can be identified. This is the Directive 2009/52/EC on sanctions and measures against employers of illegally staying third-country nationals.

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In our view, this Directive represents a turning point in the treatment of subcontracting within EU social law. In short, it is the first instance in which a community Directive related to the labour field, first, explicitly mentions the phenomenon of subcontracting; second, introduces a definition on the matter; and third, and most importantly, imposes a specific inter-business liability mechanism.

In that direction, the Article 8 of the Directive set out a liability mechanism; an aspect that, both practically and theoretically, represents the main innovation in the field. In short, this is the first time the EU legislator has establish a direct liability mechanism within the framework of subcontracting (Jorens, Peters, Houwezijl, 2012, p. 5). Moreover, the mechanism is presented not as a competence for the Member States, but as an obligation they must fulfil.

4. Directives related to outsourcing

Up to this point, several Directives from the labour sphere – or with influence on it – issued between the end of the last century and the beginning of the present one have been examined. Additionally, within this set of regulations, it is possible to identify a series of Directives whose subject is closely related to outsourcing: in short, public procurement, posting of workers and temporary agency work.

4.1. Public procurement

Public procurement represents a clear case of outsourcing. In essence, the public administration obtains a good or service through a legal transaction, in this case, an administrative contract or a public contract. In addition, the awarded bidder may subcontract all or part of the contract to a third party, which would be defined as subcontractor in the strict sense.

The latest series of Directives on public procurement, adopted in 2014, represents a significant step toward "*socially responsible public procurement, or more specifically, labour responsible public procurement*". The Directives in question stand out for "*the presumption of legitimacy of implementing social clauses in EU law*", thus emphasizing the social function of public procurement (Rodríguez-Piñero, Bravo Ferrer, 2018, p. 14).

In terms of subcontracting, the Directives on public procurement represent a decisive milestone, both due to the increased attention and the expanded protection. Following this logic, the legislator introduces certain mechanisms

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aimed at ensuring socially or labour-responsible subcontracting. The main reflection of this new legislative policy is Article 71 of Directive 2014/24/EU, equivalent to Article 88 of Directive 2014/25/EU. As an example, this regulation requires national authorities to ensure that subcontractors comply with environmental, social, and labour obligations. In this regard, the Directives call for the establishment of joint liability between subcontractors and the main contractor. Finally, the EU legislator emphasizes that Member States may implement stricter measures, citing direct payment to subcontractors as an example.

4.2. Posting of workers

When examining this institution from a broader perspective, and setting aside complex legal issues that are beyond the scope of this discussion, it is possible to notice that the outsourcing is at the root of the posting of workers. At a schematic level, the posting of workers is based on the existence of a civil or commercial service contract between two employers located in different Member States. Apart from the supranational component, it is a service provision carried out by the employer's own workers for the benefit of a third party.

The pillar regulation on this issue, Directive 96/71/EC, does not introduce any explicit reference to subcontracting; beyond the fact that, as previously mentioned, the posting of workers presupposes the existence of an intercompany arrangement aimed at obtaining a service provision.

Unless we are mistaken, it was not until Directive 2014/67/EU that the issue of subcontracting was explicitly addressed in the context of the posting of workers. As an enforcement Directive, it does not modify the content of the original Directive, but rather introduces tools, measures, and procedures to improve its implementation and compliance. Among the various aspects addressed by this regulation, it is important to focus on subcontracting.

From a teleological perspective, the preamble of the Directive, particularly recital 36, describes subcontracting as an "*issue of particular importance*". In this regard, a provision specifically dedicated to subcontracting is established in Article 12, which begins by emphasizing the need to "*combat abuses and fraud*". This norm set out a mechanism of direct responsibility in subcontracting (Izzy, 2016). For the second time, a labour-related EU regulation introduce a specific responsibility in subcontracting. At this point, two Directives implement a mechanism that extends responsibility beyond the employer in cases of subcontracting. However, the mechanism of the Directive 2014/67/EU does not merely replicate the one in Directive 2009/52/EC.

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4.3. Temporary agency work

The set of Directives specifically related to outsourcing concludes with Directive 2008/104/EC on temporary agency work. Without much controversy, this is the Directive most closely related to the phenomenon of outsourcing, as it addresses one of its primary expressions.

Focusing attention on subcontracting, Directive 2008/104/EC does not make any direct or indirect reference to the phenomenon of subcontracting. It is paradoxical that an EU regulation that directly governs a mechanism of outsourcing does not include any mention of subcontracting.

Consequently, it is worth examining the normative differences, at the EU level, between subcontracting and temporary agency work. Up to this point, subcontracting has received partial attention, gathered in sectorial regulations. However, temporary work is the subject of a standalone Directive, characterized by intense protection, both procedural and substantive. From a factual perspective, both operations lead to similar outcomes: essentially, the provision of services by an external worker without the mediation of an employment relationship.

In that direction, at least within Spanish doctrine, there is some proposal to extend the protection granted to temporary agency work to subcontracting under certain circumstances (Beltrán de Heredia Ruiz, 2017).

This thesis seems to gain some support from the recent Judgment of the Court (Seventh Chamber) of 24 October 2024. Case C-441/23. However, this point requires a detailed analysis that goes beyond the scope of the present work.

5. Recent labour-related Directives

The Directives approved in the last five years concerning aspects of labour law, or addressing various issues impacting the labour sphere, represent the final set of regulations analysed in this study. As the first group of Directives examined in this study, it is possible to identify three predominant approaches: first, the total absence of regulation; second, indirect or tangential references; and, finally, specific regulation on the matter.

5.1. Lack of regulation

There are two Directives that omit any reference to subcontracting, both in its broad and strict sense: Directive (EU) 2019/1158 on work-life balance

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and Directive 2019/1152 on transparent and predictable working conditions in the European Union. It is noteworthy that subcontracting is not mentioned in this latter norm.

5.2. General or indirect references

Among the most recent regulatory interventions at the EU level, there are certain indirect references to subcontracting. The first of these comes from Directive 2019/1937/EU on the protection of persons who report breaches of Union law, commonly known as the Whistleblowing Directive. In the personal scope of the Directive, it includes "*any person working under the supervision and direction of contractors, subcontractors, and suppliers*", as reflected in Article 4.1 of the Directive.

The second indirect or tangential reference comes from the Directive 2022/2041/EU on adequate minimum wages. In Recital 30, the EU legislator lists "important challenges" related to minimum wage, among which is "abusive subcontracting". The Recital 31, specifically referred to public procurement, mention the possibility of non-compliance with labour standards in the execution of public contracts "*or in the subsequent chain of subcontracting*". However, the Directive does not create any additional obligations to protect minimum wages. Therefore, it is surprising that, despite qualifying subcontracting as a significant challenge, the EU legislator has not introduced additional measures.

The most recent reference comes from the Directive (UE) 2024/2831 on platform work, published on November 11, 2024. While this is not the most appropriate context for a comprehensive analysis of the Directive, it would be useful to outline some initial impressions on the matter. Beyond the distinction between subordinated work and self-employment, one of the current challenges in platform work is the involvement of third-party companies through subcontracting operations (Rodríguez-Piñero Royo, 2023, p. 19). The Directive directly addresses this issue, dedicating an entire provision to this effect. In this regard, Article 3 requires Member States to ensure "*the same level of protection in accordance with this Directive is guaranteed for those who have a direct contractual relationship with a digital work platform*". In short, it aims to prevent subcontracting from undermining the effective impact of the Directive.

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5.3. Directive on due diligence: Specific regulation on subcontracting?

Among the European provisions approved in recent years, it is important to focus on Directive (EU) 2024/1760 on corporate due diligence in the field of sustainability. Without further in-depth analysis, it would be advisable to identify the basic aspects of the regulation, specifically the scope of law and the main legal consequences.

The scope of the regulation is shaped by highly demanding parameters related to the size of the company. Given that the factual scenario is conditioned on whether the company is established in an EU member state or a third country, the application parameters are based on having a minimum workforce of 1,000 employees and/or a net worldwide turnover exceeding 450 million euros. As a result, the Directive applies to a tiny number of companies, specifically 5,400 companies across the EU, representing 0.05% of the total productive sector (Rojas Rivero, 2023, p. 290).

Regarding the legal consequences, Recital 19 itself acknowledges that Directive establish "obligations of means". In this way, the – limited – companies covered by the scope of the regulation must adopt a series of measures inspired by the objectives of due diligence. This concept plays a significant role in the protection of global value chains. In practical terms, the legal consequences are realized through six successive stages:

1) integrating due diligence into policies and management systems;
2) detecting and assessing adverse impacts on human rights and the environment;
3) preventing, halting, or minimizing actual and potential adverse impacts on human rights and the environment;
4) monitoring and assessing the effectiveness of measures;
5) communicating;
6) remedying.

From the perspective of subcontracting, Directive (EU) 2024/1760 appears to be a relevant regulation in this area. In brief, the objective of the Directive is to mitigate the real and potential adverse effects on human rights and the environment produced by global value chains. In this regard, it should not be overlooked that global value chains represent successive subcontracting operations on a supra-state scale.

However, considering the main parameters of the regulation – namely, the subject (large companies), the object (violations of human rights), the scale (transnational operations) and the reaction (obligations of means) – it can be concluded that the guarantees provided by the Directive have a

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limited impact on subcontracting operations. In short, the new regulation on due diligence serves as a last-resort protection, ineffective as a general legal framework for labour subcontracting.

6. Final considerations

A comprehensive analysis of the EU social law – or a representative sample of it – leads to several concluding reflections about the EU's legal treatment on labour subcontracting.

First, the initial hypothesis is confirmed by the absence of a specific and comprehensive regulation on labour subcontracting. However, there is no a complete omission of this phenomenon. Among the various Directives examined, whether in the labour field or with influence on it, indirect or tangential references can be found, and even specific regulations aimed to increase labour rights in subcontracting processes. Nonetheless, these latter regulations stand out due to their sectorial nature. Thus, protections regarding subcontracting have been introduced from the perspective of irregular work, the posting of workers, and public procurement. In fact, regulation of subcontracting does not always come from the closest norm to the phenomenon, such as the Directive on temporary work agencies.

Additionally, considering the analysed provisions from a historical perspective, it is possible to detect an increasing interest or even concern from the EU legislator regarding subcontracting. Gradually, Directives – especially through their preambles, although not exclusively – have introduced warnings about the effects of subcontracting. In consequence, legally binding instruments aimed at protecting subcontracted labour have been progressively enacted.

Directive (EU) 2024/1760 on due diligence represents the principal example of this observation. Regardless of its positive or negative assessment, a discussion that lies outside the scope of this study, it should be noted that the Directive addresses a specific and very narrow segment of subcontracting operations, the tip of the iceberg of the phenomenon under study. In summary, all value chains are subcontracting, but not all subcontracting constitutes value chains. For all the reasons, while acknowledging its relevance as an *ultima ratio* protection, Directive (EU) 2024/1760 cannot be regarded as the comprehensive European regulation on labour subcontracting.

This study has aimed to establish the legal framework for initiating reflections on a hypothetical Directive on labour subcontracting. Such a regulatory intervention would benefit both workers by increasing their labour protections and the internal market and businesses by reducing the unfair competition caused by the current lack of regulatory harmonization.

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The right to an effective remedy and due diligence legislation in the EU

Vittoria Parroco[1]

1. The relevance of the right to effective remedy as a policy instrument

Since the last decades of the past millennium, the emergence of global value chains has been restructuring the priorities of the international and supranational communities, owing to the rising awareness among Western citizens of the side-effects that these transnational organizations produce on human and labour rights worldwide. Especially after the work-related tragedies that occurred between 2012 and 2013 in Southeast Asia, European citizens have become widely aware of the poor labour conditions imposed by European fashion retailers on third-countries' garment workers. Consequently, they have started requesting for urgent actions to be taken by the EU and its Member States to grant the implementation of core labour standards everywhere.

Although the EU has always given prominent relevance to human and social rights, which are indeed conceived as its fundamental values within the TEU and the TFEU[2], the awakening of the so-called "*consumers' activism*"[3] has surely increased its concern over the years: most of the EU's recent policies are aimed at outlining the European strategy for the upcoming future in relation to the creation of a "*fair and prosperous society*" over the world and the development of "*sustainable and inclusive*

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[2] See: Preamble of the TEU; Artt. 2-3, TEU; Art. 11, TFEU; Title IV, Chapter 1, TFEU; Title IX, TFEU.

[3] Kolbe K. (2917), "A Supply Chain Approach to Trade and Labor Provisions", *Politics and Governance*, 4, p. 64.

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growth"[4]. Foremost examples can be found in the new pieces of legislation imposing due diligence obligations on European companies in order to protect workers' fundamental rights within global value chains, such as the recently enacted "*Corporate Sustainability Due Diligence Directive*" and the "*2017 Regulation on Conflict Minerals*".

Despite playing a fundamental role in the promotion of responsible business conduct worldwide, these laws might nonetheless appear inconsistent if not combined with provisions granting access to remedies in case of infringement[5].

The rights to an effective remedy and the right to a fair trial are validated as fundamental rights of the EU: they are indeed explicitly positivised in Art. 47 of the EU Charter of Fundamental Rights, whose scope of application comprises "*everyone*" who suffers from a violation of "*rights and freedoms guaranteed by the Union*".

However, whilst EU citizens have easy access to justice, the same cannot be said for third-countries' nationals whose rights have been affected by the economic decisions of EU companies: here, many obstacles – either financial, cultural or strictly legal – obstruct the way to a just redress. Therefore, any piece of legislation seeking to protect the fundamental rights of non-EU citizens must take into account these difficulties and must provide measures for obviating them, otherwise risking to remain ineffective.

1.1. The reports of the EU Agency for Fundamental Rights

To practically understand which obstacles non-EU citizens, namely victims of human and workers' rights abuses, face whenever issuing European courts, it is essential to look at the results of the research conducted by the EU Agency for Fundamental Rights[6] ("EU-FRA"), which in 2016 was appointed by the European Commission to release a scientific opinion on

[4] European Commission (2019), *The European Green Deal*, Brussels.

[5] EU-FRA (2019), *Business-related human rights abuse reported in the EU and available remedies*, Publications Office of the European Union, Wien, available at: *fra.europa.eu/en/publication/2019/business-related-human-rights-abuse-reported-eu-and-available-remedies* (accessed: 26.11.2024); EU-FRA (2020), *Business And Human Rights – Access To Remedy*, Publications Office of the European Union, Luxembourg, available at: *fra.europa.eu/en/publication/2020/business-human-rights-remedies* (accessed: 26.11.2024).

[6] The EU Agency for Fundamental Rights (EU-FRA) was established in 2007, by means of Council Regulation n. 168/2007, with the aim of providing information and data on fundamental rights matter as to enhance the knowledge of, and broader awareness of, fundamental rights issues in the Union.

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the topic in order to identify future EU actions. To accomplish the task, the EU-FRA decided to operate through a two-fold report: the first report, issued in 2019, offers a general overview of the grievance mechanisms available to human rights victims; the second one, which came out in 2020, analyses the availability and effectiveness of those grievance mechanisms for granting victims with justice and remedies[7].

In these reports, the EU-FRA considered due diligence obligations as essential tools in the concrete implementation of the right to an effective remedy, owing to the *onus* they would burden businesses with, in terms of respecting both core labour standards and minimum safety rules throughout their value chains, whilst also avoiding the risks deriving from the "*corporate veil*" mechanisms. Of course, to pose the so-called "*human rights due diligence*" obligations on businesses would eventually mean redefining the rules on the burden of proof as well as those on access to evidence, which nowadays still constitute two of the major obstacles victims face whenever seeking redress, especially in cross-border situations[8]. As a matter of fact, the EU-FRA reports have shown that, in most cases, the burden of proof is truly a "*probatio diabolica*" as it requires victims to prove the direct infringement they suffer from the business' actions as well as the company's liability and therefore, in most cases, it imposes a further establishment of the nexus between the parent company and its subsidiaries[9]. Due to these difficulties, victims often refer to Civil Society Organizations (CSOs) for filing legal proceedings. However, CSOs face obstacles as well, mainly due to the onerous conditions set for the recognition of their legal standing and to the frequent urge for the victim to stand on his/her own when claiming a specific damage compensation.

The 2020 report proposed solutions to these challenges, in order to also ensure a proper implementation of the principle of equality of arms: the EU-FRA exhorted Member States to reform evidentiary rules, including reversing the burden of proof in cases of proven violations, and to improve document disclosure for enhancing access to relevant records within value chains[10]. The same principle is recalled by the EU-FRA when discussing legal aids: no equality of arms can be granted when the courts' costs constitute a limitation for continuing the proceedings. The EU-FRA therefore advocated

[7] EU-FRA (2019), *Business-related human rights abuse reported in the EU and available remedies*, Publications Office of the European Union, Wien.

[8] *Ibidem*. Other obstacles are: lack of information and of legal knowledge; increased costs and evidential issues.

[9] EU-FRA (2020), *Business And Human Rights – Access To Remedy*, Luxembourg: Publications Office of the European Union.

[10] *Ibidem*.

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for adjustments in legal aid to address litigations' expensive costs and recommended the expanded adoption of Alternative Dispute Resolutions (ADR) systems for human rights-related business disputes, as they offer faster and more affordable outcomes. However, the EU-FRA report stressed the need for proper enforceability of the final decisions as a fundamental step for ensuring A.D.R. effectiveness.

Considering that Strategic Lawsuits Against Public Participation (SLAPPs) pose further obstacles, particularly for civil society organizations (CSOs) supporting victims, the 2020 report recommended financial and legal aid for victims facing SLAPPs and proposed increased legal standing for CSOs, including an opt-out mechanism to automatically include affected individuals in collective human rights actions unless they explicitly renounce.

Additionally, as frequent issues with gaining the status of "*qualified organization*" limit CSOs' advocacy potential, mainly owing to divergent legal standards across Member States, the EU-FRA urged the EU and Member States to streamline standards for CSO legal standing in order to strengthen their role in monitoring business compliance with human rights laws[11].

2. The right to effective remedy within EU legislation on global value chains

Following the publication of the EU-FRA reports, the EU legislator has been very propulsive in considering the findings of such research while regulating the side effects of global value chains: on the one hand, new reporting obligations have been settled; on the other, the concept of "*human rights due diligence*" has finally been recognized as the only proper instrument for limiting labour exploitation outside the EU borders.

In this regard, the EU Regulation 2017/821 on Conflict Minerals and the EU Directive 2024/1760 on Corporate Sustainability Due Diligence both represent major steps forward in the campaign against the exploitation of workers worldwide. However, an in-depth analysis of the different means for regulating the right to effective remedies within these two legislative texts leads to the conclusion that such an improvement has been concretely pursued only by one of them, that is by the Directive, and we will now understand why.

[11] *Ibidem*.

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2.1. The EU Regulation 2017/821 on Conflict Minerals

The EU Regulation 2017/821 on Conflict Minerals came fully into force in 2021, and it explicitly takes into account the need for laying down due diligence obligations within global value chains operating minerals trading in "*politically unstable areas*"[12]. The goal of this Regulation is to preserve human and workers' rights from violation while also holding companies accountable for the negative impact of their business activities.

To this end, EU importers are obliged to introduce due diligence schemes which must include the following measures:

1) the introduction and constant updating of a specific supply chains policy;
2) the adoption of a risk management model;
3) involvement of third parties' audits;
4) document disclosure's tools.

The exact content of each obligation is fully outlined within the Regulation but for the purposes of this paper, it is important to linger only on the first measure because it expressly comprises the establishment of grievance mechanisms. In this context, the grievance mechanism is defined as an "*early-warning risk-awareness system*"[13] which can be either company-based or built in collaboration with competent authorities or external organizations: it is thus a sort of a monitoring system, where everybody can "*voice concern*"[14] regarding a law infringement. However, it is clear that providing such a mechanism does not necessarily result in a company's real effort to halt the harmful situation.

A peculiar focus is posed on the monitoring elements: whilst stakeholders are encouraged to warn companies performing their extracting activities in conflicted areas, the companies themselves have to hire independent third-party auditors to assess their due diligence schemes. For its part, the EU Commission then has to elaborate and keep updated a list of "*global responsible smelters and refiners*"[15].

On the contrary, minimal relevance is given to the aspects of law enforcement and access to justice: no provision in the Regulation clearly

[12] European Commission, *Conflict Minerals Regulation: The regulation explained*, available at: *policy.trade.ec.europa.eu/development-and-sustainability/conflict-minerals-regulation/regulation-explained_en* (accessed: 25.11.2024).

[13] Art. 2, par. 1, lett. (p), Regulation (EU) 2017/821.

[14] *Ibidem*.

[15] See: Art. 9, Regulation (EU) 2017/821.

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states the consequences of an eventual breach of the law nor the actions to be taken in cases where human rights are undermined by companies' conduct. Everything in these concerns is briefly referred to Member States' national legislation, with the only general application's rule being the issuance of an injunction against the importer with the aim of encouraging its "*remedial action*"[16].

Although the EU's efforts to ensure effective compliance with the Regulation are serious, access to justice and remedies for victims who have suffered damages due to companies' unlawful conduct is completely on another level of action[17]. The Regulation surely exhorts Member States and businesses to introduce grievance mechanisms as part of due diligence schemes, however, these suggestions might remain ineffective and result weak in ensuring equality of arms among the parties involved and in granting redress to victims[18].

2.2. The EU Directive 2024/1760 on Corporate Sustainability Due Diligence: a new milestone

The masterpiece of the EU legislator's effort to address the adverse impacts produced by EU companies on workers' rights can be found in the Corporate Sustainability Due Diligence Directive, whose main purpose is:

> to ensure that companies active in the internal market contribute to sustainable development and the sustainability transition of economies and societies through the identification, and where necessary, prioritisation, prevention and mitigation, bringing to an end, minimisation and remediation of actual or potential adverse human rights and environmental impacts connected with companies' own operations, operations of their subsidiaries and of their business partners in the chains of activities of the companies, and ensuring that those affected by a failure to respect this duty have access to justice and legal remedies[19].

Prior to its final enactment, many amendments have been made to the original text of the European Commission's Proposal: even though most of

[16] Art. 16, par. 3, Regulation (EU) 2017/821.

[17] Methven O'Brien C., Martin-Ortega O. (2020), *Human Rights Due Diligence Legislation: Monitoring, Enforcement and Access to Justice for Victims*, Brussels: European Parliament – Policy Department for External Relations, available at: *www.europarl.europa.eu/RegData/etudes/BRIE/2020/603505/EXPO_BRI(2020)603505_EN.pdf* (accessed: 26.11.2024).

[18] *Ibidem*.

[19] Recital n. 16, Directive (EU) 2024/1760.

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them were proposed by the liberal members of the European Parliament and the EU Council to restrict the actual scope of application of the law, some of these amendments turned out to be notably beneficial, particularly regarding the right to an effective remedy. Indeed, likewise the EU Regulation on "Conflict Minerals", the Proposal originally contained just a brief reference to such a right, providing only for a grievance mechanism to be used by those who had "*legitimate concern*" about the actual or potential risks which may derived from the negligent conduct of the companies[20]. Nevertheless, the text of the Proposal did not include any specification on the objective mechanisms for evaluating the merits of the claim, which would give the receiving company full discretion on its assessment. Such a situation would have resulted in a serious infringement of the fundamental principles and values of the rule of law, primarily the principle of legal certainty, alongside the principle of equality of arms and the right to an effective adversarial proceeding.

Fortunately, the European legislator has adopted a fundamentally distinct approach in the formulation of the final text of the Directive, thereby ensuring adequate protection to the right of non-EU citizens to pursue justice or other remedies against unlawful conduct of the companies. Indeed, the Directive incorporates several provisions pertaining to the right of access to remedies in both the Recitals and the Normative Part, while also addressing issues of private international law that had previously obstructed the victims' right to obtain adequate justice for the violations they have suffered.

The Recital n. 82 of the Directive, for example, provides a clear and unequivocal statement of intent in this regard, emphasizing the EU's dedication to the gradual reduction and eventual elimination of practical and procedural barriers to justice for victims of adverse impacts[21].

Another key example is represented by the innovative regulation of the complaints procedure, which within the Directive is structured on systems and criteria capable of ensuring fairness, predictability, publicity, transparency, and accessibility, while also granting the claimants the right to information – on both the reasons why the complaint has been considered founded or unfounded and the actions to be taken in case it actually is founded[22]. In

[20] Art. 9, Proposal of the EU Commission for a Directive on Corporate Sustainability Due Diligence, Brussels, 23 February 2022.

[21] As already proved by the EU-FRA reports, the main obstacles mentioned by the EU legislator are the following: "*difficulties in accessing evidence, the limited duration of limitation periods, the absence of adequate mechanisms for representative actions, and the prohibitive costs of civil liability proceedings*".

[22] See: art. 14, par. 4, EU Directive 2024/1760. Cfr. art. 9, par. 4, Proposal for a Directive 2022/0051.

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addition to that, Art. 14 of the Directive also provides for the establishment of a "*notification system*", which may be submitted by anyone having information or concerns on the adverse impact caused or which may be caused by the company's activities. Either way, the EU legislator emphasizes the absence of any mechanism of preconditions between these procedures and the initiation of judicial proceedings related to the same conduct.

It is precisely on the initiation of these proceedings that the Directive introduced the most innovative and significant innovations, solving the problems highlighted by the EU-FRA reports. First of all, the Directive allows national courts to order documents' disclosure whenever the claimant adequately and reasonably justifies the necessity of such disclosure for supporting the plausibility of the claim. *Ça va sans dire*, for the disclosure order of corporates' documents to be properly legitimate, it must adhere to the principles of strict necessity and proportionality[23]. In the second place, Member States are exhorted to amend their national provisions on legal standing to give any "*alleged injured party*" the possibility to authorize any NGOs or CSOs as well as trade unions to file civil liability claims to uphold victims' rights. However, Member States can pose limits on such authorizations for example by demanding that these entities operate through a consolidated organization which is neither just temporarily dedicated to the protection of the rights at stake nor a profit-oriented activity[24].

The Directive has also strongly affected the sphere of private international law: not only is the limitation period extended *ipso iure* to five years for any claim that may be filed[25], but overriding mandatory application is also granted to all the national provisions transposing the civil liability regime enshrined in the Directive[26]. In this way, the EU legislator solved a juridical debate that emerged during the so-called "*KiK case*"[27] in Germany and developed ever since, concerning the potential discriminatory effect of the strict application of the Rome and the Brussels Regulations, which may avoid the operability of the most favourable and guaranteeing regimes of fundamental rights protection provided by the laws of the EU Member States to persons who, although not nationals, have been harmed by companies of that countries. In short, the Directive finally opens up to the possibility of granting extraterritorial extension to the European labour and procedural laws' protections.

[23] Recital n. 83, and Art. 29, par. 3, lett. (e), EU Directive 2024/1760.
[24] Recital n. 84, and Art. 29, par. 3, lett. (d), EU Directive 2024/1760.
[25] Recital n. 85, and Art. 29, par. 3, lett. (a), EU Directive 2024/1760.
[26] Recital n. 90, and Art. 29, par. 7, EU Directive 2024/1760.
[27] Jabir *et al*. v. KiK Textilien and Non-Food GmbH.

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3. Conclusions

This brief overview of the EU legislation posing "*due diligence*" obligations on global value chains has shown that in the last decade many improvements have been made to grant effective access to remedies to those victims of human and workers' rights abuse having a non-EU nationality. The suggestions of the EU-FRA seem to have been eventually considered (and applied) in the development of the newest legislative act and a major relevance has been given to the regulation of the remedial tools available to every person suffering from a violation of the prescribed obligations.

In particular, it can be stated that the Corporate Sustainability Due Diligence Directive has endorsed a totally different approach from the one adopted in the Conflict Minerals Regulation: whilst the latter seems to accord merely secondary importance to the right of access to remedies, failing to perceive the real relevance of this right for the effectiveness of its rules, the new Directive's provisions could concretely strengthen the recognition of right at stake, thanks to both their extraterritorial reach and indiscriminate application, i.e. regardless of the nationality of the person issuing the remedy. Obviously, it must be taken into account that this is just a *prima facie* assessment as a concrete evaluation of the effectiveness of these measures will only be adequately performed once the Directive comes into full effect and will thus be transposed into the national legislation of the Member States.

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A missed opportunity? Transnational company agreements as a tool to enforce labour standards from the perspective of Central and Eastern European Countries[1]

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1. Introduction

Transnational company agreements (TCAs) have been concluded by central management of multinational companies (MNCs) and workers' representatives since the 1980s (see e.g. Schömann, 2012; Clauwaert, 2012; Jaspers, Pisarczyk, 2024; Ter Haar, 2024). The agreements have applied to entities that make up the economic organization, including subsidiaries and (sometimes) suppliers and contractors situated outside the "metropolis". Alongside codes of conducts and company policies, TCAs can be seen as a manifestation of corporate social responsibility and an instrument to improve and enforce labour standards (Schömann, 2012). Moreover, contrary to unilateral acts concluded by companies they have also contributed to the development of industrial democracy in its transnational dimension. The agreements were to promote fundamental worker rights and contribute to safeguarding decent working conditions. The TCAs had a special role to play in countries with low levels of workers' rights (Sobczak, 2012). Moreover, negotiating the TCAs could be perceived as a trigger in the development of industrial relations, in particular where the collective bargaining coverage remained low.

In Europe TCAs, called European Framework Agreements (EFAs), have been concluded mostly by MNCs situated in Western countries (France, Germany, Italy) covering subsidiaries, *inter alia*, from Central and Eastern European Countries (CEECs). Although the CEECs have adopted extensive

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labor legislation, in some areas the level of workers' rights is lower than in the West (protection against dismissal). Despite the dynamic economic development of the CEECs, there are still significant differences in the level of wages. In some areas workers' rights are massively violated (e.g. by abusing the self-employment status and civil law contracts). Last but not least, in the majority of CEECs a collective bargaining system covering a significant part of the workforce has not been formed (Kahancová, Mrozowicki, Šćepanović, 2024). As a result, the TCAs could have been perceived not only as a chance to improve working standards in the region but also to promote the social dialogue. The hopes associated with the agreements in the CEECs were justified by the strong position of the internationals in the region. Their influence on the functioning of the economy and the situation on the labour market is (or at least was) significantly greater than in the West (see Surdykowska, 2021).

The aim of the article is to highlight the influence of TCAs on employment standards and industrial relations in CEECs. The article discusses the regulatory potential of TCAs (their subjective and personal scope as well as legal nature) and their real influence on the enforcement of workers' rights in Central and Eastern Europe. This is the basis for answering the question of whether the potential of the agreements has been used and whether in the future they can play a greater role in building a new social model.

2. The regulatory potential of TCAs

There are several models of TCAs. They vary significantly in terms of content as well as personal scope. As far as their content is concerned, the agreements have regulated a variety of matters such as fundamental rights, other workers' rights or restructuring issues[3]. Due to their flexible nature the TCAs could react to new phenomena, including technical development and the digitalization of the employment relationship. The TCAs may improve the position of workers in various areas by unifying working standards. Theoretically, they may constitute an important instrument intended to enforce decent working conditions by safeguarding fundamental rights where they are not respected and by increasing the efficiency of workers' protection. The TCAs have been concluded for units from the companies' central locations as well as subsidiaries based in other jurisdictions, e.g. CEECs. Some agreements have extended their application scope to suppliers and contractors which are usually based in low-standards countries (Sobczak,

[3] Database of TCAs, available at: *ec.europa.eu/social/main.jsp?catId=978&langId=en*.

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2012). The TCAs are not limited by national concepts of employment relationships. As a result, many of them cover not only employees, but also other workers. Therefore, although provisions of TCAs directly limiting the use of non-employee status are rather unique, the transnational agreements may contribute to both: combating bogus self-employment and civil-law employment as well as approximating employee and non-employee status.

However, the regulatory potential of the TCAs must be confronted with the legal nature of the agreements. The legal status of the TCAs has been regulated at neither international nor European (EU) level. The general guarantees of the freedom of association (International Covenants, ILO and Council of Europe standards) may constitute a legal basis for negotiating and concluding transnational agreements (Leonardi, 2012). Yet, they do not provide any legal consequences for concluding or implementing TCAs. As regards the EU law, the legal background is more complex. A part of transnational agreements have been concluded with European Works Councils. The status and functioning of the EWCs, in particular in relation to companies, is regulated by both statutory standards and autonomous agreements (Ter Haar, 2024). Usually they do not recognize the right of EWCs to negotiate collective agreements. Moreover, the right of EWCs as co-determination bodies to negotiate collective agreements has been challenged. As a result, the EWC involvement in negotiating TCAs does not necessarily improve the legal status of the agreements. Certain implications for TCAs can be also found in international private law regulations (Rome I). Still, they apply to the TCAs as agreements rather than sources of labour law (see e.g. Van Hoek, Hendrickx, 2009). As a result, supranational standards cannot be treated as a source of any *erga omnes* effect of the agreements.

At the same time most European legal systems recognize the normative nature of collective agreements. They are binding not only for signatory parties but also for third parties, in particular workers, who can derive their claims directly from the agreements (see e.g. Liukkunen 2019; Gyulavári, Menegatti, 2019). The TCAs acquire the binding force either because they meet the requirements arising from national laws or because they are implemented according to national laws. Otherwise, in the majority of national legal systems they are recognized as agreements. In many cases their legal nature remains ambiguous. This situation occurs in most CEECs. They do not recognize TCAs as collective agreements binding for third parties, unless they are concluded or implemented in accordance with domestic standards (Ales *et al*., 2006; Sobczak, 2007). Signatory parties may provide for monitoring compliance with agreements and autonomous systems of disputes settlement if workers' rights arising from the TCAs are not respected (e.g. mediation). Nonetheless, the lack of a legal framework

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at supranational level and, in particular, the ambiguity regarding the legal nature of the TCAs and consequences of their violation limit the potential of transnational collective bargaining as a tool to enforce the workers' rights (Ales *et al*., 2006; Orlandini, 2016; Ter Haar, 2021a; Adamczyk, 2021).

In order to strengthen the regulatory potential of the agreements, attempts have been made to create a voluntary legal framework that would facilitate the process of negotiating and applying the agreements (European Commission, 2008). The idea has been supported by some Central and Eastern European trade unions, e.g. the Polish "Solidarność". Various groups of experts have submitted proposals how to regulate transnational collective bargaining to increase its efficiency (e.g. Ales *et al*., 2006; Sciarra *et al*., 2014; ETUC, 2016; ETUC, BusinessEurope, 2018). However, the European Commission has not taken any further legal action so far. The interest in the project from trade unions that focus on the sectoral level of negotiations has also decreased (ETUC, 2019). Employers have never been in favour of regulating TCAs. They believe that this is a matter of autonomous social dialogue (Schömann, 2012; Cilento, 2012). As a result, there is no real perspective of adopting a legal framework for transnational collective bargaining in the nearest future.

Irrespective of the above-mentioned weaknesses caused by the lack of appropriate legal framework, the TCAs may play a role in developing and implementing working standards. The agreements bind international companies for which their reputation (image) is an important value. They create their image, *inter alia*, by creating and observing decent working standards. Failure to comply with the obligations resulting from the TCAs may affect the perception of the ICs and their market position. An important factor can be also the pressure from workers' representatives, including trade unions monitoring compliance with agreements. Transnational agreements, even if not recognized as sources of labour law, have a potential to improve labour standards (e.g. Demetriades, Biletta, From, 2016).

3. Transnational collective agreements as a tool to enforce working standards in CEECs

The impact of TCAs on working standards in CEECs is not obvious. On the one hand, the agreements strengthen the protection of workers' rights, including fundamental rights. On the other hand, there is a number of factors limiting the efficiency of TCA standards in the region. The main obstacle is the lack of legal enforcement mechanisms. As a rule, workers cannot derive their claims from the provisions of the agreements. Consequently, they

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cannot enforce the application of standards which are not legally binding. The key factor is the company's will to comply with agreements (determined by image issues, for example). The further away from the metropolis, the less important these circumstances become. Moreover, TCA standards are usually characterized by a general nature which impedes formulating workers' claims. The opportunity to strengthen the impact of agreements is seen in a more precise formulation of their provisions and the use of deontic modalities (like "shall" or "must") (Ter Haar, 2021b; 2024). However, it does not change the legal nature of autonomous provisions and may be insufficient to encourage subsidiaries to follow the rules agreed by central management. Moreover, in many cases workers are not even aware of guarantees arising from the TCAs.

The practical importance of TCA is also limited by relatively developed statutory standards (health and safety, work-life balance, working time and annual leave) (Müller, 2021)[4]. An illustrative example could be working time regulations. Statutory standards of working time are developed and worked out in detail in the majority of CEECs. Standards arising from TCAs cannot significantly influence the position of the parties to the employment relationship. To the contrary, employers in CEECs expect greater flexibility, which is not offered by TCAs that cannot affect domestic standards. Last but not least, the agreements, as a rule, do not regulate wages – the key element which differentiates the position of workers in the West and in the CEECs (Eurostat, 2023).

Domestic regulations in CEECs have not yet been effectively adapted to the new conditions of doing business. In some countries, the problem of controlling algorithmic management or the right to be offline remains unresolved (Gyulavári, Menegatti, 2022). In this respect, agreements could play an important role. Unfortunately, during the period of the greatest technological development, the dynamics of negotiating agreements began to decline. The analyzed agreements in CEECs only rarely refer directly to tech-based employment. As a result, the potential of TCAs in regulating new phenomena, like teleworking and tech-based employment, has not been utilized to a greater extent. Although the majority of TCAs cover not only employees but also other workers, there has been no evidence that they have contributed to combating bogus self-employment and bogus civil law contracts in CEECs. The number of those working outside employment

[4] In the CEECs which belonged to the Soviet bloc, labour codes, based on the Soviet code, were adopted. None of the CEECs decided to decodify labour law. However, in most of them new codes have been adopted. In some cases, e.g. in Hungary, they are characterized by an increased level of flexibility (Gyulavári, Kártyás, 2015).

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relationships has remained stable or even increased (Bulgaria, Poland, Romania) (Eurostat, 2022; OECD, 2023a).

Consequently, the role of TCAs in developing, unifying and enforcing working standards as well as combating social dumping is rather limited.

4. Transnational collective agreements as a tool to boost collective bargaining in CEECs

The importance of TCAs as a tool to boost collective bargaining in CEECs has been deeply influenced by the position of national social partners in negotiating and implementing the agreements (Blanpain, 2013). The agreements are negotiated by central management, national or transnational trade unions (national, European) and/or European Works Councils (Zimmer, 2016). Governing bodies are usually located in the West. Not one TCA has been concluded by a Central or Eastern European company so far. Consequently, no EWC established in one of the CEECs has been involved in transnational negotiations. Workers' representatives from CEECs participate in negotiations as members of EWCs established in other jurisdictions. Employers and trade unions from CEECs have only rarely participated in negotiating TCAs (Schömann, 2012). As a result, the direct involvement of Central and Eastern European social partners has been limited (Pisarczyk, Wieczorek, 2021).

Theoretically, national social partners could play a greater role in implementing working standards arising from TCAs. Nevertheless, there have been some obstacles limiting their involvement. As a rule, employers are reluctant to negotiate collective agreements. In order to compete with Western companies, they expect a greater flexibility and adaptability to market conditions. They treat collective agreements as a burden in running their business. As a result, they do not search for the unification of working standards. To the contrary, they prefer decentralization in the process of setting wage and working standards. Moreover, they raise an argument of extensive statutory standards which leave no room for autonomous social dialogue. Even those employers who constitute a part of MNCs may tend to avoid implementing transnational standards. Moreover, at least in some CEECs, they may implement TCA standards by means of unilateral instruments like company regulations or policies.

The approach of national trade unions is different. Usually they support the idea of transnational collective bargaining. They realize that the existence of transnational standards which should be implemented at a domestic level could be a stimulus for collective bargaining (Surdykowska,

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Adamczyk, 2012). The first problem is the lack of knowledge about existing agreements and transnational standards. Some TCAs provide expressly the obligation to distribute the text to all affiliated companies/their management (with translation) along with (annual) review mechanisms. However, the obligation is not always respected by the central management of MNCs. Sometimes communication problems occur between trade unions – signatory parties and local units. As a result, local trade unionists are not always aware of the potential of agreements concluded at transnational level. Then, even though they may be interested in implementing TCA standards, local trade unions are often unable to encourage the employers to commence negotiations. This may partly be a result of the weakness of the social dialogue in CEECs. Moreover, the content and nature of TCA standards do not make them excessively attractive for trade unions and the represented workers. The majority of industrial actions concern wages and (potentially) working hours. The research did not reveal any significant activity of trade unions in the CEECs aimed at enforcing the application of the agreements.

To summarize, TCAs have not significantly contributed to the development of industrial relations in CEECs. During the period of dynamic development of TCAs collective bargaining in CEECs was not promoted. Currently, when collective bargaining coverage is expected to increase, the potential of transnational agreements turns out to be insufficient to contribute to this goal. From this perspective, the potential of transnational collective bargaining has been wasted. The question arises whether there will be another chance to use it.

5. Promoting collective bargaining in the EU as a game changer for the development of TCAs?

The experience of CEECs with the transnational collective bargaining has been, so far, disappointing. The transnational collective agreements have neither significantly improved the working standards nor contributed to the development of collective bargaining in the region. Moreover, the dynamics of the TCAs' development has significantly decreased. The idea of adopting a European legal framework has been (temporarily) abandoned. Both the willingness to negotiate agreements on the part of employers and the desire to negotiate on the part of employee representatives (including trade unions in particular) have decreased. As a result, the number of agreements concluded is low and negotiations are even fading out. Consequently, it can be concluded that the idea of transnational collective bargaining has ended in

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failure. An opportunity to utilize the TCAs as a tool to improve the workers' rights in CEECs has been missed.

However, the broader regulatory background is changing. The turning point is the adoption of the European Pillar of Social Rights which declared, *inter alia*, the promotion of collective bargaining. Article 4.1 of the directive on adequate minimum wages in the European Union (AMWD) (Brameshuber, Ratti, Pietrogiovanni, 2024) requires the Member States to promote collective bargaining in wage setting. Moreover, the Member States, where the coverage by collective bargaining is below 80 per cent, should adopt an action plan aimed at increasing the coverage. Countries of Central and Eastern Europe are among the MSs with the lowest collective bargaining coverage. Before implementing the AMWD, it ranged from 5-10 to 30-40 per cent with the exception of Slovenia (Eurofound, 2022; OECD, 2023b). A question arises whether transnational collective bargaining, if revived and developed, could be included in the coverage. Because of a broad definition of collective bargaining adopted in the AMWD, TCAs could be, *prima facie*, covered by its application scope. However, the process of negotiating TCAs does not meet the criteria arising from international standards. Due to their transnational character, negotiations conducted by workers' representatives, as a rule, have no recourse to collective actions. Moreover, the problem of negotiating the mandate to bargain on behalf of subsidiaries (suppliers and contractors) as well as workers appears (Zimmer, 2016). Last but not least, the role of TCAs in wage setting is rather marginal. It does not mean, however, that TCAs cannot constitute an element of a broader strategy of supporting collective bargaining. The existence of transnational standards may encourage local social partners to open negotiations. A problem may appear if TCAs are perceived as a competition for sectoral collective bargaining which is fundamental in order to increase the collective bargaining coverage. As a result, it would be reasonable to avoid mechanisms which could undermine their position. This explains skepticism in the approach of European sectoral federations and some local trade unions (e.g. Nordic) to TCAs (Adamczyk, Surdykowska, 2015). In CEECs, where a comprehensive system of sectoral negotiations does not exist, the development of transnational negotiations may be helpful to restore/set up a required model. However, taking into account the previous experience, the role of TCAs should not be overestimated.

Transnational collective bargaining is also perceived as an instrument to implement other EU standards adopted in recent years. One of the examples is the directive on corporate sustainability due diligence (CS3D) aimed, *inter alia*, at protecting human rights, including workers' rights (Ter Haar, 2024). The CS3D lays down rules on obligations for companies regarding actual and potential human rights adverse impacts, with respect to their own

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operations, the operations of their subsidiaries, and the operations carried out by their business partners in the chains of activities of those companies. The Member States must ensure that companies take appropriate measures to prevent, or, where prevention is not possible or not immediately possible, to adequately mitigate the potential adverse impacts that have been, or should have been, identified (Article 10.1 CS3D). The directive refers not only to the involvement of employees and/or their representatives. A due diligence policy is to be developed in prior consultations with the employees and their representatives in the form of a code of conduct describing the rules and principles to be followed throughout the company and its subsidiaries (par. 39 preamble and art. 7 CS3D). A potential instrument that would meet the Directive's standards is a transnational company agreement covering units (including subsidiaries) situated in various locations. Moreover, the CS3D contains some references to sectoral-level TCAs rather than company-level TCAs (Ter Haar, 2024). Taking into account an early implementation stage of the CS3D, it is impossible to assess the potential importance of TCAs in implementing the Directive's requirements. Companies may use a variety of legal instruments to meet the future compliance standards. A lot will depend on the adopted strategies. Therefore, we should not realistically assume that the compliance standards themselves may significantly change the negative tendencies in the development of transnational collective bargaining and their impact on industrial relations in CEECs.

A real change in the position of TCAs as a factor affecting the working standards and industrial relations may be triggered only by a change in the approach of the main actors. At European level, the strategy of the European union and European social partners is decisive. The EU is the only political power able to create a legal framework boosting the development of TCAs. However, the idea of a voluntary legal framework has been recently abandoned. It is unrealistic to believe that the European authorities will relaunch the idea without real pressure from the trade unions. Unfortunately, at the moment, trade unions, including ETUC, sectoral federations, as well as national trade unions are not interested in supporting the development of TCAs. Due to the decline in coverage, their main interest is sector-based negotiations which are crucial for the potential of the social dialogue. Trade unions from CEECs, the potential main supporter of the TCA idea, have not adopted a comprehensive strategy and are not strong enough to restore transnational collective bargaining to the union agenda. Moreover, the state of uncertainty caused by economic and technological changes, wars and crises does not encourage the social partners to establish a new level of collective bargaining. At the same time, some MSs may chose a direct intervention in social matters instead of supporting collective bargaining.

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This may be caused either by the need for a quick and efficient action (like during the pandemic) or by the adoption of a populist agenda, which has recently happened in some CEECs (Becker, 2024).

6. Conclusions

In the past, TCAs were perceived in CEECs as an instrument that could increase the effectiveness of workers' rights enforcement and as a collective bargaining trigger. The expectations were justified by the strong position of MNCs in the region and their impact on local markets. The example of transnational agreements could have an effect on the entire system. In reality, the TCAs did not play the expected role. There is no clear evidence of using TCAs to significantly increase workers' rights in CEECs. The transnational agreements have not become a catalyst for the development of collective bargaining, either. During the period of dynamic development of TCAs, collective bargaining in CEECs was not promoted. To the contrary, the countries of the region sought for a greater flexibility and promoted the decentralization of setting employment standards. Currently, the very idea of cross-border negotiations is undergoing a deep crisis. The opportunity to use TCAs as a tool to enforce workers' rights was missed and it is not sure whether it will ever resurface. The chance to change the situation is seen in new EU instruments which could be implemented through cross-border agreements. However, in view of the previous experience, this seems to be rather unlikely. The use of agreements as a real instrument for implementing workers' rights will be possible if transnational bargaining regains its past position. However, this requires a change in the attitude of social partners as well as European institutions.

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Collective bargaining as a weapon in the fight against climate change: for a just ecological and social transition[1]

Henar Álvarez Cuesta[2]

1. Las consecuencias del cambio climático y la necesidad de una transición ecológica y energética en la Unión Europea y en España

Los informes del Grupo Intergubernamental de Expertos sobre el Cambio Climático (IPCC) llevan advirtiendo desde los años 90 del siglo pasado de la existencia de una emergencia climática y de sus consecuencias, hasta el punto que ya ha producido mutaciones irreversibles cuyos efectos se prolongarán durante milenios debido a la acción humana[3]. Considera que los riesgos y los impactos adversos previstos, así como las pérdidas y los daños relacionados con el cambio climático, aumentan con cada incremento del calentamiento global[4]. Estos Informes apuestan (casi ruegan) una mitigación profunda, rápida y sostenida y una aplicación acelerada de las medidas de adaptación en esta década, que reduciría las pérdidas y los daños previstos para las personas y los ecosistemas y aportaría muchos beneficios colaterales, especialmente para la calidad del aire y la salud. Sin embargo, un retraso en las medidas de mitigación y adaptación aumentaría las pérdidas y los daños y reduciría la viabilidad[5]. A la luz de sus conclusiones, resulta de extrema urgencia

[1] *La negociación colectiva como arma en la lucha contra el cambio climático: por una transición ecológica y social justa*. Esta investigación ha sido realizada en el marco del Proyecto "Hacia una transición ecológica justa: los empleos verdes como estrategia frente a la despoblación" (*TED 2021-129526B-I00*), financiado por MCIN/AEI/10.13039/501100011033 y por la Unión Europea "NextGenerationEU/PRTR".

[2] Catedrática de Derecho del Trabajo y de la Seguridad Social, Universidad de León (España).

[3] Lara Ortiz, M.L. (2021). *Instrumentos jurídicos en la lucha contra el cambio climático*, in Miñarro Yanini M. (ed.), *Cambio climático y Derecho social. Claves para una transición ecológica justa e inclusiva*, Jaén: Uja, p. 16.

[4] IPCC (2023), *Synthesis report of the IPCC sixth assessment report (AR6)*.

[5] *Ibidem*.

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la adopción de medidas que eviten el empeoramiento de las condiciones climáticas mediante la búsqueda de vías de mitigación y métodos para reducir las emisiones de gases de efecto invernadero, para lograr su eliminación de la atmósfera y, al tiempo, consensuar y seguir opciones de adaptación a las condiciones climáticas ya causadas[6]. La conclusión, no por catastrofista, deja de ser real, tal y como afirma el Comité Económico y Social Europeo, en un planeta degradado, no habrá vida, ni empleo, ni empresas[7].

2. La negociación colectiva como respuesta para alcanzar una transición ecológica justa

Cualesquiera medidas de mitigación y/o adaptación van a conllevar cambios de mayor o menor calado en todos los sectores productivos y, desde luego, en el empleo asociado. Por tal razón, desde la OIT se demanda que estas transformaciones y transiciones climáticas sean justas, "*que no deje a nadie atrás*" y que asuman y defiendan en su desarrollo el trabajo decente[8], la inclusión social, la erradicación de la pobreza[9] y el respeto y defensa del medioambiente, es decir, un sistema productivo capaz de aunar ecología y empleo[10].

Para alcanzar ese objetivo, el convenio colectivo constituye el mecanismo idóneo para incorporar contenido vinculado a la transición ecológica y a la lucha contra la crisis climática merced, de un lado, al amplio ámbito objetivo concedido por el art. 85 ET y de otro, a la imbricación entre la actividad productiva, el cambio climático y las distintas interacciones entre ambos. Más aún, la negociación colectiva constituye un útil instrumento que puede ayudar a las empresas y a las personas trabajadoras a hacer frente a los retos de la crisis climática con cláusulas que aborden el impacto de la actividad de las empresas en el medio ambiente; la protección de las personas trabajadoras frente a los efectos del medio ambiente y del cambio climático; el impacto de la transformación ecológica en la actividad productiva; o los necesarios

[6] IPCC (2021). *AR6 Climate Change 2021: The Physical Science Basis*.

[7] Comité Económico y Social Europeo (2020), Dictamen *La economía sostenible que necesitamos*.

[8] Chacartegui Jávega C. (2022), *Eco-labour law intersectionalities: from the green transition to legal certainty for workers*, in Aa.Vv., *Labour Law and Ecology*, Cizur Menor: Thomson Reuters/Aranzadi, p. 66.

[9] OIT (2015), *Directrices de política para una transición justa hacia economías y sociedades medioambientalmente sostenibles para todos*, Genève: OIT, p. 6.

[10] OIT (2009), *The social and decent work dimensions of a new Agreement on Climate Change*, Genève: OIT, p. 9.

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cambios en los perfiles profesionales y las competencias de las personas trabajadoras[11].

En las siguientes páginas se trata de examinar los contenidos medioambientales existentes en las cláusulas convencionales de forma ejemplificativa y desde luego abierta, en tanto caben otras posibilidades para alcanzar idénticos objetivos: bien a luchar contra el cambio climático (mitigación), bien a tratar de adaptar las condiciones laborales a las actuales y futuras condiciones climáticas (adaptación), y, en fin, a llevar a cabo una transición justa hacia los nuevos modelos productivos[12].

3. Contenido convencional vinculado a la lucha contra el cambio climático

Descendiendo al análisis convencional de las estrategias adaptativas frente al cambio climático, los acuerdos colectivos, *rectius*, cuantos mencionan la protección del medio ambiente, suelen contener declaraciones más o menos programáticas referidas a la lucha contra el cambio climático, a la protección del medioambiente, a la transición justa o al desarrollo sostenible.

Más allá de estas menciones generalistas, muchas veces ligadas a la sostenibilidad, algún pacto configura estos conceptos como principios a seguir en sus políticas. Si bien este tipo de cláusulas muestran interés por la materia, la traslación de contenidos medioambientales y frente al cambio climático a este tipo de instrumentos les restan capacidad de actuación y no integran el contenido normativo de un convenio colectivo, verdadera norma jurídica.

Conviene advertir que falta, salvo excepciones, una mayor sistematicidad, concreción e implantación práctica de las cláusulas *green friendly*, si bien la incorporación de cláusulas de contenido medioambiental (de cualquier tipo) en la negociación colectiva puede contribuir a la concienciación de las personas trabajadoras y empresarias[13].

Como contenido intermedio entre lo programático y lo pragmático en la

[11] Comité Económico y Social Europeo (2023), Dictamen *Negociación colectiva verde: buenas prácticas y perspectivas de futuro*.

[12] Por extenso en Álvarez Cuesta H. (2024), *La negociación colectiva "verde" como instrumento para lograr una transición ecológica justa* en *Estudios sobre negociación colectiva y diálogo social*, Albacete: Bomarzo, pp. 7 ff.

[13] Muñoz Ruiz A.B. (2014), "La negociación colectiva como mecanismo de impulso de la competitividad empresarial: II acuerdo para el uso sostenible de los recursos, la protección del medio ambiente, la salud de las personas y la mejora de la competitividad del sector cementero español", *Información Laboral*, 2 (BIB 2014\808).

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lucha contra el cambio climático y la protección del medioambiente, cabe situar aquellas previsiones heterogéneas vinculadas a la comunicación. Las previsiones convencionales en esta materia abordan la fijación de estándares para llevar a cabo la estrategia de comunicación sobre protección del medio ambiente, así como las vías para la difusión interna y sobre todo externa de los logros o acciones en este ámbito, en particular en aquellos sectores o empresas más contaminantes (acercándose peligrosamente a la calificación de *greenwashing*).

El contenido medioambiental referido a la lucha contra el cambio climático aparece de forma preeminente en el espacio convencional dedicado a la prevención de los riesgos laborales, no en vano las medidas que se tomen en un aspecto, no cabe duda que van a incidir en el otro: el elemento contaminante o tóxico para las personas trabajadoras también lo es para la ciudadanía, y viceversa, y las medidas adoptadas al respecto en el ámbito productivo tienen como consecuencia un medio ambiente menos perjudicado, como también el principio preventivo de eliminación del riesgo conllevará implicaciones positivas para el medioambiente.

Ahora bien, y sin perjuicio de la conexión general, es preciso poner el foco en el contenido destinado a prevenir los riesgos laborales generados por el cambio en las condiciones climáticas. Así, cada vez son más numerosas las consecuencias que acarrea de modo transversal la variación de temperaturas, fenómenos meteorológicos y transformación de ecosistemas a todas las personas trabajadoras, y con especial incidencia en cuantos lo hacen al aire libre[14]. Entre todas, destaca, en atención a las condiciones climáticas de España, y el ritmo de calentamiento que se está midiendo, las altas temperaturas.

A la luz del impacto, es imprescindible identificar los riesgos causados por la temperatura, los factores que inciden en el estrés térmico (la temperatura del aire, la humedad relativa, la velocidad del viento, la radiación, la actividad metabólica y el tipo de ropa de trabajo[15]), evaluarlos y adoptar las medidas preventivas necesarias, siendo conveniente que en los convenios colectivos se incluyan cláusulas que adapten las soluciones a las concretas características de la actividad productiva en atención a los nuevos datos climatológicos.

Las normas ya han comenzado a avanzar medidas. Así, el RD-Ley 4/2023, de 11 de mayo, por el que se adoptan medidas urgentes en materia agraria y de aguas en respuesta a la sequía y al agravamiento de las condiciones del sector primario derivado del conflicto bélico en Ucrania y de las condiciones

[14] UGT (2020), *Adaptación de los sectores productivos a los retos del cambio climático*.

[15] Nota Técnica de Prevención 922/2011: Estrés térmico y sobrecarga térmica: evaluación de los riesgos.

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climatológicas, así como de promoción del uso del transporte público colectivo terrestre por parte de los jóvenes y prevención de riesgos laborales en episodios de elevadas temperaturas, reforma la normativa vinculada a las condiciones laborales y climáticas[16]. Cuando las medidas adoptadas para garantizar la protección sean insuficientes (y en conexión con el art. 23 RD 1561/1995, sobre jornadas especiales de trabajo) señala que habrá de incluirse la prohibición de desarrollar determinadas tareas durante las horas del día en las que concurran fenómenos meteorológicos adversos, en aquellos casos en que no pueda garantizarse de otro modo la debida protección de la persona trabajadora. Los convenios colectivos habrán de concretar esta previsión de nuevo, se insiste, en atención al sector, características de la actividad y organización del trabajo en la empresa.

Por último, contempla el apartado 3 el supuesto de la emisión por parte de la Agencia Estatal de Meteorología, o autonómicas, en su caso, de un aviso de fenómenos meteorológicos adversos de nivel naranja o rojo. En estas situaciones, la norma prevé que, si las medidas preventivas anteriores no garantizan la protección de las personas trabajadoras, resultará obligatoria la adaptación de las condiciones de trabajo, incluida la reducción o modificación de las horas de desarrollo de la jornada prevista. En este caso, en línea con la protección por evitación de la exposición al riesgo, ante esta situación de riesgo perfectamente objetivada, la norma exige un cambio de condiciones, que puede suponer la reducción o modificación de horas de trabajo o incluso la paralización de la actividad ante lluvias torrenciales u olas de calor, entre otros fenómenos adversos.

Los convenios colectivos han comenzado a incorporar en su articulado medidas destinadas a encontrar maneras saludables y productivas de vivir y trabajar en un ambiente más cálido y sometido a fenómenos climáticos extremos.

La legislación laboral ha abierto, tímidamente, el camino para incorporar la participación de las personas trabajadoras en la protección del medioambiente. Así, el art. 64.2.b) ET reconoce el derecho de los representantes unitarios (y por extensión de los sindicales de conformidad con la LOLS) a ser informados sobre las actuaciones medioambientales que tengan repercusión directa en el empleo. En segundo lugar, el art. 64.7 ET hace una llamada más o menos explícita a la negociación colectiva al

[16] Siguiendo a Miñarro Yanini M. (2023). "La protección frente a los riesgos medioambientales en el RDL 4/2023: notas sobre la (no tan nueva) regulación de los fenómenos climáticos adversos en el trabajo", *Brief AEDTSS*, *www.aedtss.com/la-proteccion-frente-a-los-riesgos-medioambientales-en-el-rdl-4-2023-notas-sobre-la-no-tan-buena-regulacion-de-los-fenomenos-climaticos-adversos/*.

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encomendar al comité de empresa (y por extensión a todos los representantes de las personas trabajadoras): "*colaborar con la dirección de la empresa para conseguir el establecimiento de cuantas medidas procuren el mantenimiento y el incremento de la productividad, así como la sostenibilidad ambiental de la empresa*", siempre supeditado este derecho a su reconocimiento por el convenio colectivo de aplicación. En tercero, los arts. 36 y 39 LPRL en la remisión que realizan al art. 33 de la misma norma conceden a los delegados de prevención y al Comité de Seguridad y Salud un derecho de información paralelo al examinado, en tanto la protección del medioambiente está íntimamente vinculada a la debida protección al medioambiente de trabajo y a la obligada consideración de la salud y seguridad de las personas trabajadoras. En fin, los representantes de las personas trabajadoras ejercen una función de control y denuncia de ilícitos medioambientales vinculada a su función de controladores de las normas laborales y de aquéllas con incidencia en la empresa, en particular respecto a las conectadas con la prevención de riesgos laborales. Incluso dicha tarea habría de ser ampliada en su campo de acción y desarrollada también por las personas trabajadoras.

La negociación colectiva puede ampliar y mejorar estos derechos mediante el desarrollo de nuevos niveles de participación en la lucha contra el cambio climático y para llevar a cabo una transición justa, creando órganos específicos como los delegados de medioambiente y transición justa, a los que cabe otorgar competencias participativas en este ámbito y garantías semejantes al resto de representantes.

La formación en materia medioambiental, no solo para quienes han de ejercer competencias en este sentido, sino para el conjunto de las personas que trabajan en la empresa, vinculado su contenido a la actividad que desarrollan y al sector que esta ocupe en la economía, supone una de las mejores vías para introducir el medioambiente transversalmente en el conjunto de la sociedad, como trabajadores y ciudadanos; y, a la par, resulta una medida que contribuye, sin duda, a la lucha contra el cambio climático, no en vano el conocimiento siempre es una de las principales armas.

Es posible también incorporar contenido vinculado con la lucha contra el cambio climático para mitigar sus efectos en previsiones convencionales destinadas al uso eficiente de recursos, al reciclaje y a la economía circular, a la reducción de consumo energético y de materias primas, a la apuesta por las renovables, a la disminución de los residuos o a la utilización de recursos menos contaminantes teniendo en cuenta las propias peculiaridades de su actividad productiva

Entre las medidas de mitigación del cambio climático, conviene centrar la atención en los desplazamientos laborales, en tanto el transporte por carretera supone una fuente de emisiones contaminantes y es uno de los sectores en

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los que el Pacto Verde europeo (y. la normativa comunitaria) ha fijado su atención, no en vano la generalización de un modelo de transporte urbano basado fundamentalmente en la utilización del vehículo privado ha generado importantes inconvenientes entre los que cabe señalar la contaminación del aire y la saturación de las vías de comunicación.

Por tales razones, y a la espera de la obligación impuesta por la norma para las grandes empresas, aparece cada vez con mayor frecuencia en los convenios la obligación de implantar planes de movilidad empresarial o planes de movilidad sostenible que reduzcan las emisiones contaminantes y, al tiempo, los accidentes de trabajo *in itinere*. Este contenido responde a las remisiones efectuadas en la Ley 34/2007, de 15 de noviembre, de calidad del aire y protección de la atmósfera, que en su art. 16.2.a) hace una llamada a la negociación colectiva para que considere la introducción de la movilidad sostenible dentro del contenido convencional. Por su parte, la Estrategia Española de Movilidad sostenible prevé fomentar el desarrollo de Planes de transporte de centros de trabajo en aquellos centros cuyas características de dimensión de la plantilla, actividad, procesos o ubicación así lo requieran, así como Planes Mancomunados cuando varias empresas compartan un mismo centro o edificio o bien desarrollen su actividad en un mismo polígono industrial o recinto asimilable. Incluso contempla el fomento de un coordinador de movilidad, responsable de la implementación del plan en aquellas empresas de más de 400 empleados; en ambos casos, siempre dentro del diálogo social al que la Ley 34/2007 hace referencia, esto es, la negociación colectiva.

También el V Acuerdo Estatal para la Negociación Colectiva señala que "*para garantizar la reducción de emisiones y la eficiencia de las medidas que en su caso de apliquen, tanto en beneficio de las empresas como de las personas trabajadoras, se impulsarán planes de movilidad sostenible, fomentando el transporte colectivo por áreas geográficas, polígonos industriales o espacios de gran concentración de personas trabajadoras*".

Como último de los contenidos a abordar por la negociación colectiva vinculados a la lucha contra el cambio climático, se encuentra la denominada transición ecológica justa, la cual supone hacer frente a los desafíos que conlleva el cambio climático[17]. Y estas transformaciones han de ser justas y equitativas, las cuales "*exigen integrar los objetivos climáticos con políticas sociales y económicas destinadas a reducir la vulnerabilidad, apoyar a los afectados por el cambio climático y crear empleos dignos*"[18].

[17] OIT (2015), *Directrices de política para una transición justa hacia economías y sociedades medioambientalmente sostenibles para todos*, Genève: OIT.

[18] ONU (2021), *World social report 2020 inequality in a rapidly changing world*, pp. 88 ff.

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Para lograrlo es necesario garantizar, como pide el Parlamento europeo, la "*cohesión económica, social y territorial de las transiciones, prestando especial atención a las regiones más desfavorecidas, a las zonas afectadas por la transición industrial (principalmente las regiones mineras y las zonas dependientes de industrias con altas emisiones de carbono, como la producción de acero), a las zonas escasamente pobladas y a los territorios vulnerables desde el punto de vista medioambiental*"[19].

Dada la envergadura y la urgencia de estos desafíos ambientales y en materia de empleo, es evidente que no se dispondrá ni de los recursos ni del tiempo necesarios para abordarlos por separado ni consecutivamente. Así pues, hacerles frente de manera conjunta no es una opción, sino una necesidad, y gobernarlos de forma negociada y anticipada a nivel empresarial y sectorial resulta imprescindible.

4. Potencialidades de la negociación colectiva para lograr una transición justa

Las potencialidades de la negociación colectiva en la consecución de una transición justa son evidentes. La participación de las personas trabajadoras en el diseño de esa nueva realidad puede facilitar que dichos tránsitos no se hagan en detrimento de los derechos laborales y no se olvide a nadie[20].

Desde el Comité Económico y Social Europeo se defiende que las cláusulas convencionales podrían cubrir, entre otras cosas[21]:

- el impacto de la actividad de las empresas en el medio ambiente;
- la protección de las personas trabajadoras frente a los efectos del medio ambiente y del cambio climático;
- el impacto de la transformación ecológica en la actividad de una empresa por lo que respecta a la organización del trabajo, los cambios en los perfiles profesionales y las competencias de las personas trabajadoras;
- la supervisión interna de la aplicación de las condiciones anteriores

A nivel interno, en el V Acuerdo para el Empleo y la Negociación Colectiva firmado en 2023 se aborda de forma específica la transición

[19] Parlamento Europeo (2019), *Resolución del Parlamento Europeo, de 15 de enero de 2020, sobre el Pacto Verde Europeo (2019/2956(RSP))*.

[20] Comité Económico y Social Europeo (2023), Dictamen *Negociación colectiva verde: buenas prácticas y perspectivas de futuro*.

[21] *Ibidem*.

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ecológica, la descarbonización energética y la economía circular, en tanto pueden alterar los procesos productivos afectando a los puestos de trabajo, las tareas y competencias que desempeñan las personas trabajadoras. Reconoce que estos fenómenos harán que surjan nuevas ocupaciones, pero también que otras desaparezcan o se transformen. Por tales razones pretende que estas transiciones sean "*afrontadas de manera temprana y efectiva desde la negociación colectiva, en el marco de procesos participativos con la representación de las personas trabajadoras, para poder así sensibilizar e identificar soluciones que puedan adaptarse a las especificidades de los diferentes sectores y plantear cuestiones esenciales*".

El V AENC propone "*identificar nuevas necesidades de cualificación y mejora de las competencias, rediseño de los puestos de trabajo, organización de las transiciones entre empleos o mejoras en la organización del trabajo. Para la consecución de dicho objetivo, resulta prioritario impulsar líneas de formación e información a las personas trabajadoras para asegurar su implicación ante la adopción de medidas que reclama el cambio climático*". A este respecto, se necesitarán competencias más específicas relacionadas con la economía verde, como el conocimiento de los materiales sostenibles, las capacidades para medir la "*impresión de huella de carbono*" y las habilidades de evaluación del impacto ambiental (flora y fauna).

Como conclusión, si bien los convenios colectivos en España comienzan a asumir la necesidad de incorporar contenido medioambiental y de lucha contra el cambio climático, convendría regular un marco legal a tal efecto, de modo que cuantas unidades productivas que contaran con un determinado número de personas trabajadoras, bajándose de forma progresiva desde las 250 personas trabajadoras hasta las 50, tendrían que conformar una comisión de medioambiente y transición justa con competencias en tal sentido y con las debidas garantías[22].

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Global judicial bodies and labour relations: some reflections on history, present challenges, and future prospects

Alexander Nurik[1]

1. Introduction

Theme of this paper lies at the intersection of labour rights, international law, and collective bargaining. Collective bargaining encompasses not only legal matters but also connects with issues such as collective actions, public campaigns, the right and ability of workers to organise trade unions, and the right to strike, all of which reflect the balance of power between workers and employers. In a world marked by rapid economic shifts and evolving dynamics of labour relations, these issues take on new dimensions.

Given these circumstances, examining the state of the right to collective bargaining and the right to strike, as well as how these issues are reflected in global jurisprudence, is both timely and essential. Current global challenges to these rights, alongside the impact of the digital economy and the emergence of new forms of employment arising from it, underscore the urgency of this topic within the international legal discussions.

This text will address the judicial practices of court bodies claiming global jurisdiction – namely, the Permanent Court of International Justice and its successor, the International Court of Justice, as well as the such very interesting institution as the Permanent Court of Arbitration. Consequently, regional or specialised international courts are excluded from the scope of this text.

The creation of an international court system was actively debated in governmental circles, the expert community, and the labour movement in the late 19th and early 20th centuries. It was primarily viewed as a tool for resolving interstate conflicts and ensuring global peace. Nevertheless, labour-

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related issues have occupied a certain place in the practice of international judicial institutions. While the number of cases adjudicated has not been large throughout their long existence, the matters addressed by the courts have been significant and set important precedents.

2. Labour relations in the scope of international courts: a brief historical overview of key decisions

When considering the influence of international judicial institutions on labour rights, it is important to first highlight cases that have had a broad political impact on the International Labour Organisation (ILO), shaping its mandate, tools, and international labour standards system. The Permanent Court of International Justice (PCIJ) played a significant role in defining the ILO's authority through its advisory opinions in the 1920s and 1930s.

The role of the Permanent Court of International Justice advisory opinions of these years in shaping the mandate of the ILO and the scope of labour standards cannot be overstated. These advisory opinions – on labour regulation in agriculture, the organisation of agricultural production, and the regulation of employers' labour – directly broadened the competencies of the International Labour Organisation and contributed to the foundation of the ILO's supervisory bodies and the development of international labour norms. This was pivotal in shaping collective bargaining processes, as it provided a legal framework within which workers could organise and strike.

In these advisory opinions, the Permanent Court formulated several important conclusions regarding the ILO's mandate, significantly strengthening the organisation and its role as a key international instrument for regulating and promoting labour rights and protections, including trade union rights. It is important to note that the Court's rulings on these matters were part of a broader debate within the ILO at the time – during the organisation's formative years, as it sought to define its scope of authority. These advisory opinions played an important role in laying the groundwork for shape its supervisory bodies and contributed to the development of international labour norms.

Within this debate, trade unions were the primary advocates for expanding the ILO's mandate, often finding support from many governments and their representatives in the Governing Body of the International Labour Office. Meanwhile, the Employers' Group in the ILO consistently argued for limiting the organisation's competence and for a restrictive interpretation of the norms governing its activities and the acts it adopts.

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As political scientist Ernst Haas (1964, p. 147) noted, "*the first phase of the ILO's history was also a period of consistent constitutional expansion into new fields*". Regarding the 1922 advisory opinion of the Permanent Court concerning the competence of the ILO in questions of agricultural labour, Haas (1964, p. 147-148) remarked that in this opinion "*the Court upheld the Office interpretation, declaring that* [Part XIII of] *the Treaty* [of Versailles] *was 'comprehensive' and had to be read in its entirety", and further* (Haas, 1964, p. 148): "*The Office was free to determine the political opportunities of intervention*".

Following the same reasoning, a senior ILO official George Johnston (1970, p. 252) observed: "*The importance for the future of the ILO of these Court findings* [in both advisory opinions on agriculture in 1922] *cannot be overestimated. Not only did they determine once and for all the competence of the ILO in agriculture, but they were accepted as justifying a wide interpretation of the scope of its Constitution*". Regarding the 1926 advisory opinion on the regulation of employer labour Johnston (1970, p. 169) emphasised: "*This advisory opinion of the Permanent Court of International Justice, although it was given in a particular case and at a particular time, was of general import and of permanent application in safeguarding the competence of the Organisation*".

Until recently, the practice of PCIJ's successor, the International Court of Justice (ICJ), did not include such cases. While the International Court of Justice has a history of issuing advisory opinions on matters related to labour, these issues – concerning the jurisdiction of the Administrative Tribunals of the ILO and the UN in specific cases – can rightly be regarded as fairly "narrow", addressing the activities of highly specialised institutions within the International Labour Organisation and the United Nations systems. However, this changed in 2023 when the dispute over the right to strike was referred to the ICJ for an advisory opinion.

Another avenue for judicial intervention in the labour field is linked to the still-limited practice of the Permanent Court of Arbitration (PCA), which considered the dispute about enforcement of a Global Framework Agreement by multinational companies in 2016-2018. These cases under review by the PCA were particularly noteworthy.

The Permanent Court of Arbitration, established as early as 1899, initially focused on intergovernmental disputes but gradually expanded its jurisdiction to cover disputes. The Court's jurisdiction progressively extended not only to disputes between states but also to commercial and investment disputes where a state was one of the parties, as well as to disputes regarding the enforcement of contractual obligations between parties, neither of which were states.

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The latter category included two cases considered by the Permanent Court of Arbitration under the UNCITRAL Arbitration Rules (1985), as amended in 2006, concerning complaints by trade unions regarding violations of a Global Framework Agreement. These are likely the only two cases within the PCA's history that pertain to the labour field.

Global Framework Agreements serve as a tool for cooperation between global union federations and multinational companies amid the increasing shift of production to developing countries. The agreements are designed to ensure that workers worldwide, regardless of where a company's production sites are located, can enjoy fundamental labour and trade union rights in line with ILO labour standards, particularly regarding freedom of association and collective bargaining. At present, several hundred Global Framework Agreements have been signed.

In 2016, two global sectoral trade union federations filed complaints with the Permanent Court of Arbitration, alleging violations of the terms of the Accord on Fire and Building Safety in Bangladesh (the Bangladesh Accord) by two multinational companies that were signatories to the agreement. By the end of 2017 and early 2018, the parties reached a settlement and suspended the proceedings, ultimately concluding settlement agreements. Consequently, in July 2018, the arbitral tribunal issued decisions to terminate both cases.

The handling of this case demonstrated that the Permanent Court of Arbitration can be a tool for resolving disputes between global sectoral trade union federations and multinational companies under Global Framework Agreements. To date, several hundred such agreements have reportedly been signed, covering a wide range of industries, primarily in manufacturing, transport, and services. However, the experience of resolving the Bangladesh Accord case remains the only instance of a labour-related case within the PCA's practice. As trade unionist Walton Pantland (2022) remarked, "*while the victory was important, the process was expensive, time consuming and complex*".

3. The right to strike before the International Court of Justice

The debate within the International Labour Organisation on the right to strike and its place in the ILO system of standards, which has been going on for more than a decade, has brought this issue back to the attention of both the trade union and academic communities.

The study of the fairly long practice of application of the right to strike by ILO's supervisory bodies leads to the clear conclusion that the right to strike

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is an integral element of ILO's legal system, since it is derived from the right to freedom of association, which is regulated mainly by Conventions n. 87 and n. 98. In examining individual aspects of the exercise of that right, the ILO supervisory bodies derive the protection of this right primarily from the standards of Convention n. 87.

In their approach to the right to strike, the ILO supervisory bodies rely on a well-established practice of interpretation and application of the norms on freedom of association, which has a history of almost 70 years, if we trace it back to the first decisions of the Committee on Freedom of Association in the early 1950s, when the foundations were laid for a systematic consideration of the implementation of freedom of association by ILO structures.

For example, the Committee on Freedom of Association has since adopted a significant number of decisions in which it outlines its attitude to the right to strike in the context of the application of Convention n. 87. The Committee directly derived from Convention n. 87 both the right to strike as a whole, as enshrined in a number of its decisions, and its various aspects, such as the declaration of strikes by trade union federations and confederations and the granting of an exclusive right to strike to union organisations.

It is remarkable that, in relation to cases of violation of labour rights in Greece, the committee noted in its 2007 and 2011 decisions that "*organisations responsible for defending workers' socio-economic and occupational interests should be able to use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and standards of living*" (CFA, 2007, para. 1076, p. 266; CFA, 2011: para. 1077, p. 278).

At the same time, CFA considers the dismissal of workers as punishment for participating in a strike as a violation of rights in the context of the application of the norms of Convention n. 98.

Furthermore, it should be noted that the Committee of Experts on the Application of Conventions and Recommendations, which also has vast experience of considering cases of violation of the right to strike mainly in the context of compliance with the norms of Convention n. 87, has in some cases considered the right to strike in the context of application of Convention n. 105 on the Abolition of Forced Labour. That Convention, although it does not mention the "right to strike", states that ratifying ILO members "*undertake to suppress and not make use of any form of forced or compulsory labour*", including "*as a punishment for having participated in strikes*".

In the context of the application of Convention n. 105, the 1974 report

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of the Committee of Experts examined Turkish legislation which, inter alia, imposed significant restrictions and prohibitions on striking and provided for imprisonment, including compulsory labour, as a punishment for their violation.

The long-standing practice of the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations led the latter to conclude in 1994, in its general survey *Freedom of Association and Collective Bargaining*, which devoted a chapter to the right to strike, that in the absence of a clear provision on the right to strike in the basic texts, the ILO supervisory bodies had to determine the precise scope and meaning of the Conventions on this subject, and went on to say that these bodies were primarily the Committee on Freedom of Association, within the framework of a special procedure established to examine complaints of violations of freedom of association, and the Committee of Experts under Articles 19 and 22 of the ILO Constitution (CEACR, 1994, para. 145, p. 64).

In the same report, after summarising the practice of the ILO supervisory bodies – the Committee on Freedom of Association and the Committee of Experts – in dealing with the right to strike since the 1950s, the Committee of Experts stated: "*In the light of the above, the Committee confirms its basic position that the right to strike is an intrinsic corollary of the right to organise protected by Convention n. 87*" (CEACR, 1994, para. 151, pp. 66-67).

The events of 2012 at the 101st session of the International Labour Conference, when the Employers' Group refused to find agreement on the report of the Committee of Experts on the Application of Conventions and Recommendations in relation to the Committee's approach to the right to strike and blocked the [Conference] Committee on the Application of Standards from considering the worst cases of violations of workers' rights – had no previous precedent. These actions became the starting point for regular employer criticism of the approaches of the ILO supervisory bodies – primarily the Committee of Experts – to the right to strike.

The following year, 2013, the Committee of Experts noted in its general survey *Collective Bargaining in the Public Service* that its competence did not allow it to give definitive interpretations of Conventions, which, according to Article 37 of the ILO Constitution, is within the competence of the International Court of Justice. However, the Committee pointed out, since its views do not conflict with those of the ICJ, they should be regarded as valid and universally recognized (CEACR, 2013, para. 8, p. 2).

In 2023, following a decision by the Governing Body of the International Labour Office, the long-standing dispute over the right to strike – an issue actively debated within the ILO since 2012 – was referred to the International

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Court of Justice for an advisory opinion. The central question presented to the Court is: "*Is the right of workers and their organisations to strike protected by the 1948 Freedom of Association and Protection of the Right to Organise Convention (No. 87)?*".

4. Conclusion. Current challenges and future prospects

International courts' practice proves highly significant for global labour issues, albeit in different ways.

In this regard, the key role played by the Permanent Court of International Justice in shaping the mandate of the International Labour Organisation during the formative years of the organisation is particularly important. Strengthened, among other things, by the advisory opinions of the Permanent Court of International Justice in the 1920s and 1930s, the ILO solidified its position as a key global institution in the development of international labour standards both in the interwar period and in the decades following World War II. The ILO expanded the system of labour standards and established its own supervisory mechanisms, with the Committee of Experts on the Application of Conventions and Recommendations, the Committee on Freedom of Association, the Conference Committee on the Application of Standards, and Commissions of Inquiry playing key roles.

It is within this context that we must view the emergence within system of international labour standards of the ILO's system of fundamental labour conventions, including Convention n. 87 on Freedom of Association and Convention n. 98 on the Right to Organise and Collective Bargaining. It is within the framework of these conventions – primarily Convention n. 87, but in some aspects also Convention n. 98 – that the ILO's supervisory bodies examine the exercise of the right to organise by workers and trade unions. These norms logically follow from the expansion of the ILO's mandate, have created a legal foundation for strengthening workers' organisations, reinforcing the right to collective bargaining, and establishing the right to strike as elements of international law.

This is why trade unions place such great importance on referring the dispute over the right to strike, as part of Convention n. 87, to the International Court of Justice for an advisory opinion. This case could become a significant precedent that would strengthen the legal basis for collective bargaining and the right to strike on a global scale. At the same time the issue of the "right to strike" is not only a matter of law, explicitly prescribed or derived from a specific norm, but also to a large extent a question of the balance of power between workers and their organisations, trade unions on one side,

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and employers on the other, within industrial relations at all levels – from local to global.

The issue of the role of international labour standards in regulating platform-based employment to protect the rights of platform workers is particularly important here. In recent years, the ILO has been actively studying the activities of online platforms and the experience of regulatory frameworks for platform-based employment in various countries, particularly concerning the status of platform workers and the associated rights and guarantees. The development of standards for platform-based employment is expected to be a key topic at the 113th session of the International Labour Conference in June 2025.

International norms – including both ILO standards and other international instruments – concerning the right to organise, already provide a solid basis for their application to platform workers, thus creating certain tools that arise from this right. First and foremost, platform workers fully possess the right to organise to protect their professional and economic interests, including the formation of or joining trade unions. Through the establishment of trade unions, platform workers gain tools for collective representation and institutionalised engagement with employers, including opportunities for collective bargaining.

However, it is essential to adopt a separate regulatory instrument for platform-based employment within the framework of the ILO's labour standards system, one that more clearly defines the rights and guarantees of platform workers, including the right to organise and engage in collective bargaining, as well as other aspects of labour relations, such as occupational safety. The position of the trade union movement emphasises the need for a convention and an accompanying recommendation.

The question of how global justice affects collective bargaining becomes even clearer when considering the case before the Permanent Court of Arbitration regarding the enforcement of a Global Framework Agreement by multinational corporations. The issue of ensuring compliance with the norms of Global Framework Agreements – a highly interesting negotiation tool in the context of a globalising production environment – leads us directly to the question of the balance of power. In conditions of obvious inequality between employers and workers in industrial relations, it is impossible to ensure workers' rights if they are deprived of the right to strike. This is precisely why the ILO's supervisory bodies view the right to strike as "*the most essential means by which workers can protect and safeguard their professional interests*".

Commenting on the successes and challenges related to the case before the Permanent Court of Arbitration, Walton Pantland (2022) noted

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that unions "*need a better way to resolve international labour disputes*". Among the tools he considers necessary "*in the long term*" are "*a binding UN treaty and an ILO Convention on supply chains*", as well as "*a global system of arbitration, managed through the ILO or a separate panel along the lines of the International Panel on Climate Change*". These are highly interesting issues that deserve broad discussion in legal and industrial circles.

It is fitting here to address the issue of judicial activism – a topic that sparks considerable debate in legal circles and is increasingly pertinent in the context of international courts, especially in light of the complex and evolving issues within labour law. In this regard, it is appropriate to consider the perspective of András Sajó in his analysis of constitutional judicial review mechanisms. Sajó (2019, pp. 25-26) highlights the "*danger of politicisation*" as "*a very strong reason to avoid activist positions in social rights adjudication*". Nonetheless, he asserts, "*Only where the democratic constitutional process fails to operate, that is where the poor or other social groups are permanently unable to protect their interests in the democratic process, is there a place for judicial intervention*".

And he further writes: "*Social rights activism is not only a problem of constitutional interpretation. Constitutional positions regarding socioeconomic policies are not occupied in a vacuum. At least some constitutional courts are very politicised. Sometimes judicial rejection of restrictive social policies is about taking sides in polarised political conflicts*".

When considering the issue of the right to strike, it is crucial to recognise that workers and their organisations, trade unions, are traditionally the weaker institutional side in industrial relations. As such, workers and their organisations need support at both the legislative and political levels. This understanding of inequality in industrial relations is reflected, in part, in the approach taken by the ILO's supervisory bodies, which have repeatedly emphasised that the right to strike is "*the most essential means by which workers and their organisations can protect their interests*".

During the formation of the ILO and throughout the many decades of the organisation's existence, the understanding of the inequality in industrial relations was publicly shared, in addition to trade unions, also by governments and employers. A clear awareness, on the one hand, of the fragility of world peace in the first years after the end of the First World War, and, on the other hand, of the connection between social problems and the peaceful development of humanity – against the background of the emergence and expansion of radical revolutionary projects and movements in different parts of the world – created the basis for the global interaction of workers' and

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employers' organisations to develop international standards in the world of work and, in fact, created the basis for the emergence of the ILO.

The readiness for dialogue and compromise – while, as one of the leaders of the International Organization of Employers Hans Christian Oersted pointed out, "*not compromising the economy of their countries by making unconsidered concessions to workers' claims*" (Maul, 2019, p. 46) – created certain global balance over a long period in the 20th century and allowed the implementation of a model of tripartite interaction between governments, workers and employers in order – in theory, but not always in practice – to ensure the equality of workers and employers in industrial relations and the negotiation process. The tripartite model has become the basis of social partnership systems in many countries of the world and the basis and key element of the structure and mechanisms of the ILO, including its supervisory mechanisms.

Undoubtedly, judicial activism, including in international courts, may raise legitimate concerns about judicial overreach. However, it is both appropriate and justified in ensuring the protection of workers' and trade unions' rights, which are often disadvantaged in industrial relations, and in addressing the imbalance of power between workers and employers, including at the transnational level. In the face of global instability, a series of conflicts, political and economic crises – local, regional and global – which we are witnessing today, it is important to recall the principle enshrined in the ILO Constitution after World War I, which remains there to this day: "*Universal peace can be established only if it is based upon social justice*".

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Inter-American Court of Human Rights: workers of the hacienda Brasil Verde v Brazil

Anne Trebilcock[1]

1. Introduction and summary of the case[2]

As a member of the editorial board of the *International Labor Rights Case Law journal*, it was a pleasure to be part of the panel "Landmark decisions on fundamental labour standards: A decade of impact" at the 24th World Congress of the International Society for Labour and Social Security Law (Rome, 17-20 September 2024). The chosen case laid bare what a regional human rights court may and could do to address the continuing scourge of forced labour.

For decades, poor workers in northeastern Brazil – men and boys of Afro-Brazilian descent – were recruited to work on farms distant from their homes. Promised good wages, the workers discovered on arrival that they were in debt for the costs of transport, food and lodging. The wages, if paid, were minimal. Workers were placed under armed surveillance. Attempted escape led to severe punishment. In 1988, the first group of workers at the Hacienda Brasil Verde sought help from the authorities, but little was done, even after more inspections found deplorable conditions. Finally, inspections in 1997 and 2000 led to the release of first 43 and then 85 workers from the plantation, which the Labour Ministry accused

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[2] Excerpts of the case (*Workers of the Hacienda Brazil Verde v Brazil, Preliminary Objections, Merits, Reparations and Costs, Series C, n. 318, 20 October 2016*) appeared in International Labor Rights Case Law 2017: 3, pp. 357-386. This summary reflects the published excerpts, translated from Spanish by Anne Trebilcock. The authoritative English translation of the full text of the decision by the Inter-American Court of Human Rights is now available at *www.corteidh.or.cr/docs/casos/articulos/seriec_318_ing.pdf*.

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of maintaining a private prison system. The landowner promised not to use slave labour again and agreed to pay a fine. Criminal charges were eventually dropped.

In the meantime, two NGOS – the Center for Justice and International Law and the Pastoral Land Commission – had filed a claim with the Inter-American Commission of Human Rights. They alleged violation of Article 6 of the American Convention on Human Rights, which prohibits slavery, involuntary servitude and forced or compulsory labour. The Commission found in their favour in its merits report[3]. In 2015, finding that Brazil had failed to implement its recommendations, the Commission filed this case with the Inter-American Court of Human Rights.

In 2016, the Court found that the State was responsible for the breaches of Article 6.1 (slavery or involuntary servitude, the slave trade and traffic in women)[4] of the rights to a fair trial and to judicial protection under Articles 8[5] and 25[6] of the American Convention, and of the protection to exercise rights and freedoms "without any discrimination" under its Article 1(1).

The Court did not have a factual basis on which to quantify each worker's loss, but ordered payment of from 30 to 40 thousand US dollars per victim for intangible harm, plus reimbursement of costs and expenses. The Court ordered the State to reopen, with due diligence, investigations and criminal proceedings and to ensure that no statute of limitations could apply to the international crime of slavery and similar practices. (This brief summary necessarily glosses over many details in the 158-page opinions.)

2. Which primary legal issues did the Court identify?

First, was the State responsible for violation of Article 6(1) on slavery, caused in the framework of a situation of historical structural discrimination linked to the economic position of the workers at the hands of private parties? The Court said yes. (It did not explain why it omitted citing Article 6(2)

[3] Inter-American Commission on Human Rights, Case n. 12,066, Report n. 169/11, OAS/Ser./LVII.143, Doc. 63 of 3 November 2011.

[4] This provision states: "*No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women*".

[5] Article 8.1 provides: "*Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal* […] *for the determination of his rights and obligations of a civil, labor, fiscal or any other nature*".

[6] Article 25.1 states, "*Everyone has the right to simple and prompt recourse* […] *to a competent court or tribunal for protection against acts that violate his fundamental rights recognized* […] *by this Convention*".

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of the American Convention, which begins, "*No one shall be required to perform forced or compulsory labour*").

Second, was the State responsible for violating the fair hearing rights of due diligence and judicial action within a reasonable period, as foreseen by Article 8 of the American Convention? Again, yes.

And third, was the State responsible for violating the right to judicial protection provided by Article 25 of the American Convention? Once again, yes.

3. What was the impact of the case?

The Court broke new interpretive ground by linking (first) historical discrimination arising out of slavery, (second) extreme poverty and vulnerability of the affected groups, (third) forced or compulsory labour imposed by private individuals, and (fourth) obligations of the State to take positive action to combat such situations. As Plant pointed out in his comment in the Journal, this was the first time that such considerations – stressed by various UN rapporteurs – underpinned a binding judgment of a regional human rights court (Plant, 2017).

The decision also refers to other sources, such as the ILO Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1958 (No. 105), as well as the Minimum Age (Employment) Convention, 1973 (No. 138) and the Worst Forms of Child Labour Convention, 1999 (No. 182), as part of the Court's review of international law developments since 1969, when the American Convention was adopted. However, as noted by Vogt in his comment on the case, the Court missed useful ILO supervisory body interpretations and the 2014 Protocol to Convention n. 29, which could have strengthened the analysis (Vogt, 2017).

The decision also gave impetus to a country that has been an innovative leader in combatting forced labour to redouble its efforts (de Paz, 2018). The ILO Committee of Experts on the Application of Conventions and Recommendations has highlighted Brazil's action by labour inspectorates, its dirty list of abusive employers, and criminal prosecution of persons accused of human trafficking and reducing a person to a condition akin to slavery[7]. The *Brasil Verde* case, albeit with much delay, unleashed public discussion and spurred the adoption of new measures in the country (some of which were rolled back during the Bolsonaro regime, later to be re-established).

[7] See for instance the observation on Brazil in relation to Convention n. 29 in Committee of Experts on the Application of Conventions and Recommendation (2023), International Labour Conference, Report III(A), referring to earlier measures.

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However, what the Court failed to do – as Blackett powerfully argues – was to see the important *persisting* historical relationship between slavery and the position of Black workers in today's Brazilian economy (Blackett, 2022). The Court's timid remedies, which were certainly less than the "transformative reparations" seen in some other cases (Ebert, 2023, p. 235), also fell far short of the *systemic* changes that are needed to address racialized exploitation.

4. Conclusion

In short, *Brasil Verde* is among the landmark cases from a human rights Court that takes a progressive – if incomplete – approach to economic and social rights, including labour rights. The case also illustrates how much more remains to be done to achieve emancipatory labour law in a globalized world. The journal, *International Labor Rights Case Law*, was right to showcase this decision.

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Exploring a multilateral framework for facility-specific labour mechanisms

Mathias Wouters[1]

1. Introduction

Trade between the United States and Mexico has surged dramatically in recent decades. As reported by *The New York Times* in February 2024, the U.S. now imports more goods from Mexico than from China (Swanson, Romero, 2024). In this environment, access to the U.S. market has become essential for Mexican companies, fostering a political climate conducive to establishing new mechanisms that address labour rights in cross-border commerce.

The United States-Mexico and Canada-Mexico Facility-Specific Rapid Response Labour Mechanism (FSRRLM), outlined in Chapter 31 of the 2018 United-States-Mexico-Canada Agreement (USMCA), is predominantly designed to address collective labour rights violations in Mexican facilities. While the Canadian counterpart of this mechanism has only been used once, the U.S. version has been employed dozens of times, targeting Mexican facilities of major corporations like General Motors, Panasonic, Goodyear, Caterpillar, Volkswagen, and Pirelli (Office of the United States Trade Representative, 2024).

The U.S. authorities can use the FSRRLM, on a "good faith basis", when they believe workers in Mexican covered facilities are being denied the rights to free association and collective bargaining in violation of Mexican labour law. Once such a belief is established, U.S. authorities request Mexican authorities to investigate the matter. Although Mexican authorities can refuse the request, this does not prevent U.S. authorities from taking further action. Firstly, they may impose interim trade measures targeting

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the facility's exports, which more specifically delay the final settlement of customs accounts. These measures can impose significant financial pressure, leading companies to often agree to remedial measures before a panel is convened (Claussen, 2024). Secondly, U.S. authorities may also request the formation of an independent Rapid Response Labour Panel to objectively determine whether workers' rights are being violated.

The FSRRLM's focus on ensuring compliance with domestic law at a facility rather than changing the content of Mexican law is considered an innovative approach from a trade law perspective. It allows the U.S. authorities to influence company behaviour in Mexico and, in principle, places the blame on the facility rather than on Mexican authorities. Therefore, some commentators wonder whether similar "factory-specific" tools could be adopted more broadly in international (trade) agreements (Kolben, forthcoming). Some U.S. officials have even expressed interest in replicating the FSRRLM in future agreements (X, 2022).

In this vein, the 2023 Indo-Pacific Economic Framework (IPEF) for Prosperity Agreement Relating to Supply Chain Resilience includes a Facility-Specific Labour Rights Inconsistencies Mechanism (FSLRIM). Although far less stringent than the FSRRLM, this mechanism nevertheless mirrors the facility-specific focus and shows that the facility-specific labour mechanism-concept (FSLM) is adaptable to different contexts.

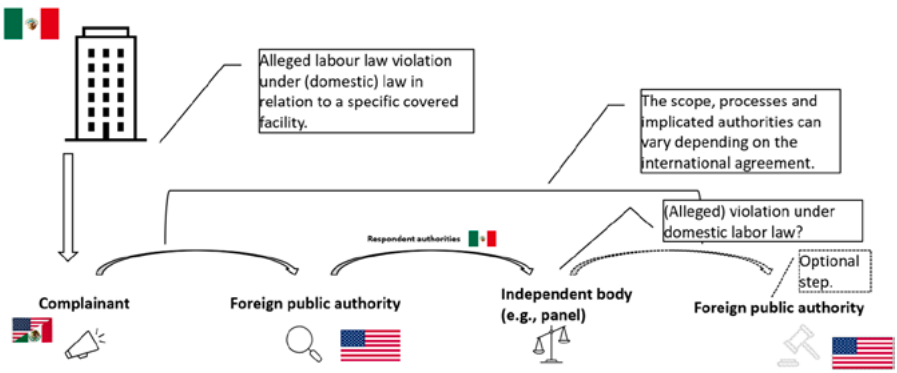
As FSLMs may continue gaining traction, there is a growing interest in thinking about a multilateral framework that could standardize their use and improve their effectiveness. While the FSRRLM is innovative, it has faced criticism, for instance, for allowing foreign authorities to enforce domestic labour laws in another country in a one-sided manner, i.e. only/predominantly against Mexican facilities. A multilateral framework could address some of these concerns, potentially making such mechanisms more acceptable to all parties.

This contribution explores the possibility of developing a multilateral framework for FSLMs, examining criticisms of the FSRRLM and how such a framework could resolve these issues. By drawing inspiration from existing models, like the International Labour Organization's (ILO) Fact-Finding and Conciliation Commission on Freedom of Association, the contribution attempts to show that designing a multilateral structure for FSLMs may be feasible. Ultimately, this discussion serves as a thought experiment to start broader reflections on a possible future for facility-based labour mechanisms – it should not be read as a concrete recommendation.

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2. The characteristics of facility-specific labour mechanisms

Although the USMCA FSRRLM is the only genuinely effective mechanism to date, it introduced a new type of mechanism in international economic law, a FSLM, that can be adapted to various international agreements. At its core, the mechanism functions as follows:



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An alleged labour law violation occurs in a "covered facility" (USMCA) or "subject facility" (IPEF) of a treaty party. After a complaint is submitted via a dedicated mechanism, or based on other information received by a foreign authority, the complainant/notifying party (e.g., the U.S.) requests the respondent/host party (e.g., Mexico) to review the alleged violation. The treaty outlines procedures and deadlines for the respondent to investigate and reply. The respondent may either agree that the violation occurred and take remedial measures or deny the alleged violation based on its findings. In some cases, respondents may even refuse to investigate if they deem the request unfounded/abusive.

To ensure the mechanism's effectiveness, the respondent's refusal to address the violation should not prevent the complainant from taking further action. For instance, the complainant can unilaterally involve an independent body, like the USMCA Rapid Response Labour Panel, and impose interim measures, such as delaying customs account settlements. This allows the complainant to exert pressure on the respondent to engage with the allegation at the facility level.

In contrast, the IPEF's approach is less forceful. The complainant cannot impose sanctions, nor establish a fact-finding body. Instead, unresolved labour rights inconsistencies are simply listed on the IPEF Subcommittee's

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public record, without even naming the specific facility involved, and further action, like referring the matter to the ILO or offering technical assistance, can only happen if two-thirds of Subcommittee members agree. Therefore, while the USMCA Panel serves as a fact-finding body, verifying alleged violations and enabling the imposition of harsher sanctions, the IPEF Subcommittee does not verify allegations or enable direct pressure on facilities. This lighter approach raises doubts about whether civil society will have as much incentive to file complaints under the IPEF mechanism, given its weaker enforcement capabilities.

Nevertheless, IPEF's "light touch" mechanism does offer certain advantages. Its scope is broader than the USMCA's, covering labour rights issues such as freedom of association, forced and child labour, discrimination, workplace safety, and even minimum wage and working hours[2]. The FSRRLM's forceful but narrow focus on collective rights thus contrasts with IPEF's more diplomatic and comprehensive mechanism.

3. Criticisms on the USMCA facility-specific rapid response labour mechanism

The USCMA FSRRLM has garnered significant attention and criticism, particularly regarding its structural implications. One major critique is that Mexico made considerable, one-sided sovereignty concessions by allowing U.S. and Canadian authorities to enforce its domestic collective labour law in covered facilities, potentially conflicting with the principle of sovereign equality between states.

Middlebrook (2023, p. 288) points out that Mexico accepted the FSRRLM on the suggestion of U.S. lawmakers. The López Obrador government "*was compelled to accept the rapid response mechanism because it was the necessary price to bring the USMCA negotiations to conclusion and secure U.S. congressional approval of the continental free-trade agreement on which Mexico depended so heavily*". Based on Hurd's (1999, p. 379) framework of power in international relations – coercion, self-interest and legitimacy – Mexico's concessions were driven by coercion (asymmetrical market power) and self-interest (domestic interest in labour reforms), with legitimacy playing a lesser role.

In terms of coercion, Mexico's concessions were not equally reciprocated. A USMCA footnote limits the application of the FSRRLM against U.S. or

[2] Articles 1 and 9 of the Indo-Pacific Economic Framework for Prosperity Agreement relating to Supply Chain Resilience of 14 November 2023.

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Canadian facilities to those already subject to enforced orders from the U.S. NLRB or Canadian CIRB. Consequently, it has been estimated that in 2020, only 12-13 U.S. employers were potentially exposed to the mechanism (LeClercq, 2021a), compared to all covered facilities in Mexico, creating a serious imbalance in the potential of the FSRRLM to enforce collective labour law in the two countries.

From a legitimacy standpoint, the FSRRLM does not aim to align Mexican labour laws with broader international standards, such as the ILO's fundamental principles or Conventions (LeClercq, 2021b, pp. 38-41). Instead, the USMCA, including the FSRRLM, shapes Mexican labour relations based on a North American framework, as set out in Annex 23-A of the USMCA (Polaski *et al.*, 2022, p. 144). LeClercq (2021b, p. 39) notes that this approach could decouple Mexican laws from international commitments, as the U.S. itself has faced criticism from the ILO for failing to fully implement international labour standards (i.e., the North American framework may not align with international labour standards).

A second criticism is therefore that a proliferation of FSLMs may undermine the coherence of the international legal order. Agreements like the USMCA or IPEF may include provisions that conflict with ILO standards, for example regarding collective rights. Furthermore, the USMCA FSRRLM, being a plurilateral treaty without broader international involvement, has additional structural weaknesses.

- The mechanism could be exploited by domestic public authorities. For instance, a future U.S. administration might reduce or intensify cross-border labour law enforcement in Mexico, depending on its agenda. Claussen (2024) warns that expanded interference could be seen as infringing on Mexican sovereignty, potentially threatening North American economic integration. Bellace (2019, pp. 199-200) questions more broadly why the U.S. would take on monitoring labour rights in other countries when the ILO already performs this function and could arguably provide valid alternatives for U.S. monitoring schemes.
- The FSRRLM's sole focus on individual facilities, often subsidiaries of foreign multinationals, restricts its effectiveness. As Claussen and Brown (2024, pp. 111, 117) point out, these parent companies tend not to be involved in the remediation process, which takes place between the U.S. and Mexican authorities in relation to the facility. Their exclusion limits the potential impact of the mechanism, as multinational corporations could potentially reassess their practices globally if they were engaged in these conversations. The FSRRLM's narrow focus may miss an opportunity to influence broader corporate behaviour across global supply chains.

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– Lester (2023) raises another key structural issue by questioning why mechanisms like the FSRRLM are embedded in trade agreements. He remarks: "*Why not have this be an international labor agreement negotiated and primarily enforced by labor departments? I understand the politics of how trade policy-adjacent issues such as intellectual property or labor rights made their way into trade agreements, but I think there is still room for thinking about the appropriate scope of trade policy and where IP, labor and other issues best fit into domestic and international governance*". The inclusion of the USMCA FSRRLM and IPEF FSLRIM within trade or broader economic agreements may not necessarily be the most appropriate or desirable approach.

Additionally, there are also more specific procedural issues of a less structural nature. One significant challenge is for rapid response labour panellists to conduct on-site verifications of labour rights violations in Mexican facilities (Claussen, 2023). Observers have also noted that the FSRRLM may lack sufficient due process guarantees (Claussen, 2024). Such procedural shortcomings, though potentially addressable through treaty amendments, remain significant problems within the current framework and weaken the mechanism's legitimacy and functionality.

4. A multilateral framework for facility-specific labour mechanisms

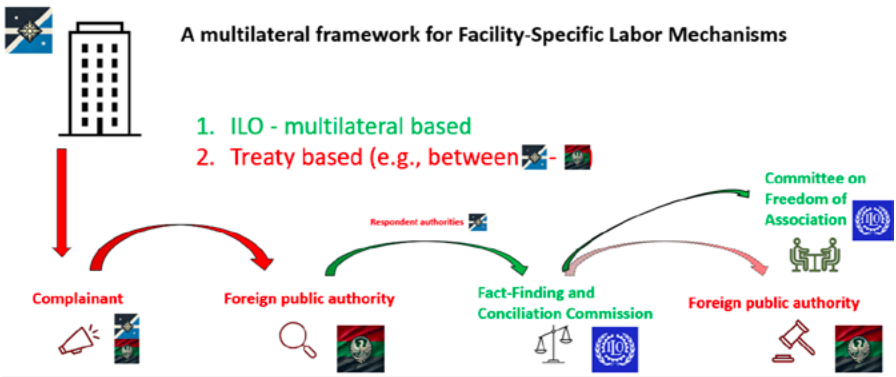
The criticisms highlighted above could arguably be addressed through a multilateral framework. The ILO Fact-Finding and Conciliation Commission on Freedom of Association (FFCC), which dates back to the 1950s, may serve as a potential source of inspiration. While the ILO Committee on Freedom of Association (CFA) plays a pivotal role in overseeing collective labour rights, the FFCC has been far less effective. Of the 3,412 cases reviewed by the CFA, only six have been referred to the FFCC, which has developed into a higher body to conduct thorough investigations, including on-site visits, if deemed desirable by the CFA (Teramoto, 2022, pp. 43, 68).

Some ILO officials have acknowledged the FFCC's failure, with the CFA, which was established after the FFCC, expanding its role and overshadowing the FFCC (Moreira Gomes, Verma, 2022, p. 153). Moreover, considering that some of the original reasons for the FFCC's establishment have diminished (e.g., Conventions n. 87 and 98 have obtained many ratifications, enabling supervision by the regular supervisory bodies), reconfiguring the FFCC might be worth considering. Emphasis could be put on its original

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investigative function; as the ILO Director-General communicated in 1950 that the FFCC is "*essentially a fact-finding body*"[3].

If a reconfiguration of the FFCC were to be considered, a multilateral framework modelled along the lines below could become conceivable. The FFCC is used here as a concrete example but could be replaced by another standing body at the international level.



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The proposed model framework consists of two legal sources. The first source comprises plurilateral treaties (highlighted in red) between states, to which the ILO is not a party, such as the USMCA and the IPEF Agreement. These treaties create distinct FSLMs that oversee labour rights violations in the treaty parties' territory. Each treaty outlines key aspects with notable relevance before the FFCC assumes responsibility for the case, such as:

1) The identification of covered/subject facilities;
2) The areas of labour law covered (e.g., only collective labour rights, all fundamental rights and principles or more);
3) The (civil society) actors authorized to file complaints;
4) The features of the reporting mechanism;
5) The possibility for authorities to take proactive action (without the need for a complaint);
6) The competent foreign investigating authority (e.g., the trade representative office or labour department) that verifies the alleged labour rights violation before referral to the host state;

[3] Letter from the Director General of the International Labour Office to the Secretary-General of the United Nations, dated 19 January 1950, doc. n. E/1595.

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7) The competent responding authority (e.g., the host state's trade representative office or department of labour) that reply to the allegations;
8) The conditions, including deadlines, that govern the proceedings until, to the extent the ILO agrees to this, the FFCC assumes responsibility for the case;

Each treaty also determines the following:
9) Any potential interim measures that can be taken before or while the FFCC treats the case;
10) Any potential consequences for the facility, parent company or treaty party if the FFCC finds that a labour rights violation occurred.

The second legal source creates a body (e.g., a reconfigured FFCC), controlled by the ILO (highlighted in green), that can replace the fact-finding or allegation-finding bodies established by plurilateral treaties, such as the USMCA's Rapid Response Labour Panel or IPEF's Subcommittee. In consultation with the ILO, the plurilateral treaty (in red) will allow the treaty parties to refer an alleged labour rights violation to the ILO's FFCC (in green). If agreed to, the FFCC, acting as a neutral fact-finding body, determines whether a labour rights violation occurred, but does not impose sanctions – a matter to be determined by the treaty parties (see points 9 and 10 above). These sanctions (in pale red) could take the form of trade measures, as seen in the USMCA following a panel ruling, or other types of penalties. The FFCC may have the option to refer labour rights violations (or a pattern thereof) to another ILO body, such as the CFA (in green).

Assuming the ILO succeeds in conceiving of an effective fact-finding body, which is interesting for treaty parties to use as the independent investigative body at the core of their FSLM, the ILO would also play a crucial role in determining whether the plurilateral treaty's FSLM meets the necessary conditions for access to the ILO fact-finding body (arrow in green). These access conditions could directly address some of the criticisms previously raised; for instance, an imbalance in the application of the FSLM, similar to the USMCA FSRRLM's one-sided application to Mexico, could prevent access to the FFCC. Similarly, the foreign public authority investigating the alleged labour rights violation could be required to demonstrate objectivity, ensuring that the investigation is based on rule of law rather than political motivations.

Other criticisms could also be addressed by this dual-structure framework:

– The FFCC could not only address whether a labour rights violation occurred under domestic law, resulting in the consequences the treaty

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parties have agreed upon (in pale red), but also evaluate the violation in light of ILO principles and standards. The FFCC may also have the option to refer the violation to another ILO body, like the CFA. Such a multilateral procedure could help preserve the coherence of the international legal order.

- Simon Lester's observations point to another potential benefit of this setup: FLSMs could become more independent of (international) economic law by "outsourcing" investigations to an international body. This would also prevent labour rights investigations from being influenced by the economic interests embedded in trade (and economic) agreements.
- A multilateral framework could build strength through collective action. For instance, suppose the FFCC finds a labour rights violation in the U.S., and a revised USMCA allows Mexican authorities to impose trade sanctions against the facility, while the IPEF might only permit for IPEF states to request technical assistance. If Mexico does not act based on the established violation, IPEF states it may be eligible to intervene using the "sanctions" allowed by their respective agreements, while the ILO works toward reconciliation.
- As FSLMs become more widespread, a multilateral framework may be better suited to oversee and investigate labour violations across entire global value chains. For example, a Mexican subsidiary of an Asian multinational with similar labour issues in other countries could be comprehensively examined by the FFCC, provided the implicated countries are bound by FSLMs (in plurilateral agreements).
- On-site verifications would be facilitated under a reconfigured FFCC, potentially leveraging the ILO's experience and established procedures, such as the "direct contact" method used by the CFA (Teramoto, 2022, p. 62). ILO representatives, perhaps benefiting from international privileges and immunities, may be able to conduct fact-finding missions more effectively than panellists (von Potobsky, 1981, p. 581). The ILO's global network of 40 field offices may further enhance its capacity to assess labour rights violations under domestic law.

5. Conclusion

Starting from the assumption that FSLMs may become increasingly common in future treaties, this contribution has aimed to demonstrate that designing a multilateral framework around such mechanisms is not entirely implausible. In doing so, some of the criticisms directed at the USMCA FFRRLM can be addressed.

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Ultimately, whether the ILO's Fact-Finding and Conciliation Commission is restructured, or a new body is created is of secondary importance. What matters is the ILO's potential to position itself as a central authority overseeing FSLMs. The United Nations or another international organization could also establish a body capable of conducting facility-specific investigations, perhaps doing so across various legal areas, such as environmental law, in addition to labour law.

Therefore, the central suggestion of this contribution is to explore whether some form of interplay between plurilateral treaties containing FSLMs and a standing international body, as illustrated in the scheme above, could enhance the legitimacy, functioning, and effectiveness of FSLMs. For proponents of FSLMs, one could even ask whether the creation of such a standing international body – capable of conducting rapid investigations – might encourage the inclusion of FSLMs in future plurilateral treaties.

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Gender equality and the parents' right to care as a human right in light of SDG 5.4: the EU legal framework

Alessia Gabriele[1]

1. Introduction

This paper aims to draw out the evolving understandings of unpaid care work in order to articulate a clear standard by which to evaluate social and economic policies and thereby to make a recognition of the parents' right to care as a human right.

In premise it is necessary to clarify that unpaid care work is undoubtedly considering a crucial point for individual and collective lives, because "*without care nothing works, and no one can live*" (Pautassi, 2023).

Thus, care is essential for children and their development, persons with disabilities or illnesses, the elderly, and the environment (Rico, Marco Navarro, 2013).

It is well knowing that many definitions and conceptions of care have been offered from different disciplines and standpoints, especially in the field of social sciences (Sarti, 2014).

More recently, care work (without distinction between paid and unpaid work) has been defined as "*activities and relations involved in meeting the physical, psychological and emotional needs of adult and children, old and young, frail and able-bodied*"[2].

This paper will focus on unpaid care work and its assumed contribution to the wellbeing of society.

In particular, it will analyse care work in connection with larger notions, such as reproductive labour or social reproduction (Fudge, 2011). It will pay special attention to care activities in the home, where the boundaries between direct (face-to-face) and indirect care are often blurred in practice.

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[2] ILO, *Care Work and Care Jobs for the Future of Decent Work* (Report ILO 2018) 6.

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In this paper the term "unpaid care work" will used as a general term, giving more precision when necessary and avoiding implicit hierarchies between "noble" activities (direct care work) and "less noble" activities (indirect care work as household work) (Encinas de Munagorri, 2023; Blackett, 2019).

Moreover, it is widely recognized that caring for loved ones has a high societal and economic value.

This issue was more considerable after the mass closure of private and public childcare services (as school and pre-school) due to Covid-19, that has had an enormous and ongoing impact on parents and cares.

The Covid-19 pandemic emphasized the importance of the care and shed light on gaps in public policies.

Moreover, the pandemic exacerbated the disproportionate share of unpaid care work provided by women and girls.

The Covid-19 pandemic lockdowns and their severe consequences for economies, employment and livelihoods have turned the care unpaid work debate into a live policy issue in some countries, and in particular in the European Union.

The economic downturn, described as a "pink collar recession", is having a particularly harsh impact on women[3].

This is because women are in industries and roles hardest hit by job cuts, loss of access to child care, and because women were already the most precarious workers.

Putting in connection gender inequality and unpaid care work is a starting point to investigate the political and legislative tools and to suggest solutions to policy makers.

The enormous contribution of carers not only makes an invaluable difference to the people they support, it is an integral part of our health and social care system and it deserves to be better recognised.

This presentation starting points considers the reconciliation of unpaid care and paid work which is among the most pressing and difficult problems currently facing employment law.

To this end it will use a gender and human rights approach to lay the foundations for recognizing care as a human right.

The method will be a juridical approach to the analysis of different national work family legislation and parental leave. This analysis could lead to showing that gendered assumptions surrounding parental care remain.

[3] Wang N., "Covid Leads to a Pink Collar Recession", *Forbes*, 24.05.2020, *www.forbes.com/sites/nancywang/2020/05/24/covid-leads-to-a-pink-collar-recession/-7d41553e2bb5* (accessed: 01.09.2020).

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Lack of adequate leave and care arrangements for children and other dependent family members can discourage people with caring responsibilities, mainly women, from continuing their jobs or re-entering employment. Barriers to female participation in the labour market include lack of adequate work-life balance policies, fiscal disincentives for second earners or excessive taxation of labour, and stereotypes on fields of study and occupation.

Access of self-employed or workers who are not on full time and permanent contracts to paid family-related leave or insurance schemes remains uneven. Moreover, insufficient possibilities and encouragement for men to take leaves is reinforcing women's roles as primary carers, with negative effects on female employment.

There is also an enhanced opportunity for flexibility in the organisation of work partly derived from digital environments and combination of several occupations in the sharing and collaborative economy.

For this reason, flexible working arrangements can also help facilitate work-life balance by allowing both people in employment and firms to adapt working schedules and patterns to their needs.

2. The interconnection between unpaid care work and gender

The incompatibility of carers' needs and the demands of the labour market is commonly identified in relation to working mothers and their parental duties.

Unpaid parental care is predominantly provided by women, so that its intersection with paid work is severely gendered (Busby, 2018).

But, as has been widely demonstrated, this division is unfair and creates barriers to transforming modern societies (Fredman, Goldblett, 2015).

Women suffer from gender inequalities *both* in their professional lives and their family lives (by taking care of others). Some of them face a double burden of caring for children and other dependent family members at the same time.

Therefore, women provide the bulk of care and this often leads them to adapt their work patterns to care responsibilities, including by taking career breaks, working part-time, or leaving the labour market entirely and prematurely. And this is true before, during and after the Covid-19 pandemic (EIGE, 2021a; 2021b).

The professional and familial spheres are separate in our current institutions, but they interact in individual and collective daily lives. And it is barely possible to be fully engaged in one sphere without detrimental consequences for the other.

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How can we solve the so called "*conflict between unpaid care/paid work*" (Barbera, 2003; Nusby, 2011)?

Is it possible to reconcile unpaid care work with paid work?

Which legislative tools could the institutions provide to aim this purpose?

First of all, more adaptable working conditions and family and care-related leave would help working parents and carers balance private and professional interests and avoid the need to choose between family and career.

Although the divide between productive and reproductive work, has delineated the boundaries of state intervention in the private space, with significant negative implications for women.

Generally, recognizing and valuing unpaid care and domestic work is seen as instrumental tool to promote gender equality and equal opportunities.

Thus, it could lead to increase women's employment rate and create incentives for fathers to take family-related leave.

3. The crucial importance of substantive equality and the recognition of the care value

Primarily, to improve the compatibility between paid work and care, it is crucial to link carers' leave and the right to request flexible work with the principle of equality. Among international human rights instruments, this principle is expressed in very general and open-textured terms (Fredman, Goldblett, 2015).

Equality of opportunity and treatment between women and men in the world of work is a principle established in a number of international labour standards, above all the most notably is the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)[4].

This ILO Convention enshrines the elimination of discrimination regarding employment and occupation as a fundamental principle – one that remains at the core of the ILO Decent Work Agenda today (ILO, 2000a).

This means that the overall objective of advancing gender equality also needs to be applied in the area of working time – and integrated into the full

[4] With regard to international standards, particular reference should be made to both UN Covenants (Article 3 ICESCR, Article 3 ICCPR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), as well as the ILO's two fundamental rights conventions, namely the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and, more specifically, the Equal Remuneration Convention, 1951 (No. 100),69 the Workers with Family Responsibilities Convention, 1981 (No. 156) and the Maternity Protection Convention, 2000 (No. 183)

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range of working time policies – in order to ensure that policies designed to advance other "decent work" objectives do not inadvertently have a negative impact on gender equality.

Thus, in order to address women's inequality, it is necessary to focus on the specificity of women's disadvantage, particularly by recognizing the link between discrimination in the home and discrimination at work.

It is important to acknowledge, however, that pursuing a transformative response to unpaid care work in the workplace raises important tensions between the distributive and recognition dimensions of equality.

In particular, there is a risk that accommodations for pregnancy and childcare to remedy distributive inequalities, may inadvertently reinforce and entrench recognition wrongs, such as negative gender stereotypes.

This cross-dimensional problem has been observed in the literature. Many scholars affirmed that even if parental leave policies are designed to support the health and economic security of new mothers, they can reinforce the female homemaker norm by only offering leave to women and failing to enable shared care between parents (Chapman, Baird, 2022). This in turn contributes to the "motherhood penalty" – a gender gap in working hours and pay over the life course – with the normative expectation that women will perform the bulk of unpaid care work firmly entrenched (Baird, Heron, 2019).

As suggested by scholars, the persisting care divide between men and women is not inevitable (Fudge, 2014).

Fraser (1994) – refusing the two models of social welfare for gender equity: the "Universal Breadwinner" model and the "Caregiver Parity" model – proposes a new model, called the Universal Caregiver model, aiming "*to induce men to become more like most women are now, namely, people who do primary care work*" (Fraser, 1994, p. 61).

To enhance this tendency, Fudge (2011, p. 132) points out to consider all kinds of work under the same labour law umbrella. That would confer the same symbolic status on care and domestic work as on other work.

She affirms that "*There is no* a priori *conceptual reason why such work should fall outside the boundaries of labour law*" (Fudge, 2011, p. 132).

In this perspective, unpaid care work is not only a question of individual choice: it is also a burden, a moral and social responsibility that is unavoidable at the collective level.

The recognition of the right to care is an essential step to impose obligations that must be fulfilled within the framework of the definition of universal policies, with regular budgets and a gender perspective.

To sum up, recognizing care as a human right has been part of theoretical development and a political and social process.

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4. The international legal framework

The care unpaid work has its strong articulation in the United Nations Sustainable Development Goals (SDGs) that commits the world to achieve gender equality and empower all women and girls by 2030.

In an important breakthrough for the right to care, target 5.4 requires all countries in the world to "*Recognize and value unpaid care and domestic work through the provision of public services, infrastructure and social protection policies, and the and to promote shared responsibility within the household and the family as nationally appropriate*".

As it's well-known, the SDGs are, however, only political commitments, without legally binding force.

On the other hand, "care" began to be considered as a right with the adoption of the Convention on the Rights of Persons with Disabilities (2007), regarding children and teenagers and was first referred to as the right to care in the Inter-American Convention on the Protection of the Human Rights of Older Persons (2015) (Pautassi, 2023).

The International Labour Organization (ILO) plays a leadership role in promoting decent work in the care economy, based on a life-course approach to care, embracing the 5R Framework for Decent Care Work (recognition, reduction and redistribution of unpaid care and reward and representation of care workers).

And most recently, the ILO adopted the "Resolution concerning decent work and the care economy" (14 June 2024) affirming that care work, paid and unpaid, is essential to all other work and guides integrated and coherent strategies to achieve decent work in the care economy.

According to the 5R Framework for Decent Care Work, the resolution points up that unpaid care work should be recognized, reduced and redistributed. Achieving decent care work includes the adoption and effective implementation of well-designed care leave policies and services. This enables, inter alia: better work-life balance and more equal sharing of care responsibilities between men and women; productivity growth through maintaining the health and well-being of the workforce; addressing disadvantages faced by people with high care or support needs, as well as those faced by people providing unpaid care or support.

The resolution calls to account (point 30) governments, employers' and workers' organizations, as appropriate to their spheres of responsibility, in achieving and maintaining compliance to fulfil the rights of informal carer and parents: to ensure appropriate responses to the needs of all workers with care responsibilities by ensuring comprehensive maternity protection and care leave and protection policies, including paternity, parental leave;

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strengthen policies and measures facilitating work-life balance, paid work and care responsibilities.

This includes measures related to the organization, time and location of work, and other terms and conditions of employment

International human rights law – and in particular CEDAW and the work of the CEDAW Committee – has led to many tangible and positive changes around women's rights in the laws and policies of countries around the world.

For instance, Article 11(2) of CEDAW requires States "*encouraging the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities*".

However, it does not require equal parental rights for fathers.

The crucial importance of recognizing the role of unpaid caring work in order to advance substantive equality for women has been most vividly highlighted in the 2013 report of the Special Rapporteur on extreme poverty (UN General Assembly 2013). As she points out: "*There are limits to how much care a person can give without negative impacts on their own health. Thus, when public policies implicitly assume the free and limitless availability of unpaid care, and fail to take it into account by supporting, funding or provisioning care, this can have a major impact on the health of women caregivers and the quality of care that they are able to provide*" (UN General Assembly 2013, para. 43)

Addressing care responsibilities is thus an essential component of the obligations of States to ensure gender equality at home, work and in society more broadly (ivi, para. 13).

Redistributing roles and challenging the associated gender stereotypes require a transformative approach, whereby the support provided to women not only recognizes their specific needs, but affords the opportunity to question "*existing social and cultural norms*" (Human Rights Committee-HRC 2012, para. 18).

This transformative approach, supported by the language of CEDAW, requires that women's special needs are simultaneously accommodated while traditional gender divisions are subverted.

Moreover, the CEDAW Committee recommends increased efforts to assist women and men to strike a balance between family and employment so that they can both adequately share domestic and childcare tasks.

Crucial for the transformation of women's role in childcare is to ensure not only that women are not prejudiced at work, but also that men are included in childcare. This issue is inescapable in order to guide national

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legal systems promoting better conditions of work for women and men with family care responsibilities, also in an intersectional perspective, improving social protection policies.

5. The EU legislative framework: the EU Work-Life Balance Directive and the European Care Strategy

In the EU legislative framework, parental leave constitutes a fundamental right explicitly enshrined in Art. 33 (2) of the Charter of Fundamental Rights by joining the equality principle (Article 23 CFR).

It mentions expressly the "*right to paid maternity leave and to parental leave*".

However, its express reference to the reconciliation of work and family is notable and it does offer scope for improvements to the provision of family leave as the rights enshrined are minima so can be expanded. In this way, the CFR's application in the current context is more than merely symbolic, although its potential is still limited in practice by the EU's legal competence which does not extend to social welfare provision.

In its n. 16 the Community Charter states the matter even more clearly: 16. Equal treatment for men and women must be assured. Equal opportunities for men and women must be developed.

Article 24 of the Charter of Fundamental Rights moreover sets out: Equality between women and men must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the underrepresented sex.

Article 3 TEU sets out that the Union shall combat social exclusion and discrimination.

In parallel, Article 8 TEU affirms that the Union shall aim to eliminate inequalities and to promote equality between women and men.

Moreover, Principle 9 of the European Pillar for Social Rights states that parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements and to have access to care services.

Various techniques, including integrating paid employment with unpaid care work, have been used in some state social security systems to protect individuals who care for others in their households (eg children, elderly relatives, and partners). Many Western countries have adopted policies that reconcile paid employment and unpaid care.

In recent years, European legislation has provided numerous measures to build a legal framework for working carers, in attempts to change the

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traditional "*male breadwinner / female caregiver paradigm*" and to conceptualize and politicize the right to care (Caracciolo di Torella, 2017).

As regards secondary legislation, in this scenario it is possible to ascribe, above all, the "EU Work-life Balance Directive" – which aims to improve families' access to family leave and flexible work arrangements – and the so called "European Care Strategy" to ensure quality, affordable and accessible care services across the European Union and improve the situation for both care receivers and the people caring for them, professionally or informally.

The second one will help making the principles on access to good quality and affordable care of the European Pillar of Social Rights a reality and contribute to achieving the headline targets on employment and poverty reduction for 2030 across the EU. The European care strategy suggests, in particular, taking measures to improve the work-life balance for parents and closing the gender care gap.

WLBD's Principles 2, 3 and 9 on gender equality, equal opportunities, and work-life balance, respectively, are relevant in this context.

The WLB-Directive is the most recent piece of EU gender equality legislation, and the first legal instrument to emerge from the European Pillar of Social Rights (EPSR).

Both the principle of gender equality and the principle of work-life balance are clearly reaffirmed in the EPSR's principles 2 and 9.

In accordance with Principles 17-18 EPSR, all parents and people with caring responsibilities shall have access to adequate leave arrangements for children and other dependent relatives, and access to care services.

An equal use of leave arrangements between sexes shall be encouraged, through measures such as the provision of remunerated leave for parents, both men and women.

The WLB-Directive complements Dir. 2010/18/EU's parental leave regulations by enhancing existing rights and introducing new ones (WLBD, para. 9).

It establishes minimum requirements for parental, paternity, and carer's leave, as well as flexible work arrangements. These entitlements aim to "*achieve equality between men and women with regard to labour market opportunities and treatment at work, by facilitating the reconciliation of work and family life for workers who are parents, or carers*"[5].

Despite the Directive being criticized for being a slightly diluted version of the original Commission's proposal and possibly losing its legal clout, the preamble acknowledges that many parents and workers with care responsibilities are still struggling with work-life balance.

[5] Art. 1 WLB-Directive, see also Art. 16 n. 1 and preamble, para. 16.

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Concerning reconciliation of professional and family life several issues are at stake.

First and foremost, paid leaves are paramount in relation to caring responsibilities.

Closely related is the second element on *working (time) arrangements*.

It is interesting to note that it is not limited to working time but conceived in a general way. There is also an enhanced opportunity for flexibility in the organisation of work. Flexible working arrangements can also help facilitate work-life balance by allowing both people in employment and firms to adapt working schedules and patterns to their needs.

Formulating care as a human right leads to changing the regulatory framework of working time, which is a key issue.

As suggested by many scholars, the Directive doesn't consider the specific link between working time legislation and the right to care, but it affirms for the first time the right to flexible work arrangements. In this direction the Dir. strengths as employees may for example request flexible work schedules or reduced working hours (Art. 3 (1) f. and Art. 9 WLB-Directive).

Recognizing the right to care could have the potential to spread effects in two directions.

The first effect this recognition could have, is towards governments, that should consider the principle as welfare provisions and improve legal or collective working conditions, incorporating a powerful legal definition associated with its nature as a human right.

The second direction is towards economic private actors. In particular, the right to care as a human right could make relevant obligations for the private sector, the markets, and communities. In addition, it could impose obligations in employment relationship, where the employer could have the duty to guarantee the workers' time to care, and indirectly their well-being.

Despite this, the WLB-Directive finally refrained from requiring paid leave, leaving the question of payment to the discretion of member states. As rightly stressed by critics, implementing compulsory payment would have been more effective than mere recommendations (Hack, 2023).

In this point of view, a more decisive measure to gain equal share of available parental leave is the payment of such leave.

The Directive, moreover, in its preamble, stresses the importance that the leave is paid, and that it explicitly encourages member states to introduce paid carer's leave "*in order to guarantee the effective take-up of the right by carers, in particular by men*"[6]. This is considered what remains from the Commission's promising intention (Hack, 2023, p. 119).

[6] Preamble, WLB-Directive, para. 32.

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Due to the reason that women are often secondary earners, it is crucial introducing incentives for men, to avoid leaving care work to women for economic reasons.

In line with the European Commission's proposal, in the literature it is proposed introducing paid carer's leave, where wages are replaced based on the rates of sick leave and maternity leave.

From this assumption, it is desirable that the decision of who would perform care work would no longer be connected to economic factors.

In this scenario, and under these premises, the role of women in care and in domestic work must not restrict their full and equal participation in paid work. If one in addition worked progressively on reducing the pay gap between men and women, the question of who takes the leave might become a gender-neutral one.

In a nutshell, according the ETUC, "*Leave facilities should offer a genuine prospect of combining work, family and/or private life; they should be paid and ensure the right combination of length and flexibility without impacting workers' capacity to come back to work after the leave period or negatively affect their career, wages and pensions rights*".

Moreover, an emphasis on "fathers' rights" has not yet produced the expected improvements in term of men's sharing care responsibilities and fathers' involvement in children's lives, slowing down the effective increase of gender equity in the labour market.

Consequently, it will be necessary to improve the right to care inside the working relationship, enforcing a gender neutral caring idea, re-setting the focus to instead presume that all workers are encumbered and require equally support to balance work with other life commitments.

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Empleo y trabajador maduro: retos ante el escenario de la transición ecológica

Natalia Ordóñez Pascua[1]

1. Impacto del cambio climático en las condiciones de trabajo: límites y adaptaciones del trabajador mayor

Naturaleza y el trabajo son cuestiones intrínsecamente relacionadas por cuanto el desarrollo de la vida depende en un alto grado del mantenimiento del entorno natural. El reiterado discurso sobre el inminente agotamiento de recursos naturales insiste en la escasez de recursos por cuanto aquellos que no son renovables son extraídos a una mayor velocidad que su renovación – como es el supuesto de los combustibles fósiles – poniendo en peligro su perdurabilidad.

Frente a esta realidad, los de carácter renovable – sol, viento – parecen ofrecer un horizonte con un atisbo de esperanza para la resolución de la cuestión de la conservación ambiental. Esto encuentra traducción en el ámbito productivo tanto en aquellos sectores más ligados y dependientes de los recursos no renovables para su producción – agricultura o minería – como en otros de dependencia indirecta como son el procesado de alimentos o la industria textil, todos afectados por la creciente escasez de recursos naturales y por la cada vez menor capacidad de absorción de residuos y de gases de efecto invernadero. En el proceso señalado jugará un papel fundamental la transición hacia una economía circular en la que se ponga en valor el reciclado de residuos para poder ser puestos a disposición de otras empresas u otras fases productivas (Romero Hernández, Romero Hernández, 2018).

Estos cambios están reconfigurando el mercado laboral, desplazando empleos tradicionales y cambiando los procesos de trabajo. Las regiones que dependían de industrias contaminantes requieren estrategias de transición

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para evitar efectos adversos en el empleo y la inclusión social. Por ello, es crucial intervenir para garantizar una transición ecológica y energética justa y equitativa que impulse iniciativas de desarrollo y empleo para promover las oportunidades, y acompañar a las personas con protección social, formación y trabajo decente para mitigar los efectos potencialmente adversos en los trabajadores (Nieto Sáinz *et al*., 2020) – en general – y del colectivo de mayor edad – en particular.

1.1. La pérdida de empleo en la transición ecológica

La transición hacia una economía baja en carbono ha generado críticas por el temor a la pérdida de empleos en sectores tradicionales que suponían elevados niveles de empleo como es el caso de la minería, el petróleo y el gas. Los cambios producidos en el empleo en los mentados sectores afectan más a los trabajadores maduros ya que su vida profesional se ha desarrollado en esos espacios laborales en mayor medida; sin embargo, todo apunta a que las pérdidas de empleo podrían compensarse con nuevas oportunidades en sectores emergentes que necesitan más mano de obra y tecnología avanzada, incrementando la productividad.

También adquieren un papel destacado los programas de reconversión de estos espacios como es el caso del que acompaña a la minería del carbón, sector que sufrió grandes pérdidas de empleo desde los años 70, acompañadas de planes sociales como prejubilaciones o indemnizaciones. En 2018 se cerró definitivamente el sector del carbón y se desmantelaron centrales térmicas y la reconversión de la minería encontró grandes dificultades para recolocar a sus trabajadores debido fundamentalmente a la despoblación y la falta de alternativas laborales viables en otras industrias. En ese sentido fue preciso el acompañamiento de un conjunto de medidas fruto del diálogo social que recogidas en el Acuerdo marco para una transición justa de la minería del carbón y desarrollo sostenible de las comarcas mineras para el período 2019-2027 procede a la planificación de una serie de políticas públicas dirigidas a promover economías alternativas en las zonas afectadas (Álvarez Cuesta, 2022).

El sector eléctrico ha logrado una mejor adaptación a la transición verde, con iniciativas concretas para mantener empleos y facilitar la movilidad de los trabajadores afectados por el cierre de plantas térmicas; sin embargo, la pérdida de empleo directo e indirecto sigue siendo significativa.

En el panorama español, uno de los avances más importantes en la transición energética ha sido el Plan Nacional Integrado de Energía y Clima 2021-2030, parte del "Marco Estratégico de Energía y Clima" y que prevé

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dos escenarios: uno sustentado en medidas actuales y otro orientado a los objetivos de descarbonización y eficiencia energética; se espera que este plan genere entre 253.000 y 348.000 empleos anuales, reduciendo la tasa de paro entre un 1,1% y un 1,6% para 2030.

Con todo, las políticas de acompañamiento para la Transición Justa y su articulación mantienen como objetivo prioritario la lucha por el empleo en los territorios y zonas más afectadas por la transición hacia la deseada economía baja en emisiones de carbono, otorgando especial interés a los supuestos de cierre o reconversión de instalaciones. Con el fin esbozado, y en aras a conseguir la reempleabilidad de trabajadores expulsados de los empleos tradicionales, la empleabilidad de aquellos más vulnerables y colectivos en riesgo de exclusión, la fijación de población en los territorios rurales o en zonas con instalaciones en proceso de cierre y la promoción de una diversificación y especialización coherente con el contexto socio-económico, los Convenios de Transición Justa se erigen como herramienta de especial relevancia por cuanto son el mecanismo a través del cual se tratará de fomentar la empleabilidad de trabajadores vulnerables y colectivos en riesgo de exclusión especialmente sensibles a los procesos inherentes a la transición hacia la economía baja en emisiones de carbono, en particular aquellos afectados por el cierre o reconversión de empresas o instalaciones. Además, constituyen un itinerario idóneo para evitar la destrucción de puestos de trabajo por cuanto su ámbito geográfico es definido a través de la evaluación objetiva y exhaustiva de los impactos socioeconómicos de los cierres sobre las poblaciones locales.

Entre los colectivos afectados, los escenarios descritos afectan desgraciadamente en mayor medida al trabajador maduro en el que suelen convivir dos de los factores determinantes de la situación de vulnerabilidad al reunir el requisito de la edad – 45 o más años – y formar parte del grupo de desempleados de larga duración cuando han sido expulsados del mercado de trabajo; no en vano, son considerados como colectivo de atención prioritaria para las políticas de empleo españolas. Aunque el desempleo de larga duración se ha reducido, sigue existiendo una diferencia significativa para aquellas personas trabajadoras cuya edad supera los 55 años: en 2023, el 59,07% de los mayores de 55 años formaban parte del colectivo vulnerable de desempleados de larga duración, comparado con el 40,54% de la población desempleada en general. Esto indica que los desempleados mayores de 55 años tienen una mayor probabilidad de permanecer sin trabajo por periodos más largos, reflejando dificultades específicas como la obsolescencia de habilidades, cambios en la industria y posibles casos de discriminación por edad.

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1.2. Nuevos trabajos: habilidades renovadas

La transición hacia modelos de empleo más sostenibles presenta importantes desafíos para los trabajadores, especialmente para los de mayor edad, que deben adquirir nuevas habilidades requeridas por la transición ecológica y la irrupción masiva de nuevas tecnologías en el panorama empresarial.

A la desactualización de competencias cabe añadir los arraigados prejuicios sociales y empresariales que limitan el acceso y la continuidad en el empleo de los de mayor edad y algunos estereotipos negativos – la dificultad para aprender, la menor capacidad e interés formativo y el menor interés en la integración de las tecnologías en el contexto de trabajo, ser conservadores, tradicionales, rígidos, con escasa o menor capacidad de adaptación, poco flexibles, menor capacidad de movilidad laboral, menor productividad, menor capacidad para trabajar bajo presión, habilidades competenciales obsoletas, menor creatividad, deterioro cognitivo o irritabilidad, entre muchos – que constituyen barreras en el ámbito del empleo y que estarían relacionados con distintos aspectos como la salud y los cambios físicos y mentales; el escaso nivel de empleabilidad; las nuevas tecnologías y su uso limitado en el puesto de trabajo; la diferencia intergeneracional que hace que la edad aporte visiones diferentes del trabajo y diferentes canales de comunicación que distan de los impuestos actualmente; la actitud de empleadores que buscan experiencia, pero no valoran ni quieren la experiencia que los trabajadores de edad pueden aportar, mostrando una actitud de resistencia y desconfianza a la hora de contratar; las barreras procedentes del sistema externo como las pensiones −planes de pensiones− y otros sistemas de beneficios, financiación −inversión económica por parte de las Administraciones y Organizaciones: los trabajadores de más edad resultan más caros que los jóvenes−; y, las barreras formativas que implican niveles más bajos de educación, menor cualificación, perfil competencial y menor preparación (Olmos Rueda, Sanahuja Gavaldà, Pérez Amorós, 2017).

La formación sería la palanca fundamental para romper esta dinámica y debe ser un pilar clave de las políticas de empleo dirigidas a los trabajadores mayores, muchos de los cuales carecen de las competencias necesarias para enfrentar nuevos retos y adaptarse a un mercado laboral competitivo.

La legislación en España contempla el derecho del trabajador a la formación y recualificación, desde la normativa laboral básica hasta la prevención de riesgos laborales (art. 2, 14 y 19 TRLET), reconociendo el derecho a la formación y adaptación a cambios en el puesto de trabajo y favoreciendo con ello la empleabilidad.

Por su parte, el art. 23 TRLET refuerza el derecho a la promoción y formación profesional, facilitando permisos para la obtención de títulos,

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adaptación de jornada, y formación necesaria para ajustarse a cambios en el puesto de trabajo, afectando especialmente a los trabajadores mayores que necesitan recualificarse (Requena Montes, 2019). Si descendemos en el despido por causas objetivas es posible encontrar una clara relación con el abandono indeseado del trabajador del mercado laboral por falta de adaptación a los nuevos requerimientos o exigencias. Así, el art. 52 TRLET recoge de manera explícita la extinción del contrato por ineptitud o falta de adaptación tras un periodo de formación, reforzando la importancia de la formación continua para preservar el empleo.

En este escenario, las carencias formativas más significativas percibidas por los trabajadores incluyen la escasa formación en nuevas tecnologías y el dominio de idiomas, cruciales en un contexto globalizado; no es la edad lo que discrimina al trabajador, sino el déficit de competencias, lo que hace necesaria una intervención del empleador en materia de formación continua para salvaguardar el empleo de aquellos trabajadores más maduros.

La formación en el contexto de transición hacia economías verdes se trata en España en el Plan de Recuperación, Transformación y Resiliencia, destacando acciones para recapacitación y mejora de habilidades (Reskilling y upskilling) de la población activa, en especial los trabajadores maduros. Las áreas clave son:

1) Reconocimiento y acreditación de competencias profesionales mediante evaluación de experiencia laboral o formación no formal.
2) Oferta modular digital para ocupados, esencial para mantener la competitividad y avanzar en nuevas competencias.
3) Flexibilización de la formación profesional mediante "Aulas Mentor" en municipios con menor acceso a FP, apoyando también a mujeres rurales y colectivos vulnerables.
4) Formación modular para recapacitación en competencias emergentes, como nuevas tecnologías y digitalización.

Indudablemente, la transición ecológica vendrá unida a nuevas exigencias que traen causa en la emergencia de diferentes profesiones y actividades en las cuales la adquisición de habilidades constituirá el elemento nuclear y no dejan de suponer un gran reto para evitar la discriminación del trabajador mayor (Cabeza Pereiro, 2022), por cuanto en un mercado cada vez más competitivo, el reciclaje constituye un imperativo en la carrera profesional de todo trabajador y especialmente a aquellos que superan los 45 años de edad y que precisan actualizar sus competencias y adaptarlas a las nuevas necesidades del mercado de trabajo para no ser expulsados del mismo. A la inadaptación a mentados escenarios puede sumarse una precariedad laboral

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en la edad madura que implica un riesgo de pérdida del empleo y pese a que tal posibilidad puede no ser mayor que la de las personas más jóvenes, sus efectos pueden ser devastadores a cierta edad en la que se afronta el desempleo de larga duración convirtiendo así la edad en un factor que puede dificultar la contratación de trabajadores además de su formación por considerase poco rentable ante una posible jubilación o la merma de capacidades. Por otro lado, los contratos temporales de carácter precario no constituyen una exclusiva del trabajador joven, sino que han sido utilizados como herramienta para sucesivas entradas y salidas del mercado de trabajo de la población de mayor edad.

Por otra parte, la irrupción de nuevas tecnologías y la digitalización representan otro de los grandes desafíos, especialmente para trabajadores mayores (Cruz Villalón, 2017), aumentando el riesgo de "parados tecnológicos" debido a la brecha digital generacional, que se agrava a partir de los 55 años. Esto genera una desventaja social y laboral. La brecha de edad se hace notar en mayor medida en las competencias digitales, donde existen estereotipos sobre el desinterés o incapacidad para adaptarse. Aunque los jóvenes parten con ventaja tecnológica, el desinterés o dificultad para aprender no afecta a todos por igual. Este factor ha dejado a las personas trabajadoras de mayor edad alejadas de los sectores dinámicos y tecnológicos caracterizados por una mayor creación de empleo.

La importancia de la brecha digital en la edad como factor que indudablemente puede convertirse en una desventaja social y laboral ha justificado la necesidad de actuación pública (Serrano Falcón *et al*., 2019) para garantizar acceso a productos digitales y formación adecuada.

2. Efectos del factor edad: desigualdades sociales, pérdida de ingresos y exclusión social

El trabajo es un elemento clave en el desarrollo personal y social del individuo; a través del mismo es posible cubrir las necesidades básicas y conseguir la autonomía personal adquiriendo un carácter vital para el ser humano y situando este en el centro de las aspiraciones de las personas en tanto constituye el medio fundamental para obtener su sustento, mejorar la calidad de sus vidas y su realización personal, y siendo elemento esencial para conseguir el bienestar.

A nivel internacional, destaca la Declaración Universal de los Derechos Humanos que recoge en su art. 23 el derecho al trabajo de toda persona, a la libre elección del mismo, a condiciones equitativas y satisfactorias de trabajo y a la protección contra el desempleo y con espíritu similar la Organización

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Internacional del Trabajo (OIT) avanza un paso más allá cuando impulsa el trabajo decente, resaltando la importancia de que los hombres y las mujeres tengan iguales oportunidades de un trabajo que sea productivo y que les genere un ingreso que les permita vivir con dignidad.

La Constitución Española de 1978, reconoce en el art. 35 el deber de trabajar y el derecho al trabajo, a la libre elección de profesión, a la promoción a través del trabajo y a una remuneración suficiente, sin discriminación por sexo. También insta a los poderes públicos a promover su realización efectiva. Aunque solo menciona el sexo como causa de discriminación, el Tribunal Constitucional extiende esta protección a cualquier discriminación por circunstancias personales o sociales, incluyendo la edad. El art. 4.2.c) del TRET también menciona la edad como causa de discriminación prohibida en el acceso y ejercicio del empleo.

2.1. Causas del desempleo del trabajador maduro

La falta de trabajo de los de mayor edad puede traer causa en diversas situaciones que transitan desde la propia voluntad del trabajador hasta las motivadas por la figura del despido – individual o colectivo – desplegando distintos en uno u otro caso; en el primer supuesto, la baja voluntaria del trabajador – independientemente de su edad – no activa ningún sistema prestacional de protección por cuanto la percepción de la prestación por desempleo es posible sólo cuando la baja laboral es consecuencia del despido – procedente o improcedente – por lo cual, si la persona trabajadora cesa en su puesto de manera voluntaria no sería acreedora de la mentada prestación que la norma reserva a aquellos expulsados del mercado de trabajo de manera obligatoria y que quieren y pueden trabajar; en el segundo, el sistema desplegaría sus efectos protectores como medida de apoyo a una nueva búsqueda de empleo.

Las dificultades en el acceso al empleo se tornan más complicadas cuando la persona con falta de trabajo se encuentra en cierto rango de edad. Pese a la inexistencia de un criterio legal para determinar la edad del trabajador maduro, el panorama laboral actual hace que, con carácter general, adquieran tal consideración cuantos ostentan la edad de 55 años o más ya que es a éstos a los que el sistema parece dispensar una protección más acentuada. Una interpretación más extensa es aquella que sitúa dentro de este colectivo a los trabajadores de edad superior a los 45 años, si bien diferencia entre aquellos mayores de 45 años y menores de 55 años y los que igualan o superan los 55 años de edad. Sin embargo, la falta de trabajo no solo incide en este grupo de edad – mayores de 55 –; todo apunta a que la edad se convierte cada vez

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más en una causa de perpetuación en la situación de desempleo y buena muestra de ello fue la modificación sufrida en la regulación del subsidio para personas trabajadoras mayores de 55 años en virtud de la cual se minora la edad para acceder al mismo a los 52 años habida cuenta de las dificultades para su reinserción en el mercado laboral.

La reincorporación al mercado de trabajo del mayor supone – en la mayoría de los casos – la adquisición de un conjunto de competencias transversales que doten al trabajador de las habilidades, actitudes y aptitudes necesarias para el desarrollo óptimo de su actividad y dentro de las cuales se encontraría el uso de las nuevas tecnologías como instrumento básico que aporta un elevado valor añadido. Está es quizá la primera y mayor dificultad para poder reinsertarse en el mercado de trabajo, pero no la única; a la digitalización cabe añadir los cambios tecnológicos que implican que la introducción de modificaciones de carácter técnico y organizativo a la hora de realizar estructuraciones de plantillas afecte especialmente a las personas trabajadoras de mayor edad pasando a ser la primera opción empresarial en las acciones de despido pese a contar con una elevada experiencia laboral. Esta carencia de competencias y habilidades que padecen con frecuencia los mayores de 55 años los sitúan en un plano de discriminación respecto de cuantos si las poseen lo que unido a una falta de capacidad en la búsqueda efectiva de empleo conduce inevitablemente a convertirlos en los denominados "parados de larga duración". Pese a este panorama poco halagüeño, la falta de conocimientos digitales no siempre desembocará en el despido ya que existe la oportunidad de mejorar las habilidades tecnológicas a través de la formación, constituyendo este además un derecho básico de los trabajadores (Requena Montes, 2019).

La otra cara de esta moneda viene dada por la configuración prestacional del trabajador maduro que parece haberse ido perfeccionando para dar cobertura a la situación vivida por el parado de larga duración y supone el acceso a la prestación contributiva de desempleo – siempre que se cubran los periodos de carencia establecidos – y posteriormente el paso a un subsidio de desempleo destinado a mayores de 52 años – si fuera necesario – o de 55 años, que han perdido su puesto de trabajo. La percepción de la prestación sustitutiva de rentas supone como ha sido reseñado haber sido expulsado del mercado de trabajo pero exige del cumplimiento de una serie de requisitos y compromisos básicos como es encontrarse en situación legal de desempleo, haber agotado la prestación contributiva o subsidiada de desempleo, o cumplir con el acuerdo de actividad en el que se establecen los derechos y obligaciones de ambas partes para incrementar la empleabilidad y que tendrá en cuenta a ciertos colectivos prioritarios, como es el de las personas trabajadoras maduras.

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2.2. Cese del trabajo por transición a la jubilación

La discriminación hacia los trabajadores mayores está arraigada en la cultura laboral, donde la edad se asocia a mayores costes de formación, salarios y beneficios. Por ello, muchas empresas optan por fórmulas que facilitan la salida temprana del trabajador, como expedientes de regulación de empleo, jubilaciones parciales y anticipadas, y prejubilaciones, especialmente en contextos de exceso de mano de obra.

Existe una evidente contradicción entre las normas que fomentan la prolongación de la carrera laboral y las acciones destinadas a facilitar jubilaciones tempranas si bien, garantizar la sostenibilidad de los sistemas de protección social precisa del equilibrio entre los activos cotizantes y los perceptores de prestaciones por jubilación, mediante la promoción del empleo de los trabajadores mayores, incentivando su permanencia o incluso su reincorporación al mercado de trabajo.

La participación en España de mayores de 50 años en el mercado laboral ha disminuido, en muchos casos, por el uso de mecanismos de jubilación anticipada y prejubilaciones; pese a todo, la prejubilación ofrece una transición menos traumática hacia el cese definitivo de la actividad laboral, combinando un subsidio con el aporte económico de la empresa, aunque no todos los trabajadores pueden acceder a ella.

La jubilación anticipada, ya sea voluntaria u obligatoria, puede reducir la cuantía de la pensión debido a coeficientes reductores, que varían según la voluntariedad, los meses de anticipación y los periodos de cotización. También se puede acceder a la jubilación anticipada por actividades laborales especialmente penosas, tóxicas o peligrosas, siempre que se cumpla con los requisitos de cotización y cese en el trabajo. Frente al abandono total del mercado de trabajo, podría ser beneficioso el sistema mixto que ofrece la jubilación parcial al combinar la reducción de la jornada laboral desde los 60 años con el mantenimiento del contrato de trabajo, lo cual permite al trabajador seguir cotizando. Esta modalidad puede incluir un contrato de relevo con otro trabajador, permitiendo mejorar el empleo existente o crear uno nuevo. En el caso de pasar de una jubilación parcial a una anticipada, se requiere cumplir con una serie de condiciones adicionales, como antigüedad, cotización mínima y un contrato de relevo equivalente al tiempo que falte para la jubilación ordinaria.

Lo cierto es que la expulsión de trabajadores mayores del mercado laboral puede ser una forma velada de discriminación. Pese a los esfuerzos del Tribunal Constitucional por proteger a este colectivo, los trabajadores mayores enfrentan dificultades de reincorporación en un entorno de constantes cambios tecnológicos y productivos. Las Directrices para el empleo del año

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2000 subrayaban la necesidad de apoyar a los trabajadores de más edad para prolongar su participación en la población activa. Esta idea sigue vigente en la UE en un contexto de envejecimiento poblacional.

La norma europea prohíbe la discriminación directa o indirecta por motivos de edad, pero permite diferencias de trato justificadas en políticas de empleo, formación y mercado laboral, siempre que se basen en objetivos legítimos. Esta protección incluye acceso al empleo, formación, condiciones laborales, remuneración y despido, aunque también permite diferencias de trato justificadas para modular el tránsito de la vida activa a la inactiva.

Sin embargo, estas justificaciones pueden ser utilizadas para acciones discriminatorias. La falta de formación continua puede causar ineptitud sobrevenida al final de la carrera laboral, lo que lleva a situaciones de desempleo de larga duración (Bentolila, García-Pérez, Jansen, 2018).

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Freedom and autonomy in telework in the EU

Sara Huybrechts[1]

1. Introduction

Even though telework has existed for a long time, it can be seen as part of the new ways of working. Under the influence of digitalization and globalization telework underwent a transformation, which implies that it will be utterly important for the future as a flexible work arrangement. Working with and through digital means enhances the possibility to work anytime, anywhere. This might entail that workers have the freedom to choose where and when to work. And in some instances they will even have the autonomy to choose the content of their work. Telework has thus led to the emergence of so-called "*autonomous work*"[2] which allows employees to work autonomously in a time- and place-independent manner, resulting in new challenges for the regulation of telework. Furthermore, it is possible for workers to have different degrees of autonomy or time and place independency depending on their activities or function, making it even more challenging to regulate this employment relationship.

In this paper, based on the presentation at the ISLSSL world conference in Rome of 2024, the autonomy of teleworkers is explored from a European regulatory perspective. The different aspects of autonomy and their interaction are analysed. Whereas some indications to autonomy are made in regulation, the way in which telework is approached does not take sufficiently into

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[2] Hendrickx F. (2018), "Regulating the new ways of working: from the new 'wow' to the new 'how'", *ELLJ*, p. 201.

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account the varying degrees in which teleworkers can perform their work autonomously. The main focus lies on the regulation of working time[3].

2. Telework in Europe

From a regulatory perspective, the European Framework Agreement on Telework of 2002 remains until now the main reference for regulating telework at the European level. In this Agreement, telework is defined as a form of organizing and/or performing work, using information technology in the context of an employment contract/relationship, where work, which could also be performed at the employer's premises, is carried out away from those premises on a regular basis. It hereby distinguishes itself from the pre-industrial practice of "homework" as discussed in the ILO Convention n. 177.

In this chapter it is argued that telework underwent a transformation or has been transforming throughout the years in the light of the new ways of working – in search for more flexibility and a better work-life balance but also in the war for talent to let capabilities, creativity and innovation come to the fore. This has happened by giving employees more freedom and trust, by letting them work from home or other locations, creating their own working individualized schedule and shaping their tasks. Therefore, telework is approach as a form of autonomous work, where a focus lies on autonomy, flexibility and the achievement of results, all made possible by using technology[4]. The degree of autonomy experienced by the employee is depending on the nature of the work and the arrangements between parties.

The possibility to work anytime, anywhere has a considerable impact on both the duration and the organization of working time according to Eurofound and the ILO[5]. The duration of the teleworkers working time is longer than those of workers who work at the premises of the employer. Their schedules become more irregular and make way for the performance of work outside the "traditional" business hours – work is performed in the evening and during the weekend. Technology facilitates permanent connectivity, which is very intrusive for the teleworker as there are no physical boundaries separating the workplace from the home.

[3] On the relation between working time and autonomy: Huybrechts S. (2023), "Working time and autonomy: lessons for the new ways of working", *ELLJ*, pp. 570-587.

[4] Katsabian T. (2021), "It's the end of working time as we know it – new challenges to the concept of working time in the digital reality", *McGill Law Journal*, 14.

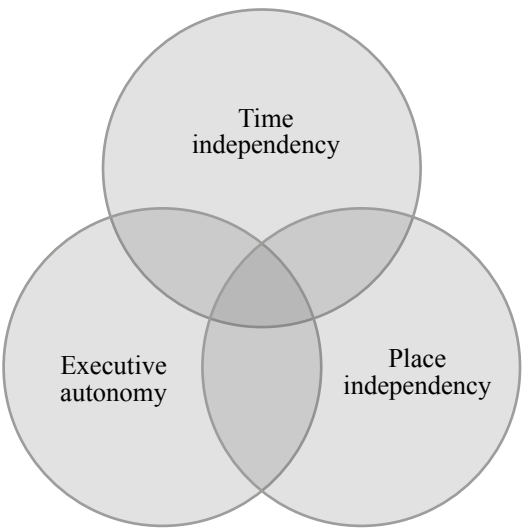
[5] EUROFOUND and ILO (2017), *Working anytime, anywhere: The effects on the world of work*, Luxembourg: Publications Office of the European Union, and Genève: International Labour Office, pp. 21-28.

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3. Autonomy and freedom

In the European Framework Agreement, several indications are already made with regard to the autonomy of the teleworker. In Article 3 the voluntary character of telework is explained, requiring mutual consent of the employer and employee. This principle actually entails the freedom of either party to consider telework or return to the employer's premises. An important reference on the autonomy of teleworkers is made in Article 9, where it is stated that the teleworker manages the organization of his/her working time. This Article implies that the teleworker has a certain amount of autonomy with regard to working time, however, how far this autonomy reaches is not clear. An interpretation guide of the Framework Agreement on Telework emphasized that no new employment status needs to be created for teleworkers as they are considered employees.

In practice, other elements of autonomy can be recognized in teleworkers. Therefore telework can be approached as a form of autonomous work. The characterization of autonomous work depends on three factors where each of these can occur to a varying degree. Autonomous work therefore comes in a variety of forms and shapes, depending on the elements related to freedom and autonomy that are present. The prevalence of only one of the three element can be enough for the work to be regarded as autonomous work. Even though some of these characteristics might challenge the nature of this work relationship, the autonomous worker is assumed to be an employee who is in a subordinate relationship with the employer. The spectrum of autonomous work can be envisioned by the graph below.



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The first characteristic is place independency which allows the employee to choose where to work. This element of autonomy results in the qualification of autonomous work as telework, given that telework is defined in the EFA as work that could be performed at the employers premises, but is carried out away from those premises. The location of the work could also differ based on the activity concerned or the arrangements made between the parties. Messenger and Gschwind refer to three locations in which telework can be performed[6]. The first location is the home of the teleworker. Remote work is often performed at home. Additionally it is possible to perform work from a third location. This can be a co-working space or a coffeehouse for example. Teleworkers with full place independency can also work in intermediary locations. Technology makes it possible to work anytime, anywhere, therefore also whilst travelling. Employees might attend meetings from the car, take calls in the train or read and answer e-mails while simply walking on the sidewalk. The degree to which extent an employee is time independent can of course be subject to agreements between them. Some employers only allow telework from the home location, whereas others draw the line in working abroad.

The second characteristic of autonomous work is executive autonomy, entailing autonomy in the performance of the work. This element includes that the employee can choose what to do and/or how to do it. Employees manage their own remit and are desired to take initiative or invent innovating solutions or work methods. A consequence of this element is that often the focus shifts to the achievement of a certain goal or the delivery of a result. This characteristic of autonomous work can again occur to a varying degree. However, Article 9 of the European Framework Agreement on Telework of 2002 states that the workload and performance standards of the teleworker should be equivalent to comparable workers. Furthermore, the fact that the autonomous worker receives executive autonomy, does not mean that the employer cannot exercise control or monitor his activities, albeit within the legal limits. Article 6 of the European Framework Agreement states that the employer should respect the privacy of the teleworker and if any kind of monitoring system is put in place, it needs to be proportionate to the objective and introduced in accordance with Directive 90/270 on visual display units.

The third characteristic is time independency: the employee can choose when to work. In light of autonomous work, it needs to be noted that time independency can take many forms. The main idea is that employees receive

[6] Messenger J., Gschwind L. (2016), "Three generations of telework: new ICTs and the (R)evolution from home office to virtual office", *New Technology, Work and Employment*, pp. 195-208.

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the flexibility to manage their own time, to work outside the traditional hours and break away from traditional fixed schedules. This element of autonomy is also foreseen in the European Framework Agreement on Telework in Article 9. There it is stated that within the framework of applicable legislation, collective agreements and company rules, the teleworker manages the organization of his/her working time. The meaning of this provision is not very clear, as it does not indicate the extent of the autonomy. The first part of the article "*within the framework of applicable legislation, collective agreements and company rules*" seems to suggest that the autonomy of the teleworker to organize his/her work can be restricted in a telework policy for example. On the other hand, this implies probably that the working time limits, as they are applicable on employees who work on the premises of the employers, are also applicable to the teleworkers. From a regulatory perspective, time independency is the most challenging characteristic as there are several rules and regulations to comply with as the interpretation of the Working Time Directive by the Court of Justice of the European Union and the Commission seems to impede the development of a growing time-independent mode of work.

4. Working time for autonomous workers

At the European level is the Working Time Directive[7] the main reference for regulating working time. Article 17 (1) of the Working Time Directive is referred to as the "*autonomous worker derogation*". This Article states that member states may derogate from some of the articles in the WTD when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves. In points a) to c) this Article lists by way of example categories of workers to which the autonomous worker derogation could be used, such as managing executives or other persons with autonomous decision-taking powers; family workers or workers officiating at religious ceremonies. The derogation allows to derogate from Articles 3 to 6, 8 and 16 of the Directive. This means that if the derogation is applicable, the working time limits are not applicable, neither are the mandatory rest periods. It also entails that there is no limit for night work and reference periods for the calculation of the limits can be altered. It therefore has a serious impact. Besides, Article 31.2 of the Charter of Fundamental Rights

[7] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

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of the European Union[8] guarantees the right to limitation of the maximum working hours and to daily and weekly rest periods for every worker.

It is important to take a closer look to this provision, as it is highly misunderstood and misused by wrongful implementation by the member states. Article 17 (1) of the Working Time Directive actually consists of two separate conditions which are not cumulative. The first criterium is activity-specific and therefore inherent to the activity that the worker performs – this can be derived from the statement: "*on account of the specific characteristics of the activity concerned*". In relation to the activity it is stated that the duration of the working time is not measured and/or predetermined. On the other hand, this sentence of the provision includes an employee-specific criterium, namely the fact that the duration of the working time can be determined by the workers themselves. It must be noted that workers can only be excluded from some of the provisions on working time listed in the Directive based on the activity-specific or employee-specific criterium.

In an interpretative document of 2023[9] the Commission has clarified that on the basis of this Article no whole category of workers can be excluded. According to the Commission it needs to be decided on a case-by-case basis, taking into account the actual performance of the work[10]. In addition, the working time as a whole should be unable to be measured or predetermined for the derogation to have effect. It is therefore not enough that a worker is only able to determine a part of their working time. The examples given in subsections a) to c) are non exhaustive, so the mentioned categories of workers are examples of categories that generally have a high degree of autonomy, but not all workers who fall under this categorization will qualify for the autonomous worker derogation.

To illustrate why the derogation is called misunderstood or misused in this chapter, some examples of implementation can be given. Instead of relying on the activity-specific or employee-specific criterium, member states have introduced alternative criteria, resulting in an unlawful exclusion of some workers from the rules regarding working time. In Belgium, for example, the derogation of Article 17 (1) WTD is used to excluded all teleworkers as a group from the working time limits[11], regardless of the actual performance

[8] Charter of Fundamental Rights of the European Union (2000/C-364/01) of 18 December 2000.

[9] Interpretative communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time (2023/C-143/06).

[10] Leccese V. (2023), "Monitoring working time and Working Time Directive 2003/88/EC: A purposive approach", *ELLJ*, p. 29.

[11] Article 3-*bis* Belgian Labour Act of 16 March 1971.

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of the work and whether or not the relevant criteria are met. The same is true for the group of management executives and counsellors, where the Belgian courts tend to taken into account a wrong criterium (namely the autonomous decision-making powers from the example in Article 17 (1), a) of the Working Time Directive)[12]. However, Belgium is not the only member state using an "alternative" benchmark to decide who is excluded from the rules regarding working time. In the Netherlands, workers are exempted as autonomous workers when they earn three times the minimum wage, whereas in Hungary they need to occupy a position of considerable importance or trust and receive a salary that is seven times the mandatory minimum wage[13].

Jurisprudence of the Court of Justice can also help to understand the derogation in light of autonomy. In the *Hälvä* case of 2017[14], Article 17 (1) of the Directive was applied to employees who acted as "relief parents", a kind of replacement parents when foster parents became absent. These relief parents lived with the children and were responsible for their care and all related household tasks, with the ability to organize the day as they seemed fit, albeit within the limits imposed by the needs of the children. The Court of Justice decided that even though they had a certain degree of autonomy, they were not free to determine the number of hours they worked during those periods. Freedom of organization in both the quantity and the scheduling is therefore important in determining whether a worker falls within the scope of the derogation. The Court hereby creates a very high threshold for the derogation to apply. Only autonomous workers at the very end of the spectrum can therefore be excluded from the working time limits.

Lastly, the jurisprudence of the Court of Justice has also impacted the measurement of working time. In 2019, the Court made an important statement when it comes to the recording or measuring of working time. Working time fulfils several functions in labour law, such as the delineation between work and private life, the protection of health and safety by setting limits and in several instances it is decisive for the measurement of work itself and its remuneration. The Court of Justice decided in the CCOO-case[15] that, for the Directive to have a useful effect, the number of hours worked

[12] Cass. 29 March 2010, JTT 2011, 333; Arbh. Brussel 24 October 2008, AR.nr.49.934, juportal.be; arbh. Brussel 5 January 2010, AR.2008/AB/51665, juportal.be.

[13] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation by the Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time, COM (2023) 72, 7.

[14] CJEU 26 July 2017, C-175/16 ECLI:EU:C:2017:617, *Hälvä*.

[15] CJEU 14 May 2019, C-55/18, *Federación de Servicios de Comisiones Obreras (CCOO)/Deutsche Bank SAE*.

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each day should be measured for each employee by an objective, reliable and accessible system set up by the employer. This obligation is bound to Articles 3, 5 and 6 of the Working Time Directive and is therefore not applicable to employees who fall under the autonomous worker derogation. For other workers on the spectrum – those with (limited) time independency, but to whom the derogation does not apply due to the high threshold – the obligation to provide an objective, reliable and accessible system to measure the working time of each employee still applies.

5. Conclusion

Autonomy is inherent to telework, but to varying decrees, as illustrated by the graph representing a spectrum. For the regulation of this challenging employment relationship individualisation is key: there is no one-size-fits-all for the telework case. The European Framework Agreement on Telework of 2002 seems to recognize this, as it allows individualization by adding ambiguity to the provisions. Nevertheless, it is utmost important for the protection of the autonomous worker that some aspects are clarified in a telework policy or in a telework agreement.

The three characteristics of autonomous work are challenging the rules and regulations in labour law. Yet, time independency seems to create the biggest challenge of all. As set out above, there is a very high threshold for derogation from the working time limits to apply, which means that there is a very high level of protection. However, as article 17 (1) of the Working Time Directive is highly misunderstood and incorrectly implemented in several member states, workers may often not experience this protection. At the same time Article 17 (1) is also a useful recognition of the fact that autonomy can be part of the employment relationship. Even at the outer end of the telework spectrum, when an autonomous worker has full time independency.

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The right to a fair remuneration in the catholic social teaching

Michel Martone[1]

1. Work as an expiation of sin in the Bible

The obligation to pay a remuneration has always been connoted with a strong ethical charge, given that already in the Bible the condemnation "*cursed be the earth in thy labor; thou shalt eat of it in toil all the days of thy life by the sweat of thy brow*"[2] was countered by certain moral obligations of the employer relating to the payment of the remuneration, such as those found in the Old and New Testaments: "*woe to him who makes his neighbor work without giving him wages*"[3], "*at his day thou shalt give him his hire, neither shall the sun go down upon it*"[4], or "*you shall not withhold the wages of the laborer in your service until the next day*"[5], or even "*the laborer is worthy of his wages*"[6].

And it is crystal clear that in the Bible, while there was a concern to ensure fair wage guarantees for the worker, the discipline of remuneration was marked by a conception of work as expiation of sin or punishment and therefore as toil, with clear reflections and influences from the Roman conception of "labor".

A conception that has lasted for millennia and has not even been affected by Protestant thought, despite the undoubted centrality assigned to work by Calvin, who has always confined remuneration among the boundaries of free consent and negotiation.

[1] Full Professor of Labour Law and Industrial Relations, Sapienza University.
[2] *Genesis*, 3:17-19.
[3] *Jeremiah*, 22:13-14.
[4] *Deuteronomy*, 24:15.
[5] *Luke*, 19:13.
[6] *Luke*, 10:7.

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2. The centrality of the dignity of the worker in the encyclical *Rerum Novarum*

These biblical precepts were followed in the late nineteenth century by Pope Leo XIII's recall, as relevant as ever for the times, of the employer's duty to pay the worker a "fair remuneration".

Starting with the encyclical *Rerum Novarum*, the theme of a fair remuneration was in fact placed at the centre of the Church's social teaching[7] to emphasize how this issue could not be left to free market forces alone[8].

For the very first time the Rerum Novarum marks the affirmation, even within the Catholic teaching, of a new and more advanced conception of work, not as a condemnation but as an instrument of fulfillment of the person, that entitles the person to a wage that begins to be qualified as fair.

To this end, it recognizes that "*to defraud any one of wages that are his due is a great crime which cries to the avenging anger of Heaven*"[9] because "*to exercise pressure upon the indigent and the destitute for the sake of gain, and to gather one's profit out of the need of another, is condemned by all laws, human and divine*"[10].

The encyclical thus identifies work as the instrument of liberation from need and for the first time establishes a moral obligation of the State to ensure the payment of just wages and temper the bronze law of wages[11].

As "*wages ought not to be insufficient to support a frugal and well-behaved wage-earner*", the encyclical clarifies that the remuneration established by free agreement in not anymore sufficient and it is society and boards duty to provide for a solution[12].

[7] On labour law in the Catholic Social Teaching see: Bell M. (2023), *Catholic Social Teaching and Labour Law: An Ethical Perspective on Work*, OUP; Beckett P. (2021), *Labour Rights and the Catholic Church. The International Labour Organisation, the Holy See and Catholic Social Teaching*, Routledge.

[8] Pope Leo XIII, *Rerum novarum: On Capital and Labor* (1891), no 20: "*His great and principal duty is to give everyone what is just*".

[9] Ivi: "*To defraud any one of wages that are his due is a great crime which cries to the avenging anger of Heaven. 'Behold, the hire of the laborers* […] *which by fraud has been kept back by you, crieth; and the cry of them hath entered into the ears of the Lord of Sabaoth'*".

[10] Ivi: "*Before deciding whether wages axe fair, many things have to be considered; but wealthy owners and all masters of labor should be mindful of this – that to exercise pressure upon the indigent and the destitute for the sake of gain, and to gather one's profit out of the need of another, is condemned by all laws, human and divine*".

[11] On the role of the bronze law of wages that postulates an inversely proportional relationship between wage levels and employment rates see Martone M. (2019), *A che prezzo*, Roma: LUISS.

[12] *Rerum novarum: On Capital and Labor* (1891), no 45: "*Let the working man and the*

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At the same time the Rerum Novarum already introduces some fundamental principles, which significantly will return in the Italian Constitution and will be the core of fair remuneration[13], such as the concept of sufficiency, as well as that of proportionality of wage, as "*man's labor is necessary; for without the result of labor a man cannot live, and self-preservation is a law of nature* […] *Together with the personal element in a man's work, we consider the fact that work is also necessary for him to live*"[14].

These provisions reflect a conception of work as a personal and necessary matter, so that wages must respect the natural right of every worker to procure what is necessary to live.

employer make free agreements, and in particular let them agree freely as to the wages; nevertheless, there underlies a dictate of natural justice more imperious and ancient than any bargain between man and man, namely, that wages ought not to be insufficient to support a frugal and well-behaved wage-earner. If through necessity or fear of a worse evil the workman accept harder conditions because an employer or contractor will afford him no better, he is made the victim of force and injustice. In these and similar questions, however – such as, for example, the hours of labor in different trades, the sanitary precautions to be observed in factories and workshops, etc. – in order to supersede undue interference on the part of the State, especially as circumstances, times, and localities differ so widely, it is advisable that recourse be had to societies or boards such as We shall mention presently, or to some other mode of safeguarding the interests of the wage-earners; the State being appealed to, should circumstances require, for its sanction and protection".

[13] There is a value direction that permeates Article 36 Const.: to subtract the determination of wages from the pure and simple laws of the market, given that, through reference to the principles of sufficiency and proportionality, the constitutional precept recognizes two profiles of specialty of wages with respect to the consideration benefits of exchange relationships, the one relating to the determination of the quantum of wages and the one pertaining to the link between this and the performance of work, which, in turn, is inseparable from the person of the worker. On this aspect Martone M. (2019), *A che prezzo*, cit., pp. 24-25.

[14] *Rerum novarum: On Capital and Labor* (1891), no 44: "*A man's labor necessarily bears two notes or characters. First of all, it is personal, inasmuch as the force which acts is bound up with the personality and is the exclusive property of him who acts, and, further, was given to him for his advantage. Secondly, man's labor is necessary; for without the result of labor a man cannot live, and self-preservation is a law of nature, which it is wrong to disobey. Now, were we to consider labor merely in so far as it is personal, doubtless it would be within the workman's right to accept any rate of wages whatsoever; for in the same way as he is free to work or not, so is he free to accept a small wage or even none at all. But our conclusion must be very different if, together with the personal element in a man's work, we consider the fact that work is also necessary for him to live: these two aspects of his work are separable in thought, but not in reality. The preservation of life is the bounden duty of one and all, and to be wanting therein is a crime. It necessarily follows that each one has a natural right to procure what is required in order to live, and the poor can procure that in no other way than by what they can earn through their work*".

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3. Quadragesimo anno and the liberation of the worker and the family from need

Forty years later, the basic principles of Rerum Novarum concerning the fair remuneration are further developed in the encyclical Quadragesimo anno, in which wages take on an additional function, not only to free the worker from need but also to support his family[15]. We are well above the contractual scheme.

And it is significant to note that Quadragesimo anno prescribes that the conditions of the company should also be taken into account when determining pay[16], which means to consider the need of the enterprise to find its balance.

This idea fifteen years later will instead remain external to the Italian Constitution, that will treasure only the principles of proportionality and sufficiency in art. 36 of the Constitution, which recognizes that "*a worker has the right to wages proportionate to the quantity and quality of his or her work and in any case sufficient to ensure a free and dignified existence for himself or herself and his or her family*".

Thus Article 36 of the Italian Constitution, with an open formula, limits itself to the establishment of a fundamental principle of value, compatible with all political inspirations and, therefore, with all wage policies: namely, that remuneration must be proportional to the quantity and quality of work performed and in any case sufficient to guarantee the worker and his or her family a decent existence[17].

[15] Pope Pius XI, *Quadragesimo anno: On Reconstruction of the Social Order* (1931), n. 69: "*The worker must be paid a wage sufficient to support him and his family. That the rest of the family should also contribute to the common support, according to the capacity of each, is certainly right, as can be observed especially in the families of farmers, but also in the families of many craftsmen and small shopkeepers. But to abuse the years of childhood and the limited strength of women is grossly wrong. Mothers, concentrating on household duties, should work primarily in the home or in its immediate vicinity*".

[16] *Quadragesimo anno: On Reconstruction of the Social Order* (1931), n. 70: "*In determining the amount of the wage, the condition of a business and of the one carrying it on must also be taken into account; for it would be unjust to demand excessive wages which a business cannot stand without its ruin and consequent calamity to the workers. If, however, a business makes too little money, because of lack of energy or lack of initiative or because of indifference to technical and economic progress, that must not be regarded a just reason for reducing the compensation of the workers. But if the business in question is not making enough money to pay the workers an equitable wage because it is being crushed by unjust burdens or forced to sell its product at less than a just price, those who are thus the cause of the injury are guilty of grave wrong, for they deprive workers of their just wage and force them under the pinch of necessity to accept a wage less than fair*".

[17] In the end, this is the reason why the Constitution refers to general criteria, such as those of sufficiency and proportionality, suitable rather to express a collective aspiration to be

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4. Social peace and the role of collective bargaining: from the encyclical *Mater et Magistra* to the encyclicals *Laborem Exercens* and *Centesimus annus*

In 1961 with the encyclical *Mater et Magistra*[18], Pope John XXIII returned to the matter of fair remuneration to emphasize the social value of wages, which became functional to the peaceful coexistence of fellow citizens[19].

For this reason, the determination of remuneration cannot be left to market laws or arbitrariness but must be done according to justice and equity with the intervention of the State, if needed[20].

A recall that over the years has unfortunately very often been overwhelmed by the multiple tensions that bring remuneration downward, most recently and above all that of the globalization of the economy and that of the consequent crisis of the middle classes resulting from the phenomena of the precarization of work and the growing spread of "work poverty"[21].

The last encyclical that deals directly with the issue of fair remuneration is Pope John Paul II's *Laborem Exercens*[22], according to which fair remuneration not only is central to the verification of justice in labour

reversed through collective bargaining than to make selective evaluations among mechanisms for determining pay. In this sense, on all Dell'Olio M. (1995), "Retribuzione, quantità e qualità di lavoro, qualità di vita", *Arg. dir. lav*., 2, p. 9 ff.; Ichino P. (2010), "La nozione di giusta retribuzione", *Riv. it. dir. lav*., 1, p. 719 ff. For the different orientation according to which the one enshrined in Article 36, rather than a principle, would be a rule, see Ballestrero M.V. (2019), "Retribuzione sufficiente e salario minimo legale", *Riv. giur. lav*., 2, p. 235 ff.

[18] Pope Saint John XXIII, *Mater et magistra: On Christianity and Social Progress* (1961).

[19] Please note that the same call for justice and fairness in wage determination is briefly contained in the subsequent encyclical *Pacem in terris* (1963).

[20] *Mater et magistra: On Christianity and Social Progress* (1961) n. 71: "*We therefore consider it Our duty to reaffirm that the remuneration of work is not something that can be left to the laws of the marketplace; nor should it be a decision left to the will of the more powerful. It must be determined in accordance with justice and equity; which means that workers must be paid a wage which allows them to live a truly human life and to fulfill their family obligations in a worthy manner. Other factors too enter into the assessment of a just wage: namely, the effective contribution which each individual makes to the economic effort, the financial state of the company for which he works, the requirements of the general good of the particular country – having regard especially to the repercussions on the overall employment of the working force in the country as a whole – and finally the requirements of the common good of the universal family of nations of every kind, both large and small*".

[21] On work poverty see, most recently, Brollo M., Zoli C., Lambertucci P., Biasi M. (2024), *Dal lavoro povero al lavoro dignitoso. Politiche, strumenti, proposte*, Bergamo.

[22] On the encyclical *Laborem exercens* and the industrial culture see Mengoni L. (2004), "L'enciclica *Laborem Exercens* e la cultura industrial", in Mengoni L., Napoli M. (eds.), *Luigi Mengoni. Il lavoro nella dottrina sociale della Chiesa*, Vita e Pensiero, p. 47.

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relations but it is the instrument for measuring the degree of social justice of the entire socio-economic system which is now facing the problem of technological evolution and the progressive divide between the humanistic logic of *homo sapiens*, which believes in values, and the technocratic logic of *homo faber*, which trusts only results[23].

This encyclical in fact reaffirms the need to protect the humanistic principle in considering work in the technological era. And it is very important to highlight how wages are also understood as a tool for promoting social peace with the fundamental help of trade unions.

So based on the principles affirmed in his encyclicals, Pope John Paul II issues an appeal for a global coalition in favour of "decent work" supporting the strategy of the International Labour Organization to guarantee a decent work for families in every Country of the world[24].

This is a beginning of a new series of encyclicas which have started to tackle the issue of the technological and technocratic evolution of capitalism to reaffirm the need of humanistic values, among which fair remuneration.

A century after *Rerum Novarum*, in the encyclical *Centesimus Annus*[25] Pope John Paul II recalls the principles affirmed by Pope Leo XIII but also recognizes the fundamental function performed by trade unions and collective bargaining in defining fair remuneration[26], in balancing living time and working time and in ensuring the right to express one's own personality at the work place[27].

[23] Pope Saint John Paul II, *Laborem exercens: On Human Work* (1981), n. 19: "*The key problem of social ethics in this case is that of just remuneration for work done.* […] *Whether the work is done in a system of private ownership of the means of production or in a system where ownership has undergone a certain 'socialization', the relationship between the employer (first and foremost the direct employer) and the worker is resolved on the basis of the wage, that is through just remuneration for work done.* […] *The justice of a socioeconomic system and, in each case, its just functioning, deserve in the final analysis to be evaluated by the way in which man's work is properly remunerated in the system*".

[24] On decent work see Boscati A. (2024), *Il decent work nel Quadro costituzionale*, in Brollo M., Zoli C., Lambertucci P., Biasi M. (eds.), *Dal lavoro povero al lavoro dignitoso. Politiche, strumenti, proposte*, Bergamo, p. 6 ff.

[25] On work and the principles recognized in the Centesimus annus encyclical see Pessi R. (1991), "Il Diritto del Lavoro e della Previdenza Sociale nell'Enciclica *Centesimus Annus* di Giovanni Paolo II", *Dir. Lav*., I, p. 398 ff.

[26] Pope Saint John Paul II, *Centesimus annus: On the Hundredth Anniversary of Rerum Novarum* (1991), n. 15: "*Rerum novarum points the way to just reforms which can restore dignity to work as the free activity of man. These reforms imply that society and the State will both assume responsibility, especially for protecting the worker from the nightmare of unemployment.* […] *The role of trade unions in negotiating minimum salaries and working conditions is decisive in this area*".

[27] Ivi: "*This is the place to mention once more the role of trade unions, not only in negotiating contracts, but also as 'places' where workers can express themselves. They serve*

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5. Fair remuneration as an instrument for the realization of human dignity on a global level

Over the past few years first Pope Benedict XVI and then Pope Francis have returned to the subject of the fair remuneration, which in the encyclical *Laudato Si'* is linked to that of the dignity of work and to that of the environmental and social sustainability.

In continuity with the encyclicals *Laborem exercens* and *Centesimus Annus*[28], the issue of fair remuneration and decent work becomes a worldwide problem with the encyclical Caritas in veritate[29], with which Pope Benedict XVI addresses the problem of globalization and, somehow trying to prevent the problem of social dumping between Countries, advocates a new conception of work and remuneration, that becomes an instrument for the realization of human dignity on a global level and states an important definition of decent work[30].

While Pope Benedict XVI sought to affirm fair work and fair remuneration in the context of globalization, with his encyclical *Laudato Si'* Pope Francis criticizes company efficiencyism and the replacement of man by machine[31], condemning the tendency that has emerged in globalization to place man against machine in order to reduce wages[32].

the development of an authentic culture of work and help workers to share in a fully human way in the life of their place of employment".

[28] On the principles affirmed in the two encyclical and on the recall to the principles of the *Rerum Novarum* see Vallebona A. (2003), "Le tre condanne delle Encicliche sociali: liberismo, marxismo, consumismo", *Il Diritto del lavoro*, 4, 1, p. 367 ff.

[29] On the effects on work of the encyclical see Vallebona A. (2009), "'Caritas in veritate' e diritto del lavoro", *Rivista italiana di diritto del lavoro*, 4, 1, p. 439 ff.

[30] Pope Benedict XVI, *Caritas in veritate: On Integral Human Development in Charity and Truth* (2009), n. 63: "*Work that is freely chosen, effectively associating workers, both men and women, with the development of their community; work that enables the worker to be respected and free from any form of discrimination; work that makes it possible for families to meet their needs and provide schooling for their children, without the children themselves being forced into labour; work that permits the workers to organize themselves freely, and to make their voices heard; work that leaves enough room for rediscovering one's roots at a personal, familial and spiritual level; work that guarantees those who have retired a decent standard of living*".

[31] In the context of the digitalization of work, on the threatening possibilities of the gig economy as the future of work and on the relevance of the teaching of Pope Leo XIII and his successors see Himes K.R. (2020), "Work in Roman Catholic Though", *American Journal of Economics and Sociology*, 79, 4.

[32] Pope Francis (2015), *Laudato Si'*, n. 128: "*Yet the orientation of the economy has favoured a kind of technological progress in which the costs of production are reduced by laying off workers and replacing them with machines. This is yet another way in which we*

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The encyclical thus affirms the powerful need to counter poor work and to invest in the training of people because in Pope Francis' thinking work has now become an instrument for the fulfillment of the dignity of the person[33].

The same principles are recalled in the subsequent encyclical Fratelli Tutti, by which Pope Francis not only denounces that we live in a "throwaway world" that aims at reducing production costs without concern of the employment consequences[34]. But it also reminds that work liberates man and enables the fulfilment of the person only if it is dignified by a fair remuneration[35].

6. Conclusions

In conclusion, the issue of fair remuneration is as present today as it was a hundred years ago.

The social injustice and inequality, not only of remuneration, when it fails to recognize the value of each person in his or her work and when it places humans against humans and humans in competition with machines, risks to undermine – today as it did in the late XIX century – the foundations and

can end up working against ourselves. The loss of jobs also has a negative impact on the economy 'through the progressive erosion of social capital: the network of relationships of trust, dependability, and respect for rules, all of which are indispensable for any form of civil coexistence".

[33] Ivi: "*We were created with a vocation to work. The goal should not be that technological progress increasingly replace human work, for this would be detrimental to humanity. Work is a necessity, part of the meaning of life on this earth, a path to growth, human development and personal fulfilment. Helping the poor financially must always be a provisional solution in the face of pressing needs. The broader objective should always be to allow them a dignified life through work*".

[34] Pope Francis (2020), *Fratelli tutti*, n. 20: "*This way of discarding others can take a variety of forms, such as an obsession with reducing labour costs with no concern for its grave consequences, since the unemployment that it directly generates leads to the expansion of poverty*".

[35] Ivi, n. 162: "*The biggest issue is employment. The truly 'popular' thing – since it promotes the good of the people – is to provide everyone with the opportunity to nurture the seeds that God has planted in each of us: our talents, our initiative and our innate resources.* […] *Since production systems may change, political systems must keep working to structure society in such a way that everyone has a chance to contribute his or her own talents and efforts.* […] *In a genuinely developed society, work is an essential dimension of social life, for it is not only a means of earning one's daily bread, but also of personal growth, the building of healthy relationships, self-expression and the exchange of gifts. Work gives us a sense of shared responsibility for the development of the world, and ultimately, for our life as a people*".

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functioning of our society and more generally of our economic system in this global age[36].

A teaching that has finally been made its own by the European Union, which, overcoming the traditional reluctance that since the Treaty on the Functioning of the European Union had precluded it from having any competence in remuneration matters, has finally intervened with the issuance of the new Directive EU 2022/2041 on the subject of adequate minimum wages in the European Union[37].

[36] On the role of Catholic Social Teaching in a changing world of work see, most recently, Pessi R. (2020), "Riflessioni sul lavoro nel mondo che cambia, alla luce della dottrina sociale della Chiesa", in Aa.Vv., *"Servi inutiles sumus" – Studi in memoria di S.E. Mons. Giorgio Corbellini*, Vatican City, 2020, p. 345 ff.

[37] On minimum wages in Italy see M. Martone (2022), *L'emergenza retributiva tra riforma della contrattazione collettiva e salario minimo legale*, in *Lav. dir. eur.,* 2 ff.; T. Treu (2021), *Impasse regolativa della rappresentatività degli attori negoziali: riuscirà la direttiva europea sul salario minimo a sbloccarla?*, in *Lav. dir. eur.*, 3 and Id. (2021), *La proposta sul salario minimo. La nuova politica della Commissione Europea*,in DRI, p. 1 ff.

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Is closing the gender gap through remote work a possible path? The EU agreements have their say

Marianna Russo[1]

1. Introduction

The current global labour force participation rate for women is just under 47%, while for men, it is 72%[2]. The difference of 25 percentage points – more than 50% in some regions – represents the gender divide at work.

From an economic perspective, reducing the gender gap in labour force participation could substantially boost global gross domestic product (GDP); from a broader point of view this imbalance may generate social inequality with serious consequences at both collective and individual levels, such as gender pension gaps and greater risk of old-age poverty for women, unequal wealth distribution and low female participation in decision-making. From a strictly legal standpoint, this gender divide at work may concurrently be a cause and an effect of gender discrimination and non-compliance with fair and decent working conditions (gender pay gap, high rates of women in non-standard jobs, lower presence of women in top professional roles, critical issues in work-life balance, unpaid care work, and violence and harassment at work).

Furthermore, during the Covid-19 pandemic, the situation has further worsened. The socioeconomic effects of the health emergency hit women more severely than their male colleagues, as attested by the higher unemployment levels, the greater exposure to the virus due to the overrepresentation of women in positions requiring physical contact, and the explosion in the number of requests for assistance in cases of domestic violence[3].

[1] University of Campania "Luigi Vanvitelli", Italy.

[2] See *webapps.ilo.org/infostories/en-GB/Stories/Employment/barriers-women#bridging-gap*.

[3] Buzmaniuk S. (2023), "Gender equality in Europe: a still imperfect model in the world", *European Issues*, 2023, p. 1; EIGE (2023), *Evidence to Action: Gender equality and gender mainstreaming in the Covid-19 recovery*, Publications Office of the European Union, p. 11.

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Even though overall gender equality remains better in the EU than anywhere else in the world[4], the gender gap in the labour force within EU countries is not very different from that described worldwide, as attested by the European Commission[5]. Despite progress over generations, women remain underrepresented in the European labour market. In 2021, 67.7% of women were employed, whereas men's employment stood at 78.5%.

This gender inequality in the labour market is a critical issue to be addressed seriously, *a fortiori* because demographically women are not a minority. Statistical data show that on January 1st, 2020 there were 219 million men and 229 million women in the EU, which means there were 4.7% more women than men[6] and this figure is expected to increase[7].

2. The EU legal framework on the gender equality

It is clear that in Europe there are persistent challenges in achieving gender equality despite significant advancements in recent decades. Lower female participation is still a consequence of social and cultural factors, prejudices and stereotypes. This is a fundamental challenge to face in order to ensure equality between men and women in all areas, including employment, work and pay. Nevertheless, gender equality is a fundamental right and is one of the core values of the EU, as attested by the numerous legal provisions on the matter. It is enshrined in art. 2[8] and 3(3)[9] of the Consolidated version of the Treaty on European Union, in art. 8[10] of the Treaty on the Functioning of

[4] 14 of the top 20 countries worldwide on gender equality are EU Member States, as attested by the European Commission's Communication "A Union of Equality: Gender Equality Strategy 2020-2025", 5.03.2020, in *eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0152*.

[5] See *commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/women-labour-market-work-life-balance/womens-situation-labour-market_en*.

[6] See *www.istat.it/demografiadelleuropa/bloc-1b.html?lang=it#:~:text=Quasi%20il%205%20%25%20in%20pi%C3%B9,in%20pi%C3%B9%20rispetto%20agli%20uomini*.

[7] See *www.europarl.europa.eu/EPRS/graphs/2021-Demography_IT.pdf*.

[8] "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*".

[9] "*It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men*".

[10] "*In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women*".

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the European Union, and in art. 21[11] and 23[12] of the Charter of Fundamental Rights.

Over time the EU has adopted several directives on equality between women and men at work, covering all the most significant aspects of the employment relationship, such as Directive 2006/54/EC on equal opportunities and the equal treatment of women and men in employment and occupation, which requires the implementation of the prohibition of direct and indirect sex discrimination. There is Directive 79/7/EEC and Directive 2010/41/EU, on equal treatment for men and women in matters of social security and in self-employed activities, and Directive 92/85/EEC, which aims to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. There is the Work-life Balance Directive[13], with the aim of helping working parents and careers reconcile work and family responsibilities through family-related leave and flexible working arrangements to increase the participation of women in employment.

More recently, the Pay Transparency Directive[14] was approved in order to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through enforcement mechanisms, putting into practice art. 157 of the Treaty on the Functioning of the European Union[15].

Even if not strictly related to employment, two other milestone achievements on the path of gender equality have been accomplished. In November 2022 the Directive on gender balance in corporate boards was adopted as an efficient instrument for enhancing the presence of women in decision-making in the largest listed companies within EU countries. Furthermore, in March 2022 a proposal for a directive on combating violence against women and domestic violence was presented by the European Commission.

The latest directives on the matter are the fruit of the European Commission's Gender Equality Strategy 2020-2025. This strategy pursues a

[11] "*Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited*".

[12] "*Equality between women and men must be ensured in all areas, including employment, work and pay*": art. 23 (1) CFR.

[13] Directive 2019/1158/EU.

[14] Directive 2023/970/EU.

[15] "*Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied*": art. 157(1).

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dual approach, combining gender mainstreaming and specific measures for the advancement of women, to ensure better policy making and better use of resources. Furthermore, the European Commission aims to outline gender equality policies from an intersectional perspective. Intersectionality[16] is a cross-cutting principle, which takes into consideration multiple factors of discrimination that can affect the same person: not only gender, but also age, race, sexual orientation, disability, etc. Women are a heterogeneous group and may face intersectional discrimination based on several personal characteristics.

The goal is a Union where women and men, in all their diversity, are free to pursue their chosen path in life, have equal opportunities to thrive, and can equally participate in and lead European society[17].

Despite this accurate regulatory framework, gender inequalities have persisted. Gender gaps still exist in employment, entrepreneurship and public life, even though women surpass men in terms of educational attainment[18].

3. Remote work from a gender perspective

In the midst of the digital transition – one of the most relevant transformations in society – verifying whether and how digitalisation can bridge the gender divide at work is fundamental.

As stated, "*the relationship between innovation and employment is a 'classical' controversy, where a clash between two views can be singled out*"[19]. Indeed, remote work[20], which is one of the most relevant and common examples of technologies applied to work, is controversial because, at the same time, it has a lot of potential advantages and numerous disadvantages. On one hand, it may be a better way to balance professional and personal

[16] The term was coined by Kimberlé Crenshaw: Crenshaw K. (1989), "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", *University of Chicago Legal Forum*, n. 1, p. 139.

[17] See *commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/gender-equality-strategy_en*.

[18] See OECD (2017), *The Pursuit of Gender Equality. An Uphill Battle*, Paris: OECD Publishing.

[19] Van Roy V., Vértesy D., Vivarelli M. (2018), "Technology and employment: Mass unemployment or job creation? Empirical evidence from European patenting firms", *Research Policy*, 47, p. 1762.

[20] Even though remote work covers a wide and fast-evolving range of circumstances and practices, it is above all a way of carrying out working performance outside company premises. In practice, remote workers complete their duties outside of a traditional office environment, generally using technological tools.

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life, by reducing commuting time and consequent stress. It is also a tool for promoting inclusion in the labour market since working remotely increases the accessibility of employment for mothers and persons with disabilities. On the other hand, it raises a number of issues regarding labour rights, psychosocial risks, social protections, and extensive technological unemployment[21].

Furthermore, from a gender perspective, it is important to highlight how statistical data show that it is primarily women working from home and this could increase the gap between male and female workers in the office, strengthening gender stereotypes and relegating women "to the home", where they can become crushed by the difficulty of combining remote work with caring for their homes and children[22].

Another aspect to consider is the growing number of episodes of domestic violence against remote workers engaged in homework. International statistical data indicate an increase precisely in the two-year period harshly marked by the pandemic experience. Restrictions on freedom of movement during the pandemic and the consequent need for remote work carried out from one's private home have had the side effect of a significant increase in the number of domestic violence[23]. Domestic violence means violence that occurs within the family unit, regardless of the actual existence of biological or legal ties. Victims are generally women[24], as this type of violence has its roots in gender inequality and in models of coercion and control towards them. It is a serious violation of the right to life and integrity of the human person. For many female workers who are victims of violence, the workplace represents a safe refuge for at least part of the day. If the dividing line between workplace and home disappears due to the adoption of remote working methods, even the only possible escape disappears.

Therefore, working remotely can become a double-edged sword for women.

[21] OECD (2016), *Automation and independent work in a digital economy*, in *www.oecd.org*; McAfee A., Brynjolfsson E. (2016), *The Second Machine Age: Work, Progress, and Prosperity in a time of brilliant technologies*, New York.

[22] Arabadjieva K., Franklin P. (2023), "Home-based telework, gender and the public-private divide", in Countouris N., De Stefano V., Piasna A., Rainone S. (eds.), *The future of remote work*, Brussels: ETUI, p. 61.

[23] Harvey R. (2021), *The ignored pandemic. The dual crises of gender-based violence and Covid-19*, in *www.oxfam.org*.

[24] It is appropriate to clarify that potential victims of domestic violence can also be men, elderly people, minors, LGBTIQ (lesbian, gay, bisexual, transgender, non-binary, intersex and queer) people.

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4. The key role of the EU social dialogue

Even though European provisions exist to protect women's rights and promote gender equality within the European Union, translating these normative provisions into tangible societal changes requires concerted efforts across various sectors, including social dialogue. Indeed, communication and negotiation among governments, employers, workers, and other stakeholders play a pivotal role in shaping attitudes, policies, and practices capable of responding to the needs of enhancing gender-sensitive solutions. From this perspective, the EU social partners[25] could play a key role in improving working conditions of remote workers in order to promote gender equality.

Social dialogue between workers' and employers' representatives is a key component of the European social market economy[26] and the Treaty on the Functioning of the European Union states that its promotion is one of the common objectives of the European Union and the Member States[27]. As provided for by art. 155 TFEU, agreements concluded at Union level are called to co-design with the European Commission and national governments balanced measures to create an enabling environment for enterprises and better living and working conditions.

When remote work was still a niche topic, the first fruit of the social dialogue on the matter was the Framework Agreement on telework signed on the 16th of July 2002.

During a consultation with social partners on modernising and improving employment relations, the European Commission invited them to start negotiations on telework. The items on the agenda were the following: identifying flexible working arrangements, making undertakings productive and competitive, and achieving the necessary balance between flexibility and security. This framework agreement was the tangible outcome of their collective bargaining. It is important to highlight that the EU social partners were far-sighted because, at the time, digitalisation applied to work was still taking its first steps[28].

[25] The term "European social partners" specifically refers to those organisations at EU level which are engaged in European social dialogue, provided for under artt. 154 and 155 of the Treaty on the Functioning of the European Union (TFEU). They are representatives of management and labour (both, employer organisations and trade unions).

[26] European Commission (2016), *The role of social partners in the design and implementation of policies and reforms*, Brussels, p. 1.

[27] Art. 151 TFEU.

[28] According to the impact assessment conducted in 2008 by the EU Commission, the Framework Agreement on Telework "may be considered a success" because the instruments chosen and the level of protection and guidance provided by them are deemed adequate in the

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According to the EU social partners remote work could be a win-win strategy as it increases productivity and work-life balance at the same time. For that reason, they paid great attention to its regulation[29], especially regarding the most critical aspects, such as health and safety[30], data protection and privacy[31], and collective rights[32]. However, in the Framework Agreement on Telework there are no direct references to gender equality. At that time the situation of remote workers had not yet analysed from a gendered perspective, and, in any case, the number of workers involved in remote work was negligible.

Things changed during the Covid-19 pandemic since working remotely was specifically considered an effective measure to limit the spread of the Coronavirus in the workplace. European statistics from 2019 show that only 5.4% of employed people were working remotely[33], while, during the health emergency, close to 70% of full-time workers were working from home all over Europe. Even though there was a small decline in 2022[34], this upward trend in teleworking is set to resume as technological developments increase the number of teleworkable jobs, and employee and employer preferences lean more towards remote working.

After the boom in telework during the health emergency, several studies focused on the phenomenon have shown that working remotely "*has a disproportionate negative impact on women in terms of work-life conflict, stress and health outcomes*"[35]. Consequently, it may expand the gap between women and men, with serious implications for working conditions[36] and,

majority of EU Member States: see the Report on the implementation of the European social partners' Framework Agreement on Telework (COM (2008) 412 final).

[29] For a more detailed comment of the Framework Agreement on telework, see Russo M. (2023), "Twenty years of EU Agreements on Remote Work from 2002 to 2022. What next?", *Freedom, Security and Justice. European Legal Studies*, 3, p. 217 ff.

[30] Art. 8 of the Framework Agreement.

[31] Artt. 5 and 6 of the Framework Agreement.

[32] Art. 11 of the Framework Agreement.

[33] European Commission (2020), *Telework in the EU before and after the Covid-19: where we were, where we head to*, *joint-research-centre.ec.europa.eu/system/files/2021-06/jrc120945_policy_brief_-_covid_and_telework_final.pdf*.

[34] Because "*remote work is often seen as anathema by some who associate it with laziness, low productivity and the degradation of the social fabric of firms and of their creative and collaborative potential*": Countouris N., De Stefano V. (2023), "Out of sight, out of mind? Remote work and contractual distancing", in Countouris N., De Stefano V., Piasna A., Rainone S. (eds.), *The future of remote work*, Brussels: ETUI, p. 147.

[35] EU-OSHA (2024), *Exploring the gender dimension of telework: implications for occupational safety and health*, EU-OSHA publications, p. 1.

[36] For instance, in terms of fewer opportunities for professional training, career progression, and social benefits. On the point, see V. Filì (2021), "Le difficili libertà delle donne tra gender

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above all, occupational safety and health[37], especially psychosocial risks. Indeed, teleworkers run a greater risk of contracting pathologies deriving from the so-called "hyperconnectivity". This term refers to the continuous availability of the worker via multiple types of work-related communications systems, such as email, instant messaging, mobile phone calls, etc. One of the effects of hyperconnectivity is an increased intensity at work, which could lead to overworking and risk burnout[38].

Digitalisation and its impact on the labour market and the world of work have been on the EU social partners' agenda even in recent years. In June of 2020, a framework agreement on digitalisation was signed to implement their multiannual work programme 2019-2021. It was the result of negotiations to promote tools and measures[39], where necessary at national, sectoral, and/or enterprise levels, in the light of article 155 of the consolidated version of the Treaty on the functioning of the European Union[40]. According to the framework agreement on digitalisation, the overall goal is to achieve a consensual transition not only via the successful integration of digital technologies in the workplace, but also through reaping opportunities and preventing and minimising the risks for both employees and employers. The aim thus seeks to ensure the best possible outcome for everyone.

Another step forward in the digital transition is the Joint work programme 2022-2024, signed by the European social partners on the 28th of June 2022. Even though the aims of the Joint Work Programme are numerous[41], reviewing and updating the Agreement on Telework of 2002 is the first

wage gap, soffitti di cristallo e bassa fecondità", *Lavoro Diritti Europa*, n. 2; Filì V. (2024), "Brevi riflessioni su differenziale di genere e discriminazioni indirette nel sistema italiano di sicurezza sociale", *Equal. Rivista di Diritto Antidiscriminatorio*, n. 1, p. 45.

[37] "*The latest available OSH data for teleworkers show that gender inequalities are marked with regard to exposure to OSH psychosocial risks, incidence of work-related health problems, and availability of OSH initiatives in the workplace to prevent or address stress and mental health problems. In all these aspects, women are at a disadvantage compared to men*": EU-OSHA, *Exploring the gender dimension of telework*, cit., p. 11-12.

[38] Burnout is a state of emotional, physical, and mental exhaustion caused by excessive and prolonged stress. It occurs when one feels overwhelmed, emotionally drained, and unable to meet constant demands.

[39] See *ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=9729&furtherNews=yes*.

[40] "*Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements*" (par. 1).

[41] The other issues included in the programme are the green transition, youth employment, work-related privacy, and surveillance, improving skill matching in Europe, and capacity building.

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priority. There is no mention of gender equality in this document either, but there are several references to the need to improve work-life balance, which affects women more.

5. Concluding remarks

These recent agreements on the matter are encouraging signs of a new spring of social dialogue within the European Union. As attested by the ILO, in the past few years "*EU-level social dialogue has been rich, involving social partners in individual sectors making statements on the impact of digitalization on the economy*"[42]. Even though diversity of national systems of social dialogue[43] and decline in membership density of unions and employers' associations in many Member States[44] are critical issues that EU social partners have been facing in recent years, "*no doubt such social dialogue at EU level will feed and stimulate the social partners to conclude more specific agreements*"[45].

Nevertheless, the EU social partners could have done more – and can still do more – to strengthen the benefits of remote work for women and try to use digitalisation to close the gender gap.

The first issue they should address is implementing the various forms of hybrid work, which can be an effective flexible working arrangement. Indeed, the EU social partners seem to exclusively focus on telework, which is the way of carrying out employees' duties from home[46]. This kind of telework is also called home working. However, working from home for an extended period of time can lead to serious risks of isolation and reduced

[42] Ghellab Y., Vaughan-Whitehead D. (2021), "Enhancing social partners' and social dialogue's roles and capacity in the new world of work: Overview", in Vaughan-Whitehead D., Ghellab Y., de Bustillo Llorente R.M. (eds.), *The New World of Work. Challenges and Opportunities for Social Partners and Labour Institutions*, ILO publications, p. 9.

[43] The differences involve not only the institutional frameworks, but also differing levels of operational capacity of social partner organisations in different countries, *a fortiori* after Eastern enlargements: Poland, Hungary, Slovenia, the Czech Republic, Slovakia, Latvia, Estonia, Lithuania, Cyprus, and Malta joined the EU in 2004. In 2007 Bulgaria and Romania were added. The last entry was Croatia in 2013.

[44] Even though there are substantial differences in union density figures across EU Member States, since the early 1980s, trade union density rates have been declining, largely due to the growing number of employees who choose not to join a trade union and the expansion of non-standard forms of employment: *www.eurofound.europa.eu/en/european-industrial-relations-dictionary/trade-union-density*.

[45] Ghellab Y., Vaughan-Whitehead D., *cit*., p. 9.

[46] It is also called home working.

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chances of career progression. Therefore, hybrid work, carried out partly within company premises and partly outside, could combine the advantages of remote work with the reduction of its disadvantages.

For instance, the Italian form of hybrid work, named agile work[47] or, more commonly, smart work, if used correctly, may have an encouraging gender impact, as attested by art. 18 l. n. 81/2017. Indeed, paragraph 3-bis of art. 18 recognises working parents with children under twelve years of age as having priority in accessing agile work. Moreover, paragraph 3-ter establishes that if an employer refuses or hinders the use of agile work, they cannot obtain gender equality certification[48].

Secondly, three years have passed since the European Union Parliament resolution on the necessity to recognise the so-called right to disconnect[49] and yet the directive is still a proposal. The right to disconnect[50] is the right to not use technological work tools and not engage in work-related electronic communications out of service hours, without disciplinary consequences[51]. In other words, employees cannot be disadvantaged by keeping their mobile phones or PCs turned off, not answering phone calls, or picking up emails and messages during their holidays and rest periods. Therefore, it has a transversal scope, concerning fundamental issues such as rest time, health and safety, and work-life balance, which especially benefits women, who traditionally spend more time than men fulfilling caring responsibilities.

Indeed, the right to disconnect may be one of the most effective ways to

[47] Art. 18 and following law 22 May 2017, no 81. See, *ex multis*, M. Brollo (2017), "Il lavoro agile nell'era digitale tra lavoro privato e pubblico", *Il Lavoro nelle pubbliche Amministrazioni*, n. 1, p. 119; Santoro Passarelli G. (2017), "Il lavoro autonomo non imprenditoriale, il lavoro agile e il telelavoro", *Rivista italiana di diritto del lavoro*, n. 3, p. 369; Martone M. (2108), "Il lavoro agile nella l. 22 maggio 2017, n. 81: un inquadramento", in Zilio Grandi G., Biasi M. (eds.), *Commentario breve allo Statuto del lavoro autonomo e del lavoro agile*, Wolters Kluwer Cedam, p. 461; Spinelli C. (2018), *Tecnologie digitali e lavoro agile*, Bari: Cacucci; Tufo M. (2021), *Il lavoro digitale a distanza*, Napoli: Editoriale Scientifica; Russo M. (2023), *Il datore di lavoro agile. Il potere direttivo nello smart working*, Napoli: Edizioni Scientifiche Italiane.

[48] Provided for by art. 46-*bis* of legislative decree 11 aprile 2006, n. 198

[49] EU Resolution 21.01.2021 (2019/2181).

[50] Ray J.E. (2022), "Naissance et avis de décès du droit *à* la déconnexion, le droit *à* la vie privée du XXIème siècle", *Droit social*, n. 11, p. 939; Ray J.E. (2016), "Grande accélération et droit *à* la déconnexion", *Droit social*, n. 11, p. 912.

[51] On the right to disconnect, see, *ex multis*, Dagnino E. (2017), "Il diritto alla disconnessione nella legge n. 81/2017 e nell'esperienza comparata", *Diritto delle relazioni industriali*, n. 4, p. 1024; Zucaro R. (2019), "Il diritto alla disconnessione tra interesse collettivo e individuale. Possibili profili di tutela", *Labor & Law. issues*, vol. 5, n. 2, p. 215; Russo M. (2020), "Esiste il diritto alla disconnessione? Qualche spunto di riflessione alla ricerca di un equilibrio tra tecnologia, lavoro e vita privata", *Diritto delle relazioni industriali*, n. 3, p. 682.

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put in practice not only art. 31 of the EU Charter of fundamental rights on fair and just working conditions, but also art. 23 regarding equality between men and women, as highlighted in the text of the resolution.

The involvement of social partners is focal to implement this issue, particularly by identifying the most effective measures to exercise disconnection. To make it effective, it is fundamental to establish detailed arrangements for ensuring the disconnection in a fair and transparent manner.

The topic is complex and multifaceted, as identifying the most effective policies and tools to remove social, cultural, and legal obstacles to gender equality and ensuring the active participation of women in the European labour market is not easy. However, in light of the EU regulatory framework, the collective agreements signed by the EU social partners, the existing literature, and the current state of play as shown by the data on the matter, the time may be ripe to take advantage of the many opportunities offered by digitalisation to boost the level of equality in Europe.

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Driving towards inclusive workplaces: Italy's certification of gender equality for a fairer labour market

Maria Cristina Degoli[1]

1. Introduction

The opening line of the Gender Equality Strategy 2020-2025 states that "*The promotion of equality between women and men is a fundamental task for the European Union, in all its activities, required by the Treaties*"[2]. This means, therefore, that every Member States has to play its part in implementing gender equality in business, politics and society as a whole, because it represents a core value of the EU, a fundamental right and key principle of the European Pillar of Social Rights. From a financial perspective, research showed that a more inclusive environment creates the right conditions for an innovative, competitive, and thriving European economy[3].

With this policy strategy as its base, the Italian legislator adopted the National Recovery and Resilience Plan (PNRR – Piano Nazionale di Ripresa e Resilienza) in 2021, marking the beginning of a new era for legislative gender equality strategy. Among the seven missions broadly covered by the

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[2] COM(2020)152 final, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A Union of Equality: Gender Equality Strategy 2020-2025"*, Brussels, 5 March 2020, p. 1.

[3] By 2050, improving gender equality would lead to an increase in the EU's GDP per capital by 6.1% to 9.6%, which amounts to €1.95 to 3.15 trillion: *eige.europa.eu/gender-mainstreaming/policy-areas/economic-and-financial-affairs/economic-benefits-gender-equality*. See COM(2020)152 final, cit.

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Next Generation EU pillars, the goal promoted by mission n. 5 "Cohesion and Inclusion" is to reinforce antidiscrimination tools and promote work-life balance actions, together with a new approach to tackle the gender gap through transparency and accountability of corporate human resources policies (Zappalà, 2022; Gottardi, 2021; Peruzzi, 2021).

This paper aims to present a brand-new tool – the Certification of Gender Equality (*Certificazione della parità di genere*) – which aspires to reduce gaps in all critically important areas of women's professional growth and wage transparency, by supporting and incentivising companies at a national level. The final goal, therefore, is to implement a fairer labour market by narrowing the gender gap and fostering growth opportunities within the participating companies. This certification would state the result of a shift of culture towards one in which companies need to adopt best practices to better support their work environment. Consequently, a series of actions to strengthen equal pay for work of equal value, gender management policies, and a comprehensive work-life balance ethos are required to be implemented.

The study on the Gender Equality Certification will proceed in two interconnected stages.

Firstly, the paper addresses both the legislative framework and the existing literature on the topic in order to provide a complete description of the gender equality tool, highlighting the benefits it offers to companies in terms of business. Secondly, the paper tackles the quantitative data regarding the number of companies that have achieved the Certification of Gender Equality so far. This second phase of the research will enable the author to outline the dissemination of the tool within the Italian entrepreneurial landscape and assess its impact on the promotion of gender equality in the workforce.

Finally, presenting the research findings, the paper evaluates whether this innovative tool can contribute to fostering a fairer world of work. If so, the Gender Equality Certification can be viewed as a result of different forms and degrees of social dialogue.

2. The Certification of Gender Equality

The National Recovery and Resilience Plan (PNRR) in its Mission n. 5 entitled "Inclusion and Cohesion" foresees the adoption and implementation of a national system to certify gender equality in public and private companies. The goal is to promote the implementation of internal policies to close the gender gap in all areas – i.e. employment, pay and management[4].

[4] National Recovery and Resilience Plan (PNRR – *Piano Nazionale di Ripresa e*

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The Certification of Gender Equality has been put in place on the 1st of January 2022. This Certification can be obtained on voluntarily basis for both private and public sector. The minimum requirements that a company must meet in order to gain certification were established by the Ministry Decree of 29th April 2022. This document superseded the Reference Practice (PdR) UNI/PdR 125:2022 of March 16th which contained the guidelines for the gender management system.

Overall, from the legislator's perspective, the Certification of Gender Equality is the final goal of a systemic journey to mark a real cultural change in corporate organisation, and hence society, in order to achieve permanent gender equality.

Companies that achieve the certification are rewarded with a range of benefits. Firstly, a company is awarded points to access European funding[5] and to participate in public tenders[6]. Secondly, the company gains a 30% reduction of the bank guarantee to attend public tenders[7]. Finally, employers from the private sector can be exempt from paying 1% of their national insurance payments (i.e. social contributions) up to a maximum of 50.000 euros per year[8].

Embarking on the journey to achieve the Certification of Gender Equality means that a company must promote organisational transparency. In other words, businesses aspiring to certification must adopt an overall gender equality policy, together with their management system. To achieve this companies must appoint a Steering Committee (*Comitato guida*) which is responsible for drawing up a strategic plan, as well as taking the necessary measures to put the above-mentioned plan in place.

Furthermore, the company is responsible for informing staff about the new corporate culture of better implementing gender equality and for providing training to employees focused on their commitment to removing gender stereotypes and promoting diversity and inclusion. In addition, the company shall review both management and organisational models to adapt them to the qualitative and quantitative requirements required by the Certification of Gender Equality. Companies also are required to appoint a

Resilienza), #Nextgenerationitalia, Mission 5, 201-223, text available at: *www.governo.it/sites/governo.it/files/PNRR.pdf*.

[5] See article 5, paragraph 3, Law n. 162/2021. The Certification of Gender Equality gives an award score for project proposals to obtain a co-financing for previous investments.

[6] See article 95, paragraph 13, Legislative Decree n. 50/2016.

[7] See article 95, paragraph 7, Legislative Decree n. 50/2016.

[8] Concerning the social contribution exemption described above, the legislator made it permanent following the inter-ministerial decree 20.10.2022 published on the 28.11.2022. See *Circolare* INPS n. 137, 27.12.2022.

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contact person to whom workers can submit – even anonymously – reports and complaints about gender discrimination issues. This same person is involved in evaluating new diversity and inclusion policy implementation to verify its impact on the company environment. Finally, the Steering Committee is engaged in an ongoing company evaluation to assess progress and the possibility of obtaining the Certification of Gender Equality.

The *fil rouge* that leads the Reference Practice and – accordingly – the overall system of gender equality certification, is the belief that "*to achieve a real paradigm shift on gender equality it is necessary that its principles, together with the respect of any diversity would be integrated into the corporate's objective*" (Lamberti, 2023, p. 216). Therefore, the starting point for the evaluation does not coincide with the *state of the art* of the company but rather its history also has an impact on granting the business Certification. Precedents, for example in violating parental rights or opposing parental leave request, will make it harder for a company to successfully achieve the Certification of Gender Equality.

Literature on the topic affirms that the structure of the values described in the Reference Practice UNI/PdR 125:2022 shows the "*critical aspects of corporate behaviour towards women work*"[9] (Lamberti, 2023). In the Italian business environment attention should be paid to the (unfortunately) well-known gender pay gap[10], as well the bias inherent in the classical patriarchal culture which is still present in the country.

Despite the legislative architecture to protect both maternity and paternity leave, when it comes to parenthood companies link its duties, as well as business costs, to women. Therefore, being a mother is a disadvantage in the recruitment process. Businesses are more likely to hire or promote men over women because of this perceived lack of responsibility. As a result, the same behavioural model is subconsciously replicated in family life where women are more focused on family care instead of their career, leaving men to their professional success.

The Reference Practice points out that hiring processes are not neutral. Indeed, a selecting committee composed of men will likely not be able to evaluate a woman's working performances or skills. A group composed of both men and women, on the other hand, will be more accurate and efficient in selecting a candidate on a purely merit basis.

With this premise, the Reference Practice UNI/PdR 125:2022 establishes

[9] See UNI/PdR 125:2022, p. 10.

[10] See UNI/PdR 125:2022, paragraph 0.3. "Obiettivi e strumenti". The Ministerial Working Group claims that the gender pay gap is the result of a corporate culture which does not appreciate gender equality and does not penalise its negative actions.

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its company evaluation criteria through specific Key Performance Indicators linked to the six areas policies – i.e. Culture and Strategy; Governance; Human Resource process; Career Opportunities, along with women's inclusion in the company; Equal Pay for Work of Equal Value; Parenting policies and Work-Life Balance – that distinguish an inclusive business organisation which respects gender equality. Therefore, to evaluate the effectiveness of actions taken to acquire the Certification of Gender Equality, criteria must be "*accessible, appropriate and comparable and able to drive the change as well as represents the continuous improvement put in place by business corporation*"[11]. For each Evaluation Area, specific KPIs have been established to measure the organization's maturity level through annual monitoring and biannual verification. This process provides evidence of the improvements made because of various implemented interventions or an activated remediation plan.

The Culture and Strategy area contains seven KPIs. This section evaluates the alignment of the organization's principles and objectives related to inclusion, gender equality, and attention to gender diversity. Its overall vision, mission, and values define the work environment. The impact of these policies is worth 15% of the final score.

The Governance area, instead, contains five KPIs. This sphere assesses the maturity of the organization's governance model in establishing effective organizational controls, ensuring minority gender representation in management and control bodies. It also involves implementing processes to identify and address any instances of non-inclusion. The impact of these policies is worth 15% of the final score.

The Human Resource process area with its six KPIs focuses on assessing the maturity of key HR processes across the various stages of an employee's life cycle within the organization, ensuring they are grounded in the principles of inclusion and respect for diversity. The impact of these policies is worth 10% of the final score.

The fourth area – Career Opportunities along with women's inclusion in the company – assesses the maturity of organizations regarding gender-neutral access to internal career development and growth opportunities, including the mechanisms for accelerating such advancement. This area is composed of seven KPIs, and the impact of these policies is worth 20% of the final score.

For the Equal Pay for Work of Equal Value area, the Reference Practice UNI/PdR 125:2022 specifies three KPIs which collectively account for 20%

[11] See UNI/PdR 125:2022, paragraph 5, "Indicatori di performance (KPI) per le organizzazioni", p. 16.

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of the total score. This section considers the maturity of organizations in addressing the pay gap within a comprehensive total rewards framework, which includes both monetary compensation and non-monetary benefits such as welfare and well-being systems.

Finally, the Parenting policies and Work-Life Balance policies contain a total of five KPIs. This area assesses the maturity of organizations in implementing policies that support parenthood in its various forms and the adoption of procedures that facilitate and support employees with preschool-aged children. The impact of these policies is worth 20% of the final score.

The KPIs themselves are divided into two categories: qualitative KPIs and quantitative ones. The former are measured in terms of presence or absence; in other words, the evaluation committee checks whether the KPIs are in place or not. The quantitative KPIs, instead, are measured using a percentage compared to a company value or a national average reference value related to ISTAT[12] indices or the type of economic activity. KPIs' score is weighted taking into consideration the above six areas. Furthermore, the KPIs are functional to the business size. The Reference Practice UNI/PdR 125:2022 identifies four clusters. The target safeguards related to diversity are defined based on the company's classification into one of the four clusters, thus ensuring alignment with the organisation's size and specific needs. Simplifications are provided for organisations in band 1 (micro-organisations) and band 2 (small organisations), whereas all indicators are applied to organisations in band 3 (medium organisations) and band 4 (large organisations).

Finally, a minimum overall score of 60% is required to obtain the Certification. For companies with multiple sites across the national territory, the evaluation is "flexible" and considers the specific characteristics of the gender equality management system designed and implemented by the organization.

3. Does the certification system work? Mid-term results overview

The Certification of Gender Equality aims at being pivotal in implementing the equality gender value in companies by making it a strategical part of their core business to achieve a sustainable and lasting change over time. Leaving the theory aside, does the Certification of Gender Equality really work?

To answer to this question, the paper will present some quantitative

[12] The acronym ISTAT stands for National Institute of Statistics (Istituto Nazionale di Statistica).

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data, together with some inputs from representative of ACCREDIA[13] – the Italian Accreditation Body – and Ms. Sonia Alvisi[14], Consigliera di parità (Counsellor of Gender Equity) of Emilia Romagna Region, in Italy.

Firstly, let's display some numbers to better understand the impact of the Certification of Gender Equality on the Italian business sector. Since the introduction of the Certification of Gender Equality, the number of certified sites[15] has reached 12.005[16]; 11.461 at national level and 544 abroad.

Tab. 1. Number of certified sites per Region at National Level and number of certified sited abroad

Regione	**UNI/PdR125**
Abruzzo	233
Basilicata	114
Calabria	171
Campania	891
Emilia-Romagna	1.255
Friuli-Venezia Giulia	246
Lazio	1.401
Liguria	267
Lombardia	2.322
Marche	272
Molise	47
Piemonte	733
Provincia autonoma di Bolzano/Bozen	71
Provincia autonoma di Trento	126
Puglia	688

[13] We would like to personally thank Mr Alessandro Nisi (*Relazioni esterne e studi statistici*), Sara Vitali (*Referente Sistema gestione e Funzionamento Tecnico, Dipartimento Certificazione e Ispezione*) and Ing. Irene Uccello (*Funzionario tecnico ispettrice, Dipartimento Certificazione e Ispezione*) for their very interesting insights into the Certification of Gender Equality; *www.accredia.it/*.

[14] We would like to personally thank Mrs Sonia Alvisi and Mr Francesco Raimondo for their time and kind cooperation in answering questions on the Certification of Gender Equality' results and process.

[15] According to Accredia, when speaking of certified companies we must refer to them as "*siti certificati*" (i.e. certified sites).

[16] Database Accredia, *services.accredia.it/ppsearch/accredia_stats_reserved_2.jsp?ID_LINK=1755&area=310*, April 2024.

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Regione	UNI/PdR125
Sardegna	232
Sicilia	557
Toscana	602
Umbria	121
Valle d'Aosta/Vallè d'Aoste	15
Veneto	1.097
Totale Italia	**11.461**
Estero	*544*
TOTALE	**12.005**

Source: Database Accredia

Tab. 2. Number of certified sites in Italy in April 2024

Schema di certificazione	Numero siti certificati
UNI EN ISO 9001	129.157
UNI EN ISO 14001	39.244
UNI EN ISO 45001	35.261
UNI/PdR 125	12.005
UNI CEI ISO/IEC 27001	5.720
UNI ISO 37001	5.486
UNI CEI EN ISO 13485	4.433
UNI CEI EN ISO 50001	4.207
FSSC 22000	3.446
UNI EN ISO 22000	3.356

Source: Database Accredia

Running through the numbers, if we compare April 2024's situation with that of April 2023[17] it is easy to observe the importance of the impact of the Certification of Gender Equality on the business sector. April 2024 shows an increase of 31 times the number of certified sites compared to the twelve

[17] Database Accredia shows a total number of 1.367 of certificated sites in April 2023.

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months previous. However, this increase is artificial, as the Certification of Gender Equality for companies did not previously exist. In other words, it is necessary to wait a few more years to gather more accurate data and identify a reliable pattern.

Furthermore, currently, data on certified sites can only be analysed in aggregate form. This means it is not possible to distinguish the number of certified sites based on specific criteria such as company size, KPIs, or business sector. This situation raises several research questions about company trends, such as which KPI is most implemented to achieve certification and which companies or business sectors are leading in adopting these practices. According to ACCREDIA representatives, this information will eventually be collected and processed by SOGEI through a web portal, which has yet to be developed. The portal will be developed for the Department of Equal Opportunity, under the Presidency of the Council of Ministers (*Dipartimento Pari Opportunità, Presidenza del Consiglio dei Ministri*). Accredited bodies will have direct access to update the system with all relevant information regarding the Certification of Gender Equality in real-time.

In addition, according to ACCREDIA representatives, when examining companies' applications to achieve the Certification of Gender Equality, areas four and five – i.e. opportunities for women's career advancement and inclusion within the company, and gender pay equity – are the least frequently implemented. This information shows that these are the most difficult policy areas to implement. As described above, companies must reach a minimum overall score of 60% to obtain the certification. Consequently, choosing to avoid implementing the hardest policies could be a way of achieving the Certification of Gender Equality, together with the related economic benefits, without engaging in core gender equality change. This result is far from a win-win situation for either companies or society. However, as correctly pointed out by ACCREDIA representatives, although we do not yet have a definitive answer, it will not be long coming. The Certification of Gender Equality is valid for three years, after which companies must undergo an audit by the monitoring group to obtain renewal. A renewal reflects the company's status, providing a basis for evaluating progress compared to the previous certification period. Therefore, the lack of improvement concerning either opportunities for women's career advancement and inclusion within the company or gender pay equity will mean that these companies were sadly looking only for economic rewards.

Regarding the economic incentives provided to companies to encourage the Certification of Gender Equality, ACCREDIA representatives and the Counsellor of Gender Equity of Emilia Romagna Region provided two distinct types of feedback. On the one hand, ACCREDIA representatives emphasized

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the importance of these incentives, noting that companies often value not just economic benefits but also the recognition of their efforts. On the other hand, the Counsel for Gender Equality expressed doubts about whether companies are genuinely interested in pursuing the certification process. Her comment on the subject is influenced by her role as an expert in gender equality within the monitoring group. She observed that when interviewed about incidents analysis or risk of gender equality rights violations, as well as the countermeasures adopted, employers they often overlook the possibility of unspoken complaints, thus presenting a situation that appears not to require any further action. Although the Reference Practice UNI/PdR 125:2022[18] provides a detailed list of actions to prevent all forms of physical, verbal, and digital abuse, including harassment, the Counsellor observed that this risk is not included in the risk assessment document (*Documento di Valutazione dei Rischi* – DVR)[19]. This observation supports her interpretation of the employers' behaviour.

Finally, when discussing with the Counsellor of Gender Equity the role of gender equality in negotiating gender policies implementation, she recalled what Ms Fiorani – Head of Women and Gender Policies Coordination of CISL, Emilia-Romagna – presented in February 2024 at the Conference on the biennial reports and gender certification. Ms Fiorani pointed out that "*KPIs have been identified without trade union's consultation; in addition, there is no role designated for company representatives in the certification procedure or in drafting the strategic plan*". Their involvement, therefore, is limited to post-implementation oversight and control. Put simply, instead

[18] See UNI/PdR 125:2022, paragraph 6.3.2.6. "*Attività di prevenzione di ogni forma di abuso fisico, verbale, digitale (molestia) sui luoghi di lavoro*" (Activities aimed at preventing all forms of physical, verbal, and digital abuse (including harassment) in the workplace). The Reference Practice foresees that "*the company must: a) Identify the risk of any form of physical, verbal, or digital abuse (including harassment) in the context of Health and Safety at Work; b) Develop a plan for the prevention and management of workplace harassment; c) Provide regular, targeted training at all levels on zero tolerance for any form of violence against employees, including all forms of sexual harassment; d) Establish a methodology for anonymous reporting of such incidents to protect employees who come forward; e) Plan and implement employee surveys to investigate whether they have personally experienced any behaviours, either internally or while working externally, that caused discomfort or disturbance, such as sexist attitudes or lack of respect; f) Evaluate work environments from this perspective as well; g) conduct a risk assessment and analysis of reported adverse events; h) Maintain constant vigilance over the language used, promoting awareness of communication that is both respectful and neutral*", p. 32.

[19] The "*Documento di Valutazione dei Rischi* – DVR" is required for the employer to assess all risks faced by employees working within the company. See Legislative Decree n. 81/2008.

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of having an explicated and recognised role to play, collective bargaining is left behind in negotiations aimed at promoting the active participation of women within a company. In conclusion, given that the changes required by the Gender Equality Certification System necessitate an internal approach to be effective and sustainable, this absence could have significant (negative) consequences on the factual implementation of gender equality policies in the company.

4. Conclusions

The Certification of Gender Equality could serve as a transformative tool in reshaping corporate behaviour and, by extension, society as a whole in addressing gender equality issues permanently. Implementing a neutral hiring process, along with policies that support work-life balance and family care in its broader sense, is not only crucial for business but also for overall societal well-being. In our opinion, gender equality should be viewed not as an issue requiring investments and isolated actions, but as an opportunity for meaningful cultural change. Therefore, its architecture, along with the concepts and rules guiding its mission, is well-designed. However, rules alone are insufficient. Without genuine commitment to promoting cultural change and moving beyond past practices, this opportunity will ultimately be missed.

All the data analysed, though partial at this point, indicate that the Certification of Gender Equality tool is moving in the right direction. The number of companies involved in the certification process is growing, which means that more employers are embracing a transformation into safer working environments. Is this solely the result of economic incentives? Perhaps, but it's a risk worth taking to drive positive change. Moreover, we would agree with ACCREDIA representatives in saying that companies look at economic incentive more as a recognition of their engagement in facing gender discrimination than for the financial benefits themselves. While awaiting more comprehensive data, we can suggest some improvements to make the certification system more efficient.

In our view, the primary gap is the insufficient involvement of collective bargaining in negotiations to promote active female participation within the company. As noted by CISL representative Ms. Fiorani, excluding trade unions from the process of identifying KPIs and shaping the overall certification system has been a significant oversight. Trade union representatives at the company level are invaluable assets for employers, offering realistic insights into which policies should be implemented and helping to assess workplace

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risks. Furthermore, their cooperation will enhance social dialogue as a vehicle for advancing gender equality within the company and contribute to transforming the labour market into a more inclusive environment.

In conclusion, the Certification of Gender Equality alone is not enough to achieve sustainable and lasting change without the active involvement of all parties. Given the economic investments allocated for this purpose, we hope that collective bargaining will play a more significant role in the certification process in the future. We believe that robust social dialogue is key to improving the Italian business landscape and advancing gender equality in the workforce.

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Fighting labor exploitation in traineeships: current issues and prospects for a regulatory reform

Marcella Miracolini[1]

1. Introduction

It is widely recognized that traineeships have emerged as a key instrument of both national and supranational legal frameworks, facilitating the integration of young individuals into the labor market. By offering practical and professional experience, traineeships can ease – as a bridge – the transition into stable employment, operating as a strategic educational mechanism.

This aim aligns with the objectives of initiatives like the enhanced *Youth Guarantee*, which was revitalized following the pandemic and builds upon the pathway initiated in 2013. Additionally, the *National Program for Youth, Women, and Work* – part of the ongoing reform of active labor policies driven by the *Employability Guarantee for Workers* and the *National Recovery and Resilience Plan* (PNRR) – further supports this objective. The overarching goal is to utilize available European funds to remove barriers preventing young people from entering the labor market, while implementing a systemic strategy focused on creating quality jobs. And, in this context, traineeships and apprenticeships have assumed a central role in European youth employment policies. Accordingly, it is evident that this topic is connected to the broader PRIN research project, entitled "*YES – Youth Employment Strategy*", within the scope of which this paper is included. It critically analyzes the regulatory frameworks employed by national and regional legislators within the context of EU employment policies, with a particular focus on the improvement of youth retraining and the facilitation of effective integration into the labour market.

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Young people, in fact, remain a particularly vulnerable group, for whom the transition from education and training to employment continues to present significant challenges. This is especially true when employers prioritize candidates with specific, transferable skills or prior professional experience, thereby creating formidable barriers to entry.

Recent data on youth employment presents a rather discouraging picture, especially in certain national contexts. According to Eurostat's latest surveys, published in May 2024 and referencing the year 2023, the percentage of NEETs (Not in Education, Employment, or Training), defined as inactive young people aged 15 to 29 who are neither employed nor engaged in education or training, averages 11.2%, with substantial variation across Member States[2]. While some countries have already succeeded in reducing their NEET rates below the 9% target for 2030 (such as the Netherlands, Sweden, Malta, Slovenia, Ireland, Luxembourg, Denmark, Germany, and Portugal): Italy, for instance, registers a NEET rate of 16.2%, reflecting a modest improvement from the previous year but still the second highest in the EU.

In this precarious context, the Eurobarometer survey from April 2023 reaffirmed traineeships' strategic importance as steppingstones for young people, especially those vulnerable to labor market exclusion. Traineeships offer direct workplace exposure, enabling the acquisition of transferable professional skills and aiding in overcoming employment entry barriers.

However, despite the potential positive impact of the instrument, especially in countries with more advanced systems, practical experience has revealed a more troubling dimension over the years. This particularly occurs when traineeships are used to disguise genuine employment relationships, as a cost-saving mechanism for employers. In such cases, traineeships effectively mask full-time employment arrangements. Furthermore, the precarious nature of such positions within the contemporary capitalist system often exacerbates the exploitation of traineeships, positioning them as a prerequisite for future stabilization, without the protection promised by the legal system. This underscores the necessity of implementing a series of measures aimed at preventing the most egregious forms of abuse while preserving and enhancing the strategic function of traineeships. They should focus on increasing protections for young people entering the workforce.

[2] The data are available for consultation on the Eurostat website at the following link: *ec.europa.eu/eurostat/statistics-explained/index.php?title=Education_and_training_in_the_EU_-_facts_and_figures*.

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2. A concise overview of the measures for traineeships in domestic law and their current state of the art

The necessity to safeguard the integrity of traineeships and to protect them from potential abuses has been recognized since a long time at multiple levels.

At the national level, legal frameworks have sought to emphasise the educational purpose of traineeships and to introduce sanctions addressing exploitative practices.

Setting aside the older and less organic phase[3], the main first rationalisation of the discipline in this area can be traced to the so-called "Treu Law" (Law n. 196 of 24 June 1997), which formalised the practice of training internships and, in conjunction with the Ministerial Decree n. 142 of 25 March 1998, established parameters and conditions for their implementation. The law defined them as tools intended to "*facilitate moments of alternation between study and work*" and to "*assist in career choices through direct exposure to the labor market*" aimed at individuals who had completed their compulsory education (Varesi, 1998). Thus, the legislative framework clearly differentiated traineeships from employment contracts, a distinction famously characterized by legal scholars as the paradigm of "*I train you (potentially) for future employment*" (Napoli, 1997), with a foundational principle that has been reaffirmed in subsequent reforms, which tried to address the issue of low-quality traineeships lacking genuine educational content.

While these reforms have not altered the core elements of traineeships, they have focused on addressing the challenge of curbing the proliferation of low-quality traineeships or those lack of genuine educational content (Pascucci, 2008).

The initial efforts to confront these challenges, exemplified by Article 11 of Decree-Law n. 138 of 13 August 2011 (converted into Law n. 148 of 14 September 2011), evidenced only a modest impact and were later deemed unconstitutional for violating Article 117(4) of the Italian Constitution[4]. However, the Fornero Law subsequently introduced a more comprehensive set of measures.

Article 1, paragraphs 34, 35, and 36, of Law n. 92 of 28 June 2012 aimed

[3] This phase was distinguished by a rather unsystematic approach to the matter and by an overlapping of provisions that had created a certain ambiguity: Article 16-*bis* of Law n. 285/1977 introduced an initial form of traineeships, which was defined as a period of on-the-job training in companies; Article 15 of Law n. 845/1978 addressed vocational training. Moreover, Decree Law n. 726/1984, converted into Law n. 863/1984, and Article 9 of Decree Law n. 148/1993, converted into Law n. 236/1993, introduced a further orientation traineeship.

[4] Constitutional Court 19 December 2012, n. 287.

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to guarantee the authenticity and quality of traineeships, but also to prevent the regulatory gaps that have permitted traineeships to evolve into unpaid apprenticeships or extended pre-employment probationary periods (Filì, 2012). Additionally, the law sought to establish consistent rules to guarantee uniformity across regional legislation: the law addressed the complex issue of power distribution between the State and the Regions, formulating general guiding principles and entrusting the task of drafting specific guidelines to the Permanent Conference for relations between the State, Regions, and Autonomous Provinces of Trento and Bolzano. This resulted in the adoption of the Guidelines on Traineeships on 24 May 2013, which were later updated by a subsequent agreement on 25 May 2017.

One of the most significant protective measures was the introduction of a legal obligation for host entities to provide trainees with a monetary "participation allowance". However, despite the intention of this measure to prevent the misuse of traineeships, it has, in practice, on occasion resulted in a distortion of their purpose. Some employers have treated the payment of an allowance as a form of legitimization for using traineeships to meet their own productive needs, rather than focusing on the educational objectives of the program.

In general, despite these efforts, significant disparities remain among regional regulations, particularly concerning issues such as compensation levels, the identification of entities authorized to promote traineeships and the maximum number of traineeships an employer may offer.

The Guidelines introduced also a sanctioning framework, but it was not until 2021 that significant advancements were made in this area.

Indeed, the most recent legislative intervention can be found in Italy's 2022 Budget Law, which significantly tightened the conditions for the use of traineeships (Article 1, paragraphs 720-726 of Law n. 234/2021) (Varesi, 2023).

The latest reform sought to comprehensively revise the traineeship framework, beginning with its definition, at paragraph 720, and, in line with previous regulations, reaffirmed that traineeship should not be utilized as a substitute for subordinate employment. In order to achieve this objective, a series of measures were introduced which were both prescriptive and punitive in nature: the intention was to reinforce the existing legal framework and to combat abuses in a more effective manner. For the first time, the legislation provided the offense of "fraudulent traineeship", defined as traineeships used to disguise actual employment relationships.

Nevertheless, once again, the reform process remains incomplete three years after its enactment. The legislation required the introduction of novel guidelines to supplant those adopted in 2017, but the legislative process

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was abruptly suspended following the Constitutional Court's judgement on 14 April 2023 (No. 70) (Pascucci, 2023). The Court ruled that a criterion limiting traineeships to individuals facing social inclusion difficulties was unconstitutional. This infringed on regional autonomy, as the regulation of "vocational training" – which includes traineeships – lies within the exclusive competence of the regions. Imposing such a criterion unduly infringed on regional authority by restricting their ability to adopt alternative approaches during the negotiation of the guidelines. Moreover, we can say also that the attempt to restrict traineeships to socially disadvantaged individuals overlooks the fact that young people, in general, are vulnerable during the transition from education to employment. While increased support for socially disadvantaged groups is essential, it would be unreasonable to exclude large groups of young people from access to this crucial tool for personal and professional development.

3. The European Commission's traineeship package and identification of potential gaps

While this is the domestic scenario, at the supranational level, on the other hand, the complexity of the regulations and the absence of uniformity across EU Member States, combined with insufficient capacity to monitor the fair use of traineeships, persists as a considerable obstacle.

To date, the 2014 Council of the European Union's Recommendation on a "Quality Framework for Traineeships" has served as a fundamental reference for defining the minimum standards of a "quality traineeships". This framework has influenced national initiatives, as Italy's 2017 Guidelines. However, the fragmented and inconsistent implementation among Member States, due largely to the non-binding nature of the Recommendation, highlights the inherent inadequacies of this soft law instrument. Therefore, a central question remains: could a more robust approach within the multilevel legal system effectively address these deficiencies?

In response, in March 2024, the European Commission proposed a package of measures to improve traineeship conditions across the Union. This package includes a proposal for a Directive, designed to guarantee quality working conditions for trainees and to combat the misuse of traineeships as a substitute for regular employment. This so-called "Traineeships Directive" (COM(2024) 132 final) has entered the approval process and is accompanied by a new Council Recommendation (of 10 March 2014, COM(2024) 133 final), intended to review and replace the 2014 Recommendation on a Quality Framework for Traineeships.

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This initiative follows the Commission's evaluation of the 2014 Recommendation and the European Parliament's 2023 Resolution calling for stronger legislative measures. Furthermore, it incorporates the results of consultation with European social partners as mandated by Article 154(2) TFEU, which requires the Commission to consult management and labour on the need for and possible direction of EU action, before submitting proposals in the social policy field[5].

While a comprehensive examination of the stipulations is beyond the scope of this discussion and not feasible within the limited time frame, it should be noted that a preliminary assessment reveals both the strengths and potential concerns associated with the proposal for a Directive.

It undoubtedly represents a significant advance towards the harmonisation of regulations and the prevention of abuses. Nevertheless, initiatives of this scale must take into account the specificities of the legal systems of the countries concerned and the potential side effects of the introduction of new provisions.

A point of concern is the definition of a traineeship in Article 2 of the proposal of Directive, which defines it as "*limited period of work practice which includes a significant learning and training component, undertaken to gain practical and professional experience with a view to improving employability and facilitating transition to a regular employment relationship or accessing a profession*". A "trainee" is further defined as "*any person undertaking a traineeship who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in every Member State with consideration to the case law of the Court of Justice*". This definition implies integration with EU case law, which has developed criteria for determining employment status on a case-by-case basis. However, the reference to an employment contract in connection with traineeships creates a potential legal conflict, particularly in systems like Italy, where traineeships are explicitly not considered employment relationships. It is precisely this element that serves to distinguish the contract in question from the apprenticeship one, which, despite including a training component, constitutes a distinct form of employment relationship, characterised by a unique nature, purpose and regulatory framework.

[5] The consultative process was conducted in two phases: the first one involved the gathering of responses from 13 European social partners; the second phase was undertaken following the assessment of the necessity for legislative action, in accordance with Article 153(3) TFEU. The documents pertaining to the consultations can be accessed via the following links: *ec.europa.eu/commission/presscorner/detail/en/ip_23_3746* and *ec.europa.eu/commission/presscorner/detail/en/ip_23_4606*.

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The definitional ambiguity risks an unintended overlap between traineeships and employment contracts, making it imperative to clarify the distinction to prevent misinterpretation, as also recommended in the Opinion of the European Economic and Social Committee (EESC)[6]. The combination of disparate categories risks generating a problematic heterogeneity of purposes, potentially leading to unintended and adverse consequences.

The proposal for a Directive also provides for the adoption of measures based on several key principles, the first of which is the principle of non-discrimination. Article 3, in Chapter II, mandates that trainees should not be treated less favorably than comparable regular employees in terms of working conditions, including remuneration. Member States are required to ensure that trainees receive treatment comparable to that of regular employees at the same establishment or, in the absence of such employees, in accordance with collective agreements or national law. However, it allows for differential treatment based on objective reasons, such as the nature of tasks performed, the level of responsibility, and the intensity of work ("*unless different treatment is justified on objective grounds, such as different tasks, lower responsibilities, work intensity or the weight of the learning and training component*"). Although this clause is designed to protect trainees from exploitation, it gives rise to concerns about the potential for regulatory conflicts. In particular, in legal systems such as that of Italy, the very elements listed as justifications for differential treatment (as the lower intensity of work and responsibilities) are intrinsic to the nature of traineeships. These characteristics serve to distinguish traineeships from regular employment, and any conflation of the two could have the effect of undermining the legal clarity of the trainee's status.

For this reason, a more suitable approach should lead to the adoption of a set of non-derogable minimum rights, rather than simply applying the principle of equal treatment. For example, it is crucial to ensure that trainees benefit from full workplace health and safety protections and are entitled to exercise trade union rights. Establishing such baseline protections would avoid the pitfalls of conflating traineeships with subordinate employment while still safeguarding train rights.

The following measures to combat regular employment disguised as traineeships are other positive aspects of the proposal. Chapter III sets forth provisions designed to detect and prevent abuses. In accordance with Article 4, Member States are obliged to implement monitoring and inspection

[6] See Recommendations 1.1. and 1.2. of the Opinion of the European Economic and Social Committee – Employment Section of 28.06.2024, in *eur-lex.europa.eu/legal-content/IT/TXT/HTML/?uri=PI_EESC%3AEESC-2024-01418-AS*.

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measures with regard to traineeships, with a view to addressing instances where such schemes are employed with the intention of circumventing the protections afforded to workers. Article 5 further requires that competent authorities conducting inspections evaluate a range of factors that may indicate the abuse of traineeships. Such factors include the already known absence of a meaningful learning component, or the excessive duration of the traineeship, and the assignment of tasks, responsibilities, and work intensity equivalent to those of regular employees.

Although not particularly innovative, the measures, when considered in conjunction with the enforcement procedures and sanctions delineated in Articles 6 through 10, represent a substantial stride forward in addressing exploitation. For instance, Article 6 establish that employers must inform the relevant authorities in order to facilitate their assessments. Moreover, there are "support measures" which aim, among other things, to ensure that the host institution provides clear, complete, and easily accessible information on the rights of trainees. This is in line with the broader process at the European level, which is guided by the principles of transparency and awareness as antidotes to labour exploitation, inequalities, and discrimination.

Conversely, the accompanying Council Recommendation poses fewer interpretative difficulties, also likely due to its more limited impact. It introduces innovative elements aimed at improving train protections, including advocating for adequate social protection and inclusive traineeships, recommending equal access for vulnerable groups, and adapting programs to meet individual needs. Also these suggestions are consistent with the overarching European goals of fairness and the promotion of social equity in the labor market, and their effective implementation could help reduce disparities and discriminatory practices related to traineeships across the Union.

It must be noted, however, that the Commission has not heeded the calls from social partners for more effective measures to support young people in particularly vulnerable situations, who frequently face greater difficulties in accessing traineeships. This is the case, for example, of young people from rural areas, from remote regions like the EU outermost regions or from lower socio-economic backgrounds, or young people with disabilities, with a migrant background, less represented ethnic minorities. In this regard, the implementation of targeted initiatives, such as the introduction of incentives for employ trainees after the traineeship or the expansion and improvement of the quality of remote or hybrid traineeships, could prove to be instrumental. Such measures have the potential to reduce the obstacles to traineeship access for vulnerable groups, thereby aligning the proposal with the principle of reasonable accommodation for trainees with disabilities.

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4. Final considerations

The recent legislative developments within the European Union, in addition to the increased investment to expand traineeship availability, are commendable steps towards enhancing both the quality and accessibility of traineeships. These initiatives play a pivotal role in improving both the quality and accessibility of this instrument throughout Member States. However, caution is warranted to ensure that these efforts align with the specific legal frameworks of individual Member States, avoiding regulatory approaches that may inadvertently produce adverse effects.

Effective regulation, intended to safeguard both the authenticity and quality of traineeships, must prioritize the ontological and teleological dimensions of the traineeships experience. Traineeships are, and must remain, structured learning opportunities designed to facilitate the transition of young people into the labor market, offering a gradual progression from learning to stable employment. Unlike conventional employment, the primary purpose of them should not be economic remuneration (it is imperative that this is not lacking when the work is actually being done), but rather personal development and career orientation.

Ensuring fair compensation is essential, but it is equally crucial to maintain the distinction between traineeships and salaried employment. Blurring this line risks to create a class of "working poor" who are treated as employees yet compensated at significantly lower rates, thus defeating the purpose of the tool as a bridge to full employment and potentially disguising discriminatory outcomes. The European legislative framework must strike a balance between economic guarantees and the integrity of training and this oversight should extend across all phases of the traineeship relationship, ensuring that the educational and developmental aspects of the experience remain central.

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NEET: a social emergency not only (but especially) Italian

Antonio Pellicano[1]

1. Position and framing of the problem

The high percentage of young Neets is still an issue of great concern today.

Although, in fact, important steps to mitigate the phenomenon have been taken over the years, the recent report "Global Employment Trends for Youth 2024", prepared by the International Labour Organization (ILO), continue to give an alarming picture, in respect of which there is still a long way to go to curb the problem[2].

However, it is good to clarify that, while in the Arab countries, Africa and South Asia the quantity of young people who are neither in employment nor in education or training, already very high in itself, appears substantially unchanged with respect to the previous decade, certainly more reassuring signs in terms of decrease come from Europe, which is progressively advancing[3], despite a certain territorial inequality, towards the goal of reducing the Neet rate of 15-29 year old to 9% by 2030[4].

Moreover, the latest Eurostat survey provides us the image of a two-sided Europe: on the one hand, countries that have already reached this percentage or are close to doing so[5]; on the other hand, countries still in serious difficulty, with an incidence of Neets well above the target.

[1] Research Fellow at the University of Bari, Italy.

[2] In fact, based on this study, the ILO report, *World Employment and Social Outlook: September 2024 Update*, shows that the incidence of NEETs worldwide decreased only slightly from 21.3 per cent in 2015 to 20.4 per cent in 2024.

[3] It is noted that the decline in the Neet rate in Europe has suffered only an important halt in 2020, due to the pandemic emergency.

[4] This ambitious target was introduced as part of the "*European Pillar of Social Rights Action Plan*", adopted in March 2021.

[5] Eurostat, *Statistics on young people neither in employment nor in education or training*,

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Among the latter, Italy is sadly the second-last in the European ranking, only surpassed by Romania and far behind Germany, France and Spain.

This is certainly a painful situation, which reflects the difficulties and the deep unease of an entire category, very often defined all too severely as lazy, apathetic or "big babies"[6].

At this point, the question to ask is simple: why is Italy one of the biggest "factories" (Rosina, 2015, p. 15) of Neets in Europe?

Although the issue, also considering the "multidimensionality" of the phenomenon, is very complex and cannot be analyzed exhaustively in this paper, it is nevertheless possible to provide an initial answer starting from the latest ISTAT report on the "*Education levels and employment performance of Italians 2023*", which records a reduction of Neets by almost 2.9 percentage points compared to 2022 and 7 points compared to 2021, now standing at 16.1%.

The survey, beyond the positive result, clearly highlights the influence of educational opportunities on the status of young Neets: in fact, possession of a diploma is often associated with a higher probability of finding stable employment, confirming the importance of policies that promote at least the completion of higher education.

These data are also characterized by gender. In fact, the female participation rate in the labour market is closely correlated with the educational qualification, with very wide differentials: the employment rate of female graduates is 19% higher than that of female high school graduates (4.3% among men) and, among the latter, it is 25.6% higher than that of women with at most a lower secondary diploma (14.9% among men).

Thus, low levels of education and training are still a discriminating factor in women's access to the regular and institutional labour market.

Beyond this aspect, Italy still has much to do in the field of education and training.

In fact, high is the data on school drop-out, which places our country in fifth place in Europe, with values lower only than Romania, Spain, Germany and Hungary[7]. It is undoubtedly affected by territorial disparities since the

published in May 2024, shows that in 2023 one third of EU countries are already below the target of 9% by 2030: Netherlands (4.8%), Sweden (5.7%), Malta (7.5%), Slovenia (7.8%), Luxembourg (8.5%), Ireland (8.5%), Denmark (8.6%), Germany (8.8%) and Portugal (8.9%).

[6] Thus emblematically defined in 2007 by Tommaso Padoa-Schioppa, Minister of Economy and Finance, during a hearing in the Chambers.

[7] The reference is to Eurostat data 2022, according to which 11.5% of young people between 11-24 in Italy leave the education system prematurely, almost two percentage points above the European average of 9.6%. A positive figure, despite everything, since the country has exceeded the 16% target set by the European Union for 2020 and aims to reach 9% by 2030.

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highest percentages of Neets are recorded in southern Italy, especially in Sardinia, Sicily, Campania, Apulia and Calabria.

Moreover, in our education system, there is a lack of a well-structured pathway that provides young people with a clear and personalized indication of the course of study to be taken. Often, in fact, choices are influenced by external factors, such as the advice of parents or family friends, who, although motivated by good intentions, don't consider the strengths, weaknesses, talents and aspirations of the young people (see Sacconi, Tiraboschi, 2005).

A substantial rate of school drop-out is often accompanied by a high implicit drop-out rate[8], i.e. the attainment of a higher education qualification without the acquisition of basic skills, once again affecting young people in southern Italy[9].

This gap between the skills trained and those required in the labour market has a direct negative impact on the employability of young people.

A confirmation comes from a recent study conducted by EY, "*School-to-work transitions*"[10], that clearly emphasizes the importance of adapting the education system to the demands of the labour market and of specific interventions to correct the skills gap and improve the alignment between labour supply and demand.

In Italy, the transition period from school to work lasts a very long time, between two and three years compared to the European average of less than one year: according to the report's estimates, 30% of high school leavers will experience difficulties in this transition until 2030. Specifically, vocational school leavers will register the highest mismatch rate (+94%) of all school types.

With such a long school-to-work transition time, it is inevitable that young people grow old on the way, engendering a kind of "lag syndrome" (Livi Bacci, 2005, p. 412).

In fact, a longer transition limits the possibilities of entering the labour market according to quality and adequately remunerated regulatory and contractual paths (see Tiraboschi, 2005).

It is also for this reason that many young people, despite possessing a

[8] Italy is among the few European countries to have introduced a system of monitoring and census survey of implicit school drop-outs through the "Anagrafe nazionale degli studenti".

[9] Although the latest "*Rapporto nazionale Invalsi 2024*" is decidedly encouraging on the front of implicit school drop-out, which drops to 6.6%, the gap between North and South is still too wide. In fact, primary schools in the South struggle more to guarantee equal learning opportunities for all students, with obvious negative effects on subsequent school grades.

[10] This is a study presented during the event held on 5 March 2024 "*Costruire ponti tra istruzione e lavoro: UPSHIFT for Youth*", organised by UNICEF, Junior Achievement Italia, EY and EY Foundation.

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high level of education, often don't find positions that are in line with their professional expectations (see Salvini, Ruggiero, 2016; Gaspani, 2018), with consequent exit from Neet status only by emigrating or accepting a downward work adaptation[11].

This last aspect raises an issue that is very relevant for understanding the specificity of the Neet phenomenon in Italy: the "decent work".

In fact, it is significant to note that in our country there is a high share of the shadow economy within which "undeclared work" proliferates[12].

Many young people prefer to settle for an insecure and poorly paid job, rather than enter the education circuit (see Casano, Seghezzi, 2021). At the same time, however, the risk is to slip quickly into petty crime, thinking that delinquency pays better than school.

2. Activation policies for young Neets: the Youth Guarantee experience

Having analyzed the main factors exacerbating the Neet problem in Italy, it is now necessary to examine the role of Youth Guarantee as the main response to the "youth question" in our country.

Established at European level by the Recommendation of 22 April 2013[13] and renewed with the Recommendation of 30 October 2020[14], is the first important programme introduced in Italy to guarantee young people a job or

[11] We can understand why, not infrequently, young people prefer to give up finding employment rather than accept such work "opportunities". Moreover, this situation accentuates the typically Italian phenomenon of young people staying in families for a long time. Cf. Eurofound (2024), *Becoming adults: Young people in the post-pandemic world*, *Publications Office of the European Union*, Luxembourg.

[12] Cf. report of National Youth Council (2024), *Lost in transition. Contrasto al fenomeno dei Neet: azioni di prossimità*. In particular, it is shows that metropolitan Neets are more active in the informal economy and in participating in social and political networks: 74.8% of Neets have done "odd jobs" in the last month. In the metropolitan areas, 88.9% of Neets are involved in informal activities, while in the inner areas the percentage drops to 53.6%.

[13] Council Recommendation of 22 April 2013 on the establishment of a Youth Guarantee (2013/C 120/01).

[14] Council Recommendation of 30 October 2020 on a bridge to work, strengthening the Youth Guarantee and replacing the previous Recommendation of 2013 (2020/C 372/01). It is pointed out that this recommendation first of all provided for the extension of the age limit of the young recipients of the measures from 25 to 29 years, as already envisaged in Italy, implicitly recognising that the transition from school to work and sustainable insertion in the labour market certainly take longer. Furthermore, it highlighted the need for a greater understanding of the characteristics of young Neets in order to be able to involve them more closely and adapt the interventions to their distance from the labour market.

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training opportunity within four months of becoming unemployed or leaving the formal education system.

The national implementation plan of Youth Guarantee, launched in May 2014, immediately ran into several difficulties (see Casano, Di Stani, Petruzzo, Rosolen, 2014; Buratti, 2015), raising serious doubts about its effectiveness (see Tiraboschi, 2015; Rosolen, Seghezzi, 2015). Doubts that weren't dispelled afterwards to such an extent that today, ten years after its inception, it can be argued that the "challenge" (Fano, Gambardella, Margiocco, 2015) has been overall lost.

To understand the reasons for the lack of success of the Youth Guarantee, it is useful to examine some data from the latest monitoring of the measure[15].

Although the young Neets responded positively to the initiative, with almost 2 million registered users, evident are the difficulties encountered in the transition from their take-over to inclusion in an activation or orientation pathway, especially with regard to the most vulnerable young people, classified by the programme as most distant from the labour market and, therefore, at high risk of social exclusion in the absence of targeted "proximity strategies" (Rosina, Marta, Marzana, Ellena, Cerruti, 2021).

It should then be noted, with reference to the active policy measures offered by the employment services network, that the one predominantly used is the extracurricular internship, giving rise to the suspicion that these internships are used to make up for the labour shortage at a very low cost, without offering young people a real training and employment opportunity (see Galeotto, 2022).

This suspicion is also fuelled by the fact that a significant proportion of young people have performed tasks requiring basic knowledge similar to that which can be acquired by completing compulsory schooling. This is particularly important if we consider that apprenticeship should be exercised in the context of activities that require a clear and high-quality training contribution.

Behind the use of extracurricular traineeships, there are employment incentives[16], training, pathways to work, community service and support for self-entrepreneurship.

Surprising, in an unequivocally negative sense, is the very low utilization

[15] ANPAL (2023), *L'attuazione della Garanzia Giovani in Italia. Un bilancio del periodo maggio 2014-dicembre 2022*; as a complement, ANPAL (2023), *Garanzia Giovani in Italia. Nota quadrimestrale n. 3/2023*, which updates the data to 31 December 2023.

[16] It is worth pointing out that the adoption of the incentives under the Youth Guarantee programme didn't have a statistically significant effect in terms of youth employment. See Brunetti I., Ricci A. (2023).

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of the apprenticeship contract, considering that, for some time now, it has been shown that countries that make massive use of it, especially as a placement instrument, in the perspective of more and better integration between the education and training system and the labour market, succeed more easily in limiting the problem of youth inactivity (see Tiraboschi, 2012).

On the whole, Youth Guarantee Programme has proven to be inadequate as an only solution to the Neet phenomenon, thus stimulating important reflections on new models for designing and implementing activation policies and initiatives to combat the phenomenon, as well as on the need to identify good territorial practices from which to draw for a more structured systematization also at national level (see Terzo, 2018; Agostini, Sacconi, 2020).

Ultimately, it can be argued that the programme not only has it failed to produce the desired results, clashing with certain limitations that have prevented its effective implementation (see Avola, Azzolina, Cuttone, 2017), but it may even lead Italy to return at least 160 million resources to Europe because, from 2014 to date, we have failed to spend them[17].

3. Conclusions and perspectives

The Neet phenomenon constitutes a complex challenge that requires a necessarily multidimensional and integrated approach.

Reflection can only start with the education system as a key element in defining concrete employment opportunities for young people. Indeed, an effective education system not only promotes the acquisition of knowledge and skills relevant to the labour market, but also contributes to reducing inequalities and fostering social inclusion, thus representing a pillar for the economic and social progress of a country.

A confirmation comes from the international study by Gi Group Holding[18], which shows that countries that invest more and in a targeted manner in education, such as the United Kingdom, Sweden and the Netherlands, succeed more easily in reducing the distance between school and work,

[17] This is the provisional outcome of research by ActionAid and CGIL (2024), *Neet: giovani in pausa. Superare gli stereotipi per costruire politiche pubbliche efficaci*, according to which Italy used only 1.9 billion euro of the resources of the National Operational Programme – Youth Employment Initiative, i.e. 62% of the allocated budget of approximately 2.7 billion euro.

[18] Gi Group Holding (2023), *Youth and work, a comparative study. How to empower young people to enter and remain in employment and avoid the phenomenon of NEETs*.

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counteracting the Neet phenomenon and supporting young people's entry and permanence in the labour market[19].

To achieve these positive results, the study emphasizes that investments in education must be targeted towards fields of study closely related to the world of work, such as university STEM (Science, Technology, Engineering and Mathematics) pathways. Furthermore, it is essential to promote the differentiation of tertiary education through the organization of technical pathways designed to provide immediately applicable skills and which make use of the direct involvement of companies in the definition of courses and subjects, thus ensuring an alignment between the skills acquired by students and the needs of the labour market.

In this perspective, it is believed that the ITS Academy can represent a concrete solution to youth unemployment. In fact, ITS graduates, being highly sought-after profiles by companies due to the highly specialized skills acquired in the field, are much more likely to find employment than bachelor's or master's degree graduates[20].

Another instrument with great potential – but which is still struggling to take off, although "signs of enhancement"[21] can be discerned – to reduce the skills mismatch is the first-level apprenticeship, which represents the Italian way to the German dual system, structured in such a way as to combine in-company training with vocational education and training provided by training institutions.

Looking beyond the school-to-work transition, it is also necessary to consider unemployed young people who, after work experience, find themselves forced to look for a new job, often entering the critical area of long-term unemployment. When the main barrier to re-employment is the lack of adequate skills, it becomes crucial to offer them the opportunity to participate in medium-long training courses, among which vocational qualification and IFTS courses are valid alternatives to the ITS Academy in order to acquire technical and practical skills that are immediately spendable in the labour market.

Finally, considering the poor results of the GOL programme to date[22], it is

[19] Despite a gradual improvement in recent years, Italian spending on education and training, at 4.1 per cent of gross domestic product, is still below the European average, with greater investment allocated to primary and secondary education and fewer resources allocated to tertiary education than in other countries. See, on this point, "*Education at a Glance 2024*" report, edited by the Organisation for Economic Cooperation and Development.

[20] Indire (2024), *Rapporto Nazionale. ITS Academy. Monitoraggio nazionale*.

[21] Inapp (2024), *Segnali di potenziamento dell'apprendistato duale. XXII Rapporto di monitoraggio*.

[22] Anpal (2024), *Attuazione del programma GOL. Garanzia di occupabilità dei lavoratori, Nota di monitoraggio (dati al 31.06.2024)*.

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necessary to promote actions aimed at identifying and intercepting the young people furthest from the labour market, by implementing strategies that raise awareness in the territories and spread knowledge of the opportunities offered by the programmes available, it is necessary to promote actions aimed at identifying and intercepting the young people furthest from the labour market, implementing strategies that raise awareness in the territories and spread knowledge of the opportunities offered by the programmes available.

These actions must include the active involvement of the third sector, educational institutions and other local realities, creating collaborative networks capable of effectively reaching young people in more vulnerable situations.

In this perspective, the "Programma Nazionale Giovani, Donne e Lavoro"[23] is an opportunity not to be missed. Part of the active policy reform process implemented by the GOL, this programme is structured in five priorities, within which priority 1 is aimed precisely at promoting the entry of young people into the labour market, with the goal of reducing the Neet rate to 9%,

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Young people in the labour market: ideas for a renewed trade unions strategy[1]

Nicola Deleonardis[2], Michela Turoldo[3]

1. Introduction

The difficulties in matching labour supply and demand, together with the conditions of in-work poverty (Brollo *et al*., 2024) in which mainly young people find themselves, due to the conspicuous utilisation of non-standard forms of contractual work, have led to a lack of equal access to quality and/or decent job opportunities (Deleonardis, 2024, p. 47 ff.).

Given this situation, the question from which the analysis proposed here starts is whether the trade union can play a leading role in the governance of the labour market today, extending protection to the individual, especially young people, even before the employment relationship is established, without, however, giving up its traditional function as a contractual agent.

The answer cannot leave out any analysis of the interests that may come up. The non-implementation of the second part of Article 39 of the Italian Constitution has indeed affected not only the interpretation of the collective bargaining (Persiani, 1972), but also the function of the trade union (Giugni, 1960, p. 19).

In this regard, labour law doctrine has been divided between those who qualify the trade union as an association that acts based on a mandate with representation (Santoro-Passarelli, 1950, p. 299 ff.), as a projection of the private autonomy of individual workers, and those who instead see the trade

[1] This paper is the short version of the research by Authors next to be published in the *E-Journal of International and Comparative Labour Studies*. Although the contribution is the result of a shared reflection, the introduction and conclusions are written by both authors, paragraphs 2-3 by Michela Turoldo and paragraphs 4-5 by Nicola Deleonardis.

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union as an organised social power that is legally qualified as an alternative autonomous order to the state, which can be referred to in a multi-state perspective (Giugni, 1960).

This qualification operation is not without consequences, as it reflects the interests that the trade union represents.

The question is about the concrete ability of trade unions to extend the range of representation beyond their member workers, to achieve convergence, but not overlap, with general interests.

In this perspective, the associative approach does not consider the role that should be played by the trade union, as an organisation that is the bearer of interests that go beyond the interests of the members' reference group, until they become interwoven with the general interest in promoting employment (Scarponi, 2002, p. 370). By qualifying the trade union as an association that acts based on the mandate with representation conferred by individual workers at the time of registration, the associative perspective ends up leading each professional organisation to protect only the interests of its members.

On the contrary, the multi-state perspective allows the trade union to extend the range of representation beyond its members, becoming the bearer of broader interests, which converge with public interests, without overlapping with them.

2. Is there a collective interest in the protection of the worker in the labour market?

The exercise of trade union powers within the labour market can only be justified if there is a collective interest underlying the trade union's actions.

The principle of trade union freedom in Article 39(1) of the Italian Constitution (Giugni, 2015, p. 25 ff.) allows trade unions to select their collective interests with authority, implementing organised actions to protect them.

If, therefore, the freedom to select one's own interest can be considered inherent to trade union organisation itself, the next step is to ask whether the protection of workers in the labour market through trade union organisation actions can be qualified as a collective interest (Deleonardis, 2024, p. 69).

The existence of a collective interest in the protection of workers in the labour market can indeed already be understood from the characteristics of the labour market, from which it appears that this interest takes the form of an interest in the protection of workers against undeclared work, an interest in guaranteeing the employability of workers and, finally, an interest in protecting the professionalism of workers.

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The difference between undeclared work and irregular work is well known, even if subtle: while in the former case, it is the non-declaration of the establishment of the employment relationship that is relevant, in the latter case it is the violation of the law or a collective bargaining that is relevant.

Although undeclared work does not necessarily entail the breach of labour protection rules, there is a widespread belief in the Italian doctrine that the non-declaration of the establishment of an employment relationship is aimed at avoiding the rules protecting the worker (Ciucciovino, 2023, p. 354 f.).

Precisely because undeclared work is an area in which workers' organisations are not involved (Bellavista, 2008, p. 19), there is a collective interest in the transparency of the labour market and the trade unions are not merely spectators but take an active part in protecting workers (Deleonardis, 2024, p. 75).

There is also a collective interest in guaranteeing the employability of workers, given the central role played by training in the fight against in-work poverty, allowing workers' professional skills to be adapted to constant economic and production changes.

Employability has been defined as an "*individual right with a mainly collective actuation*" (Ghera, 2000, p. 524), namely as an interest selected by the trade union organisation, which, acting as a representative of the working world, guarantees egalitarian requests, ridding the market of any discriminating factor and pursuing minimum training objectives.

The collective interest in employability therefore includes those instances of protection and social inclusion, as well as freedom and equality, protected by the Italian Constitution (arts. 2, 3, 4 and 35 of the Italian Constitution), which thus become rights that can be exercised not only by the worker, but by the individual as a person, and which would find a constitutional referent in the freedom of trade unions under art. 39(1) of the Italian Constitution.

Finally, training in the labour market also affects the protection of workers' professionalism, becoming an object of interest for trade union organisations, especially following the changes in production processes resulting from technological innovation.

A modern system of industrial relations cannot remain indifferent or neutral to the emergence of new models of productive organisation. Consequently, the protection of the worker's professionalism takes on the features of a collective interest, in the double form of the adjustment of existing professional figures and the profiling of new ones according to production contexts. This is an interest that is linked to the protection of the worker already in the labour market and, therefore, even before the employment relationship is established.

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3. The trade union's selection of the collective interest in the protection of the worker in the labour market

This collective interest in the protection of the worker in the labour market not only seems to exist but also appears to have been the subject of selection by trade union organisations, as can be seen from an analysis of the production of the inter-union system in recent years, that is expressed not only in collective bargaining but also in inter-confederal agreements (Deleonardis, 2024, p. 92 ff.).

It is especially concerning youth employment that a collective interest in protecting the worker in the labour market emerges.

The reference goes especially to the so-called Patto per il Mezzogiorno of October 14, 2019, which requires the enhancement of targeted active policy programs for young people, making it easier for them to be hired.

Particularly emblematic, again for the attention given to youth employment, is also the 2021 Protocollo di Intesa per le Politiche attive del Lavoro tra la Regione Lazio e le Parti Sociali, which is part of a territorial plan to modernize the regional labour agency, supported by the establishment of a Labor Market Observatory, to detect trends and forecasts of the main indicators.

This agreement provides for a range of actions aimed at promoting employability and employment, resorting to generational turnover measures, thus supporting the inclusion of young people in the labour market (article 6 of the Protocol).

Of particular interest, for the existence of a collective interest in the protection of professionalism in the labour market, is the Patto per le nuove competenze, signed by the social partners and the Lazio region to complete the Protocollo di Intesa per le Politiche attive.

This Pact, besides calling for an intervention of the Parties in the fulfilment of the subjective right to training, promotes a series of discussion meetings between all stakeholders involved in the pact, to identify the new skills and new professional figures, anticipating their needs related to the changes in the regional economic, productive and social context (article 3 of the Pact).

4. The European Union for employability: an essential role for trade unions

The analysis has focused on social self-regulation resulting from inter-union coordination, as well as on agreements of a concerted nature. The scholars have postulated a direct, but not necessary, correlation between

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the authoritative selection of the collective interest before the formation of the trade union organization, then within inter-union coordination, and its formal legal recognition by the state authority (Persiani, 1972, p. 47). This is not a fundamental moment in the process of recognizing social entities. Nevertheless, an eventual heteronomous recognition could facilitate the pursuit and satisfaction of these interests.

From this perspective, it seems appropriate to start with the European Union level, because the protection of workers' rights in the era of multi-level protection (Sciarra, 2011) is based on a functional relationship between European and national law (Caruso, 2010, p. 11; D'Antona, 1998; Veneziani, 2008; Lo Faro, 2008), in an attempt to preserve their dynamic balance.

So, it is important to emphasize that the satisfaction of the collective interest occurs through the use of an alternative governance model, distinct from the legal formalism typical of hard law measures. This model is based on the adoption of minimum provisions in the areas listed in Article 153, letters a-i (Bano, 2003; Roccella, 2007) and relies on the "*open method of coordination*" (now Article 149 TFEU), which uses non-binding instruments listed in Article 288, § 4, TFEU, provides for "*the coordination of the employment policies of the Member States*".

Is not necessary to recall all European documents aimed at the involvement of social partners in the protection of young people in the labour market (Deleonardis, 2024).

It's enough to recall the recent European Commission communication on Labor and Skills Shortages in the EU: An Action Plan (European Commission, 2023) eloquently addresses both the Member States and the social partners. It is worth noting that the communication directs attention to the social partners concerning all the priority axes identified within it, and not just about the axis of "*improving working conditions*" through collective bargaining. Specifically, social dialogue should extend to other action lines, such as "*supporting the activation of underrepresented groups in the labor market*" (especially women, people with disabilities, and youth), and "*providing support for skills, training, and education*". The communication reinforces the call to Member States to "*fully implement the initiatives of the Agenda for Skills for Europe with the involvement of the social partners and relevant stakeholders*" while emphasizing that "*the Commission welcomes the intention of the social partners* […] *to develop and implement actions aimed at improving skills and upskilling in the context of social dialogue, supporting the recognition of skills, and helping to identify skill shortages, based on their information and skills intelligence*".

To paraphrase a recurring scholar's expression (Biagi, 2000), an "expectation" arises that the social partners, and particularly trade unions,

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will be involved by the national legislator in the creation of a social safety net to protect young people from the risk of remaining unemployed, while also supporting their personal life projects.

5. The trade unions for young people's employability according to Italian rules

Especially after the Covid-19 pandemic, the national legislator has followed these European Union guidelines. It's appropriate to focus the attention on the territorial pacts already described in the GOL Program (GOL means Guarantee of Employability of Workers) and incorporated in Law n. 234/2021, art. 1, paragraphs 249-250, which proposes again an experiment with a long tradition in Italy and Europe (Regini, 2001; Viscomi, 2004), but still today "alive" in some part of Italy (Bianchi *et al*., 2020; Chapellu, 2024). In line with the Skills Pacts of the EU, territorial pacts aim to establish neo-concerted governance models of the labor market to promote, among other things, the training and professional integration of young people, especially in the sectors of ecological and digital transition. The institution involves all stakeholders interested in employment and employability, including trade unions, bilateral bodies and interprofessional funds. Above all, it fits into a legal framework where economic resources are substantial (Varesi, 2022, pp. 110-111).

The purpose of these agreements is to implement training and employment insertion projects in the sectors of ecological and digital transition. These projects are aimed not only at retraining already employed workers (paragraph 249, letter b), but also at "*inserting and reinserting, with adequate training, unemployed, inactive, and out-of-work individuals*" (letter a).

As for the beneficiaries, territorial agreements target not only those already employed, but also those who are temporarily unemployed (the unemployed), those who have never been employed (inactive individuals like NEET or, in general, young people), or those who face particular difficulties in accessing the labor market (fragile and vulnerable individuals) (Sartori, 2021). So, to promote active policies for young people, territorial pacts represent an interesting approach to enhancing employability while also protecting them from undeclared work. This is because these pacts involve ongoing trade union oversight of working conditions before the employment relationship is established.

Until recently, there had been no implementing decree for territorial pacts (Corti, Sartori, 2022, p. 74). However, the Interministerial Decree of March 29, 2024, reintroduces them, even though with a party different form,

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focusing only on the ecological transition sector and requiring regions to legislate on the matter by September 30, 2025. For this work, and further supporting the thesis presented, it seems useful to highlight a particularly interesting passage from the PNC-transitions, which outlines an ideal process that active labor market policies should follow in regard to young people. It is particularly interesting to note that the regional implementation rules of the decree must provide for the active involvement of all stakeholders to build a process that starts with the ex-ante analysis of training and employment needs and goes all the way through to the monitoring of the employment outcomes of funded training, quickly verifying whether the recipients of the training interventions have achieved employment results through the signing of an employment contract (detailed by type of contract, duration, sector in which the employer operates, and job position). Furthermore, in qualitative terms, it is possible to assess the consistency between the training provided and the eventual employment contract signed[4].

The plan indeed concerns those sectors and/or professions impacted by the ecological transition (but here the question arises: which sectors would be excluded?), however, the path taken – as expressed in the national document and limited to the enhancement of trade union-based entities – seems to be a commendable one.

6. Final consideration

In conclusion, these tools should be welcomed because, on the one hand, they promote the development and economic growth of the country, and on the other hand, they strengthen union power by extending union consensus, allowing the trade union to participate in the governance of the labour market and to preventively verify the contractual conditions of newly hired young people.

However, there are some concerns. The first concern is about the timing and methods of implementing the decree on territorial pacts by the regions, as there is a risk that Italy will have both virtuous and less virtuous regions in terms of active labor market policies. The second concern is related to the difficulty trade unions face in reaching young people in the labor market. Unlike workers who are already familiar with the workplaces, where trade unions are in contact with them, even if they are not union members, reaching and involving young people in territorial pacts requires an organizational capacity that trade unions do not seem to possess in this difficult phase of its history.

[4] See interministirial decree of March 29, 2024, Attached A, p. 30.

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Pathways to inclusive and just societies: strategies and innovations in the work of equality bodies in the European Union

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1. Introduction

In the last two decades, the European anti-discrimination legislation has represented a successful vehicle for the enforcement of non-discrimination and equality principles and for achieving social justice in the world of work among European countries. Nevertheless, some weaknesses are still apparent, especially due to the excessive fragmentation of the legislation and its heterogeneous implementation across Member States.

Equality bodies were originally established following *article 13* of the *Racial Equality Directive* (Dir. 2000/43/EC), soon replicated by *article 20* of Dir. 2006/54/EC and *article 11* of Dir. 2010/41/EU, concerning the protection against discrimination based on gender.

Nevertheless, these bodies have experienced limitations in their actions because of external and internal factors characterising their mandates, structures and resources. Moreover, the context where equality bodies act is worrying, considering that discrimination is still too spread among European countries and several doubts and weaknesses continue to characterise the implementation of acceptable standards: for instance, a high degree of uncertainty surrounds the concept of "discrimination" in the first place, especially due to the emergence of new forms of discrimination (such as algorithmic or statistical ones); besides, the number of cases denounced and brought before judges is modest, indicating both fear in victims' behaviour and low awareness of the existence of support services; lastly, follow-up

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measures to decisions in matters of discrimination are currently ineffective, where present. More particularly, different levels of protection against discrimination have been registered among European countries for years: a situation hardly conceivable for the progressively social European Union which is currently becoming more and more solid (COM(2021) 139 final).

Eventually, the potential positive impact deriving from equality bodies' intervention came to the attention of the European institutions, which decided to act, firstly through the publication of a Recommendation (C/2018/3850) about the necessity to improve the minimum standards for the functioning of equality bodies in 2018; and afterwards, given that no effective changes were registered, they intervened by proposing two draft directives on the subjects. Finally, Dir. 2024/1499/EU and Dir. 2024/1500/EU have been adopted in May 2024.

Equality bodies appear to be, at least on paper, actors capable of contributing to the enforcement of the anti-discrimination legislation, due to several characteristics that can lead to favourable impacts in, at least, three areas (Elizondo-Urrestarazu, 2022; Kádár, 2018; Van de Graaf, 2020): in the first place, equality bodies can contribute to a radical change at the societal level, spreading the values of diversity and equality in the national culture (*macro-perspective*); secondly, they can lead to organisational changes, both in the public and in the private sectors, by influencing policy-making and procedures (*meso-perspective*); and lastly, their actions impact on the personal situation of the victims who entrust equality bodies for some form of support (*micro-perspective*).

Given the circumstances, it appears crucial to conduct an in-depth investigation of the role played by equality bodies until today, at the same time considering hypothetical developments which may derive from the newly increased standards provided at the EU level.

2. Establishment, mandate and characteristics of renewed equality bodies

Article 1 of the new directives introduces a first improvement, given that it assigns equality bodies the competence to act against discrimination based on all the grounds covered by the *Equality Directives*: as a matter of fact, one of the limits highlighted until now about the functioning of these bodies was the absence of a mandate to act in the field of discriminations due to religion or belief, disability, age or sexual orientation of the victims, as covered by Dir. 2000/78/EC. However, over the years, equality bodies have proved to be quite flexible and proactive, almost all ensuring support in

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contrasting discrimination deriving from the excepted grounds, thus showing a general over-transposition of the EU anti-discrimination requirements in this area. Lastly, as for the number of grounds that a single body can treat, no strict obligations are provided for in the directives but, from the analysis of national practices, it emerges that both single-ground bodies and multi-ground bodies exist (SWD(2021) 63 final).

Since *article 2* of the Directives foresees that one or more bodies can be established in the same country, a widespread usance consists of the co-existence of two national bodies, one focused only on a single ground together with a multi-ground body.

The new directives also deal with the regulation of a number of aspects that define both the internal functioning of equality bodies and their external appearance (Solanes Corella A., 2023), as can be observed in *article 3* about the *independence* of equality bodies, *article 4* about their *resources*, and *articles 12* and *13* regarding *equal access* for all, along with *accessibility and reasonable accommodations for persons with disabilities*.

The new directives provide for some improvements in the regulation of equality bodies' independence, especially through the adoption of *article 3*, which aims at guaranteeing "neutrality" to these organs (Farkas L., 2022). Here, explicit reference is made in the first paragraph to grant that equality bodies can work without being subjected to any external influence, which may derive from Governments, other public bodies as well as private ones. Moreover, an independent management of all types of resources is requested. The second paragraph focuses on the recruitment process of equality bodies' staff, in order to guarantee transparent procedures, as asked and suggested by the European institutions in the 2018 Recommendation (Crowley, 2018). Finally, the fourth paragraph addresses the theme of multi-mandate bodies, indicating the necessity to build a solid internal structure within them to efficaciously exercise the equality mandate at the same level as the other ones.

As a whole, from the analysis of the new directives, mixed sensations are evocated in this area. Undoubtedly, the general requests moved by the European institutions have been answered positively, especially taking into account the introduction of transparent procedures, as well as the specifications concerning independence for all equality bodies and also for multi-mandate ones. Conversely, failures or, more appropriately, potential "missed opportunities" are related to: first and foremost, the lack of explicit safeguards to guarantee independence or the absence of legal avenues to be used to "counterattack" when the independence of equality bodies is violated; secondly, while providing for transparent procedures in staff's recruitment, ideally, a reference to the possibility to include exponents of

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vulnerable groups directly in the staff would have been appreciated, thus further representing a whole diverse society (Benedi Lahuerta, 2021); and lastly, no explicit reference is made to the need to overcome the incidence of national political contexts on equality bodies' activities nor any means are provided for to address the issue.

As far as resources allocated to equality bodies are concerned, *article 4* of the new directives explicitly refers only to the need to grant these organs, including multi-mandate bodies, with "sufficient resources". Once again, a missed opportunity can be pointed out, given that no procedures are foreseen in this provision to create, firstly, a multi-annual budget and, secondly, a monitoring programme of the budget. In so doing, the legislator has missed the chance to spread a good practice that could have been applied to all equality bodies, flexibly, by adequately considering the specific functions, activities and needs of each of them.

Lastly, access for victims to equality bodies and their services must be granted through flexible, clear and simple procedures. In this direction, the new directives reiterate multiple times the point: firstly, paragraph 3 of *article 5* states that these organs must implement all appropriate instruments and formats to reach the audience, taking into account multiple vulnerable groups of people; secondly, *article 12* explicitly refers to the absence of barriers to be ensured in the submission of complaints and to the importance of cost-free procedures; and lastly, *article 13* specifically relates to issues concerning access to equality bodies for people with disabilities.

Overall, the directives seem to have followed a clear and linear strategy in the matter.

3. Functions and tools of renewed equality bodies

The original functions of equality bodies following *article 13* of the *Racial Equality Directive* were the provision of independent assistance to victims, the conduction of independent surveys, the publication of independent reports and the issuing of recommendations. Among them, assistance to victims has been recognised as being used in the most varied ways among Member States.

Following the renewed legal framework, equality bodies' functions can be now divided into three main categories: promotion and prevention, decision-making, and support and litigation (SWD(2021) 63 final) (Crowley, 2018; 2020).

In this way, these organisms are solidly equipped to confront discrimination from two opposite perspectives (Benedi Lahuerta, 2021;

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Solanes Corella, 2023): in the first place, *ex-ante* instruments enable them to prevent discrimination and play a proactive role in creating the ideal conditions for uprooting any form of discrimination in several areas; secondly, equality bodies have at their disposal instruments suitable also to react to discrimination, thus ensuring *ex-post* interventions aimed at minimising the impact of unequal treatment.

3.1. Promotion and prevention function

Article 5 of the new Directives deals with the first function recognised to equality bodies, that is the prevention of discrimination and the promotion of equal treatment. In this regard, many are improvements that can be highlighted, among which, the promotion of positive actions and equality mainstreaming both in public and private entities; secondly, the provision of training, advice and support to organisations; and lastly, the establishment of solid collaborations with stakeholders and social partners, which represent fruitful activities for the promotion and exchange of good practices.

Article 6 enumerates a series of activities that equality bodies shall perform while providing victims with assistance, ranging from the receipt of complaints from individuals to other various measures to be taken to assist vulnerable people. Among them, significant attribution is given to the dissemination of information about the legal framework, the services provided by the body, available remedies and technical provisions concerning confidentiality and protection of personal data. Besides, equality bodies hold now the competence to make suggestions and orient victims to complementary forms of support (such as psychological help). Lastly, the organisms shall guarantee the respect of a reasonable time to respond to the assistance requests lodged by victims.

Overall, the two directives have provided specific standards for the organisation of assistance within equality bodies, covering all phases of the victim support request procedure.

3.2. Decision-making function

Originally, *article 13(2)* of the *Racial Equality Directive* recognised the power of equality bodies to conduct independent surveys, publish independent reports and make recommendations. Nevertheless, only a limited number of Member States have organised their equality bodies in

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a way that allows them to issue legally binding decisions. Likewise, the opportunity to effectively ensure the enforcement of such decisions has been taken by even fewer organs.

With the adoption of new legislation on equality bodies, extended specifications have been made about the nature of and the processes involved in their decision-making function. As a matter of fact, *article 8* (titled "*Inquiries*") and *article 9* (titled "*Opinions and Decisions*") of the new directives regulate, respectively, the sphere of investigations conducted by equality bodies, and their ability to make assessments about cases and issue decisions about them.

On the one hand, more clarity about definitions of roles and activities has been guaranteed, welcoming the suggestions made by both the doctrine and the European institutions. On the other hand, concerning the enforcement of the decisions issued by equality bodies, it seems that both steps forward and steps back have been taken. *Article 9*, in its second paragraph, refers explicitly to "*specific measures to remedy any breach of the principles of equal treatment found and to prevent further occurrences*" and to the establishment of "*appropriate mechanisms for the follow-up to non-binding decisions, such as feedback obligations, and for the enforcement of binding decisions*". In so doing, the legislator has appropriately satisfied the demands concerning the supply of mechanisms to actively follow equality bodies' decisions, but the achievement of effective results appears unrealistic due to the lack of explicit reference to any sanctions (European Commission – DG Just, 2020). In this sense, the legislator has missed the opportunity to follow entirely the 2018 Recommendation, which counted on the necessity to issue suitable, effective and proportional sanctions to achieve a high standard in the enforcement of equality bodies' decisions. Of course, the mention of "*feedback obligations*" is welcomed, but it appears too weak in comparison, for example, to the provision of activities' periodical monitoring, as first suggested in the 2018 Recommendation. For instance, monitoring processes could have been mentioned and extensively treated in *article 9*, entailing both cyclic follow-ups in relation to further complaints received about the same issue of discrimination, or focused on the steps taken, subsequently to decisions, both by perpetrators and the legislator (Iordache, Ionescu, 2022).

But surely, an improvement is generated by *article 10(4)*, which entails the opportunity for equality bodies to initiate legal proceedings aiming at defending their legally binding decisions, taken following *article 9* of the same directives.

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3.3. Support and litigation function

The support and litigation function granted to equality bodies mainly consists of, firstly, the possibility to act in court proceedings (on behalf or in support of one or more victims, or to defend the public interest), and secondly, the opportunity of recurring to forms of alternative dispute resolutions.

As far as the latter are concerned, new legislation constitutes an important improvement in the field, by introducing the use of alternative dispute resolutions for equality bodies across all Member States. In particular, *article 7* of the new directives regulates the issue, suggesting mediation or conciliation as possible forms of alternative dispute resolutions, to be chosen by each State following their legal framework and traditions. Overall, this kind of support can prove to be effective in order to achieve structural responses, at the same time offering assistance to individual victims and adapting legislation to more appropriate standards (Iordache, Ionescu, 2022; Kádár, 2019).

Additionally, "*Member States shall ensure that equality bodies have the right to act in court proceedings in civil and administrative law matters relating to the implementation of the principle of equal treatment*"[2]. By doing so, article 10 of the new directives provides for the recognition of legal standing to all equality bodies, trying to put a remedy to the variegated framework in the field.

Legal standing, intended as the "*right or ability to bring a legal action to a court of law, or to appear in a court*" (Kádár, 2019), when recognized to equality bodies, allows for a series of improvements in the fight against discrimination, for several reasons (Van de Graaf, 2020; Elizondo-Urrestarazu, 2022; Farkas, 2022): first of all, it is considered the most effective instrument for acting against collective discrimination which harms entire groups of the society; secondly, it appears to be a valuable means to overcome the systematic issue of low access to justice by victims of discrimination, as well as the under-reporting of such cases, since providing equality bodies with the possibility to represent these victims relieve the latter from the fear to be exposed and consequently to be victims of retaliation.

Besides, the legal casework of equality bodies has succeeded in impacting equality law at different levels (Kádár, 2018): first and foremost, national non-discrimination legislation among all Member States has been deeply investigated and further interpreted thanks to legal actions taken by equality bodies; additionally, these legal actions have reached several times the European Courts, namely through the encouragement directed to

[2] Art. 10(1) of Dir. n. 2024/1499/EU and of Dir. n. 2024/1500/EU.

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national courts to refer for preliminary ruling in front of the Court of Justice (CJEU), or by bringing cases in front of the European Court of Human Rights (ECtHR).

When it comes to the study of the legal standing of equality bodies, it is interesting to note that some specific legal provisions provide them with this competence, namely *article 7(2)* of Dir. 2000/43/EC and *article 9(2)* of Dir. 2000/78/EC, which allows them, as public institutions set up to fight against discrimination and to promote equality, to exercise this function in courts as well. The remarkable fact is that this concession doesn't derive from their *status* as victims of discrimination, as normality requests.

Equality bodies in Europe have developed and implemented different legal actions, depending on many internal and external factors characterizing their functioning. Therefore, several are the legal procedures that these bodies can advance in courts, thus constituting a wide set of legal instruments which best characterize their fight against both individual and structural disparities which weaken our societies (Pirker, 2022). More precisely, equality bodies shall appear in court in different circumstances, as indicated directly by *article 10* of the new directives: firstly, as explicated in the second paragraph, they can issue *amicus curiae* observations to courts as experts in equality law, in this case not taking the side of any party (Lantschner, 2020); secondly, as written in the fourth paragraph and observed above, they can act in court proceedings to defend and guarantee the correct enforcement of their legally binding decisions. And lastly, the third paragraph enumerates a series of other circumstances in which these organs can appear in court: first of all, they can initiate court proceedings on behalf of one or several victims, by employing their own staff or lawyers paid for the job; secondly, they can participate in support of one or several victims, taking the side of a party with the aim to obtain particular outcomes; and lastly, they can initiate court proceedings in their own name to defend the public interest, both with identifiable or no identifiable victims (depending on national criteria for their legal standing) and by opting for *class actions* or *actio popularis* (Micovčinová, 2022; El Morabe, 2022), thus playing a proactive role in the fight against discrimination which harms the rights and interests of entire groups of persons.

As a matter of fact, further specifications concerning the legal standing of equality bodies were absolutely necessary to be developed and included in the new legislation and the fact that the two directives both provide for specific regulation in the field is of pivotal importance. This is also due to a series of challenges and risks which strongly affect the enforcement of legal actions lodged by equality bodies, which derive from the already mentioned vague guidance provided by legislation until now. In particular, limitations

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of economic resources influence the choice of equality bodies to recur to litigation, given the high costs; similarly, high costs may induce equality bodies to recur only to strategic litigation, thus impacting negatively on the "quantity" of proceedings, while preferring "quality" of them; besides, the general lack of internal planning of litigation can be also highlighted in the work of the bodies, thus requesting strategies to build a balance in the forms of support granted to victims; and lastly, given the scarce awareness of these bodies and their competencies, building trust among victims is even more complicated.

4. Equality bodies' cooperation and consultation with other actors

The fight against discrimination, in order to be coherent and effective, must be conducted at different levels, by several actors and in multiple areas that mark the lives of people involved. Equality bodies, where well organised and supported, are playing a significant role in this field, especially thanks to their capacity to build connections and start collaborations with several other actors engaged in the same fight against discrimination. For this reason, they have been sometimes renamed "equality hubs", thus capable of connecting different actors and allowing mutual learning and coherent action, bringing the fight against discrimination to a systemic level (Benedi Lahuerta, 2021; Crowley, 2018).

The original legislation, through *article 11* of the *Racial Equality Directive*, only provided for the encouragement of social dialogue and cooperation between social partners and NGOs, without mentioning the involvement of equality bodies in these partnerships. Conversely, it appears that the new directives have bridged this gap, especially due to the introduction of *article 14* (titled "*Cooperation"*) and *article 15* (titled "*Consultation"*). In this scenario, collaboration is explicitly allowed and suggested at all levels (locally, regionally, nationally, and even at the EU and international levels), alongside the involvement of both public and private actors, thus including all actors who play a role in the fight against discrimination in the society.

5. Final remarks

The study of the two new directives adopted by the European Union on the organization and functioning of equality bodies, namely Dir. 1499/2024/EU and Dir. 1500/2024/EU, has helped to decipher the role that these bodies should play in the fight against discrimination following profound renewals.

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As a matter of fact, the directives represent a significant step forward in trying to improve the still too varied and generally disappointing conditions characterising contemporary equality bodies. Clearly, the effectiveness of the change can only be assessed at a later stage, once national implementation has taken place and is effective.

On the one hand, it is possible to expect that, for some Member States, the required adjustments to the new standards will be almost insignificant, given the positive results already achieved in this area and their progressive nature. For other States, the adaptation process will be more complex and will involve, in the first place, the revision of political priorities at the Government level, so as to ensure the recognition of an appropriate engagement to the cause. Probably, where the new European legislation has failed to arrive, progressive States will arrive first, thus continuing to provide an example to follow for those who experience difficulties and for the European institutions themselves.

As a whole, the new legislation allows equality bodies to fight discrimination on a systemic and multi-level basis, thanks to the provision of functions and tools aimed both at preventing discrimination and remedying it. Likewise, the opportunity to choose between different instruments constitutes an attempt to mediate the same variety of political, legal and social cultures that characterise the European Member States.

In the end, the European institutions have sought to build a cohesive structure of actors, reserving a central role for equality bodies, with the ultimate aim of fighting discrimination at all levels.

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What public policies has Brazil been adopting since 2015 to achieve goal number 08 of the UN agenda 2030 – bringing together decent work and economic development?

Rachel Spinola e Castro Canto[1], Ricardo José Macêdo de Britto Pereira[2]

Introduction

The aim of this paper is to discuss which public policies have been adopted by the Brazilian government since 2015 to promote the integration of the population into the labor market in order to achieve full employment

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and decent work for all, in order to reach goal 08, among the 17 goals agreed to be met in the UN Agenda 2030[3], "Decent work and economic growth".

The study will be based on the time frame from September 2015 to September 2024, and will analyze which public policies were adopted by the Brazilian government during this period, and whether there was an increase in employability.

When it comes to Brazil, the race criterion cannot be left out of the analysis, since in 2022, around 92.1 million people declared themselves to be brown, equivalent to 45.3% of the country's population. Another 20.6 million declared themselves black (10.2%), while 1.7 million declared themselves indigenous (0.8%) and 850,100 declared themselves yellow (0.4%). The data is from the Demographic Census 2022: Ethnic-racial identification of the population, by sex and age[4].

In item I, an evolutionary line will be drawn from 2015 to the present day regarding the evolution of public policies for the insertion of the population into the labor market.

In item II, the actions of the Federal Supreme Court, which has been modifying decisions of the Superior Labor Court, will be analyzed in the light of labor legislation, altering employment relationship decisions already judged by this constitutional court. Although the STF issued Resolution 710 of November 20, 2020, institutionalizing the United Nations 2030 Agenda within its scope, it has been giving another understanding to the provisions of infra-constitutional legislation, more specifically to Article 3 of the Consolidation of Labor Laws, which defines the requirements to be observed by the legislator to declare or not the employment relationship. The Federal Supreme Court's current position on the matter is that the Federal Constitution of the Federative Republic of Brazil of 1988, article 170, caput, states that "*the economic order, based on valuing human work and free enterprise, aims to ensure dignified existence for all, in accordance with the dictates of social justice*". This opens up the possibility of forms of work other than employment contracts.

In conclusion, it will be investigated how Brazil, alongside the reforms carried out and the decisions of the Supreme Court, will be able

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[3] Sustainable Development Goals. *brasil.un.org/pt-br/sdgs*.

[4] Belandi C., Gomes I. (eds.), "Censo 2022: pela primeira vez, desde 1991, a maior parte da população do Brasil se declara parda", available at: *agenciadenoticias.ibge.gov.br/agencia-noticias/2012-agencia-de-noticias/noticias/38719-censo-2022-pela-primeira-vez-desde-1991-a-maior-parte-da-populacao-do-brasil-se-declara-parda* (accessed: 16/11/2024).

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to achieve the objectives of promoting decent work in conjunction with economic development by 2030 over the next six years. The method used is bibliographical, qualitative and quantitative, and hypothetical deductive.

Keywords: UN 2030 Agenda; Reducing social inequalities; Decent work; Economic development; SDG 08.

1. Public policies to integrate the population into the labor market

Brazil is one of the countries with the worst income distribution in the world. Studies show that "*the income of the richest 20% is 32 times higher than that of the poorest 20%*"[5]. This "phenomenon" will obviously have an impact on the job market and the inclusion of the population, especially black people.

In the 2000s, Brazil has been making progress, albeit slowly, in public policies, but with scant effect. 2003, saw the creation of SEPIR – the Secretariat for Policies to Promote Racial Equality. SEPIR has the aim of creating various public budget instruments, social participation councils, reparations actions, quotas in universities, definition of quilombola lands, among other things. Likewise in 2010 the National System for the Promotion of Racial Equality was also brought into existence. Despite these developments and the strong social demand for "*equality in a multiracial society*", there was no materialization of public intervention. According to research by the author Clara Marinho, there was no budget[6] to implement the demands. The amount allocated to SEPIR, according to Marinho, "*never exceeded 50 million a year*" and was the lowest of all "*the other portfolios of the Esplanade of Ministries*", which hindered the maintenance of activities and planning "*according to the metrics initially agreed*"[7].

Although since 2001 Brazil has adopted the guidelines and programs established at the Durbam Conference in Africa, creating various institutions and secretariats, including those with budgetary and financial autonomy, which led to the first "*affirmative action public policy initiatives*"[8], public policies only began to take effect five years later.

[5] *Ibidem*.

[6] Marinho C. (2023), *A questão racial no orçamento público: Racial issue in the public budget, Notes for an intervention agenda, Affirmative Policies for Inclusion and Racial Equity*, Belo Horizonte: Ed Fórum, p. 99.

[7] Ivi, p. 100.

[8] Ivi, p. 99. Rocha F. (2023), "The national judicial pact for racial equity: Transversality with the sustainable development goal – SDG 10: From the UN's 2030 Agenda", in Bomfim

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There is evidence that Brazilian public policies, especially those aimed at the black population, which guarantee them rights and opportunities and conditions of equality in relation to the rest of the population, follow generic and imprecise criteria for distributing resources, "*while inequalities have color and gender, among other attributes*"[9] (Marinho, Clara, 2023). As a result, it is clearly difficult to accurately identify the subjects of public policy rights in the budget.

Research shows that by 2022, for the first time, more than 50% of people aged 25 and over in the country will have completed basic education, and the average number of years of study for women is higher than for men. By contrast, in 2016, one in five young people was neither studying nor employed.

This scenario will have a directly proportional impact on high unemployment rates, young people entering the informal market, difficulty in entering public careers, job insecurity, low income, perpetuating the exclusion of the most vulnerable population from access to a dignified life and remaining in the cycle of poverty.

In 2015, the Brazilian government set several development goals, in line with the UN's AGENDA 2030, with the aim of achieving average annual *per capita* economic growth of 1.6% between 2016 and 2018 and 2.55% between 2019 and 2030[10]. Aiming to achieve higher levels of productivity, through diversification, adding value, technological modernization, innovation, management, and worker qualification, so that by 2030, the unemployment rate and other forms of underutilization of the workforce would be reduced by 40%, guaranteeing decent work, with an emphasis on equal pay for work of equal value, achieving a reduction of 3 percentage points by 2020 and 10 percentage points by 2030 in the proportion of young people who are neither employed, nor studying or in professional training. All these developments were to take place along with the eradication of work in conditions analogous to slavery, human trafficking and child labor by 2025.

By 2022, Brazil had 67.8 million people living in poverty and 12.7 million in extreme poverty[11].

From 2014 to 2015, there was, for the first time in 11 years, a drop in

D.Q.J.S. (ed.). *Affirmative policies for inclusion and racial equity: reflections on the role of the public and private sectors*, Belo Horizonte: Fórum, p. 202.

[9] Marinho C. (2023), *A questão racial no orçamento público*, cit., p. 102.

[10] Decent work and economic growth –*www.ipea.gov.br/ods/ods8.html#coll_8_1* (accessed: 14/04/2024).

[11] "Poverty Falls in 2022", available at: *agenciadenoticias.ibge.gov.br/agencia-noticias/2012*.

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the real income (adjusted for inflation)[12], of the Brazilian population. This decrease was driven by job cuts, according to the PNAD survey, "*Between 2014 and 2015, for the first time since 2004, there was a drop in the employed population, which lost around 3.8 million people (-3.9%)*"[13].

The real average monthly income from all jobs of people aged 15 and over who were employed and had a job income in 2015 was estimated at R$1,853, 5.0% lower than in 2014 (R$1,950). This occurred in all the major regions, with the biggest drop in the North (-7.2%, from R$1,565 to R$1,453).

On the other hand, in 2015 there was a reduction in inequalities in average real monthly income between men and women aged 15 and over. Men's salary was R$2,058 and women's R$1,567[14]. "*In proportional terms, women received an average of 76.1% of men's income in 2015, an increase of 1.6 percentage points compared to 2014 (74.5%), when the figures were R$2,184 and R$1,627, respectively*".

Between 2016 and 2018, Brazil experienced the repercussions of its worst economic crisis in 2015, and the highest rate of social inequality[15]. During this period, in which the government had pledged to make efforts to increase economic growth per capita by 1.6%, it actually fell by 31% in 2015, a percentage that remained until 2017[16].

In 2018, there was a 2.8% increase in economic growth, and Brazilians now have a monthly per capita income of R$2,247, which remained practically unchanged in 2019 at R$2,244. However, the increase in the average *per capita* household income[17], increased only for the richest; at the

[12] "PNAD 2015: incomes decrease and inequality remains on downward trend", available at: *agenciadenoticias.ibge.gov.br/en/agencia-press-room/2185-news-agency/releases-en/10157-pnad-2015-incomes-decrease-and-inequality-remains-on-downward-trend* (accessed: 25/11/2024).

[13] *Ibidem*.

[14] *Ibidem*.

[15] Barbosa R., Ferreira de Souza P., Soares S. (2020), *Desigualdade de renda no Brasil de 2012 a 2019*, available at: *dados.iesp.uerj.br/desigualdade-brasil/* (accessed: 25/11/2024).

[16] "Continuous PNAD 2019: earnings from richest 1% correspond to 33.7 times what half the population in low-income classes earn", available at: *agenciadenoticias.ibge.gov.br/en/agencia-press-room/2185-news-agency/releases-en/27601-continuous-pnad-2019-earnings-form-the-1-higher-income-classes-correspond-to-33-7-times-the-earnings-of-half-of-lower-income-classes* (accessed: 25/11/2024). The Continuous PNAD is the main instrument for monitoring the country's labor force. The survey sample per quarter in Brazil corresponds to 211,000 households surveyed. Around two thousand interviewers work on the survey, in 26 states and the Federal District, integrated into the collection network of more than 500 IBGE agencies.

[17] Barbosa R., Ferreira de Souza P., Soares S. (2020), *Desigualdade de renda no Brasil de 2012 a 2019*, cit.

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bottom, there was still a crisis. "*The economic recovery was already in full swing for the richest 5% – and little by little, from top to bottom, it became more comprehensive*"[18].

A 2019 study by the IBGE revealed that there were still huge discrepancies between the real average monthly income of all workers, with white people earning R$2,999 per month, compared to brown people who earned R$1,719. Black people were the worst paid, earning R$1,673 a month. In terms of gender, the differences also persist: "*men's income from all jobs (R$2,555) is 28.7% higher than women's (R$1,985)*"[19].

In 2023, monthly household income per capita reached "*the highest value in the historical series of the Continuous PNAD Income from All Sources module, which began in 2012: R$398.3 billion. The increase was 12.2% compared to 2022. In relation to 2019, the increase was 9.1%*"[20].

The indices show that Brazil is exceeding the percentages set in 2015. In 2019, the target set by the Brazilian government for that period was 2.2% higher than expected for 2018[21]. Nonetheless, inequality is increasing in the country. Black people have an income 27.5% lower than the national average[22]. The income of the richest 1% of the population is 33.7 times that of the poorest 50%[23]. Income from the Bolsa Família also grew during this period, reaching "*the highest level in the historical series (19.0%). The highest percentages were in the North (31.7%) and the Northeast (35.5%)*", reporting the loss of jobs.

Growth rates compared to employability rates show, according to the PNAD survey, that the level of unemployment in Brazil increased in 2016, with a small increase at the end of 2017. Moreover, the composition of *per capita* income, although it comes primarily from work, is also made up of other indices such as the family allowance, pension income, rents and others.

The average unemployment rate in 2017 stood at 12.7%, according to data from the Continuous National Household Sample Survey (PNAD Contínua), released today (31) by the Brazilian Institute of Geography and Statistics (IBGE). This was

[18] *Ibidem*.

[19] "Continuous PNAD 2019: earnings from richest 1% correspond to 33.7 times what half the population in low-income classes earn", cit.

[20] Cabral U.A. (2024), "In 2023, wage bill and per capita household earnings hit record", available at: *agenciadenoticias.ibge.gov.br/en/agencia-news/2184-news-agency/news/39816-in-2023-wage-bill-and-per-capita-household-earnings-hit-record* (accessed: 25/11/2024).

[21] "Continuous PNAD 2019: earnings from richest 1% correspond to 33.7 times what half the population in low-income classes earn", cit.

[22] *Ibidem*.

[23] *Ibidem*.

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the highest rate in the historical series, which began in 2012. In 2016, the rate had stood at 11.5%.

Looking only at the last quarter of the year, the level stood at 11.8%. The rate in the third quarter of 2017 was 12.4%. The rate in the last quarter of 2016 was 12%.

The total number of unemployed reached 13.2 million on average for the year, an increase of 12.5% compared to the previous year's average (11.7 million). The total number of employed stood at 90.65 million, 0.3% more than in 2016 (90.38 million)[24].

However, "*the usual real average income in the quarter (R$2,154) was stable compared to both the third quarter of 2017 and the last quarter of 2016*"[25].

With the change of government after the *impeachment of* former President Dilma Roussef in 2016, the labor reform in 2017, and the ministerial reforms, planning practically disappeared from the competencies of the economic area, "*ending up as an area subordinated to the budget in the latest configuration of the Ministry of Economy*", as Clara Marinho has observed[26].

The state, as an agent of social transformation, must and is obliged to adopt public policies with the specific purpose of "*promoting the social integration of racial minorities*", as well as "*combating the cultural stigmas In associated with the black population*", as Françoise Rocha noted[27].

Significantly, in this regard, Federal Law no. 12.990/2014 came into force in 2014[28] The law introduced quotas for the entry of black people into the Federal Public Administration for 10 (ten) years. The quotas are equivalent to 20% of the vacancies for black people in Federal Administration competitions, whenever 3 or more vacancies are offered, with the fraction equal to or greater than 0.05 being approximated upwards.

Despite the entry into force of the above-mentioned quota law between 2013 and 2021, a report by the CNJ[29] shows that in 2024 "*only 14.25% of magistrates are black. Among civil servants, this percentage reaches just 27.1%*"[30]. According to the survey, based on court records, "*since 2015, 115 competitions have been held in all branches of justice in 56 Brazilian courts. The survey shows that the main proportion of black judges are at the start of*

[24] Abdala V. (2018), "Unemployment rate in the country closes 2017 at 12.7%; unemployed population falls 5%". Published on 31/01/2018 – Rio de Janeiro (accessed: 25/11/2024).

[25] Marinho C. (2023), *A questão racial no orçamento público*, cit.

[26] *Ibidem*.

[27] Rocha F. (2023), *O Pacto Nacional do Judiciário Pela Equidade Racial, – Affirmative Policies for Inclusion and Racial Equity*, Belo Horizonte: Ed Fórum, p. 99.

[28] Law 12.990/2014, available at: *legislacao.planalto.gov.br/* (accessed: 13/07/2024).

[29] National Council of Justice.

[30] "Reservation of quotas for black people in the Judiciary are extended", *www.cnj.jus.br/* (accessed: 27/07/2024).

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their careers, as substitutes: 18.1%. This is followed by full judges (12.3%) and then judges (8.8%)".

The main reason for this low rate is economic and financial obstacles, which hinder travel, e.g. accommodation and food for candidates, various registrations and tests during the week in the face-to-face model, according to surveys carried out by Velozo, Michel de Souza, Campos and Pâmela Souza, there are numerous barriers, ranging from requiring face-to-face participation in hetero-identification stages, preliminary registration or viewing tests at the agency's headquarters on a working day or weekend when there will be no tests, increasing costs and making it impossible for candidates to participate[31].

On the other hand, studies show that government social programs have been fundamental in reducing extreme poverty, "*the study analyzed the hypothesis that these programs did not exist, and the data showed that extreme poverty would have been about 80% higher, raising the current percentage from 5.9% to 10.6%*"[32].

In addition, the website of the Ministry of Labor and Employment[33], indicates that the government currently has several protocols of intent relating to "*guaranteeing decent work in rural areas and the adoption of good labor practices*". The protocol seeks to formalize the employment relationship. There are also memorandums, with countries in Europe and the United States of America, to "*strengthen bilateral cooperation, with an emphasis on skills training and workforce development, especially for young people and jobseekers from disadvantaged communities*".

Finally, in 2024, the government proposed in the Chamber of Deputies a supplementary bill from the executive branch on the subject of regulating the activity of app drivers (PLP 12/24). The text was rejected by the Union of Transport App Drivers, who believe that it does not meet the needs of the category. According to information provided by the Brazilian government's website, the president of the Parliamentary Front in Defense of Drivers, as an alternative to the government's proposal on the subject, presented Bill 536/24[34], on 03/04/2024. The last action was made on 27/03/2024; an appointment of a rapporteur for the Bill.

[31] Velozo M. de Souza, Campos P. Souza (2023), *The under-representation of black men and women in the final functions of the administration of justice: a look at the low effectiveness of the affirmative policy of reserving vacancies for blacks in public competitions for members of legal institutions and good examples from the private sector. Affirmative Policies for Inclusion and Racial Equity*, Ed Fórum: Belo Horizonte, p. 366.

[32] *Ibidem*.

[33] *www.gov.br/trabalho-e-emprego* (accessed: 27/11/2024).

[34] *www.camara.leg.br/noticias/1053711-PROJETO-SOBRE-TRABALHO-DE-MOTORISTAS-POR-APLICATIVO-PREVE-REMUNERACAO-POR-KM-RODADO* (accessed: 27/11/2024).

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The 2019 PNAD Continua study found that people with a higher level of education had a higher the income.

People with no schooling had the lowest average income (R$918). On the other hand, the income of people with complete primary education or equivalent was 60.3% higher, reaching R$1,472. Finally, those who had completed higher education had an average income approximately three times higher (R$ 5,108) than those who had only completed high school (R$ 1,788) and around six times that of those with no education[35].

The studies suggest that, without continuous and uninterrupted investment in public policies aimed at education and promoting employment in the country, the cycle of poverty will continue among black and brown people. Accordingly, Brazil will not achieve the goals of eradicating poverty, the well-being of the population, a dignified life, sustainable growth, and Brazil will not achieve the commitments made in 2015.

2. Effects of the 2017 Labor Law reform on employment contracts and the supreme court's actions in labor matters, which has been overturning decisions of the superior labor court that were findings of employment relationships

On 11/11/2017, Law 13.467 of 2017, known as the labor reform, took effect. This law "*affected 157 articles at once*"[36], of Decree no. 5.452, of May 1, 1943, better known as the CLT – Consolidation of Labor Laws. The government's justification at the time for carrying out the labor reform was "*the hope of generating more jobs*"[37]. The labor reform was carried out against a backdrop of economic and institutional crisis, "*alongside political and economic problems, the National Congress does not reflect the diversity of Brazilian society and the minorities that exist in the country*"[38].

Ricardo J.M. de Britto Pereira, when analyzing the labor reform,

[35] "Continuous PNAD 2019: earnings from richest 1% correspond to 33.7 times what half the population in low-income classes earn", cit.

[36] Batista H. (2021), *CLT Comentada 2021*, III ed. revised, updated and expanded. São Paulo: Ed. Revista dos Tribunais – Thomson Reuters, p. 31.

[37] "Approved in 2017, the labor reform changed the rules to make the labor market more flexible", available at: *www12.senado.leg.br/noticias/materias/2019/05/02/aprovada-em-2017-reforma-trabalhista-alterou-regras-para-flexibilizar-o-mercado-de-trabalho*.

[38] Pereira R.J.M.B. (2018), "A reforma trabalhista e seu impacto sobre a igualdade e a democracia no trabalho", *Revista da Faculdade Mineira de Direito*, 21, 41, p. 65.

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emphasized that "*The labor reform, approved with Law 13.467, of 2017, instead of establishing greater equality and democracy at work, contributes to increasing inequality*"[39].

One of the most important changes was in the field of collective labor law, to the extent that "*collective agreements now take precedence over legislation*"[40]. The reform gave unions the power to approve both beneficial and harmful conditions (from the point of view of taking away workers' rights) in collective agreements, even if they are contrary to the law, reserving in article 611-B of the CLT a list of matters prohibited from negotiation, but everything that is not on this list can theoretically be negotiated.

In 2018, formal employment in Brazil grew by 0.8%[41]. "*In the 12 months of 2018, formal employment grew by 371,392 thousand positions, 1.02% more than in 2017*". It's interesting to note that the increase in employability "*was greatest among workers aged between 40 and 49*", a rare event in Brazil.

In the following year, 2019, the unemployment rate fell by another 1.7%[42]. However, "*Brazil has 11.6 million workers without a formal contract in the private sector*".

In actuality, according to data released by the government, there has been a historic increase in the number of self-employed workers:

> The number of self-employed workers reached the highest level in the series, rising to 24.2 million, most of them (19.3 million) without a CNPJ. The figure also represents an increase of 3.9 million people since 2012. Compared to 2018, the increase was 4.1% (958,000)[43].

So, although there was an increase in workers with a formal contract in 2018, there was a much bigger increase in informal work[44].

These "self-employed" workers are mostly digital platform workers, with a higher concentration in delivery apps, according to a 2022 IBGE study[45],

[39] *Ibidem*.

[40] "Approved in 2017, the labor reform changed the rules to make the labor market more flexible", cit.

[41] Formal employment reaches 46.63 million in 2018. Data from the Annual Social Information Report show growth in employment in the country, On 17/10/2019, Accessed on 25/11/2024. *www.gov.br/economia/pt-br/*.

[42] *Ibidem*.

[43] *Ibidem*.

[44] *Ibidem*.

[45] Belandi C. (2023), *Em 2022, 1,5 milhão de pessoas trabalharam por meio de aplicativos de serviços no país*, available at: *agenciadenoticias.ibge.gov.br/agencia-noticias/2012-agencia-de-noticias/noticias/38160-em-2022-1-5-milhao-de-pessoas-trabalharam-por-meio-de-aplicativos-de-servicos-no-pais* (accessed: 25/11/2024).

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which found that Brazil had 1.5 million people working through digital platforms and service apps. This number represented 1.7% of the population employed in the private sector.

It is important to note the occupation of these platform workers to the corresponding level of schooling: "*As for schooling, 61.3% of platform workers had completed high school or incomplete higher education*".

A FUNDACENTRO study on work on delivery platforms concludes that: "*these drivers and couriers work: 1) in extremely risky conditions, 2) for long hours every day, 3) without weekly rest, 4) for very low pay and 5) generally for just 1 or 2 companies*"[46].

This situation is only getting worse in Brazil, not only for platform workers, but also for liberal professionals, intellectuals, doctors, teachers, lawyers and others who, since 2017, have been working on their own account at the service of others, without seeing their subordinate work recognized. These professional workers do not have minimum labor and social security guarantees, making their lives and work precarious.

As stated in the introduction to this study, since 2023 the Federal Supreme Court has been overturning labor court decisions declaring the employment relationship between the service provider and the service taker. The definition of employee is contained in article 3 of the Consolidation of Labor Laws[47], and its characteristics are situations in which the "*service provider or self-employed worker*" worked: 1) under subordination; 2) on a regular basis; 3) receiving a salary; 4) personally (not being able to be replaced by another person). These matters are investigated at a pre-trial hearing, through the personal testimony of the party, the hearing of witnesses and the analysis of documents.

The constitutional competence to judge the matter lies in item I of article 114 of the 1988 Constitution of the Federative Republic of Brazil, which objectively states in its first part that: "*I. It is incumbent upon the Labor Courts to prosecute and judge actions arising from the employment relationship*"[48].

However, since 2023, the Federal Supreme Court (STF) has been provoked by the private sector to rule on labor cases via a legal instrument originating from infra-constitutional civil procedural legislation, the Constitutional Claim, to interpret the text of article 170, caput, which states that "*the economic order, based on valuing human work and free enterprise,*

[46] Survey on the Work of Delivery Workers and Drivers of the self-styled "digital platforms" Research Report Number 2 – Volume I – Fundacentro and Federal University of Bahia Projeto Caminhos do Trabalho – August 2023, p. 5.

[47] Decree-law n. 5.452, of May 1st, 1943.

[48] Federal Constitution of 1988.

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aims to ensure a dignified existence for all, in accordance with the dictates of social justice". The STF's interpretation of this provision facilitates the possibility of forms of work other than employment contracts.

And so the STF has, citing article 170, overturned the Labor Court's decisions by opining that, "*Outsourcing or any other form of division of labor between different legal entities is lawful, regardless of the corporate purpose of the companies involved, and the subsidiary liability of the contracting company is maintained*" Theme 725[49].

In a paradigm case, ADPF 324[50], the STF ruled that outsourcing of any and all activities was lawful and that the thesis should prevail that there is no employment relationship between the contractor and the employee of the outsourced company, and that in outsourcing, it is up to the contractor to verify the suitability and economic capacity of the outsourced company, which is subsidiarily liable for non-compliance with labor rules, as well as social security obligations.

Still along these lines, the STF, when judging Extraordinary Appeal RE 958.252[51], established a slightly broader thesis, to the following effect: "*Outsourcing or any other form of division of labor between different legal entities is lawful, regardless of the corporate purpose of the companies involved, and the subsidiary liability of the contracting company is maintained*".

Having reviewed the decisions of the Brazilian Supreme Constitutional Court (STF), and analyzing Resolution 710 of November 20, 2020[52] of this same court, we arrive at a paradox, since the Supreme Constitutional Court institutionalized the United Nations 2030 Agenda within the scope of the Federal Supreme Court, recognizing that:

1) the 2030 Agenda represents an action plan that promotes dignified life, human rights and sets goals to eradicate social inequalities at a global level, fostering sustainable development in nations, as approved by the United Nations General Assembly in 2018;
2) the importance of aligning the governance of the Federal Supreme Court (STF) with the Sustainable Development Goals (SDGs) established in Agenda 2030 in order to increase the Court's accountability, improve its internal processes and humanize its management;

[49] STF general repercussion topic – Outsourcing of services to achieve the company's core business, available at: *portal.stf.jus.br/jurisprudenciaRepercussao* (accessed: 25/11/2024).

[50] *jurisprudencia.stf.jus.br/*.

[51] *Ibidem*. r

[52] *portal.stf.jus.br/hotsites/agenda-2030/assets/img/RESOLUCAO710-2020.PDF*.

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3) that the SDGs represent a list of tasks that must be accomplished by the year 2030 in order to eradicate extreme poverty and spare future generations from the adverse effects of environmental, social, political, cultural, economic and legal problems;
4) the importance of aligning STF's internal processes and procedures with international standards, with the identification of legal controversies to the respective SDGs and the consequent improvement of the methodology for classifying, grouping and organizing cases;
5) that STF's judicial action effectively contributes to the fulfillment of the goals associated with the SDGs of the 2030 Agenda and the values enshrined therein.

In Article 1, the resolution institutionalizes the 17 SDGs, whose guiding principles are the eradication of poverty, decent work, reduction of inequalities, well-being, education, among others, and in Article 2 establishes a "*working group for the implementation of the inaugural actions and initiatives for the implementation of the SDGs in the STF*". In paragraph 2 of article 2 of the Resolution, the STF determines what the working group's attributions will be for its indexing in relation to the SDGs advocated by the 2030 Agenda.

By altering the decisions of lower courts that have assessed evidence and made judgments in accordance with testimonies, documents, expert opinions and other means of proof admitted in law, the STF, by adopting only a literal interpretation of the Constitution that is discordant in with accepted infra-constitutional standards of protection, perpetuates the cycle of poverty and social inequality in Brazil. Additionally STF abrogates the control of constitutionality carried out by the Superior Labor Court when analyzing the issues submitted to it.

Labor legislation and the general principles of labor law protect the hypo sufficient worker, thus considered to be the one who receives less than twice the social security ceiling in Brazil, currently in the amount of R$ 15,572.06 (fifteen thousand five hundred and seventy-two reais)[53], in the form of article 444 of the Consolidation of Labor Laws[54].

Considering the race factor, the STF's decisions are keeping workers, "entrepreneurs" in the cycle of poverty, making it impossible for them to have access to the minimum civilizing conditions of housing, leisure, health and well-being in line with SDG 8 of the UN's 2030 Agenda, which brings together decent work and economic development.

[53] *www.gov.br/inss/pt-br/noticias/confira-as-aliquotas-de-contribuicao-ao-inss-com-o-aumento-do-salario-*.

[54] *legislacao.planalto.gov.br/legisla/legislacao_Identification 2013* (accessed: 25/11/2024).

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3. Conclusion

Brazil is almost five (5) years away from taking stock of the goals that have been set for the next UN conference in 2030.

A survey carried out by the PNAD in 2023[55], found an increase in income from work, as well as an increase in per capita income, reaching the highest value in the survey's historical series, which compared to 2022 had an expansion of the employed population, even surpassing the income mass of 2019, until then the year with the highest value since the beginning of the PNAD survey.

The real average monthly household income per capita also reached the highest value in the survey's historical series: R$1,848, an increase of 11.5% compared to 2022. Compared to 2019 (R$1,744), the year that had previously recorded the highest value in the historical series, the increase was 6.0%.

Another record in the series was the proportion of the population with income usually received from work, which rose from 44.5% (or 95.2 million people) in 2022 to 46.0% (or 99.2 million) in 2023. The lowest percentage of this indicator occurred in 2020 (40.1% or 84.7 million), still under the influence of the pandemic.

In Brazil, the employed population reached a record 100.7 million people in 2023[56], of which 38 million have a formal contract, the best result since 2014[57]. This represents an increase of 1.1% compared to 2022 (99.6 million people) and 12.3% compared to 2012 (89.7 million people)[58].

What we are seeing, from our current vantage point, is the economy heating up with the creation of jobs, coupled with the federal government's social programs and public educational policies that are putting more young people into public and private universities (through incentives/scholarships) who were on the margins of society, excluded from access to quality education and formal work, which in Brazil not only guarantees security for workers, but also stimulates the local economy.

The number of people with a formal contract in the private sector is also at an all-time high, reaching 37.7 million people, or 37.4% of the employed population,

[55] Cabral U.A. (2024), "In 2023, wage bill and per capita household earnings hit record", cit.

[56] Brazil breaks record for number of people in work with a formal contract in 2023, available at: *agenciagov.ebc.com.br/noticias* (accessed: 26/11/2024).

[57] *Ibidem*.

[58] *Ibidem*.

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the highest figure since 2014, when it was 39.5% of people in work. In the public sector, the number of people with formal employment contracts remained at around 12% in 2023, equivalent to 12.2 million workers[59].

The country's annual unemployment rate, measured in 2023, fell "*to 7.8% in 2023, which represents a drop of 1.8 percentage points (p.p.) compared to the previous year's average*"[60], which represented "*a total of 8.5 million people* […] *(-17.6%) compared to 2022*".

The level of employment in the country increased by 1.6 percentage points in 2023 compared to 2022, with the percentage of employed people in the working-age population estimated at 57.6% in 2023 compared to 56.0% in 2022[61]. These rates were higher in the central-western and southern states of the country.

On the other hand, the study indicates that informal work increased in the year, "*from 39.4% in 2022 to 39.2% in 2023*"[62]. The most affected states are in the north of the country. Workers without a formal contract in the private sector rose in percentage in 2023 compared to 2022, reaching 13.4 million (5.9%)[63]. The "*number of self-employed workers totaled 25.6 million in 2023, up 0.9% year-on-year*"[64].

Brazil has an arduous road ahead until 2030 to reduce informal work, which is growing much more than formal jobs every year, leaving a huge contingent of men, women and children who live under its responsibility outside of legal and social security protection, causing Brazil to currently rank 89th out of 193 countries and territories in the Human Development Index (HDI)[65].

[59] *Ibidem*.

[60] "Quarterly Continuous PNAD: annual unemployment rate drops in 26 FUs in 2023", available at: *agenciadenoticias.ibge.gov.br/en/agencia-press-room/2185-news-agency/releases-en/39210-quarterly-continuous-pnad-annual-unemployment-rate-drops-in-26-fus-in-2023* (accessed: 26/11/2024).

[61] Brazil breaks record for number of people in work with a formal contract in 2023, available at: *agenciagov.ebc.com.br/noticias* (accessed: 26/11/2024).

[62] *Ibidem*.

[63] *Ibidem*.

[64] *Ibidem*.

[65] León L.P. (2024), "IDH do Brasil sobe em 2022, mas país cai 2 posições em ranking da ONU", available at: *agenciabrasil.ebc.com.br/direitos-humanos/noticia/2024-03/idh-do-brasil-sobe-em-2022-mas-pais-cai-2-posicoes-em-ranking-da-onu* (accessed: 26/11/2024). The HDI compares indicators such as wealth, literacy, education, life expectancy, birth rate and others in order to assess the well-being of a population. It ranges from 0 to 1 and is published by the UNDP in its annual report. The closer it is to 1, the greater the country's human development.

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Multilevel dimension of the just green transition and social rights

Nuria Elena Ramos Martín[1]

Introduction

This paper focuses on the theme of the just green transition (JGT) and social rights with a multidimensional and comparative approach. The paper examines the role and initiatives of several international organisations, namely, ILO and UN to cut greenhouse gas emissions in the mid-term and foster a just transition to climate-neutral societies. Different international organizations have stressed that the transition towards a greener and more sustainable future will have profound implications for employment and workers.

This in an introductory working paper of the project GREENSOCIAL – "Multiple Dimensions of the Just Green Transition and Social Rights" financed by the Spanish Ministry of Science, Innovation and Universities. This paper (with a legal logic-deduction methodology) aims to study the impact and social implications of environmental legislation and policies in the context of the just ecological transition.

The synergies in policies, strategies and roles of organisations and stakeholders to promote a just ecological transition are examined with a focus on the ILO Guidelines for a just transition towards environmentally sustainable economies and societies and the UN Global Compact and Guiding Principles on Business & Human Rights. Therefore, this paper

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focuses on identifying the synergies between the ILO approach and the UN initiatives to promote a socially sustainable ecological transition and how that transition has a clear multilevel dimension which efficiency and success strongly depends on several factors, namely: an accurate assessment of the social and economic consequences of climate change and the responses to it, on well-designed active policies for the restructuring and diversification of the economy in the territories most affected, on promoting professional training in green skills and reviewing social protection systems to cover the needs of vulnerable workers.

1. Multilevel dimension of the just green transition and multiple actors and stakeholders

The aim of this paper is to study the roles played by different organisations at various levels in the development of policies aimed at addressing climate change and promoting a just transition towards a low carbon economy and to carbon neutral societies. The JGT has a clear social dimension which involves various actors at multiple levels. The development of policies addressing climate change and promoting a just transition towards a low-carbon economy involves a complex interplay of various organizations at international, national, regional, and local levels. Each level plays a distinct role in shaping, implementing, and advocating for climate policies.

Among the international organizations, the United Nations (UN) plays a central role in global climate governance, particularly through the UN Framework Convention on Climate Change (UNFCCC). The UNFCCC organizes annual Conferences of the Parties (COP), where global climate agreements like the Paris Agreement are negotiated. The UN also facilitates international cooperation, provides a platform for climate finance, and monitors progress. In that monitoring role the UN publishes regularly reports regarding climate change. For instance, the UNEP (United Nations Environmental Program) in the Emissions Gap Report 2024[2] concludes that, according to many of the world's top climate scientists, climate impacts are intensifying globally and that nations must deliver dramatically stronger action in the next round of Nationally Determined Contributions, or the Paris Agreement goal of limiting global warming to 1.5 °C goal will be out of reach within a few years with dramatic consequences for the humans.

In this context is crucial the work of the intergovernmental Panel on Climate Change (IPCC). The IPCC assesses scientific information related

[2] Available at: *www.unep.org/resources/emissions-gap-report-2024*.

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to climate change, its impacts, and potential future risks. It provides the scientific basis for climate policies and international negotiations.

Furthermore, the International Labour Organization (ILO) plays a pivotal role in promoting a just transition towards climate-neutral societies, with a specific focus on the social dimensions of climate change. Recognizing that the transition to a low-carbon economy can have profound impacts on employment, the ILO has developed frameworks and guidelines to ensure that this transition is both socially inclusive and equitable.

There are also important actors at supranational regional level. A clear example is the EU with the adoption of the ¨Green Deal¨. Regional bodies like the EU set climate policies that member states must comply with. The EU has set ambitious targets for emissions reductions, renewable energy, and energy efficiency.

At another level the role of national governments is also crucial for a just green transition. They are responsible for creating and implementing climate policies within their jurisdictions. These include setting emissions reduction targets, developing renewable energy strategies, and enacting regulations on industries and transportation. Moreover, governments pass laws that mandate emissions reductions, promote renewable energy, and support energy efficiency. Therefore, in this context, an interdisciplinary legal approach combining various legal branches such as environmental law, labour law and tax law is needed to pursue a well-organized JGT.

Sub-National action is also crucial in the implementation of the JGT. Regions, provinces, and cities often take the lead in implementing climate policies tailored to local conditions. Especially important is the role of municipalities and local governments in implementing climate policies at the grassroots level. They manage public transportation, urban planning, waste management, and local energy systems, all of which contribute to climate mitigation and adaptation to a greener economy.

Also relevant are the initiatives of the private sector. Corporate responsibility, sustainability and due diligence are key in the success of the JGT process. Companies play a significant role by adopting sustainable practices, investing in green technologies, and reducing their carbon footprints. Many corporations are setting net-zero targets and aligning their operations with global climate goals and new legislation is being adopted at various level to foster corporate sustainability. In particular, the new EU Directive on corporate sustainability due diligence[3].

[3] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L, 2024/1760, 5.7.2024.

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Finally, several civil society organizations in the area of advocacy and awareness, including non-governmental organizations (NGOs) and environmental groups, play a key role in raising awareness about climate change and advocating for strong climate policies. They often serve as watchdogs, holding governments and corporations accountable for their climate commitments.

These organizations contribute to the effort of combating climate change and ensuring a just transition to a low-carbon economy. Their roles are interconnected, with collaboration and coordination across all levels being crucial for effective climate action.

2. The Role and initiatives of the International Labour Organization (ILO) and the United Nations (UN) in promoting a just green transition

2.1. Key role and initiatives of the ILO

The main initiative of the ILO in this process are the Guidelines for a Just Transition (2015). The ILO's "Guidelines for a Just Transition towards Environmentally Sustainable Economies and Societies for All" provides a comprehensive framework for governments, workers, and employers to design policies that integrate environmental sustainability with decent work. The guidelines emphasize the need for social dialogue, social protection, and skills development as integral components of climate policies. The guidelines are addressed to governments and social partners (workers and employers' representatives) based on the four pillars of the decent work agenda: employment, labour rights, social protection and social dialogue. The ILO guidelines promote integration of the just transition principles into macroeconomic policies by combining industrial and sectoral policies requiring public expenditure, accurate taxation policies, and an adjustment of training and education to the new model (Glynn, Błachowicz, Nicholls, 2020). One of the pillars of the guidelines is the promotion of green social dialogue and collective bargaining.

Other relevant initiative at ILO level is the green jobs program. The ILO's green jobs initiative focuses on promoting jobs that contribute to preserving or restoring the environment. The program supports the creation of green jobs, particularly in sectors like renewable energy, energy efficiency, and sustainable agriculture. It also addresses the potential job losses in carbon-intensive industries by advocating for retraining and redeployment programs.

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Moreover, in 2019, the ILO established the Global Commission on the future of work, which highlights the need for a human-centred approach to the future of work in the context of global challenges, including climate change. The commission's report stresses the importance of a just transition, calling for policies that protect workers' rights, promote decent work, and ensure that the benefits of the green transition are shared equitably.

2.2. Key role and Initiatives of the UN

As mentioned above, the UN is at the forefront of global efforts to address climate change and promote sustainable development and foster a just transition to climate-neutral societies.

A key instrument in the JGT is the United Nations Framework Convention on Climate Change (UNFCCC). The UNFCCC serves as the primary international platform for climate negotiations, including the Paris Agreement, which commits countries to limiting global warming to well below 2°C. The UNFCCC also promotes the concept of climate justice, recognizing the differentiated responsibilities and capacities of countries in addressing climate change.

Also, key in this context are the sustainable development goals (SDGs). The UN's 2030 Agenda for Sustainable Development, particularly SDG 13 (Climate Action), integrates climate action into a broader framework of sustainable development. The SDGs underscore the importance of a just transition by linking climate goals with objectives related to poverty reduction, decent work (SDG 8), and reducing inequalities (SDG 10).

A clear example of the common approach of the UN and the ILO for a JGT is the Climate Action for Jobs Initiative. The UN Climate Action Summit, held in 2019, launched the "Climate Action for Jobs Initiative", which is a collaborative effort with the ILO to ensure that the transition to a green economy is inclusive and fair. This initiative focuses on creating decent jobs, protecting workers' rights, and fostering social dialogue in the context of climate policies. The UN climate action summit jobs initiative includes a roadmap for JGT with clear steps, namely: assessing the employment, social, and economic impacts of climate action; implementing skills development; designing innovative social protection policies to protect workers and vulnerable groups; increasing the transfer of technology and knowledge to developing countries; innovation and responsible investment; fostering a conducive business environment to enable enterprises to adopt low-carbon production processes; and devising economic policies and incentives to support the green transition.

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Another important UN initiative where there is ILO's collaboration is the UN Global Compact. The UN Global Compact is the world's largest voluntary corporate sustainability initiative, launched in 2000 by the UN. It encourages businesses and organizations worldwide to align their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment, and anti-corruption. Four of the Guiding Principles for Business and Human Rights which implement the UN "protect, respect and remedy" framework are based on core labour rights. These principles are derived from the ILO's fundamental conventions[4] and are central to ensuring that businesses contribute to the advancement of decent work globally.

With this initiative the UN is encouraging companies to engage in socially responsible business conduct that goes beyond compliance with national laws to actively support international labour standards. This includes efforts to combat forced and compulsory labour, child labour, and discrimination in the workplace, and to support the rights of workers to organize and bargain collectively.

The ILO collaborates with the UN to promote labour standards and decent work principles within the context of corporate sustainability efforts. These two organisations advocate for businesses to adopt practices that not only reduce their environmental impact but also contribute to a just transition by providing decent jobs, respecting labour rights, and engaging in social dialogue.

3. Synergies between ILO and UN initiatives

The ILO and UN share a common vision of promoting a just transition that balances environmental sustainability with social justice. The synergies between their initiatives are evident in several key areas:

- *Policy Integration*: Both organizations emphasize the integration of climate policies with social policies. The ILO's guidelines for a just transition complement the UN's broader sustainable development agenda by ensuring that climate action also supports decent work, poverty reduction, and social inclusion.
- *Focus on Vulnerable Groups*: Both organizations prioritize the protection of vulnerable groups, including workers in carbon-intensive industries,

[4] See the ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998 and amended in 2022.

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low-income communities, and marginalized populations. The ILO's emphasis on social protection and skills development aligns with the UN's broader goals of reducing inequalities and promoting sustainable development.

- *Capacity Building and Knowledge Sharing*: The ILO and UN collaborate on capacity-building initiatives, providing technical assistance and sharing best practices to help countries implement just transition strategies. The Climate Action for Jobs Initiative is a prime example of this cooperation, as it aims to build the capacity of governments and other stakeholders to create green jobs and manage the social impacts of the transition.
- *Social Dialogue and Stakeholder Engagement*: The ILO and UN both stress the importance of social dialogue in shaping climate policies. The involvement of workers, employers, and governments in policy discussions is crucial for designing measures that are both effective and equitable. The UNFCCC process, for instance, encourages stakeholder engagement, while the ILO's guidelines specifically advocate for tripartite consultations to manage the social impacts of the transition.

4. Role of social dialogue and collective bargaining in the just green transition

As mentioned above, both the UN and the ILO have acknowledged that social dialogue and tripartism are key elements of the JGT. Moreover, the role of collective bargaining is crucial for the development of the necessary skills to solve the problems of labour shortages in some sectors and to guarantee the efficient organization of industrial production activities.

The aim of the JGT process is to progress towards a low-carbon economy while also promoting social protection and creation of decent jobs at a large-scale. The challenge of balancing economic growth, social equity, and environmental sustainability requires from the actors involved to adopt inclusive policies that support workers in the context of the economic transition to environmentally sustainable models. That is the most suitable pathway to achieve a "*just transition for workers*" (Ghaleigh, 2019).

Transitions to environmentally and socially sustainable economies can become a strong driver of job creation and social justice. Greener enterprises and jobs (more energy and resource efficient practices, combating pollution, and managing natural resources sustainably) might lead to innovation and job creation but jobs will be lost in the carbon-intense sectors and that requires socially fair solutions to protect the workers affected by restructuring processes and workforce adjustment.

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Fostering trade union engagement with sustainability is key for the success of that transition process. There is a need to include the collective voice of workers in this process for the JGT to be a "symbiotic process" for achieving environmental, economic and social transformations (Novitz, 2020, p. 463).

Interesting guidelines that can serve as an example on green collective bargaining were provided by the research reports delivered by the project "Work in a Warming World Project" (Canada – York University). The data base produced by this project compiles "green clauses" in Canadian collective agreements in the period 2014-2021. The data base provides "green clauses" which were identified by searching the publicly available websites including the federal government's website, as well as provincial websites. By signing these collective agreements Canadian trade unions sought to protect their members from threats to their health and safety, job security, or pay, and tried to mitigate climate change impacts. The examples of green clauses were organized under several headings: workplace environment committees and representatives; social responsibility to address climate change; commuting, travel to and from work, and working from home; extreme weather, disasters, (including wage protection in those situations) and heat stress; green procurement; recycling and conservation; right to refuse work; whistleblower protection and workforce adjustment[5].

At European level there are also some interesting initiatives to promote green social dialogue and collective bargaining. For instance, the ETUC has published some guidelines for trade union representatives in 2012[6]. The EPSU (European confederation in the public sector) has also shown its commitment to assist workplace representatives by making information available on how environmental and climate change can be addressed by collective bargaining. EPSU has published in 2011 a discussion paper titled: "Impact of Climate Change on Public Policies in Europe"[7] and commissioned a study on "Public services and adaptation to climate change" (Galgoczi, 2017). Moreover, the ETUI (European Trade Union Institute) is also promoting green social dialogue and collective bargaining by organising regular trainings for trade union officers and representatives with the aims of analysing the role and contribution of collective bargaining and social dialogue in promoting environmental sustainability and strengthening

[5] The full database is available at: *www.zotero.org/green_agreements/library*, and it has been archived at: *yorkspace.library.yorku.ca/xmlui/handle/10315/39403*.

[6] ETUC(2012), *Green Workplaces. A Guide for Union Representatives*, available at: *www.etuc.org/en/publication/green-workplaces-guide-union-representatives*.

[7] Available at: *www.epsu.org/nl/node/4116*.

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social dialogue practices in response to climate change and sustainable development.

At the national level there are also interesting examples of the unions commitment to promote green collective bargaining. For instance, the RISE Project in Belgium which aims to develop a joint network of the trade unions CSC and FGTB for supporting environmental actions in firms through workers' representatives commitment in several green topics such as waste management, energy saving, mobility and sustainable transport.

Another example is the inclusion in various collective agreements in the Netherlands of the partial or full reimbursement of the travel costs to work, if the employee is using the public transport (Kullmann, 2020, p. 50).

In Spain there are examples of green clauses in collective agreements as well. In 2023, the trade union confederation UGT has published a report on "Green Collective Bargaining. Present and Future". In the report the existing clauses in various collective agreements have been examined and classified and several categories have been identified, i.e.: Programmatic clauses: general green clauses with limited practical effectiveness but that can contribute to raising awareness among workers and spreading business culture in this regard; clauses for disseminating and communicating measures to combat climate change and protect the environment (which in sectors where the most polluting companies are present could be considered closed to "greenwashing"); and clauses extending environmental policy to subcontractors and suppliers, which are aimed at involving suppliers in reducing the environmental impact of the entire value chain and promoting responsible environmental behaviour (Álvarez Cuesta and Feigl-Berger, 2023).

There are clear examples of the trade unions commitment with the sustainability goals but further efforts are required. In 2023, a report published by the WageIndicator Foundation, in the context of the EU-funded BARMETAL project, examined how changes such as digitalisation, automation and decarbonisation have affected collective bargaining in the metal sector. An interesting finding of this research is that only 20% of the examined collective agreements in this highly contaminating sector include provisions related to environmental issues, climate change, or initiatives to create greener workplaces. This finding illustrates the clear need for further progress regarding green collective bargaining[8].

[8] See BARMETAL project: *wageindicator.org/about/projects/barmetal-:~:text=Wageindicator as one of the,from digitalization, automatization and decarbonization*.

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5. Conclusions

The International Labour Organization and the United Nations are central actors in the global effort to address climate change while ensuring a just transition to climate-neutral societies. Their initiatives are characterized by a shared commitment to integrating social justice into climate policies, protecting vulnerable groups, and fostering inclusive economic growth. The synergies between the ILO and UN initiatives highlight the importance of a coordinated approach that balances environmental objectives with the needs of workers and communities.

The UN and the ILO have collaborated on several initiatives to promote a just green transition, which integrates environmental sustainability with social equity and economic inclusion. These initiatives aim to ensure that the transition to a low-carbon, climate-resilient economy benefits all segments of society, particularly vulnerable workers and communities.

To conclude, broader coordinated action, and complementary implementation strategies at all levels (including in social dialogue and collective bargaining) are crucial for a successful JGT.

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The importance of labor law in the dual education system: a comparative analysis of the german model and its potential application in Chile

Gonzalo Serra Berrueco[1]

Abstract

This paper explores the dual education system as an integrated academic and practical training model. Focusing on Germany's highly regarded framework, it emphasizes the role of labor law in regulating relationships between companies and apprentices. By analyzing Germany's successes and comparing them to Chile's challenges, this paper highlights gaps in the Chilean legal framework and proposes adaptations to establish a robust regulatory foundation for dual education. Recommendations include implementing a specialized contract, enhancing supervision through industry chambers, and integrating labor and education systems to improve youth employability.

1. Introduction

In a globalized economy, the demand for skilled workers has prompted many countries to adopt educational models that effectively prepare students for the workforce. Among these, the dual education system, exemplified by Germany, stands out for its success in integrating academic learning with workplace training. This model not only equips students with relevant technical skills but also bridges the gap between education and labor market demands, significantly reducing youth unemployment rates.

The German model's strength lies in its robust legal framework, particularly the Vocational Training Act (Berufsbildungsgesetz – BBiG) and the tailored Training Regulations (Ausbildungsordnung) for each occupation. These laws

[1] Los Lagos Region State Technical Training Center, Chile.

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establish clear rights and obligations for apprentices and companies, ensuring fairness and high training standards. Moreover, industry chambers play a pivotal role in overseeing compliance and maintaining the system's quality.

In contrast, Chile's current framework for dual education lacks comprehensive integration with labor law. The Apprenticeship Contract regulated by the Labor Code is restrictive and outdated, limiting its applicability and effectiveness. This paper aims to address these shortcomings by proposing legislative reforms inspired by the German model to create a more inclusive and regulated dual education system in Chile.

2. Theoretical framework

2.1. Dual Education System: Concept And Principles

The dual education system combines theoretical instruction in educational institutions with practical training in companies. It operates on principles of integration, collaboration, and flexibility:

- Integration: Theoretical knowledge and workplace skills are simultaneously developed.
- Collaboration: Companies and educational institutions jointly design and deliver training programs.
- Flexibility: Curricula are updated regularly to reflect industry needs.

2.2. Labor law in dual education

Labor law ensures a fair and protected learning environment by:

- Establishing apprentice rights, such as fair remuneration and workplace safety.
- Regulating employer responsibilities, including compliance with training standards and providing certified trainers.

3. The German dual education system

3.1. Legal framework

The German dual system is regulated by:

- Vocational Training Act (BBiG): Governs contracts, apprentice rights, and employer obligations.

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– Training Regulations (Ausbildungsordnung): Define occupation-specific training objectives and methods.

3.2. Implementation

– Apprentices spend 1-2 days per week in vocational schools and the remainder in companies.
– Industry chambers certify training programs, ensuring compliance and quality.

3.3. Outcomes

– Youth Employability: Germany's youth unemployment rate is among the lowest in Europe.
– Market Alignment: Training programs adapt to technological and market trends.

4. Comparative analysis: Germany vs. Chile

4.1. Current framework in Chile

The dual education system in Chile has primarily been addressed through the Apprenticeship Contract regulated in the Labor Code. However, this framework presents significant limitations:

1) Age Restriction: The apprenticeship contract is restricted to individuals under 21, excluding adult learners and professionals seeking retraining opportunities.
2) Educational Focus: The system emphasizes theoretical education over workplace training, limiting the practical skills acquired by students.
3) Lack of Integration with Labor Law: There is no comprehensive framework aligning labor rights with educational objectives, leaving gaps in protections for apprentices.

Chile's current regulatory approach fails to establish a clear relationship between apprentices and companies, creating uncertainty and limiting the system's ability to meet the demands of a modern labor market.

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4.2. Key differences between Germany and Chile

The German and Chilean dual education systems differ significantly in terms of structure, legal protection, and effectiveness. The table below highlights the most notable differences:

Aspect	Germany	Chile
Legal Framework	Comprehensive: BBiG and Ausbildungsordnung	Fragmented: Labor Code and isolated guidelines
Apprentice Rights	Strong: contract ensures remuneration, social security, and protection	Weak: limited coverage and age restrictions
Supervision	Industry chambers certify and oversee training programs	Minimal oversight and no unified certifying body
Collaboration	High: close cooperation between companies, educational institutions, and chambers	Low: limited alignment between stakeholders

4.3. Challenges in Chile

1) Regulatory Gaps: The lack of a specialized dual education contract prevents companies from fully participating in the training process.
2) Limited Industry Engagement: Without clear incentives or protections, companies are hesitant to invest in training apprentices.
3) Disconnect Between Education and Employment: Curricula do not sufficiently reflect labor market demands, leading to mismatches in skills.

4.4. Opportunities for improvement

By adopting elements of the German system, Chile can address these challenges:

1) Expand Access: Remove age restrictions to include diverse learners in the system.
2) Strengthen Legal Protections: Develop a dual education contract that integrates labor rights and guarantees fair conditions for apprentices.
3) Foster Collaboration: Establish supervisory entities similar to German industry chambers to enhance program quality and build trust among stakeholders.

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5. Proposals for reform in Chile

5.1. Establishing a dual education contract

Chile requires a specialized dual education contract to bridge the gap between education and labor. This contract should:

1) Integrate Labor Rights: Include fair remuneration, social security benefits, and protections against unjust dismissal for apprentices.
2) Define Training Responsibilities: Clearly outline the roles of companies and apprentices, ensuring a balanced focus on education and work.
3) Extend Age Eligibility: Allow individuals beyond the age of 21 to participate, accommodating adult learners and professionals seeking retraining.

5.2. Strengthening supervisory mechanisms

Inspired by the German model, Chile should develop industry-specific supervisory entities. These entities would:

1) Certify companies as suitable training providers, ensuring they meet quality standards.
2) Collaborate with educational institutions to design curricula that align with industry needs.
3) Monitor compliance with training regulations to protect apprentices.

5.3. Enhancing collaboration between stakeholders

Effective dual education systems require strong partnerships. Recommendations include:

1) Public-Private Partnerships: Foster cooperation between the Ministry of Education, the Ministry of Labor, companies, and educational institutions.
2) Stakeholder Representation: Involve employers and workers' unions in shaping policies and curricula to ensure they reflect labor market realities.

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5.4. Developing occupation-specific Training Regulations

Chile should adopt a framework similar to Germany's Training Regulations (Ausbildungsordnung), which define:

1) Competencies required for each occupation.
2) The duration and structure of training programs.
3) Evaluation criteria to ensure quality and relevance.

5.5. Integrating competency certification systems

Leverage existing systems like ChileValora to certify skills acquired through dual training programs. This would:

1) Provide apprentices with formal recognition of their competencies.
2) Facilitate mobility within the labor market by standardizing qualifications.
3) Build trust among employers in the value of dual education certifications.

5.6. Incentivizing company participation

To encourage companies to engage in dual education, the government could:

1) Offer tax benefits or subsidies for training apprentices.
2) Recognize companies that excel in providing high-quality training through awards or certifications.
3) Reduce administrative burdens associated with apprenticeship programs.

6. Conclusion

6.1. Summary of key findings

The German dual education system provides a compelling example of how integrating labor law into vocational training can benefit both apprentices and employers. By aligning theoretical education with practical training, and by ensuring strong legal protections, the German model has successfully addressed youth unemployment and equipped workers with skills that meet labor market demands.

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1) Role of Labor Law: In Germany, labor law ensures apprentices receive fair treatment through contracts that outline their rights and responsibilities, including remuneration and social security benefits.
2) Supervisory Framework: The active involvement of industry chambers guarantees compliance and high training standards.
3) Outcomes: The system's adaptability to market demands and its structured approach to training have contributed to its success.

In contrast, Chile's current framework faces significant challenges:

– The Apprenticeship Contract is limited in scope, with age restrictions and inadequate labor protections.
– There is insufficient collaboration between stakeholders, resulting in a disconnect between educational outcomes and labor market needs.

6.2. Recommendations for Chile

1) Legislative Reform: Introduce a specialized dual education contract that integrates labor rights, extends age eligibility, and balances education with work.
2) Stakeholder Collaboration: Foster partnerships between government, industry, and educational institutions to align training programs with market demands.
3) Supervisory Mechanisms: Establish industry-specific supervisory bodies to certify and oversee training programs.
4) Competency Certification: Integrate dual education certifications into ChileValora to standardize qualifications and improve labor mobility.

6.3. Closing reflections

Adapting the German dual education model to Chile requires a comprehensive approach that addresses legislative, educational, and cultural aspects. While challenges are inevitable, the potential benefits reduced youth unemployment, improved workforce skills, and stronger connections between education and employment – make this effort worthwhile.

By creating a robust legal framework and fostering collaboration among stakeholders, Chile can establish a dual education system that meets the needs of its economy and provides its citizens with meaningful opportunities for growth and development.

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El efecto de los trabajadores migrantes sobre la informalidad laboral en Chile

Álvaro Martín Baez Espejo[1]

1. Introducción

Desde sus orígenes la migración se ha estudiado por diversas disciplinas. Entre ellas las ciencias sociales, dentro de lo que podemos destacar su importancia, puesto que ha permitido estudiar la población y sus características, además incidiendo en cuestiones de carácter gubernamental, políticas públicas, entre otras. Puedes reducir este párrafo y el siguiente a una idea: En Chile sea producido un incremento muy sustantivo de la migración. Si en 2018 la población migrante según cifras del INE se estimó 1.300.005, para 2022 esta cifra se elevó a 1.625.074 (INE, 2022). Esto plantea, entre otras cosas, una fuerte presión sobre el mercado laboral (Naudón, 2013; Arellano, 2018). Los migrantes arriban al país en busca de nuevas oportunidades que les permitan mejorar sus condiciones de vida, o enviar remeses para sus familiares.

La necesidad de buscar empleo lleva a muchos migrantes a aceptar condiciones desmejoradas de trabajo, las que se enmarcan en un mercado informal, desregulado, inseguro e, incluso, peligroso. No obstante, existen empleadores dispuestos a implementar esta práctica vinculada a la explotación laboral y a condiciones laborales precarias. Comprender cómo la informalidad laboral afecta a los trabajadores migrantes no solo es crucial desde una perspectiva de derechos humanos, sino que también tiene implicaciones para la integración social y la cohesión en la sociedad chilena.

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Si los migrantes se encuentran atrapados en empleos informales y precarios, esto puede perpetuar la marginalización y la exclusión social, especialmente en el ámbito de las relaciones laborales.

Otro aspecto importante es el impacto económico de la informalidad y los efectos en la productividad y en la calidad del empleo, lo que a su vez puede afectar el crecimiento económico y el bienestar general de la sociedad. Al analizar cómo la presencia de trabajadores migrantes influye en la informalidad laboral y en la economía en general, los investigadores pueden proporcionar información valiosa para la formulación de políticas orientadas a mejorar la calidad del empleo y fomentar un crecimiento económico.

En conclusión, la investigación sobre el efecto de los trabajadores migrantes en la informalidad laboral en Chile es esencial para las ciencias sociales por su impacto en múltiples niveles. Desde comprender la dinámica del mercado laboral hasta abogar por los derechos de los trabajadores migrantes y promover un crecimiento económico más inclusivo, este tema despierta un interés considerable y merece una atención académica rigurosa y continuada. Acá debes definir qué vas a estudiar: las causas de la informalidad laboral de los migrantes, o el efecto de la informalidad laboral de los migrantes sobre el desempeño de la economía.

1) Objetivos Generales:
   - Analizar el impacto de la migración sobre la informalidad laboral en Chile en la última década.
   - Identificar los factores que han influido en la participación de trabajadores migrantes en el sector informal de la economía.
2) Objetivos específicos:
   - Determinar el nivel de participación de los trabajadores migrantes en el sector informal de la economía chilena.
   - Investigar los factores que influyen en la elección de los trabajadores migrantes por el empleo informal en Chile.
   - Evaluar comparativamente la participación de trabajadores migrantes y chilenos en situación de informalidad laboral.
3) Preguntas principales:
   - ¿Cuál es el impacto de la migración sobre la informalidad laboral en Chile en la última década?
   - ¿Qué factores han influido en la participación de trabajadores migrantes en el sector informal de la economía?
4) Preguntas secundarias:
   - ¿Cómo ha evolucionado la participación de los trabajadores migrantes en el sector informal de la economía chilena en la última década?

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- ¿Qué factores influyen a que los trabajadores migrantes opten por empleos informales en Chile?
- ¿Es similar la condición de informalidad laboral de los trabajadores migrantes comparado con el de los trabajadores chilenos?

5) Hipótesis generales:
   - Los empleadores aprovechan a su beneficio la migración impactando negativamente aumentando los casos de informalidad laboral en Chile.
   - Los factores principales que influyen en la participación de los trabajadores migrantes en el sector informal son de orden económico y social.
6) Hipótesis específicas:
   - La participación de trabajadores migrantes en el sector informal de la economía ha aumentado en la última década.
   - La situación migratoria irregular de los trabajadores extranjeros genera las condiciones para optar por empleos informales.
   - Los trabajadores migrantes se encuentran expuestos mayormente a condiciones de informalidad laboral en comparación a los trabajadores chilenos.
7) Variable dependiente:
   - Participación de los trabajadores migrantes en la informalidad laboral.
8) Tipo de investigación:
   - Descriptiva.
9) Diseño de investigación:
   - No experimental. Se pretende estudiar una variable independiente, para analizar sus consecuencias en relación a la variable dependiente, donde simplemente se observa un fenómeno, el cual es el efecto de los trabajadores migrantes en la informalidad laboral en Chile.
   - Longitudinal. Puesto que el objeto del estudio corresponde al impacto de la migración sobre la informalidad laboral en Chile en la última década.

2. Trabajadores migrantes en Chile

A pesar de ello, nos encontramos frente a situaciones de precariedad e informalidad laboral en nuestro país, ante un empleador que utiliza esta fuerza de trabajo en beneficio de sus propias utilidades. El avance hacia un Derecho Laboral con su contenido permanentemente protector, exige que vaya en desarrollo del pleno ejercicio del trabajo como derecho fundamental. Esto, va de la mano con la solución de los casos de informalidad laboral articulándose junto a los principios que lo informan, los mismos que

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servirán de base al desarrollo del presente trabajo. Según señala el profesor Pablo Arellano Ortiz "*uno de los cambios de mayor alcance que han producido la globalización, el proceso de creciente interacción social y de interdependencia en las relaciones económicas es el cambio cuantitativo y cualitativo de los movimientos migratorios, de esta manera, se ha incluso hablado de una nueva era de las migraciones*"[2].

Pensar en la importancia del estudio de este fenómeno radica en entender según el autor citado señala que "*las migraciones se han convertido en un proceso cada vez más complejo. De migración para asentarse permanentemente se ha pasado a migraciones temporales. Además, los migrantes han variado y se han convertido en un grupo muy variado: trabajadores temporales, subcontratados, trabajadores calificados, estudiantes, buscadores de asilo, refugiados políticos, etcétera*"[3]. Existen distintas argumentaciones en torno a definir conceptos claves como trabajadores migrantes y la misma noción de informalidad laboral que se desarrollará en los siguientes epígrafes. Entonces, lo que se intenta dilucidar con esta investigación es determinar la relación que existe entre el sostenido flujo migratorio en nuestro país, observando necesariamente como se relaciona con situaciones de empleo informal.

Históricamente en Chile, la migración se ha mostrado en el escenario de las relaciones laborales donde la composición de los trabajadores y los movimientos desde poblaciones rurales a otras urbanas. Es más, centrado específicamente en la migración se relacionó íntimamente con el fenómeno de la Cuestión Social junto al proceso de codificación laboral en nuestro país. Asimismo, esta composición de la fuerza laboral como consecuencia de las migraciones, lo hace también distinguiendo la nacionalidad de los mismos. Lo anterior, según el estudio que aporta Andrés Naudón Figueroa se demuestra en que "*en el sector minero en 1904 el total de trabajadores era de 24.445 de los cuales solo 17.398 eran chilenos y los extranjeros eran principalmente de nacionalidad boliviana y peruana*"[4].

Entonces, resulta necesario analizar dentro de este tópico aquellos instrumentos que sirvan de fundamento para cuantificar a la población migrante en Chile, sobre todo de aquella que se desempeña como clase trabajadora. En dicha línea argumental, del análisis sobre algunos datos basados en conocimientos empíricos podemos revisar las dimensiones

[2] Arellano P. (2012), "Trabajadores migrantes y seguridad social: aproximación nacional e internacional a los mecanismos de protección que otorgan continuidad a las prestaciones", *Revista chilena de Derecho del Trabajo y de la Seguridad Social*, 3, 6, p. 88.

[3] *Ibidem*.

[4] Naudón A. (2013), *La cuestión social y el derecho. Orígenes de la primera codificación laboral chilena*, RIL editores, p. 33.

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laborales de la migración. En relación con las últimas cifras estadísticas desarrolladas por instituciones nacionales que son base a la estimación de personas extranjeras residentes habituales en Chile con fecha última del 31 de diciembre del año 2018 del Instituto Nacional de Estadísticas junto con el Departamento de Extranjería y Migraciones[5].

De la estadística, se estimaron 1.251.225 personas extranjeras residentes en Chile al 31 de diciembre del año 2018, de las cuales en número 646.128 corresponden a hombres (51,6%) y 605.097 a mujeres (48,4%). Desde este punto de vista importa necesariamente la distinción en base al género por ejemplo en materias como la determinación de la edad previsional en materia de Seguridad Social. En consecuencia, podemos evidenciar en el gráfico una presencia de población migrante donde en su mayoría se individualizan como hombres. Dicha importancia también adquiere relevancia por la especial protección particularmente en materia laboral a la maternidad y paternidad sin distinción de nacionalidades.

Ahora, de la distinción basada en el país de nacimiento podemos apreciar que la comunidad venezolana con el número de 288.233 personas equivalente al 23% del total de personas extranjeras residentes se instala como la más prevalente. Esto se puede asociar al actual contexto económico, político y social que vive Venezuela desembocando en grandes flujos migratorios por todo Sudamérica principalmente. El segundo colectivo que más población concentra en el periodo estudiado es el de ciudadanos peruanos con el número de 223.923 personas equivalente al 17,8%. Lo anterior, ha encontrado justificación respecto de la cercanía geográfica entre los países vecinos de Chile y Perú.

Y definitivamente en tercer lugar encontramos a la comunidad de ciudadanos haitianos quienes crecientemente llegan al número de 179.338, consolidándose como el tercer grupo con mayor presencia en nuestro país. Sabemos de igual manera que ha existido un crecimiento sostenido principalmente en la última década de ciudadanos haitianos en búsqueda de condiciones distintas de vida en Chile. Finalmente podemos apreciar que en tercer, cuarto y quinto lugar consecutivamente se encuentran porcentajes considerables de ciudadanos provenientes de Colombia con un número de 146.582 desplazando al vecino país de Bolivia con un número de 107.346 y junto con Argentina 74.713 habitantes.

Según la encuesta CASEN 2017[6], dato empírico más preciso aportado

[5] Disponible en: *www.extranjeria.gob.cl/media/2019/04/Presentaci%C3%B3n-Extranjeros-Residentes-en-Chile.-31-Diciembre-2018.pdf* (accessed: 10/05/2024).

[6] Disponible en: *www.observatorio.ministeriodesarrollosocial.gob.cl/casen-multidimensional/casen/docs/Resultados_Inmigrantes_casen_2017.pdf* (accessed: 15/05/2024).

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por una institución gubernamental dependiente del Ministerio de Desarrollo Social especifica cuáles son las actividades desarrolladas por nacidos en Chile e inmigrantes. Dichas actividades respecto de trabajadores migrantes se centran en tres grupos mayoritarios, siendo el primero de ellos el comercio al por mayor y al por menor con un 21,9%. En segundo lugar, encontramos actividades desarrolladas en torno al rubro de los hoteles y restaurantes con un 14,4%, cifra considerable por sobre los nacidos en Chile. Finalmente, en tercer lugar, encontramos el trabajo desarrollado en actividades inmobiliarias, empresariales y de alquiler con un 12,3%.

La necesidad de estudiar fenómeno migratorio en Chile ha evidenciado algunas características propias desarrolladas por algunos autores locales agregando que "*en la II Región de Antofagasta – sobre el desierto de Atacama –, donde se ha registrado en los últimos años una creciente inmigración de ciudadanos Latinoamericanos, destacando los protagonismos históricos habituales, como son peruanos, ecuatorianos y bolivianos, con una llegada explosiva de nacionales colombianos, quienes presentan características étnicas diferenciales notables – al ser en su mayoría afro descendientes del sur pacífico colombiano. Además de lo anterior se resalta el hecho de una feminización del fenómeno, con aristas importantes en distintos niveles que además genera aspectos negativos como discriminación*"[7].

Lo anterior se afirma de los constantes flujos migratorios en nuestro país se han profundizado cuestiones negativas siendo una de ellas la discriminación permanente y el rechazo muchas veces que sufren los ciudadanos extranjeros en Chile. Al respecto, en un estudio efectuado por la Universidad Arturo Prat de Iquique[8] se afirma que dicho rechazo puede recrudecerse en períodos de crisis económica, aumentando el desempleo, sobrecargando los servicios, entre otros fenómenos, lo que se da con mayor frecuencia en las mujeres, en los indígenas, los afros descendientes y los discapacitados. De esta forma, la reviste especial interés la presente investigación puesto que podemos apreciar que se han manifestado en nuestro país y particularmente en Latinoamérica practicas generalizadas de discriminación en torno al género, origen, entre otras situaciones.

A propósito de la feminización del fenómeno migratorio, se suma la precariedad laboral en la que se desenvuelve la prestación de servicios bajo vínculo de subordinación y dependencia. La idea anterior, se ve reforzada por las características de estas labores realizadas por trabajadores migrantes,

[7] Espinoza E., Ganem M., Jachura C., Macaya M., Valenzuela I. (2009), *Diagnóstico de la Población Colombiana en la Frontera Norte de Chile, Iquique*, Universidad Arturo Prat, entre otros, p. 9.

[8] Ivi, p. 13.

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donde se evidencia "*una mayor flexibilización de su trabajo y la asunción de funciones laborales normalmente vinculadas a un mercado de trabajos domésticos: limpieza, cocina, cuidado de menores y ancianos*"[9]. Además, se agrega por los mismos autores que "*el trabajo doméstico representa en América Latina un sector laboral marcado por la vulnerabilidad: con bajas remuneraciones, reincidencia de abusos por parte de los empleadores, escasa protección social y elevados niveles de informalidad*"[10].

Otra de las relaciones que podemos hacer, es el contexto común que une los casos de informalidad laboral junto con la precariedad laboral, totalmente contrarios a conceptos como los de trabajo decente, donde consecuentemente podemos agregar que "en algunos casos, es la precariedad laboral en origen lo que prepara a las mujeres para asumir este mismo mercado laboral en destino, ayudándoles a constituir unos conocimientos y prácticas en relación al trabajo informal que serán la base de su experiencia económica migratoria"[11]. Es decir, dentro de las hipótesis de inclusión laboral para personas migrantes, particularmente de extranjeros, probablemente nos encontremos en condiciones de trabajo indignas.

Frente a estos rasgos de feminización de los flujos migratorios destaca que "*las mujeres inmigrantes están sobre cualificadas para los servicios a los que consiguen acceder en destino: muchas cuentan con una escolaridad superior a la media de las mujeres autóctonas, y otras cuantas dejan trabajos que exigen formación técnica en sus países de origen, para asumir funciones que no exigen cualificación profesional. Sea como fuera, estas mujeres migrantes, al hacerse cargo del trabajo reproductivo de las familias autóctonas, pasan a constituir una mano de obra complementaria fundamental en países como Chile*"[12]. Entonces en distintas ocasiones, trabajadoras extranjeras se ven en la obligación de cambiar el objeto de su profesión u oficio para dedicarse a actividades que permitan insertarse en el mercado.

Si bien sabemos la motivación que impulsa el fenómeno migratorio es multidimensional, esto haciendo referencia a las distintas razones que tienen las personas que determinan hacerlo. Evidenciamos entonces en esta acción una percepción mayor en cuanto a la búsqueda de oportunidades, de realización material y espiritual, por tanto, respecto a dichas circunstancias, se vuelven relevantes en el ámbito las relaciones laborales produciéndose el fenómeno de la migración laboral.

[9] Lube M., Garcés A. (2012), "Mujeres peruanas en las regiones del norte de Chile: Apuntes preliminares para la investigación", *Estudios Atacameños*, 44, pp. 8-9.

[10] Ivi, p. 9.

[11] *Ibidem*.

[12] *Ibidem*.

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A propósito de la informalidad laboral como fenómeno que interesa a las ciencias sociales y concepto a considerar, resulta importante hacer presente los postulados de la Recomendación 204 de la OIT[13] convocada con fecha 01 de junio del año 2015. La misma establece distintos parámetros en torno al tópico de la informalidad laboral donde reconoce que "*la mayoría de las personas que se incorporan a la economía informal no lo hacen por elección, sino como consecuencia de la falta de oportunidades en la economía formal y por carecer de otros medios de sustento; Recordando que los déficits de trabajo decente – la denegación de los derechos en el trabajo, la falta de suficientes oportunidades de empleo de calidad, una protección social inadecuada y la ausencia de diálogo social – son más pronunciados en la economía informal; Reconociendo que la informalidad obedece a múltiples causas, incluidas las cuestiones estructurales y de gobernanza, y que, en un contexto de diálogo social, las políticas públicas pueden acelerar el proceso de transición a la economía formal*".

Al respecto, el profesor Pablo Arellano Ortiz plantea que "*a nuestro entender toda persona tiene derecho a las prestaciones de seguridad social no importando si es migrante o nacional de un determinado país. Así, un residente o nacional de un país puede ser destinatario de diversas prestaciones para cubrir sus riesgos sociales. Para ello, los Estados establecen diversos mecanismos que permiten a través de sus prestaciones lograr entregar, en lo posible, una cobertura universal de la seguridad social*"[14].

Como lo ha señalado la Dirección del Trabajo "*trabajar sin una visa o permiso constituye una falta administrativa que puede originar sanciones para el trabajador y el empleador. No obstante, esto no significa que la persona trabajadora no tenga derecho a las prestaciones laborales y previsionales que pudieran corresponderle*"[15].

La Dirección del Trabajo tiene una misión central en el control y fiscalización de las normas laborales, lo que requiere de un soporte de conocimiento que respalde su quehacer. Es indispensable que las políticas públicas avancen de manera práctica en favorecer una mayor formalidad del empleo y, consecuentemente, lograr el acceso de más trabajadores a condiciones laborales adecuadas con respeto de sus derechos. Teniendo en consideración esos elementos, cabe hacer presente que muchas veces hablamos de situaciones con importantes rasgos de precariedad laboral,

[13] Disponible en: *www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_379098.pdf* (accessed: 05/06/2024).

[14] Arellano P. (2014), "Prestaciones no contributivas de los trabajadores migrantes: un desafío pendiente en Latinoamérica", *Revista Ius et Praxis*, 20, 2, p. 473.

[15] Dirección del Trabajo, Ord. N. 1.404, 31/03/2017.

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abriendo paso a malas prácticas en materia de contratación de trabajadores extranjeros con inobservancia de la normativa nacional e internacional.

A pesar de la amplia extensión de normas que intenta equilibrar la relación laboral y a las que sucintamente me he referido, se aprecia una generalidad de casos que rozan la informalidad y favorecen la contratación en términos indignos para los trabajadores migrantes. Efectivamente, aquellos extranjeros que llegan al país con las expectativas de condiciones de vida distintas y ejercer alguna labor en las relaciones de trabajo son sometidos a jornadas extendidas, dentro de las cuales se superan muchas veces los límites establecidos legalmente para la realización de labores propiamente tal, asentándose en rubros como la agricultura, la construcción, y el comercio callejero.

En cuanto a la dimensión económica, suele observarse una extensión de la autonomía de la voluntad como potestad de mando en lo que respecta a la remuneración, encontrándose por lo general bajos sueldos que en la mayoría de las ocasiones resulta incluso ser inferior al mínimo legal establecido. Además, se puede apreciar un clima de inestabilidad y no formalización de la relación laboral, frente a la cual el trabajador se ve vulnerado al no garantizarse la continuidad en el trabajo y aún más cuando el vínculo de subordinación y dependencia no se formaliza, existiendo una grave inobservancia del empleador frente a las obligaciones que de la relación laboral se desprenden.

3. Informalidad laboral y migración

En primer lugar, para efectos de contextualizar en los siguientes epígrafes, resulta fundamental aproximar algunos conceptos referente al tópico tratado sobre qué entendemos por informalidad laboral, dentro de los cuales doctrinariamente hablando se ha señalado que "*la informalidad laboral se define como la presencia de una relación de trabajo en la que existe falta de cumplimiento de todas estas obligaciones simultáneamente: i) escrituración de contrato cuya copia se haya entregado al trabajador; ii) uso correcto del Sistema de registro Control de Asistencia; iii) otorgamiento de comprobante de pago de remuneraciones; iv) declaración o pago de cotizaciones previsionales*"[16].

De igual manera, la Organización Internacional del Trabajo nos entrega un concepto de empleo informal, entendiéndose por tal el que "*incluye todo trabajo remunerado que no está registrado, regulado o protegido por marcos legales o normativos, así como también trabajo no remunerado*

[16] Garrido R. (2014), "Manual Ejecutivo Laboral", 8, Febrero, Edig. p. 52.

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llevado a cabo en una empresa generadora de ingresos. Los trabajadores informales no cuentan con contratos de empleo seguros, prestaciones laborales, protección social o representación de los trabajadores"[17]. El empleo informal es más común entre los más vulnerables de nuestras sociedades: jóvenes, mujeres, migrantes, pobres, donde los trabajadores migrantes se encuentran en la necesidad de ingresar a la economía informal. Son diversos los casos en nuestro país de trabajadores migrantes ya sea en situación regular e irregular, encontrándose ocupados en la economía informal en puestos de trabajo sin contrato laboral ni acceso a la protección social o la seguridad social.

En numerosas ocasiones la irregularidad migratoria está acompañada de la informalidad laboral, lo cual puede constituir un factor determinante que impida el paso a la formalidad en el empleo según las políticas y prácticas migratorias de cada país, entre otros motivos. Al efecto, los trabajadores migrantes presentan niveles de informalidad sensiblemente superiores a los que tienen los trabajadores nacionales y desarrollan tareas en sectores que también cuentan con mayores tasas de empleo informal, en una región en la cual, según los últimos datos disponibles, los avances en materia de formalización de los mercados laborales se han estancado y persiste la tasa de 47,7% de los ocupados no agrícolas que trabajan en condiciones de informalidad. En numerosos casos los trabajadores migrantes desarrollan en los países de destino tareas para las cuales se encuentran sobre calificados, resultando de ello situaciones de graves vulneraciones de los derechos fundamentales de estos trabajadores.

Los trabajadores migrantes en la economía informal de los países de destino, en general no están cubiertos por las leyes laborales y, por tanto, están sujetos a condiciones laborales precarias e inseguras en el trabajo, así como a bajos salarios, a un acceso inadecuado e inapropiado a la salud y la vivienda. La protección social puede ser negada por Ley o en la práctica, incrementando el riesgo de tener que regresar a su país de origen en condición de pobreza, especialmente en los casos en que sufren accidentes laborales. Además, los trabajadores migrantes, en particular los que están en situación migratoria irregular, pueden ser discriminados en todas las fases del proceso migratorio. La discriminación que toma forma en la negación de servicios básicos, es un problema creciente para trabajadores migrantes y sus familias.

Asimismo, autores nacionales han señalado que "*a nivel regional, el mercado de trabajo latinoamericano es uno bien complejo, y a la vez precario. En donde se puede identificar corredores migratorios y realidades*

[17] Disponible en: *www.oitcinterfor.org/taxonomy/term/3366* (accessed: 10/06/2024).

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migratorias bastante diversas. Además, el nivel de migración interna en la Región resulta ser bastante elevado. Sin embargo, a nuestro parecer la región posee dos factores que interfieren de manera importante con la migración: la estructura del mercado de trabajo y los niveles de informalidad. Esto ya que las formas atípicas de contratación muchas veces se superponen con aquellos trabajadores presentes en la economía informal"[18]. Acá reconocemos evidentemente la relación directa entre el fenómeno migratorio en nuestro país junto con la informalidad laboral consagrándose como un factor fundamental en el mismo.

Teniendo en consideración lo anterior, específicamente en nuestro país el profesor Pablo Arellano agrega que "*la informalidad en Chile de acuerdo a los estudios más recientes alcanza el 35%, y en este grupo muchas veces se suele incorporar a trabajadores con un estatuto migratorio irregular. Esto último dificulta la identificación del trabajador migrante y a la vez del trabajador informal, lo que conlleva a la vez a dificultades para la implementación de políticas públicas correctoras*"[19]. Finalmente, el mismo autor concluye que "*debemos entender que, si el trabajador no tiene visa, ello no puede ser un obstáculo para que pueda cotizar y que el empleador cumpla con sus obligaciones. Los derechos sociales deben ser aplicables a los trabajadores migrantes independiente de su estatuto migratorio. Este no debe ser un obstáculo para que encuentre empleo o para que participe de la seguridad social*"[20].

4. Conclusiones

1) En primer lugar, resulta categórico pensar que en nuestra sociedad permanentemente se realizan distintos tipos de selección social ya sea étnica o cultura, siendo la migración y el estudio de las relaciones laborales que de él surgen el tópico principal de este trabajo. Adquiere relevancia respecto a la contingencia de la temática, donde hoy Chile al menos se muestra como una alternativa macroeconómica para quienes buscan opciones alternativas a sus condiciones de vida. Dicho lo anterior, el estudio de la migración conlleva en nuestro país un cambio del paradigma respecto al contexto que viven los migrantes y que exige

[18] Arellano P. (2018), "Los trabajadores migrantes en Chile hoy: hacia un enfoque complejo basado en derechos", in *Migración y Trabajo. Miradas desde el Derecho nacional e internacional*, Editorial Librotecnia. pp. 10-11.

[19] Ivi, p. 12.

[20] *Ibidem*.

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necesariamente abandonar la lógica de seguridad nacional, mostrándose como una alternativa sólida dentro del cono sur siendo capaz de responder a las necesidades del mundo globalizado, aún más cuando de ello se desprenden relaciones laborales junto a sus innegables repercusiones en la economía.

2) La protección a los trabajadores indistintamente su nacionalidad, aunque puede entenderse que la migración sea un fenómeno sostenido, pero no que sea exclusivamente de Chile. Nuestras sociedades han construido sus cimientos en virtud de trascendencia jurídica consecuencia de la migración, en base a esos mismos aportes que se realizan y generan relaciones laborales. Sin embargo, podemos evidenciar como consecuencia negativa, se está generando una situación de trabajo informal. La hipótesis de la informalidad laboral se manifiesta en que el trabajador migrante se encuentra en un estado de necesidad, desembocando en algunas ocasiones en formas precarias de trabajo. Asimismo, se vulneran derechos, por ejemplo, los de ingresos mínimos o jornadas de trabajo, entre otros, siendo una problemática que aqueja en la actualidad a nuestro país.
3) Reconocemos indudablemente la protección a todos los trabajadores indistintamente su nacionalidad, siendo relevante las instituciones al momento del análisis de las relaciones laborales, estableciendo criterios generales de interpretación para el amparo efectivo de los trabajadores.
4) Dentro de las mayores conclusiones a la que podemos arribar a la discusión para plantear la necesidad en torno a una normativa migratoria, que permita avanzar en materia laboral y la consagración de los derechos de los trabajadores migrantes. Esta regulación exige contemplar normas basadas esencialmente en el pleno reconocimiento de los derechos fundamentales y la observancia del principio de no discriminación, aboliendo toda forma de precarización en el ejercicio del trabajo.
5) Finalmente, resulta importante desde la perspectiva de las otras ramas, seguir tutelando a los migrantes indistintamente, lo que se expresa también en una de sus expresiones preferentemente más negativas como en el ejercicio de las relaciones laborales. Encontramos variadas situaciones de informalidad y precariedades frente al desarrollo de cualquier actividad humana con expectativa remunerativa, las cuales deben sin duda ser amparadas. Finalmente, frente a situaciones de vulnerabilidad se ha establecido en general una tendencia pro migrante en lo que de las relaciones laborales se desprenden.

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Part II
Social protection systems: lessons learned and new ideas

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Longevity between active aging policies and work inclusion measures: towards sustainable labor law

Valeria Allocca[1]

1. The panorama of demographic ageing

The paper addresses the consequences of the demographic transition by focusing on the relationship between work and longevity, with the aim of understanding how a person's work should adapt to longer working lives by promoting his or her health and well-being, with positive effects on employment, health care, and the social welfare system, in order to prevent a large part of the working population from being composed of individuals who are "*too old to retire*" and "*too young to re-enter the labor market*" (Guaglianone, 2015, p. 321; Filì, 2020, p. 370; Marazza, 2024, p. 128).

A longer life and a reduced generational turnover produce the aging of the labor force, on which undoubtedly also weighs those factors that delay entry into the labor market and the very transition "to adult status" (Impicciatore, 2015), as they are linked to the possession of skills, experience, professional titles and the attainment of certain standards and levels of education, or those that postpone their exit by tightening the requirements for access to retirement, which erode the younger classes of the working population and swell the older ones, thus affecting its structure and composition by age in different ways, further accentuating the impact of demographic dynamics (Rosina, De Rose, 2014, p. 110; Barbera, 2015, p. 243; De Rose, Strozza, 2015, p. 26; Bozzao, 2017, p. 41; Livi Bacci, 2018, p. 719; Cinelli, 2019, p. 295; Golini, Lo Prete, 2019; Di Salvatore, 2019, p. 540).

In the wake of an aging population and a country like ours in demographic decline, "a*ctive aging is an absolute necessity*" and one of the most important

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challenges for policymakers and national governments, which can no longer afford such high rates of inactivity for workers over 65 (Ferrante, 2011; Carlo, 2014; Boeri, 2018).

In particular, according to the latest data from Eurostat, the percentage of the population aged 65 years and older has been growing at a very rapid rate in all EU member states, where the median age is increasing and as of January 1, 2023 was 44.5 years (Kinsella, He, 2009).

In this context, Italy is the "oldest" country, with an average age of 48.4 years, due to a high level of life expectancy, accompanied by a drastic decline in births (about 27 thousand fewer births in the last ten years) and a reduction in the birth rate of migrants participating in the labor market.

The aging population will then accelerate over the next two decades as the baby boom generation completes its path to retirement, such that it will double by 2050 when, according to population projections, people aged 55 and older will account for 40.6 percent of the EU population and 45.9 percent of the Italian population.

In a demographic framework, in which more mature workers are set to become an important part of the working population, national policies can no longer continue to look at them only as a problem to be solved by inveterate pension reforms, but must view them as a useful human capital resource to make up for low generational replacement rates.

2. Active and healthy ageing policies

The World Health Organization (WHO) in 2002 defined active aging (active aging) as "*the process of optimizing opportunities for health, participation and security to improve the quality of life of people as they age*", emphasizing the close link between aging by becoming active in different areas of the social sphere and the mental and physical well-being of people, so much so that it has risen to the status of an aspiration tool for healthy aging (healthy aging).

The definition thus coined identifies "health", "participation", and "security" as the three main areas of intervention of multilevel policies on active aging. Specifically, "health", in line with the concept espoused by the WHO since its founding act (the Preamble to the 1946 Constitution), means a "*complete state of physical, mental and social well-being and not the mere absence of disease or infirmity*", "participation" refers to the self-actualization and prolonged activity of older people in the labor market and in different fields, while "security" refers to the context of reference, evoking the support of a healthy environment conducive to initiative and the

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guarantee of an income that ensures the "*right to age with dignity*" (Ales, 2021, p. 43; De Falco, 2024, p. 52).

Following this line, active aging becomes a status of the person and part of the strategy of implementation of human rights and fundamental freedoms, finding constitutional anchorage in the context of the protection of health and human dignity (Articles 2, 3, 32 Const.) and direct recognition in the provisions of the EU Charter of Fundamental Rights prohibiting discrimination originating from the possession of personal conditions including those related to the age factor (Art. 21), in those that recognize the right of the elderly to "*lead a life of dignity and participate in social and cultural life*" (Art. 25) and to access health, safety and social assistance benefits in the manner established by Union law and in accordance with national laws and practices (Art. 34-35) (Rospi, 2018; Dal Maso, 2024).

However, active aging has positive effects not only at the individual level but also at the collective level, as its benefits indirectly affect society as a whole, insofar as improvements in the health and quality of life of the elderly result in a containment of public spending by ensuring long-term sustainability and efficiency of health and social systems, thus contributing to the resolution of the major issues posed by population aging (Tullini, 2008; Walker, Maltby, 2012).

In fact, by implying being active in one or more areas of society (volunteering, child care, etc.) and remaining productive for longer in the labor market, active aging sanctions the overcoming of the idea of the elderly as "*greedy and passive consumers of public resources*" and the shift from an approach defined as care-oriented welfare, marked by social marginality and characterized by needs for assistance and protection, to an approach geared toward the pursuit of autonomy and full inclusion of people of advanced age within society, enhancing their potential (Izzi, 2014, p. 585).

For these reasons, the promotion of active aging has been on the agenda for several years and in particular since the endorsement of the United Nations Madrid International Plan of Action on Aging (MIPAA), adopted by the Second World Assembly on Aging in Madrid in 2002, which historically marks the moment when at the global and European level (the Union has embraced the challenge of aging very early on) awareness of the effects of demographic transformations matures and the point of view from which to look at them changes in order to begin thinking about the development of an inclusive society for all ages (Casale, 2005).

The ratification of the Plan, articulated by concerted actions and programmed objectives, was followed by multiple documents (a succession of UN General Assembly Resolutions, annual reports, European Commission Green Papers, communications, European recommendations and regulations,

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etc.) and initiatives carried out on a European and international scale, including in 2011 the creation of the European Innovation Partnership on Active and Healthy Aging (EIPAHA), the promulgation in 2012 of the European Year of Active Aging, and in the same year the development of the Active Aging Index, desired by the European Commission in collaboration with the United Nations Economic Commission for Europe (UNECE).

Finally, active aging has been given new impetus by becoming part of the broader theme of sustainability, first with the UN member states' endorsement in 2015 of the 2030 Agenda for Sustainable Development and later in July 2020 with the Recovery and Resilience Plan (Next Generation EU), aimed at repairing the damage done by the pandemic, to make the economies and societies of European countries more sustainable at all ages and capable of meeting the needs of the present without burdening future generations, a commitment reaffirmed in December of the same year with the proclamation of the United Nations Decade of Healthy Aging at the proposal of the World Health Organization.

3. The measures introduced by the "elderly" Decree (Legislative Decree n. 29/2024) and the performance of work in "agile" mode

Both in the MIPAA and in the Sustainable Development Strategy of the 2030 Agenda, work is considered as a key dimension for the promotion of the quality of life and for the fulfillment of people throughout their lives and, at the same time, as lever for the organization of possibilities for development, innovation and sustainable mobilization of resources.

From this point of view, it is necessary to ask ourselves how national policies must prepare the labor market to face the implications of the demographic transition and its repercussions on employment, adapting traditional work structures to the needs of older workers, so as to favor their a prolonged productive contribution and meet the sustainable development objectives of employment (Treu, 2024).

In line with the indications of the National Plan for Recovery and Resilience and the goals of sustainability, which are grounded in Article 3, paragraph 3, of the TEU itself, which commits the European Union to strive to achieve "sustainable development", Italy adopted Legislative Decree n. 29 of March 15, 2024, on "Active Policies in favor of the Elderly" non-self-sufficient, implementing the enabling law n. 33 of March 23, 2023 (Cagnin, 2018).

Within a broad architecture of interventions dedicated to the prevention of frailty, telemedicine, and health protection, the decree deals with active

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aging, combating isolation and relational deprivation, and information literacy, with a focus that, although marginal compared to the broader treatment reserved for health and welfare issues, dwells on the participation of the elderly in the labor market, considered in both the MIPAA and Agenda 2030 as a "key dimension" for sustainable development and the productive realization of people throughout their lives.

After all, the measures introduced by Legislative Decree n. 29/2024 are mainly aimed at the "elderly person", which the decree expressly defines as the one who has turned 65, or the "great elderly person" who has turned 80, or even the "non-self-sufficient elderly person", that is, the one with a loss or severe limitation of autonomy in carrying out the basic activities of daily life and his or her physical, mental and relational well-being.

Instead, national and supranational analyses of active aging at work focus mainly on the "last cohort" of the workforce, between the age of 55 (in some research even 50 years or even 45 years) until the age of old-age retirement, reflecting how the notion of older workers, also called adults, mature or seniores, cannot be equated with the notion of elderly people according to biomedical science (Pugliese, 2011).

This consideration, however, does not exclude the usefulness of the measures provided for in Chapter II of the decree (Arts. 4-10), on Measures for the prevention of frailty and the promotion of health, active ageing of the elderly, preventive healthcare and telemedicine also for the employment of elderly workers (Treu, 2024).

In particular, Article 5, paragraph 1, contains provisions specifically dedicated to the healthy and active ageing of the elderly population in the workplace through the obligations of risk factor assessment and health surveillance provided for in Article 28 of Legislative Decree n. 81/2008, taking into account the WHP on Workplace Health Promotion recommended by the WHO and the indications of the PNP (National Prevention Plan) on the "*activation of processes and interventions aimed at making the workplace an environment suitable also for the elderly through appropriate organisational changes*".

Paragraph 2 of Article 5 then states that the employer must "*favour older persons in the performance, even partially, of work in agile mode*", in compliance with the discipline of national collective agreements.

The provision intercepts the basic idea of the model adopted during the health emergency of facilitating access to agile work, as a flexible and adaptable mode of work, aimed at guaranteeing the continuity of employment of workers who are vulnerable but not unfit for work (Zilli, 2020; Brollo, 2022a).

The emergency legislation, in fact, albeit in a disorganised and fragmented

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manner, with a succession of cryptic provisions that were repeatedly extended and have now expired (some expired on 31 December 2023 and others on 31 March 2024), had designed a system of agility based on variable-geometry provisional protections in favour of workers who are fragile for health or care reasons, under the banner of organisational well-being and the reconciliation of professional and personal life times, emphasising certain vulnerable situations in order to increase the inclusion and participation of certain categories of employees.

In this regard, without going into the details of the "chaotic" emergency legislation, it is sufficient to recall that in the "multifaceted" category of fragility that emerged from the emergency legislation, the worker's age did not have its own autonomous relevance, but acquired it only in the presence of possible co-morbidities such as to entail a situation of greater risk ascertained by the competent doctor.

With the expiration of the last extension "*without seizing the opportunity for a rearrangement of the matter*", we returned to the ordinary regime regulated by Law n. 81/2017 which, in paragraph 3 bis of Article 18 (introduced by paragraph 486 of Law n. 145/2018), assigns a priority in access to agile work to certain categories of workers. Therefore, with the transition to the post-pandemic phase, the "right" to agile work disappears, but the "priority" mechanism that coexisted with it persists, by which the employer power is constrained, orienting organisational and personnel management choices towards favouring certain "fragile" situations (Zilli, 2023; Verzulli, 2024).

In particular, Article 18, paragraph 3 bis, of Law n. 81/2017, as amended by Legislative Decree n. 105/2022, adopted in implementation of dir. 2019/1158/EU, recognises priority to requests for the execution of the employment relationship in agile mode submitted by workers "*with children up to twelve years of age or without any age limit in the case of children with disabilities within the meaning of Art. 3, paragraph 3, of l. 5 February 1992, n. 104*", by those "*with disabilities in a situation of gravity ascertained pursuant to art. 4, paragraph 1, of l. 5 February 1992, n. 104*" or by those who are "*caregivers pursuant to art. 1, paragraph 255, of l. 27 December 2017, n. 205*".

With a similar provision, paragraph 6 bis of art. 33 of law n. 104/1992, added as a result of the revision of the institution by Legislative Decree n. 105/2022, grants the same "*priority in access to agile work pursuant to art. 18, paragraph 3 bis, of l. 22 May 2017, n. 81*" to workers who take advantage of the permits referred to in Article 33, paragraphs 2 and 3, of l. n. 104/1992, without prejudice to "*any more favourable provisions provided by collective bargaining*".

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In this legislative frame older workers, though vulnerable because of their age, remain outside the renewed mechanism of "selective preferentiality", which under the guise of priority attempts to consolidate the idea behind the emergency legislation of using agility as an "antidote" to frailty, but at the same time again ignores its capacity to counter longevity, which if unaccompanied risks creating inequalities and fuelling marginalisation (Brollo, 2023).

Therefore, with a view to the inclusion of disadvantaged workers, paragraph 2 of the art. 5 of Legislative Decree n. 29/2014, according to which the "*employer adopts every initiative aimed at encouraging elderly people in carrying out, even partially, the work performance in agile mode*", without prejudice to the *"discipline provided for by the national collective agreements*".

However, the step taken by the legislator is still too short to recognize the elderly worker with a "right" to agile working which obliges the employer to guarantee it or a "priority" which ensures precedence in case he decides to activate it.

The provision, in fact, limits itself to reiterating the commitment to promoting agility as a measure capable of guaranteeing the working well-being of older employees, thus wasting an important opportunity to include older workers, in that group of subjects who enjoy a preferential lane in accessing the agile working method as they are more exposed to the risk of exclusion, even more so if we consider that the decree, by defining "elderly" the person who has already reached the age of 65, has significantly raised the threshold for consideration of the factor age.

Hence, despite the favourable wind of inclusion, there is a tendency to "frigidity" towards agility among seniors, which should instead be better incentivised as a priority lever of active ageing needed to retain valuable human resources for the labour market, including through recourse to the national collective bargaining delegated by the law itself, which through specific measures could act as a catalyst for organisational practices aimed at supporting the well-being of workers and as a pioneer of the use of agile work as a welfare tool (Brollo, 2022 b).

All of this implies, however, a strengthening of professional skills, which will make it possible to delimit the boundary of "removable" activities and the enabling conditions for their exercise. To this end, Articles 19 and 20 of Legislative Decree n. 29/2024 also intervene in the area of skills obsolescence, providing for the adoption of training and support programmes and activities at digital facilitation points, in order to promote and incentivise digital literacy, necessary to avoid that gap promotes social exclusion and marginalization (De Falco, 2022).

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In order to keep pace with technology and with the continuous review of tasks, one of the main areas of policy development on the subject, aimed at stemming the early exodus from the labour market, is that formed by lifelong learning, reskilling and the strategic consolidation of lifelong skills development processes, which also passes through the various interprofessional and bilateral funds included in the Network of Services for Labour Policies (Scarpetti, 2020).

In another respect, then, technology could support the elderly in that age range where they most need care and assistance, providing innovative and revolutionary solutions to improve the quality of life within widely varying environments, not only homes, public spaces, but also workplaces.

In this different perspective, the use of digital devices and artificial intelligence-based solutions could affect productive ageing, linked to longer working lives, by compensating for the ageing of the workforce and the decline in worker performance linked to physiological reasons.

This is a crucial issue for modern companies, as ongoing demographic changes and national pension age slippage drives the search for measures to ensure that older workers remain in the labour market in a sustainable and productive way, and artificial intelligence is particularly inclined to include workers with specific needs and capabilities in its highly innovative processes.

Digitisation, in spite of its potential risks, could thus act as a bridge to the active and healthy ageing of the population, supporting the process of optimising health and participation opportunities and improving the quality of life of ageing people.

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The Directive (EU) 2019/1937 and its transposition in Italy

Stefano Maria Corso[1]

1. Introduction

The will to involve workers in the activity of contrasting actions that compromise correct administration, affect competition, hinder economic development finds specific precedents in common and civil law countries, particularly concerning workers in large corporations (both national and multinational) and public administrations[2].

In this perspective, whistleblowing developed through a series of legislative measures aimed at ensuring protection against retaliation for workers reporting breaches detected during the performance of their duties[3].

This is aimed at achieving public interests and preventing (and repressing) illicit acts but provides, as mandatory, this initiative only in cases of particularly serious crimes and/or with regard to specific subjects (*i.e.* "*being a worker does not make mandatory what for everyone else is a faculty*")[4].

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[2] For an international and Italian perspective, see Calland, Dehn (2004); Callahan, Dworkin, Lewis (2004, p. 879); Vaughn (2015); Apaza-Chang (2017); Pizzuti (2019, p. 191); Corso (2020, p. 51). From the German perspective, before the Directive, Krause (2016, p. 163) and Gerdemann (2018, p. 366).

[3] Applicable only to the public sector was the first legislation approved in 2012 (*i.e*. Law n. 190/2012, entitled "Disposizioni per la prevenzione e la repressione della corruzione e dell'illegalità nella pubblica amministrazione"). See Corso (2013, p. 713) and Liguori (2015, p. 157). This was followed by the ANAC Regulation, on supervisory activities and inspections, on 9 December 2014. See Montanari (2015).

[4] An "obligation to report crimes" is provided for judicial police (Article 347 of the Code of Criminal Procedure), for public officials (limited to the "crime of which s/he has become aware in the exercise or because of her/his functions": Article 331 of the Criminal Code) and for public servants (limited to the "crime of which s/he has become aware in the exercise or

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Over time, the list of reportable activities has increased, including not only criminal and administrative offences, but also conducts against internal regulations, codes of ethics and also standards of corporate behavior, in addition to simple organizational dysfunctions and risk situations (Callahan, Dworkin, Fort, Schipani, 2002, p. 177; Vandekerckhove, 2006, pp. 182-183).

With these premises the Directive (EU) 2019/1937, on the protection of persons who report breaches of Union law, was approved on 23 October 2019 and this was an opportunity to revisit – also in Italy – the previously approved legislation on whistleblowing[5].

It followed, after long reflection, Legislative Decree 10 March 2023 n. 24 which entirely repealed the previous Italian legislation, adapting and transposing – sometimes uncritically – the principles of the Directive (Degoli, 2023, p. 373; Allamprese, Tonelli, 2023, p. 447).

2. Whistleblowing legislation: a unitary discipline

The correct application of environmental, anti-corruption and financial reporting regulations is one of the cornerstone of European regulation and, more in general, the correct behavior of top managers and the protection of whistleblowers have been extensively confirmed as a necessary condition for correct governance, both in private and public sector (Boscati, 2020, p. 521).

While the existence of different rules for each sector can legitimately be foreseen, a unitary discipline applies to public and private employers and the specific identification of workers in the organizational chart is considered the best tool to facilitate the detection of any irregularities that may exist, assisting the Government in its efforts to prevent and contrast illicit acts.

The benefit of whistleblowing is justified by the interest in maximum transparency and the best protection of the integrity of the company/public body and its organization (including workers).

As already emerged in the case-law of the Court of Strasbourg[6], this

because of the service": Article 362 of the Criminal Code). For other subjects (workers or not) the report is always optional (with a very few exceptions: Articles 333 paragraph 1 of the Code of Criminal Procedure and 364 of the Code of Criminal Procedure). Special provisions are provided for in the field of health and safety (Article 20, par. 2, letter e, Legislative Decree n. 81 of 9 April 2008) and in the public sector (Article 8 of Presidential Decree n. 62 of 16 April 2013, but the latter provision should be considered implicitly repealed due to the subsequent whistleblowing regulation). See: Corso (2020, p. 44); Piovesana (2019, p. 301).

[5] See Manacorda (2018, p. 185); Corso (2020a, p. 600); Vitaletti (2020, p. 447).

[6] Exemplifying the non-univocal way in which the so-called "public interest" has been

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concept of public interest therefore excludes disputes, claims or requests linked to an interest of a personal nature.

This is another concept that perhaps requires further consideration. In first place, a worker may apply to obtain the protection of whistleblowing legislation if she/he reasonably believed that the information on the violations reported was true (in any case falling within the objective scope indicated)[7] and if the channels and procedures afforded were respected (Article 16, par. 1 legislative decree n. 24/2023). In second place, it should be emphasized that the reasons that led workers to report or disclose publicly are irrelevant for the purposes of protecting them (so being privately interested in the report and in its possible consequences is permitted…) (Article 16 par. 2 legislative decree n. 24/2023).

Last but not least, this perspective (which I support) does not conflict with a second possible exclusion from the relevance of the whistleblowing regulation, i.e. that of small private entities ("*average of at least 50 workers employed in the last year*" – or even less, if there is EU relevance) because the lower number of workers in a company allows the implementation of tools to protect legality that are more efficient and less expensive than the management of reporting channels[8].

Less acceptable, however, is to subordinate the application of the legislation to the lesser organizational complexity of an entity because this produces a dissuasive effect on self-organization (see "*a model referred to in Legislative Decree 231/2001 are adopted*") (Article 2 par. 1 lett. q legislative decree n. 24/2023).

3. Public interest and labour perspective in the Italian legislation

It is interesting to note that EU Directive is aimed at workers and not at private individuals in general (so that the exceptional nature of employment relationship regarding whistleblowing is confirmed) (Article 3 par. 3 legislative decree n. 24/2023).

This is the main reason that justifies and supports the specific labour law regulation of whistleblowing legislation. Among many examples, the issue

considered, see ECHR 21 October 2014, Matuz v. Hungary (par. 37); 13 January 2015, Rubins v. Latvia (par. 83-85) and 13 September 2018, Big Brother Watch et al. v. United Kingdom (par. 487 and 492).

[7] Regarding reports based on *rumors*, see ECHR 16 February 2016, Soares de Melo v. Portugal.

[8] See "recital" n. 48 of the Directive (EU) 2019/1937.

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of retaliation no longer concerns the relationship between employer and worker in a bi-univocal way but takes on a broader meaning (previously not clarified in previous legislation): regulator introduces specific protection against retaliatory acts carried out directly by colleagues and this extensive application is confirmed even during the selection process and after the end of the employment relationship (Article 3 par. 4 legislative decree n. 24/2023)[9].

Directive also provides for a definition of "worker" which is as generic as possible in order to cover the whole range of persons connected in a broad sense to private and public employers and their organizations.

This choice, aimed at giving greater certainty and effectiveness to the legislation, sometimes tends to forget the rationale of the legislation focused on labour law. This is the case of shareholders, equated to workers, but regarding whom the meaning of the application of the legislation (confirmed in the transposition: see Article 3 par. 3 lett. h legislative decree n. 24/2023) is not clear.

With regard to the content of whistleblowing following which the worker may be considered deserving of protection, the regulator provides for two directions, on one hand indicating the general characteristics of the circumstances (and "acts") that may be reported and on the other "evaluating the public interest" of the same on a case by case basis.

From this perspective, the idea of strictly limiting the matters subject to reporting (and protection) appears impractical: today the list is extremely long, presents many interpretative doubts in terms of conduct and is reasonably unknowable by the workers (who are presumed not to have special skills in law, including European law) (see Article 2 par. 1 lett. a, n. 1-6 and the Annexes).

After this, particular care is dedicated to the concept of "information", because only if workers are fully aware of the contraindications and have knowledge about the whistleblowing criteria, they can overcome any qualms about reporting and make an "*informed decision*" (Massari, 2018, p. 991).

From this point of view, the central role of management, along with "*an adequate risk assessment that takes into account the nature of the activity*", represents nothing new for the discipline but, in light of the new legislation, it is better specified.

Following a report, at least these activities must be carried out: informing the reporting person about the receipt of the report (within seven days); maintaining discussions with the reporting person (additions are permitted if

[9] For a comparison with British legislation see Lewis, Bowers QC, Fodder, Mitchell (2017, p. 268).

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necessary); diligently following up on reports received[10]; providing feedback to the report (within three months) and making clear information available on the channel, on the procedures and on the conditions for making internal/external reports (Article 5 legislative decree n. 24/2023). It is necessary to consult the representatives or trade union organizations referred to in Article 51 of legislative decree n. 81 of 2015 and management must be entrusted to an independent (internal or external) office, with dedicated and specifically trained staff[11].

Reporting channels must guarantee the confidentiality of the identity of the reporting person[12], of the person involved[13] and of the person mentioned in the oral or written report, as well as of the content of the report and the related documentation (so-called "extension of confidentiality") (Article 4 legislative decree n. 24/2023).

The identity of the reporting person and any other information from which such identity can be deduced, directly or indirectly, cannot be revealed – without the express consent of the reporting person – to people other than those competent to receive or follow up on the reports[14].

Strong protection in disciplinary proceedings is confirmed ("express consent rule" pursuant to Article 12 par. 5 legislative decree n. 24/2023) while important limits (and of which workers must be informed!) remain for criminal proceedings (with the protection of confidentiality limited to the secrecy of the investigations pursuant to Article 329 Criminal procedure code) and accounting process because, closed the investigation phase, the right to defense and cross-examination always "prevail"[15].

In any cases, however, all kind of retaliation or discrimination is prohibited: protected persons (reporting and non-reporting) who have been

[10] On the previous legislation, Fiata (2018, par. 7, in particolar, note 40).

[11] With regard to the 2017 legislation, Gabriele (2019, p. 215) and, even before, Borelli, Hohnerlein (2015, pp. 180-181). Public administrations, which are required to appoint the so-called "RPCT" (the so-called "Responsible for corruption prevention and transparency"), entrust the latter with the management of the internal reporting channel, even if management is shared between different administrations.

[12] Particular attention must be paid to the difference between confidentiality and anonymity (with the limits to its use).

[13] Regarding the protection of the accused worker and the right to be heard, both the EU Directive and the Italian legislator have not explored the issue in depth and the reform can be considered a missed opportunity.

[14] In Italy, the anonymous reporting is not prohibited but is not subject to regulation (and specific protection) under whistleblowing legislation (in which the identity of the whistleblower is only "confidential"). See Corso (2020, p. 295).

[15] With regard to Article 3, Legislative Decree n. 179/2017, see Ghera, Valente (2021, p. 250).

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fired due to the reporting have the right to be reinstated in their jobs (pursuant to Article 18 of law 20 May 1970, n. 300 or Article 2 of legislative decree 4 March 2015, n. 23, due to the specific regulations applicable to the worker) (see Article 19 par. 3 legislative decree n. 24/2023).

The judicial authority requested shall adopt all measures, including temporary ones, necessary: to ensure protection of the subjective legal situation involved, including compensation for damages, reintegration into the workplace, etc and to cease retaliatory conducts.

4. Protective measures and violations

The protection of the person who reports breaches puts special emphasis on the protective measures to be implemented by the employer through a "reorganization of the structure" of the company/public body along the guidelines provided by law.

From an organizational perspective, it is up to the employer to identify one or more channels to be used by potential whistleblowers – while protecting their integrity – to report unlawful conducts relevant and based on consistent factual elements or violations of the supervisory and internal control system, which they have become aware of in the performance of their duties.

The traditional channel, represented by the employee reporting any fact to his/her direct supervisor, is manifestly inefficient and almost impossible to pursue in the case in which the person to be reported for any unlawful conduct is in fact the supervisor, as the whistleblower would find himself/herself in the unpleasant situation of reporting an offence or irregularity to the person responsible for it.

Both companies and public administrations are in a position to remedy this, either by implementing specific procedures to allow reports to be made in line with the regulator's guidelines or by amending their supervisory and internal control system (and accordingly adapting their disciplinary codes).

In an effort to adapt their internal organization to comply with the law, employers are called upon to organize their companies in such a way as to contrast the specific offenses envisaged by law and/or identified by the organization with the ultimate goal of preventing the occurrence of offences or, at least, limiting their effects, also in relation to the degree of responsibility attributable to the employees[16].

[16] On the previous legislation, Riccio (2017, p. 141).

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5. Internal, external or public reporting channels

Another aspect to consider (which is critical especially for companies) refers to the limits to so-called "external reports" or "public disclosures", because there is often a conflict between the public interest in whistleblowing and the company's interest involved in the "internal management" of critical issues that have emerged as a result of its organization. As matter of fact, any in-house solution would mean accepting that the report is managed by and under the control of the employer; while any external action, where the procedures and the results cannot be controlled by the company, would result in the lack of trust that the company can regulate the matter and act to prevent unlawful and irregular events from occurring.

Companies are more interested in favoring internal reporting as much as possible is evident also from the fact that whistleblowers' protection does not provide for rewards or incentives of any kind by law.

The EU Directive provides, with equal effect (but not exactly with equal consequences), for internal reporting channels (Articles 7-9 Directive EU 2019/1937), external reporting channels (Articles 10-14 Directive EU 2019/1937) and public disclosures (Article 15 Directive EU 2019/1937), and always provides that the reports must be followed up (*i.e*. giving the possibility to the whistleblower to follow the process) regardless of the communication channel chosen.

However, the Directive fails to indicate any real order of priority between the reporting channels (internal, external or public), even if the provision of "adequate information" on the use of internal channels is accompanied by the "encouraged" use of the internal channels before reporting through external reporting channels (Article 7 par. 2 Directive EU 2019/1937).

According to Recital n. 47, "*reporting persons should be encouraged to first use internal reporting channels and report to their employer*", thus assuming that such channels exist and are operating and that "*where reporting persons believe that the breach can be effectively addressed within the relevant organization, and that there is no risk of retaliation*".

In other words, according to EU legislation, it is not possible to design a strict hierarchy for the criteria to be used by whistleblowers in reporting illegal conducts and this is why it is difficult for the company to prevent or limit potential damages.

On the contrary, Italian legislation introduces a real "*up to ladder approach*"[17], which is more protective for employers and based on a logic of prevention (rather than repression).

[17] OECD (2016), *Committing to Effective Whistleblower Protection*, Paris, pp. 151-152.

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If there is no internal whistleblowing procedure that provides guarantees in terms of confidentiality and protection from retaliatory measures, the worker is obviously free to choose the recipient of his/her report/disclosure as s/he sees fit.

Conversely, Italian legislation imposes internal reporting channels as the preferred route to be taken first, while external reporting channels come second and must be considered in the presence of specific circumstances such as the lack of follow-up within a reasonable period, the lack or non-compulsory use of the internal reporting channels (this is the case of non-employees or other persons in contact with the organization involved in the reporting) and the existence of contraindications to the use of the internal communication channels (see Articles 6 and 15 legislative decree n. 24/2023).

In other words, external reporting (nowadays, only to the ANAC) and public disclosures are legitimate but only under certain conditions (and essentially following an internal report), thereby establishing a further profile of "loyalty" imposed on workers which in any case cannot be understood as a limit to "recourse to jurisdiction" (constitutionally protected).

6. Discussion and conclusion

In conclusion, the disclosure towards subjects other than the employer assumes, as an additional demonstration of the divergence of interest between the parties, distrust towards the employer's self-corrective ability and prevention and its ontological unsuitability to pursue objectives other than profit optimization. In this respect, based on an approach that is common to Anglo-Saxon legal systems, the role of an employee and of whistleblowing must be exactly construed from a public communication perspective. Whistleblowing is therefore to be considered "for external use", because it is encouraged and protected by law precisely so that the knowledge acquired by any employee can be spread outside to reach the Authorities. Side effects to this approach are the legitimacy of the exercise – even if harsh and critical – of the right to freedom of expression, the emphasis on the profiles of "general interest" and of legal truthfulness more than those regarding "contractual" good faith[18]; the non-necessity of any "up to ladder" principle and the fewer criticalities encountered when involving the media.

This was also the approach of the Italian legislation but after the Directive the perspective partially changed: whistleblowing is also starting to be considered as an "internal" tool of self-regulation for the organization,

[18] See Article 16 Legislative Decree n. 24/2023 and, even before, Avio (2017, p. 664).

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for conflict settlement, or as a "collaborative" remedy to informative asymmetries, first and foremost between an employer and its employees.

For this reason, legislation often seems to follow a middle of the road orientation in balancing the interests at stake without, however, resolving the underlying question about what systemic meaning should be attributed to whistleblowing, thus deferring any interpretation to the analysis of the situation on a case by case basis.

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The Analysis of Labor Conflicts during the Pandemic as a Starting Point: A Study of the Performance of the 3rd Regional Labor Court through the "Covid-19: Acts and Productivity" Platform

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1. Introduction

The Covid-19 pandemic, a defining event of the 21st century, triggered a global health crisis and profound economic, social, political, and cultural transformations. These transformations gave rise to unprecedented legal conflicts, particularly at the onset of the pandemic, when many issues were novel and not covered by existing legislation. In this context, the Brazilian Judiciary, including the Labor Courts, played a pivotal role in addressing these challenges and providing swift responses within the legal framework.

This study focuses on labor conflicts that emerged during the pandemic, particularly the dual challenge of maintaining business operations while safeguarding workers' health and lives. It analyzes decisions from the 3rd Regional Labor Court (TRT-3) to understand the nature of the conflicts brought before the court and the solutions it provided. The research centers on measures aimed at preventing virus contagion and protecting workers' physical and mental health, in alignment with constitutional and labor standards, resulting in an effective access to justice.

The research methodology followed three interconnected stages:

1) identification and cataloging of labor conflicts disclosed on the platform TRT-3's "Covid-19: acts and productivity" platform;
2) analysis of the conflicts based on variables such as lawsuit types, professional categories, main claims, injunctions, and judicial outcomes;
3) evaluation of the platform's effectiveness in ensuring transparency and accessibility of data.

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Additionally, the study briefly compared similar platforms in other Brazilian's Labor Courts, proposing improvements to enhance public access to information in both pandemic and post-pandemic contexts.

Empirical data were collected through public consultation of proceedings on the TRT-3 lawsuit search platform, supplemented by news from TRT-3's official website. The study underscores the importance of transparency and access to information as essential tools for promoting a fair legal order, fostering citizenship and access to justice. This article is short version of the study with the same name published in Portuguese last year based on the junior research project conducted by the authors.

2. Initial considerations

The Brazilian Judiciary is structured into general and specialized branches, with Labor Justice forming a key part of the specialized system. This framework ensures that a dedicated branch, reflecting the complexity and importance of employment relationships in society, addresses labor disputes. Labor law itself is a specialized field, characterized not only by its substantive norms but also by distinct procedural rules that cater to the unique dynamics of labor relations.

Before conducting the empirical analysis, it is essential to present some preliminary clarifications. First, the 40 judicialized conflicts that formed the basis for the data to be presented were collected from the "Injunctions Granted" table on the "Covid-19: acts and productivity" tab published on the website of the TRT-3. It is important to clarify that, although the list has 41 procedural numbers, the numbers 0010217-68.2020.5.03.0107 and 0010683-92.2020.5.03.0000 refer to the same conflict, the first being the main action and the second the writ of mandamus arising from an act carried out in the main action.

Likewise, in the table there are writs of mandamus arising from acts contained in other individual or collective labor lawsuits before the Court, which were not listed. Therefore, in this work we decided to also analyze the actions in which there were acts that were submitted to the TRT-3's SDI-1 (First Individual Disputes Section) via writ of mandamus. Therefore, the analysis went beyond the 40 lawsuits listed, always with the aim of understanding the full scope of the judicialized conflict. The table was last updated on January 11, 2021, but the study period extends to January 2023, since the lawsuits continued to be processed and some are still being processed in the higher courts of the Judiciary, awaiting decisions in the Superior Courts. Finally, the data will be presented considering the

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established variables, always highlighting exceptional and emblematic aspects in each of the proposed analyses.

3. From the numbers

3.1. Types of actions

Of the cases analyzed, 70% were collective actions, classified as broad (30%) or strict (40%). Broad collective actions, often filed by unions and the Public Labor Prosecutor's Office (MPT), mainly aimed to impose obligations to act or refrain from acting, such as providing personal protective equipment (PPE) and implementing sanitary measures (Leite, 2021). Conversely, strict collective disputes were the most utilized procedural type during the pandemic, especially for interpreting general labor norms.

However, the use of strict legal collective disputes faced jurisprudential resistance. The TST, in line with its Internal Regulations (Art. 220, II) (Brazil, 2008) and Jurisprudential Orientation n. 7 (Brazil, 1998) of the Collective Disputes Section, limits the applicability of this procedural type to the interpretation of specific collective norms, excluding broader contexts. Despite this, the pandemic's exceptional circumstances provoked debates within TRT-3, with dissenting votes emphasizing principles such as precaution and prevention.

3.2. On the claims

The claims in the filed actions were categorized for analysis. The most frequent included:

1) the removal of high-risk workers;
2) the provision of PPE, such as masks and hand sanitizers;
3) the implementation of protective workplace measures;
4) maintenance of essential services;
5) recognition of Covid-19 as an occupational disease;
6) interpretation of collective norms.

Among the most frequent claims, those related to the removal of at-risk workers stood out, highlighting concerns about preventive measures against SARS-CoV-2 contagion. This type of claim was present in all analyzed procedural types, particularly relevant in collective disputes.

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3.3. On injunctive decisions

Injunctive decisions played a crucial role in the swift resolution of labor disputes during the pandemic, enabling the protection of rights in a critical moment. In the analyzed sample, all collective disputes received favorable injunctive decisions, while other procedural types faced first-instance denials, later overturned through writs of mandamus. The injunctions lasted an average of four months, mostly between March and August 2020, a period marked by the worsening health crisis in Brazil. This underscores the importance of injunctive decisions as instruments of emergency protection, particularly amidst normative uncertainties.

3.4. On the judicial resolution of disputes

The outcomes of the actions demonstrated a balance between favorable decisions (37.5%), unfavorable decisions (30%), and dismissals without a decision on the merits or by agreement (32.5%). In strict legal collective disputes, unfavorable decisions predominated, reflecting the jurisprudential restrictions previously discussed.

Individual actions, on the other hand, stood out for their high frequency of consensual solutions (42%), especially in cases involving platform workers. However, this pattern raises concerns about potential manipulation of disputes, as noted by Orsini and Leme (2021), who identified strategic practices by companies to avoid unfavorable precedents.

4. From the record

Based on the data analysis carried out in the previous topic, it is possible to conclude that the table deals with lawsuits in which injunctions were granted on issues closely related to Covid-19, which gives us an overview of the conflicts that were judicialized at the start of the pandemic. Through its study, it is possible to detect the types of actions used, the requests made and the categories covered by these decisions, the duration of injunctions and the progress of the cases.

Another conclusion that can be drawn is that the table only deals with a small group of cases located in a specific period, between the months of March and August 2020, with the last recorded injunction granted in December 2020[2]. Thus, this tab does not contain any lawsuits on the subject

[2] 0010266-87.2020.5.03.0179.

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of Covid-19 from 2021 onwards, if at all those filed in 2020. Therefore, the conclusions about the Court's actions during the pandemic period that can be drawn from the tab that is the object of this section concern the year 2020, more precisely the first moment of the pandemic (March to July 2020).

In the first study of the section, which is a summary, priority was given to analyzing the injunctions issued, which were undeniably important in protecting the rights covered therein, because the first analysis was carried out during the pandemic period and based solely on the study of the platform (Orsini, Leite, 2023). However, as the research continues, it is possible to see new critical horizons that need to be addressed beyond the relevance of the data extracted in topic 2, without, however, detracting from its importance. After all, the data from the aforementioned tab was analyzed here.

In this sense, when we carried out an analysis of the legal news published by the Court, as a way of better understanding the conflicts and influences of Covid-19 in the state of Minas Gerais Labor judiciary, we saw that the established cut was just one of the possibilities for publicizing the conflicts inherent in the Covid-19 pandemic.

Firstly, the TRT-3 itself reported that there were more than 1,300 lawsuits related to the pandemic filed between January 2020 and February 2021 (TRT-3 2021)[3], including the number of cases per court classified with the subject (TRT-3 2021). This is due to the existence of its own code, and mandatory registration of cases with the subject in the Electronic Judicial Process (PJe) system (TRT-3 2020).

The 40 conflicts or 41 cases in the table represent just over 3% of the 1,256 lawsuits filed in 2020 plus the 131 lawsuits filed in 2021 up to February (TRT-3 2021). There is no information on the total number of lawsuits filed from March 2021 to May 2023; nevertheless a safe period for analysis will only be possible in May 2025, considering the two-year deadline for filing a labor lawsuit under art. 7o XXIX, CR/88.

In 2020, the TRT-3 reported that information related to the pandemic would be concentrated on the "Covid-19: acts and productivity" platform (TRT-3 2020), however, as far as we can see, the platform has little information about the Court's cases, although, as we have seen, there is a specific code and a number well above the 41 actions disclosed.

In addition, as the study has shown, it is not possible to access other actions that would not be the target of the established cut-off (granted injunctions) and have, for example, data on dismissed injunctions or even on

[3] Available at: *portal.TRT-3.jus.br/internet/conheca-o-trt/comunicacao/noticias-institucionais/acoes-relacionadas-a-Covid-19-chega-a-1-3-mil-em-mg* (accessed: 03/08/2023).

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actions in which there were no injunction requests, but which are identified by the TRT-3 as typical of the Covid-19 pandemic.

This factor puts at risk the generalization of the data and conclusions drawn from the data found on the "Covid-19: actions and productivity" platform. The platform does not represent the jurisdictional performance of the Regional Labor Court of the 3a Region. The platform and the small amount of data contained therein could lead to questions about why the cases published in the section were chosen, why the others were excluded, why the platform is no longer used for data dissemination and transparency, etc.

For an analysis of the TRT-3's performance during the pandemic (beginning on March 11, 2020 and ending on May 5, 2023), other studies should be carried out, since it has been shown that actions were no longer included in the table in the Covid-19 and productivity acts" tab and that the Covid-19 issue continues to be brought to the labor jurisdiction without, however, being discriminated against in the dissemination channel. Furthermore, it is worth asking, was there any determination to stop including the data in the tab, what is the reason for the TRT-3 no longer including cases related to Covid-19 in a specific space? These are questions that can be answered in other surveys.

In the 2020 news item mentioned above (TRT-3, 2021), TRT-3 states that, at that time, in Brazil, the number of Covid-19 lawsuits had already reached 23.938, with the Regional Labor Courts with the most lawsuits being in the states of Rio Grande do Sul – TRT 4 (3,263), Pernambuco – TRT6 (2,915), São Paulo – TRT2 (2,571), Santa Catarina – TRT12 (2,499), Goiás – TRT18 (1,630) and, finally, Minas Gerais – TRT-3.

We analyzed the "Covid-19: actions and productivity" platforms found in the other Labor Courts mentioned in the news item above, in an attempt to investigate how the data and information on labor actions and Covid-19 were.

It was possible to identify that all the aforementioned TRTs have the "Covid-19: acts and productivity" platform, but the period and/or the way of filling it out is different. The tables on the platforms show: a) Rio Grande do Sul (TRT-4): 129 injunctions granted until October 2020 (TRT-2 2020); b) Pernambuco (TRT-6): 38 injunctions granted until June 2020 (TRT-6 2020); c) São Paulo – capital (TRT-2): 56 actions until January 2021, with a link to access the panel of the National Observatory of the CNJ (National Council of Justice), whose panel was no longer available through the link until the last conference held for this work (03/08/2023) (TRT-2 2021); d) Goiás (TRT-18): about 160 cases last updated in September 2021, it is not possible to identify the exact number of injunctions granted or denied, since there are

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blank fields, as well as, it does not have the numerical record of the number of actions and the possibility of exporting the data (TRT-18 2021). The TRT-12, for the state of Santa Catarina, was the only one where it was not possible to access the preliminary injunctions spreadsheet through the "Covid-19: acts and productivity" tab until the last consultation (03/08/2023), although there is a specific field for access (TRT-12, n.d.). If the dates for finalizing the inclusion of data in each court are different, the question remains as to why TRT-3 no longer includes cases on its platform.

However, one court stands out: the TRT-4, whose jurisdiction is the state of Rio Grande do Sul, has innovated in its disclosure, which, in addition to the cutout, features the "Panel of Covid-19 Actions in the TRT of the 4th Region". The panel counts all the lawsuits filed since March 16, 2020, a date close to the outbreak of the pandemic by the World Health Organization (WHO) on March 11, 2020, to the present day (July 2023), demonstrating that, even with the declaration of the end of the pandemic in May of this year, conflicts still remain and must be highlighted. From the panel, which is interactive, it is possible to select different sections of the study, such as:

1) number of lawsuits filed per month;
2) procedural classes;
3) subjects;
4) type of decision in 1st and 2nd degree;
5) procedural number and link to the consultation.

A quick search on the TRT4 dashboard[4] shows that it is possible to extract data related to lawsuits in general over the same period disclosed by the TRT-3 in the table, without the need for an in-depth study such as that carried out in topic 2. For example, if we select the months of March to August 2020, we find that:

1) 2,158 lawsuits were filed in the 1st level and 286 cases were distributed in the 2nd level;
2) in the first instance: there was conciliation in 1,186 cases, 496 were upheld and 166 were dismissed (TRT-4,2023).

Given the amount of data, more in-depth research is needed to understand the conflicts and the role that the pandemic has played, but it must be said

[4] Available at: *dados.trt4.jus.br/extensions/Covid-19/Covid-19.html* (accessed: 03/08/2023).

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that the panel is an example of transparency for the courts with regard to the pandemic.

Today we are moving towards digital processes and their countless possibilities in terms of analyzing case law, jurimetrics and predictive studies, but there are still few solutions to the procedural asymmetries created by access to expensive paid *software* and legal tools. In the area of labor law, which is marked by the basic inequality of labor relations, access to these tools means that many workers go to the labor courts and do not find themselves on an equal procedural footing.

Mechanisms such as the TRT4's dashboard, where it is possible to analyze decisions over a given period and for a given subject, making it possible to understand the understanding adopted in similar cases, could be an alternative for responsible litigation combined with technology, but at little or no cost to the court.

Kim Economides (1999) already said that problems of access to justice should not be treated as an option for the citizen, and that there should be no dependence on the market for access to justice, with the risk of creating gaps in the supply of quality legal services, so let's not allow technological access to jurisdiction and justice to be treated as an option for the citizen to hire high-cost legal services in order to have procedural equality arising from access to information.

Although this work is scientific research related to the pandemic, it faced problems caused by the difficulty in accessing legal data at TRT-3, but which was also found in other courts as mentioned above. It diagnosed a problem that goes beyond the performance of the courts in providing legal services during the pandemic, but which touches on its basic objective: access to justice in the sense of access to a fair legal order.

If starting from the experience of the pandemic, it is possible to continue researching the effects of the pandemic on the legal and technological fields. The distancing imposed by the health crisis has accelerated the use of technology in the Judiciary, including the creation of various platforms and the use of others to hold virtual and, later, remote trials. Platforms created for the pandemic, such as that of the TRT4, need to be disseminated as good practice and even thought of as more than data sources, but also as a source of equal access to the judiciary, capable of providing effective and efficient access to justice, facilitating future data collection, part of scientific research by improving access to justice, but also enabling informed and strategic action by both parties to labor conflicts.

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5. Discussion and conclusion

Considering the relevance of the pandemic period for human relations and for the scientific legal field, the study analyzed the labor conflicts typical of the pandemic scenario, seeking to understand them and the dynamics caused by the pandemic in the judiciary, through the platform called: "Covid-19: acts and productivity". The analysis was carried out in January 2023 and included 41 labor lawsuits and 40 judicial conflicts, between March and August 2020.

The conflicts studied were those published by the Regional Labor Court of the 3rd Region, for the state of Minas Gerais, on the aforementioned platform and according to the table referring to the injunctions granted. By researching the labor lawsuits on the platform, it was possible to identify that the selection really only dealt with lawsuits in which injunctions had been granted, even if at different procedural moments.

The most recurrent economic sectors in these processes were education, health, digital platforms and urban public transport, all related to activities defined as essential during the period. As for the requests, the most recurrent were those associated with removing workers from the risk group, or not, and other measures restricting functions in the workplace, closely related to Covid-19 prevention measures linked to social distancing. Finally, we observed that in 55% of the cases in which the lawsuit was not withdrawn or an agreement reached, the lawsuits were upheld or upheld in part and 77.5% of the cases had already become final.

The analysis of the labor lawsuits presents in the section provided an insight into the judicialized labor conflicts typical of the pandemic and the actions of the Labor Courts. It made it possible to understand each of the variables established for the research, which is a starting point for other studies on the subject. However, while maintaining the necessary criticism of scientific studies, the selection via the "Covid-19: acts and productivity" platform is small, and it is not possible to draw generalizing conclusions about the performance of the Minas Gerais Labour Court during the pandemic (11/03/20 to 05/05/23) in the face of this data.

Through news published on the TRT-3's own website, new sources of research and new data were identified that could be the subject of observation and analysis, both in the TRT-3 and in other courts. The wealth of data that each court possesses and that can be the subject of studies and research is incalculable. Achieving greater transparency and clarity of information is the right approach for judicial action, not only in terms of pandemic data, but also in terms of equal access to information from the National Judiciary itself.

Post-pandemic reflections on public judicial policies should consider the development of platforms for the broad dissemination of labor lawsuits,

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including their claims and causes of action, with easy navigation and identification of the lawsuits whose subject is the research or even the statistics disclosed. An excellent starting point for such a judicial policy is the dissemination panel of the TRT-4, the Regional Labor Court of Rio Grande do Sul.

Platforms like this demonstrate a commitment to the transparency of data relating to the pandemic context, which still leaves its mark on judicialized conflicts, but also provide equal access to a broader technological procedural dynamic, in which it is possible to use jurimetry and data in favor of the jurisdiction, but not only for those who can afford these studies.

It is necessary for the Brazilian Judiciary, through its courts, to be an effective source of information, facilitating access to justice and providing a performance that can be scientifically analyzed in an efficient manner, always seeking to improve justice, but above all, for technology not to mean procedural asymmetries, but rather an ally of the Judiciary in building true access to justice for all Brazilian citizens.

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The fragmentation of employees' IP rights. The impact on high-skilled migration and unequal innovation within the european scenario

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Abstract

Starting from the standpoint of labour law, the proposed article explores the innovative development aims of the European Union in order to determine whether the fragmentation among employees' IP rights in national regulations is adequate to attract and stimulate innovative talents, dedicating specific reference to the research and development work in the private sector.

Despite the affirmed awareness that inventions, artistic and cultural creations, brands, software, and know-how constitute the foundation of the current economy, the European legislator fails to enact a uniform protective statute for workers who are authors of innovation. The result is not only a conspicuous disparity between inventors who will be granted a different level of protection depending on the European country where they have chosen to work but also a different attractiveness of member countries for high skilled workers and, therefore, unequal innovative growth within the European scenario.

The concreteness of the study is supported on the one hand by the significant presence of workers in the European territory in the industrial inventions field, as well as by the current objective to make innovation play the stimulus role for recovery and resilience needed after the Covid-19 emergency. On the other hand, the transparency and predictability of IP rights, being recognized as the author of the invention, earning an adequate salary according to the commitment and value of what they have invented, and not least, taking part in a stimulating environment for growth opportunities, are the key factors

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that induce workers in the IP field to accept sharing their innovative talent with a company or settling down in a specific region.

From a methodological point of view, we will compare the legal systems of four countries, specifically the ones in Italy, Germany, France, and Spain, to pinpoint the most glaring inconsistencies and the traits most appealing to prospective inventors. As a result, we investigate how different regulations will keep impacting two correlated phenomena.

Firstly, we speculate on a growing, highly skilled migration towards legal systems that offer a competitive level of protection in terms of moral and economic rights for the authors of an invention. Furthermore, the concentration of innovative talents only in specific European areas will undermine the optimal allocation of human resources. Secondly, divergences in assessing and anticipating the rights to be awarded to the inventors will amplify the dumping effect. In other words, comparing costs or risks connected to investing talent and capital in one territory rather than another will ultimately lead to unequal growth within the European Union.

1. Introduction

Recognition as the author of an invention, receiving fair remuneration commensurate with the effort and quality of work, and being in an environment that fosters potential through stimulating growth opportunities are crucial factors that compel employees in the field of innovation to engage their inventive talents with a company or choose to relocate to a specific region. These elements not only motivate their decision but also significantly enhance their productivity[2]. The lack of a uniform protective statute, coupled with the fragmented and often vague internal regulations among European Union member states, creates relevant inequalities for inventors operating within the Union. Therefore, inventors face varying degrees of protection depending on the country where they choose to work. In this context, it is imperative for each country to adopt a competitive legislative strategy that includes robust legal protections for the moral and economic rights of inventors. This approach will empower them to dedicate their talent and contribute to innovation in our country rather than seeking opportunities abroad.

Recent studies underscore the importance of this issue by highlighting the current state of innovation and research and development investments in Europe. Two key elements emerge from this analysis. Firstly, the presence of

[2] Giuri P., Mariani M., Brusoni S., Crespi G. *et al*. (2007), "Inventors and invention process in Europe: results from the PatVal-EU survey", *Research Policy*, 36, p. 1113 ff.

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a substantial number of companies in Europe that hold intellectual property rights positions them to generate significantly higher profits than competitors without such assets. These companies also play a vital role in job creation and driving economic growth across the continent[3]. In fact, the European Union Intellectual Property Office forecasts that companies engaged in intellectual property will be instrumental in the recovery of the European economy from the crisis induced by the pandemic. Their focus on innovation and the protection of intellectual assets positions them to drive economic revitalization and growth in the post-pandemic landscape[4].

The second key element of our investigation is the critical role of employees, who are often the original authors of the inventions driving both the success of their companies and the broader economic growth and innovation in the regions where these companies invest. Recognizing and empowering these individuals is essential for fostering an environment that values creativity and advancement[5]. In other words, employees' inventions are the cornerstone of technological innovation. How these inventors are treated is an essential aspect of economic innovation policy, and it directly impacts the company's approach to patenting practices. A supportive environment for employees not only enhances innovation but also strengthens the company's competitive edge in the market[6].

[3] EUIPO (2021), *Intellectual property rights and firm performance in the European Union Firm-level analysis report*, p. 10: "*Among the main findings of the 2019 edition was that industries that make above-average use of IPRs contributed 29% of employment and 45% of GDP in the EU, with these proportions having risen since the previous study in 2016*".

[4] Ivi, p. 2: "*Looking to the future, IPR-intensive industries in general, and SMEs innovating with new technologies in particular, can be expected to play a crucial role in pulling Europe's economy out of post-pandemic recession*". In the literature on the relationship between investment in research and development and innovative growth in a region, see the contributions by Amponsah Odei S., Soukal I., Freibauer Hamplova E., Trnkova G., Hruska J. (2024), "The impacts of intellectual protection and R&D collaborations onfirm-level innovations: the moderating role of internal funding", *Cogent economics & finance*, 12, 1; Wen J., Deng Y. (2023), "How does intellectual property protection contribute to the digital transformation of enterprises?", *Finance Research Letters*, vol. 58; Buerger M., Broekel T., Coad A. (2010), *Regional Dynamics of Innovation: Investigating the Co-evolution of Patents, Research and Development (R&D), and Employment*, Regional Studies, 46(5), pp. 565-582; Ghidini G. (1998), "Ricerca e Sviluppo come motore del "vantaggio competitivo": il ruolo della proprietà intellettuale", *Micro & Macro Marketing*, fasc. 2, p. 229 ff.

[5] DPMA (2019), *Annual Report 2019*, p. 55 (more than 90%); Bartenbach K., Volz F.E. (2019), *Arbeitnehmererfindungsgesetz*, *Kommentar*, VI ed., Cologne (Heymanns), p. 34.

[6] Ullrich H. (2022), "Harmonization of Employee Invention Laws: The Black Hole of the EU's Innovation Policy", *Max Planck Institute for Innovation and Competition Research Paper*, n. 22-03, p. 7: "*Employee inventions are at the root of technological innovation. Their treatment constitutes an indispensable part of economic innovation policy and directly affects the patenting practice of industry*".

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Despite the importance of labor law in relation to intellectual property and innovation, the European legislator has not effectively addressed this aspect. Instead, it has left the regulation of employee inventor rights entirely to the internal laws of the Member States. As stated in the Commission's Communication to the Council, European Parliament, and Economic and Social Committee on February 5, 1999, the rights of employee inventors were deemed best managed by individual national legislations. At that time, the variability in protections was not considered a barrier to the innovative growth of the European Union. Consequently, no harmonizing initiatives were pursued, and the focus remained primarily on establishing more transparent contractual clauses that govern the relationship between companies and their inventor-employees[7].This approach is also reflected in Article 60 of the European Patent Convention, which stipulates that when the inventor is an employee, the law of the State where the employee performs their primary activities will govern. If this cannot be determined, then the legislation of the State where the employer's company is established will apply. This provision emphasizes the fragmented nature of employee inventor rights across different jurisdictions within Europe[8].The provision establishes only a few connecting criteria to identify the applicable national law for determining ownership and the entitlement to exercise rights related to the European patent. Scholars have argued that this approach aligns with the trends in contemporary private international law systems, which typically assign the regulation of employment relationships to the legal framework of the jurisdiction in which those relationships occur. This compatibility underscores the need for a coherent framework addressing the rights of employee inventors within the evolving landscape of international law[9]. However, this solution appears ineffective in addressing the complexities of

[7] Commission's Communication to the Council, the European Parliament, and the Economic and Social Committee on February 5, 1999, point 3.3: "*Employees' inventions:* […] *The general opinion which emerged from the consultation is that the issue of employees' inventions is one which should be dealt primarly at national level* […] *the Commission does not intend to take any legal initiative in this field*".

[8] Article 60 Convention on the European Patent (Munich, October 5, 1973): "*If the inventor is an employee, the right to a European patent shall be determined in accordance with the law of the State in which the employee is mainly employed; if the State in which the employee is mainly employed cannot be determined, the law to be applied shall be that of the State in which the employer has the place of business to which the employee is attached*".

[9] Ubertazzi L.C. (1985), *Profili soggettivi del brevetto*, 279 ff.; Ubertazzi L.C. (2019), *Commentario breve alle leggi su Proprietà intellettuale e concorrenza*, VII ed., Padova: Cedam, comment to article 60 of the Convention on European Patent (Munich, October 5th, 1973), p. 1582.

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the globalization of the innovation market and the rise of remote work[10]. As these dynamics create more fluid and cross-border employment relationships, relying solely on national laws becomes inadequate. There is a pressing need for a more flexible and comprehensive framework that can effectively accommodate the realities of todays interconnected work environment and ensure fair protection for employee inventors across different jurisdictions. It is certainly plausible that an employee could create an invention while working continuously in a location that is not only outside the company's premises but also beyond the territorial boundaries of the country in which the employer operates. This raises concerns about the potential inequalities that could arise if the invention results from collaboration among workers who, despite contributing equally, are physically located in different company sites across Europe. The question then becomes whether it is sustainable to apply varying national regulations, particularly when these result in differing determinations of inventor property rights. Such disparities could undermine the principle of fairness in recognizing the contributions of all inventors involved in the creative process, regardless of their geographical location.

2. The different levels of competitiveness of the European countries

The varying legal frameworks governing inventors' rights significantly impact two interconnected phenomena. Firstly, it prompts a migration[11] of highly skilled employees towards jurisdictions that offer better protection of their moral and economic rights as inventors. This trend compromises the optimal allocation of talent, resulting in a concentration of these professionals in specific areas of Europe, which in turn leads to pronounced disparities in growth and innovation levels across different regions. The attractiveness of certain legal systems can create pronounced discrepancies in how innovation flourishes within the Union, revealing a concerning lack of standardized rights for employee inventors[12]. The failure to establish harmonized protections may

[10] Janssens M.-C. (2013), "EU perspectives on employees' inventions", in Pittard M., Monotti A., Duns J. (eds.), *Business Innovation and the Law*, Cheltenham: Edward Edgar, p. 117.

[11] Naghavi A., Strozzi C. (2017), "Intellectual Property rights and diaspora knowledge workers: can patent protection generate brain gain from skilled migration?", *Canadian Journal of Economics*, vol. 50 n. 4; McAusland C., Kuhn P. (2011), "Bidding for brains: Intellectual property rights and the international migration of knowledge workers", *Journal of Development Economics*, 95, pp. 77-87; Useche D., Miguelez E., Lissoni F. (2020), "Higly skilled and well connected: migrant inventors in cross-border M&As", *Journal of International Business Studies*, 51, pp. 737-763.

[12] Ullrich H. (2022), "Harmonization of Employee Invention Laws: The Black Hole of

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indicate a strategic reluctance from more appealing countries to relinquish the competitive edge they gain from the deficiencies in the legislation of less attractive jurisdictions[13]. Such a scenario is incompatible with the principle of the proper functioning of the internal market, as outlined in Article 114 of the Treaty on the Functioning of the European Union. In addition to the issue of worker migration, we must consider a second aspect: the competition among companies operating within the Union. Differences in how economic rights for inventors are defined and enforced, as well as inconsistencies in the clarity and transparency surrounding judicial remedies for protecting inventions, create a "dumping" effect. Companies may weigh the risks and costs associated with investing in intellectual property in various territories, leading to further uneven growth across the European landscape. The issues identified in this framework appear to remain unaddressed by the post-Covid-19 legislative efforts aimed at fostering solidarity and cohesive growth. Despite the ambition to drive economic recovery through innovation, recent legislation has overlooked the critical need to regulate the intellectual property rights of inventor employees, further perpetuating the existing fragmentation in protections[14].

The analysis of national regulations across European Union member states reveals varying degrees of attention and sophistication in how labor law protects inventions. Initially, it is important to note that many aspects of these national regulations appear outdated and uncertain, particularly when compared to the rapid evolution of innovation and the transformative demands for new professional skills in the labor market. These legislative inconsistencies lead to unequal recognition of creative contributions and differing opportunities for professional and economic growth, prompting workers to seek their expertise in more favorable territories. Scholars have consistently highlighted a direct correlation between the certainty of intellectual property rights and the migration patterns of highly qualified employees. When employees find stronger protections for their inventions and professional contributions, they are more likely to remain or return to their home countries, bringing back valuable skills acquired abroad that can generate additional benefits for their communities. The lack of significant harmonization efforts at the European level proves inadequate for attracting resources from outside the Union or encouraging the repatriation of talent.

the EU's Innovation Policy", *Max Planck Institute for Innovation and Competition Research Paper*, n. 22-03, p. 9, nota 24.

[13] Ivi, p. 18 ff.

[14] Council of the EU, *Conclusions on intellectual property policy and the revision of the industrial design system in the Union*, 10.11.2020.

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Instead, it creates an internal migration toward countries that provide better transparency and predictability regarding the rights of inventor-workers, ultimately stifling collective growth in innovation across the continent.

The complexity of protecting intellectual property rights for inventor employees illustrates the many competing interests involved in this cross-cutting issue. While it may seem like a marginal aspect of employment relations, it involves a multifaceted dilemma where multiple legal positions and interests converge. The existing regulations in these European legal systems were formulated in different historical, economic, and social contexts, rendering them insufficient to address the dynamic nature of today's innovation landscape. This inadequacy is particularly evident in the research and development sectors, where unique employment relationship characteristics have yet to receive appropriate scholarly attention or be effectively addressed by collective bargaining. It is increasingly necessary to advocate for stronger protections for inventor-workers. While these individuals often view their inventions as a reflection of their identity and a means to tackle intellectually stimulating challenges, this does not negate the need for enhanced labor law protections. The emergence of new specializations and roles that involve inventive tasks contributes to a highly competitive innovative labor market. Factors such as specialized expertise and strong scientific skills, along with a growing awareness of the importance of non-monetary recognition, do not undermine the argument for improved bargaining power for these workers. The critical gap in this regard lies in collective bargaining, which has yet to respond to the urgent need for a uniform protective framework for workers engaged in research and development activities. Without such advancements, the rights and protections of inventor-workers will remain inconsistent and inadequate in the face of rapid changes in the innovation landscape.

3. Conclusions regarding the need of a harmonizing initiative by the european legislator

The necessity for European legislative harmonization in the realm of labor protections related to inventions is underscored by numerous factors concerning both workers and enterprises. In an increasingly globalized innovation market, it is an outdated perspective for companies to assume they can exclusively rely on their own resources for research activities. The high costs associated with innovation in certain sectors mean that collaboration among multiple companies across different regions has become the norm. Employees engaged in the same inventive projects often find themselves

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working under different national laws, leading to unequal protections and property rights. This disparity creates a situation where employees performing identical tasks are subject to varying levels of recognition and reward for their contributions, fostering an environment in which they may consider relocating to jurisdictions that offer more favorable legal frameworks.

A European-level intervention is essential to balance the asymmetries in bargaining power between workers and employers, as inventors often remain economically tethered to their employers. This imbalance is reflected in the low frequency of legal challenges concerning employee inventions; many employees are reluctant to assert their rights while still employed due to uncertainties within existing regulations. Consequently, disputes often arise only after employment has ended. Moreover, the need for standardization is equally compelling from the standpoint of the EU's internal market functionality. If conditions and costs associated with innovation – particularly the price of innovative labor – vary significantly between member states, competition can be distorted. Diverse protection regimes may incentivize the most qualified workers to seek out more attractive legal environments, hampering optimal resource allocation essential for research and development across Europe. This uneven distribution of human capital in innovation can influence companies' decisions regarding their investment locations, ultimately resulting in concentrated financial resources in regions perceived as supportive of innovation.

For these reasons, a harmonizing initiative is necessary, but it must be approached with caution and gradual implementation. The intricacies of this matter intersect various areas of law and are influenced by historical industrial contexts, national labor market conditions, and the dynamics of employer-employee negotiations. Additionally, ideological biases may favor industrial law over labor law in the treatment of workers' inventions, complicating the prioritization of labor rights. Establishing a future framework that delineates common minimum protections for inventors within Europe should focus on creating foundational principles for defining and calculating their economic rights. This includes the need for a clear, unified definition of remuneration or reward, alongside criteria for its quantification. However, these shared minimum protections should not preclude nations from implementing superior measures to attract talent. This competitiveness should be grounded in common, aligned rules that reflect current needs in protecting research and development endeavours rather than remaining reliant on fragmented, outdated regulations. Ultimately, regions facing greater challenges in retaining skilled workers must advocate for the development of a coherent European paradigm regarding the labor and intellectual property rights of inventors.

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Challenges for social protection in Latin America

María Ascensión Morales Ramírez[1]

1. Introduction

Public contributory pension systems, created in the last third of the 19th century and since, have played an important role as they aim to ensure people's income stability upon their retirement from working life, thus preventing poverty in old age.

Latin American pension systems were designed as contributory and mandatory systems linked to formal employment. Since the 1980s, the financial sustainability of these systems was called into question because they had failed to amass the necessary funds and to adapt their parameters to the new conditions of life expectancy, among other reasons. As a result, a new pension model emerged, giving rise to a number of conflicting approaches.

The principal players in shaping the main guidelines for pension system reforms have been international bodies: the World Bank (WB), the International Labor Organization (ILO), the Economic Commission for Latin America and the Caribbean (ECLAC), the Inter-American Development Bank (IDB), and the Organization for Economic Cooperation and Development (OECD). Research and academic sectors have also joined in some of the competing factions. Early on, views were markedly divided, but as time passed, they subtly shifted in the light of practical experiences.

Within this framework, this article examines the various approaches that Latin American pension reforms have adopted, particularly in the 1990s, to then give an account of the results and alternatives. This will, in turn, shed light on the extent to which the reforms address various aspects (design and

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labor market) for sustaining the pension system in order to highlight the issues that are not at the center of current discussions and trends.

Given the results of the pension reforms of the 1990s seen in the first five years of the 21st century and the rapprochement of conflicting stances held by the international organizations involved, it becomes apparent that future trends will be, on the one hand, multi-pillar systems with a mixed contributory component (pay-as-you-go and individual capitalization) and, on the other hand, a reassessment of the objectives, principles, functions and sustainability of the pension system, as well as rethinking the definition of old-age protection mechanisms. Nonetheless, the new discussion in Latin America focuses on establishing the hegemonic pillar of the system, as well as on the set of design factors (coverage, adequate benefits and financial sustainability) and the labor market factors (demographic, labor, tax and political economy) that come together to the detriment of pension system sustainability as they are linked to formal employment.

The experience and lessons learned over the last decades in the region suggest that comprehensive, properly planned and long-term strategies are needed to bridge the divide between pension systems and the labor market in order to collectively address the issue of old-age insecurity.

2. Pension protection

It is a fact that before the Covid-19 pandemic, Latin America had low levels of economic development, high levels of informality, low contributory capacity, poverty and insufficient tax revenues.

In this scenario, the sustainability of social protection and of pension systems in particular, continues to be a source of concern, although unlike the 1990s, it is now seen from a social and financial point of view.

Privatization reforms in some countries in the region have demonstrated that sustainability is not only a problem of finding resources, but also an issue of fulfilling many objectives, especially those related to level of protection (coverage, adequate benefits and financing), as well as addressing issues that are at the center of current concerns because these systems reflect what is happening in the world of work[2].

[2] Cfr. Arenas de Mesa A. (2019), *Los sistemas de pensiones en la encrucijada. Desafíos para la sostenibilidad en América Latina*, Santiago: CEPAL, n. 159; OIT (2018), *Reversión de la Privatización de las Pensiones: Reconstruyendo los sistemas públicos de Pensiones*, Genève.

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2.1. Fragmentation

Latin American countries have numerous pension systems that correspond to groups of workers (teachers, judicial workers, bank employees, public sector workers, and the military, among others). Even in some of them, the total number of systems is not even known[3]. The various pension schemes were created independently with different criteria for paying contributions, granting benefits and calculating the size of pensions and without portability among them, all of which leads to a high tax cost.

Likewise, the institutional framework is spread out among various agencies (Ministry of Labor and Social Prevision, Ministry of Social Development, Treasury or Ministry of Finance), which means there is no entity to guide the design of public pension policy. Moreover, the administration of the systems is in the hands of different institutes or agencies.

Recommendations indicate that avoiding fragmentation would need to start by knowing the pension inventory in each country and the tax liability it represents, as well as creating a governing agency, a national pension system, a legal framework that regulates the criteria for all the pension systems in the country. This would enable the consolidation or coordination of the different pillars, subsystems and institutional frameworks for designing a public policy that would allow reforms and correct or, if needed, rectify contributory efforts to help with the tax sustainability of these systems.

2.2. Informality, independent or atypical workers

In the region, pension sustainability issues (coverage, benefits and financing) are largely due to the fact that protection has relied exclusively on contributions from formal employment.

Many countries[4] have a high level of informality and, moreover, lack the mechanisms to incorporate independent workers, atypical workers or those coming from the collaborative or sporadic work economy where the employer is indirect, invisible or nonexistent (Uber; collaborative, mass or on-demand employment, among others).

[3] Arenas de Mesa, "Los sistemas de pensiones en América Latina: institucionalidad, gasto público y sostenibilidad financiera en tiempos del Covid-19", *serie Macroeconomía del Desarrollo*, n. 212 (LC/TS.2020/99), CEPAL, 2020.

[4] OECD (2019), *Pensions at a Glance* 2019, *OECD and G20 indicators*, Paris: OECD,; Salazar J. (2018), *Políticas de formalización en América Latina. Avances y desafíos*, Genève: OIT.

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Hence, worker protection in these changing employment-related conditions calls for steps to be taken towards cutting-edge labor and social security legislation that protect all kinds of workers, in addition to what is expected with Industry 4.0 (digitalization and robotization), in order to avoid gray areas or gaps to the detriment of workers.

Certain countries have made some progress in this by implementing mechanisms to incorporate independent workers (through voluntary or mandatory affiliation) into the system[5] and to formalize informal workers through simplified processes, among other measures.

2.3. Gender-related aspects

It has been demonstrated that pension systems are not immune to the social inequalities and discrimination men and women face[6]. Women participate less in formal employment, receive lower wages, face greater unemployment and/or work in the informal sector because of the flexibility it gives them to fulfill their unpaid activities (housework, childcare and/or taking care of dependents). These circumstances, along with new family structures, replicate and exacerbate inequalities in having access to pensions or in the amount of the pension itself.

The differences between women and men in the sphere of employment give rise to the differences observed in pension benefits, which can be enhanced or mitigated by the design of the pension system (when considering labor participation, wages, contributions, and other factors).

The various international organizations and tenets have revealed that the pension reforms of the 1990s geared towards privatization yielded

[5] Argentina has incorporated independent workers by means of a "*monotributo*" [flat contribution] at a rate of 25% of their income, 5% of which goes to the *Instituto Nacional de Seguridad Social* [National Social Security Institute] for retirees and pensioners and 3% is for occupational risks. Bolivia made incorporation mandatory for online or product consultants. Colombia set in place a voluntary old-age savings program called *Beneficios Económicos Periódicos* (Regular Economic Benefits or BEP), to which the State contributes a percentage. In Costa Rica incorporation is mandatory and stands at a rate of 7.59%. Ecuador made affiliation mandatory by enacting the Organic Law for Labor Justice and Domestic Work. In Brazil, independent workers pay 5% of the minimum wage.

[6] Cfr. Jiménez A. *et al*. (2013), Estudio *sobre la perspectiva de género en los sistemas de Seguridad Social en Iberoamérica*, Madrid: OISS. Amarante V. *et. al*. (2016), *La brecha de género en jubilaciones y pensiones. Los casos de Argentina, Brasil, Chile y Uruguay*, CEPAL, Serie Asuntos de Género, n. 138, 2016; Marco Navarro F, (2016), *La nueva ola de reformas previsionales y la igualdad de género en América Latina*, Santiago: CEPAL, Serie Asuntos de Género.

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more unfavorable results for this sector of the population because gender perspective was not taken into account in the design[7].

This issue is essential to eliminating the direct and indirect differentiating factors that prevent women from receiving a pension in their own right, a dignified retirement and economic independence in old age, especially since the latest data show a feminization in the population aging process in the region.

In recent years, trends in national legislation in some countries have included recognizing childcare through maternity bonuses or credits, regulating domestic work and incorporating it into social security[8], regulating unpaid work, eradicating sex-differentiated mortality tables in order to further equal treatment between men and women, changing the requirements for pensions and the way the amounts are calculated (with a focus on women)[9], and providing compensation for marital breakdown.

2.4. Public spending

The literature on this subject indicates that countries in the region do not have statistics on the total amount of public spending for the different pension systems, but only for the most important ones[10]. Databases are urgently needed to help design public policies, as well as future pension and tax reforms, aimed at consolidating the sustainability of (contributory and non-contributory) pension systems in Latin America. It is estimated that public spending on pensions in Latin America was 3.7% of the Gross Domestic Product (GDP) in 2015, or 17.5% of the public spending budget while that for non-contributory pensions covering 11 million older adults was 0.4%. According to Arenas de Mesa, Argentina and Costa Rica are highly committed

[7] Individual capitalization systems require more years of contributions and generally apply sex-differentiated mortality tables, which mean women receive lower pensions and have to overcome many obstacles to access these pensions.

[8] Several countries have already regulated the incorporation of domestic workers.

[9] Ecuador officially recognizes unpaid work.

[10] Bernal N. (2020), *El sistema de pensiones en el Perú*, Institucionalidad*, gasto público y sostenibilidad financiera*, Santiago: CEPAL, Serie Macroeconomía del Desarrollo, n. 207; Centrángulo Ó., Grushka C. (2020), *El sistema de pensiones en la Argentina. Institucionalidad, gasto público y sostenibilidad financiera*, Santiago: CEPAL, Serie Macroeconomía del Desarrollo, n. 208, 2020; Lorenzo, F. (2020), *El sistema de pensiones en el Uruguay*. *Institucionalidad, gasto público y sostenibilidad financiera*, Santiago: CEPAL, Serie Macroeconomía del Desarrollo, n. 204; Mesa-Lago C. (2020), *El sistema de pensiones en El Salvador, Institucionalidad, gasto público y sostenibilidad financiera*, Santiago: CEPAL, Serie Macroeconomía del Desarrollo, n. 209.

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to financial sustainability; Uruguay, Colombia, El Salvador and Mexico are moderately so; while Chile and Peru are not very committed to it[11].

2.5. Funds

The vast majority of pension systems in the region lack actuarial reserves and have a poor actuarial relationship between contributions and benefits, which has led to financial imbalances and unfeasibility. Therefore, the creation of public or solidary funds has been proposed as a way to deal with the fluctuations in financing the system and to prevent the pension deficit from being offset by increasing taxes or reducing spending in other sectors[12].

The above issues, among others, show that pension systems interact with various areas. Therefore, a comprehensive strategy under a new tax-social policy is needed as part of an agreement detailing the type of protection for older adults (and other groups), the requirements, and contributions of the economically active population, while stipulating that the State must act as guarantor (explicitly or implicitly) of both pension promises and the sustainability of the pension systems. Only then will it be possible to ensure that this process can repeat itself for future generations under more inclusive and balanced pension systems for all (coverage, contributions, and rights) with political and institutional efforts to bring tax and pension reforms to fruition.

Final comments

We are aware of the impossibility of attaining proper coverage through contributory systems and, worse still, through individual capitalization schemes. Thus, the results of the reforms of the 1990s in the region prompted inclusive policies that prioritized poverty reduction programs and greater State participation. However, it has been made clear that the sustainability of pension systems implies linking their design with the labor market to address these two key components:

– endogenous: coverage, adequate benefits and tax sustainability, institutional pension policies and gender inclusion;

[11] Arenas de Mesa, "Los sistemas de pensiones en América Latina: institucionalidad…", cit.

[12] Colombia created a *Fondo de Solidaridad Pensional* [Solidarity Pension Fund] to cover the pensions of those who do not have enough for a minimum pension.

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– exogenous: demographics, labor market (job creation, dealing with informality and the incorporation of all types of workers) and the macroeconomic environment (growth, tax burden and others)

Likewise, the sustainability of pension systems entails political and social agreements to unravel their complex interactions to then reconcile the sphere of social rights and the abovementioned aspects.

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Normativas continentales sobre Protección Social

Antonio Ojeda Avilés[1]

1. La tendencia a la formación de grandes grupos continentales de regulación de la materia aseguratoria

1.1. Causas y dificultades

El aumento exponencial de la circulación de personas, ya sea por motivos laborales o de necesidad, acompaña a la internacionalización de la economía de forma pareja, de manera que ha provocado un salto conceptual entre lo que inicialmente se veía como una coordinación para facilitar el ejercicio de derechos de los migrantes, y lo que actualmente se convierte en un mecanismo de trascendencia económica y social para el buen funcionamiento de los países. Aquí aparecen progresivamente normas regionales que simplifican con su presencia la actividad normativa puramente bilateral merced a reglas de encuadre que, al cabo, también surten un benéfico resultado de aproximación entre las legislaciones nacionales afectadas. Tal es uno de los objetivos principales de la Asociación Internacional de Protección Social (IASP-AIPS.org).

En el momento actual no resulta fácil llegar a la formación de tales normas regionales. Pese a la proclamación de la seguridad social y la protección social como derechos fundamentales de la persona[2], y a la expansión generalizada de sistemas nacionales de protección social, aún son muy distintos cada sistema

[1] Catedrático de Derecho del Trabajo (r) de la Universidad de Sevilla, España. Presidente de la International Association of Social Protection (IASP-AIPS.org). ExMiembro del Comité para las partes no ratificadas del Código Europeo de Seguridad Social, Consejo de Europa.

[2] Cfr. en la webpage de IASP-AIPS.org el *Discussion paper* 1/2003 de la prof. Roberta Soares Silva.

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de los restantes, y sus peculiaridades alejan abismalmente a unos de otros. Ello pese a que una serie de declaraciones internacionales que arrancan de la primera postguerra mundial con la creación de la Organización Internacional del Trabajo (OIT) han ido perfilando el conjunto de contingencias o situaciones de necesidad abarcadas por el concepto, a las cuales se unió la conceptualización de la asistencia social por obra de Beveridge en la segunda postguerra mundial. Y que la Asociación Internacional de Seguridad Social (AISS), creada en 1927 bajo los auspicios de la OIT, agrupa a 320 instituciones publicas y entidades gestoras de más de 160 países, prácticamente la totalidad de los países del mundo. Muchos de esos países prefieren continuar con el método artesanal de firmar convenios bilaterales de seguridad social, como hacen Estados Unidos, Australia y otros. Pero también, y quizá en la mayoría de esos países "bilaterales", la razón por la que no emprenden un camino más sofisticado consiste en que solo ostentan una protección social nominal que ni siquiera ampara a sus propios nacionales. De ahí que por ejemplo algunas normas internacionales permitan a los países suscribir los sistemas de éstas condicionadamente a venir a mejor fortuna[3].

1.2. Clasificaciones

De cualquier modo, podemos mencionar cinco de estas normas regionales, de muy diferente condición, aun cuando con un papel en todo caso de coordinación de sistemas nacionales. En concreto se trata de las siguientes, ordenadas según el criterio de antigüedad:

1) El Convenio 102 de 1952 de la OIT, norma mínima de Seguridad Social, ratificado por 65 países miembros. De esta Organización hay otros Convenios ampliatorios de la protección en concretas contingencias, en los que no vamos a entrar[4].
2) Los Reglamentos de Coordinación de la Seguridad Social de la Unión Europea, 883/2004 y 987/2009, que suceden a una robusta serie iniciada durante la época anterior a la Comunidad Europea, la de la CECA, EURATOM y CEE. Dichos Reglamentos tienen eficacia sobre todos los países miembros de la Unión Europea, actualmente 27.

[3] Así, el Convenio OIT Norma Mínima de Seguridad Social 1952 (102), art. 3, apartado 1.

[4] Los Convenios específicos son treinta. Vid. López Morales G. (1996), "Aspectos teóricos del Convenio 102 y su aplicación en Iberoamérica", en Conferencia Interamericana de Seguridad Social, *Seminario sobre normatividad internacional de la Seguridad Social*, Ciudad de México, p. 48.

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3) El Código Europeo de Seguridad Social de 1964, del Consejo de Europa, revisado en 1990, ratificado por 34 países del organismo. Muestra un estrecho seguimiento respecto del Convenio OIT 102 Norma Mínima, con la diferencia de que exige la ratificación de un número de partes mayor que éste.
4) El Convenio Multilateral Iberoamericano de Seguridad Social, suscrito en 2007 y ratificado por 13 países de América del Sur y de la península ibérica[5].
5) La Declaración para el Reforzamiento de la Protección Social, suscrita en 2013 por los diez países miembros de la Asociación del Sudeste Asiático (ASEAN)[6].

No trataremos otras normas regionales que puedan haber servido como antecedentes de los cinco citados[7]. Tampoco analizaremos la importante Carta de Derechos Fundamentales de la Unión Europea (CDFUE), pues la redacción del artículo IV.34, sobre Seguridad Social y Ayuda Social, resulta demasiado genérica.

A simple vista la coordinación regional ha arraigado en tres continentes, especialmente en Europa (con al menos dos normas) e Iberoamérica (con una), y con la sorpresa del Sudeste asiático, ASEAN, con otro, quedando fuera el Oriente próximo, medio y lejano, así como África y Oceanía.

La relación de cinco normas regionales antevista precisa de alguna observación adicional. En concreto, la de que cabe distinguir además otros dos bloques, el de las normas interregionales (de ámbito superior a una región pero inferior al mundial) y el de las normas infrarregionales (de ámbito inferior al regional, aunque superior al nacional), aunque en ocasiones requiera un cierto esfuerzo para distinguirlas de las anteriores.

1) La dificultad para detectarlas se hace visible en el grupo interregional respecto a alguna de las normas regionales acabadas de ver, si recordamos cómo la Norma Mínima de la OIT se aplica no solo en una región, sino en varias regiones del mundo[8]. De esa forma podemos distinguir entre

[5] Argentina, Bolivia, Brasil, Chile, El Salvador, Ecuador, España, Paraguay, Perú, Portugal, República Dominicana y Uruguay. Faltan México, Costa Rica, Venezuela.

[6] Brunei, Cambodia, Indonesia, Laos, Malasia, Myanmar, Filipinas, Singapur, Tailandia, y Vietnam.

[7] Riaño Barón G.M., Alonso Ligero M.S. (2014), "Introducción", *Estudios de Seguridad Social. 60 años de la Organización Iberoamericana de Seguridad Social. 1954-2014*, Madrid: OISS, p. 19.

[8] De las 65 ratificaciones del Convenio 102 de Norma Mínima, el 80 por 100 pertenecen a países europeos e iberoamericanos, y solo el 20 por 100 a países del resto de mundo, principalmente de África.

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el carácter universal de la OIT desde la perspectiva formal, y su carácter regional – al menos, para los convenios de Seguridad Social – desde el punto de vista aplicativo.

2) Respecto al grupo de normas infrarregionales, cabe mencionar a ejemplos muy significativos, en concreto el de la seguridad social de los bateleros del Rin, firmado en su versión vigente el 30 de noviembre de 1979 por los seis países ribereños: Alemania, Bélgica, Francia, Luxemburgo, Países Bajos y Suiza[9]. En el mismo grupo de normas infrarregionales cabría asimismo aludir a ejemplos históricos relacionados con las costumbres marítimas del Mediterráneo y el Mar del Norte, respecto a la cobertura de los accidentes de trabajo y de atención a las viudas[10].
3) Un último grupo de normas, caracterizadas por ser solo indirectamente regionales, lo encontramos en varios países que su enorme tamaño y trascendencia asumen los rasgos de países-región, como es el caso de Estados Unidos, India, China, Rusia, Brasil y alguno más. Suelen establecer reglas de coordinación entre el Estado federal y los Estados miembros (articulación ad intra), que se reflejan en la Constitución del país. A despecho de su tendencia al aislamiento jurídico en este plano, cabe hallar también casos en donde a pertenencen a alguna familia continental.

Aquí solo veremos el bloque principal de normas regionales, para mayor claridad del tema.

2. Los contenidos

Si hemos denominado "normas" regionales a las construcciones supranacionales de ese ámbito en materia de protección social, ello se debe a carecer de uniformidad en cuanto a su naturaleza y a su contenido, por lo cual al conjunto le conviene una denominación genérica. Claramente el sustantivo conviene a su naturaleza, si bien unas son normas en sentido estricto y otras, en cambio, declaraciones de principios, o bien convenios internacionales, o códigos supranacionales. No parece tener trascendencia la diversidad de formulaciones, más allá del diverso grado de aplicación y de ejecutividad de

[9] Cfr. Woehrling J.M. (2008), *La Commission centrale pour la navigation du Rhin: 200 ans d'histoire*, en internet*;* Woehrling J.-M., Schirmann S., Libera M. (eds.) (2015), *Commission centrale pour la navigation du Rhin, 200 ans d'histoire (1815-2015)*, Strasbourg: CCNR, passim.

[10] Sobre el tema, véase mi estudio sobre "La previsión contractual en las relaciones laborales anteriores al contrato de trabajo", en Rojas Rivero G. (ed.) (2013), *Orígenes del contrato de trabajo y nacimiento del Sistema de Seguridad Social*, Bomarzo, capítulo VII.

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cada uno, que veremos después: el rasgo principal de tales normas radica en su mera existencia, en el esfuerzo y la voluntad de armonizar una materia tan compleja entre varios países, que en ocasiones pertenecen a dos continentes, como es el caso del Convenio Multilateral Iberoamericano, y en otros se dispersan en miles de islas, lenguas y hasta credos, como es el de ASEAN. Mayor importancia que la denominación tiene el contenido funcional y material de los cinco grupos, pues varía sustancialmente de unos a otros.

2.1. Normas de armonización, de reparto y de principios comunes

Funcionalmente las normas regionales en examen son de tres tipos:

A) Los mecanismos de *armonización* tratan de impulsar las legislaciones nacionales a unos estándares mínimos en cuanto a la cobertura del riesgo, permitiendo no obstante mejorar con sus normas nacionales dichos estándares. A primera vista constituyen el objetivo más ambicioso, y constan de un largo articulado donde vemos aparecer el esfuerzo por la concreción de ese estándar. En su aspecto más claro, el de las cuantías económicas de las prestaciones, terminan en complicados porcentajes de múltiples variantes que dificultan su aplicación. Así, por ejemplo, los del artículo 72 del Código Europeo de Seguridad Social (Consejo de Europa), donde se especifica un montante común, consistente en un porcentaje del salario mínimo legal o en el salario de un trabajador ordinario[11]. A partir de ahí, el artículo 73 plantea una escala de porcentajes mínimos, que por lo común se fijan para el trabajador sin dependientes en el 50 por 100 del concepto de referencia – salario mínimo legal o salario del trabajador ordinario.

Además del Código Europeo del Consejo de Europa, también el Convenio OIT 102 (1952) sobre norma mínima de la Seguridad Social persigue el mismo objetivo y dispone de similares porcentajes, aun cuando el primero, respecto a las partes o contingencias elegibles por cada Estado para la protección, se muestra más exigente al pedir la ratificación de un número superior de partes por los Estados firmantes. Las similitudes obedecen a una clara inspiración del Código Europeo en el Convenio OIT de norma mínima, en definitivas cuentas, que se hace visible también en el procedimiento de control, merced a informes cuatrienales en el caso del Código Europeo, dirigido al Secretario General a través de una "comisión de expertos europeos" que los evalúan en cuanto al cumplimiento de sus compromisos[12].

[11] Definido como el miembro de la categoría más numerosa de personas protegidas en la contingencia correspondiente (art. 72.6)

[12] Art. 79 del Código Europeo (Consejo de Europa), revisado en 1990. Inicialmente el

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La armonización pretendida por el Convenio OIT y el Código europeo suponen el mayor esfuerzo de coordinación de los tres métodos que analizamos, tanto en los objetivos como en el procedimiento elegido, que involucra a dos comisiones y al Secretario General del Consejo de Europa. Desgraciadamente reposa sobre un suelo frágil de difícil asentamiento para alcanzar el éxito. En primer lugar, por la larga periodicidad de la obligación de informar, cuatrienal, que pone en duda la eficacia de la reacción del organismo internacional: carece de fuerza de reacción, indica contundentemente Martínez Martínez[13]. En segundo lugar, desde un punto de vista intrínseco, el cálculo de los porcentajes a tenor del salario mínimo o del salario de un trabajador ordinario queda sujeto a referentes muy frágiles, pues hay muchos países que no establecen salario mínimo interprofesional, y, por su parte, cuál sea el salario de un trabajador ordinario remite a la categoría más numerosa de trabajadores del sector metalmecánico o del sector industrial con mayor número de trabajadores, y, dentro de él, de la categoría profesional con mayor número de ellos[14]: un laberinto casi sin salida. También, en tercer lugar, se detecta fragilidad por las fallas del sistema de informes de cada país, pues con cierta frecuencia se dejarán llevar por el interés en cumplir los objetivos a costa de maquillar las estadísticas, si es que disponen de unas fiables[15]. Por último, debe mencionarse la jurisprudencia del Comité Europeo de Derechos Sociales respecto del derecho a la seguridad social contemplado también en la Carta Social Europea, para el cual Comité un porcentaje como el habitual para establecer el mínimo de la prestación puede no ser suficiente para garantizar la subsistencia, por lo que la insuficiencia en uno solo de los epígrafes basta para declarar la no conformidad del país con el requisito de mínimos (conclusiones del Comité sobre Bulgaria y Georgia)[16].

lapso previsto era de dos años. La Carta Social Europea, por su parte, dispone de dos comités, teniendo el segundo la encomienda de revisar, respecto a las partes no aceptadas del Código, el nivel de aproximación a los estándares requeridos (Parte IV de la Carta Social Europea, incorporados por el Protocolo de Turín de 1991), como veremos más abajo. Sobre las vicisitudes en la aprobación de la Carta, Rodríguez-Piñero Bravo-Ferrer M. (1978), "La Carta Social Euoepea y su puesta en práctica", *Revista de Instituciones Europeas*, 5(1), pp. 54 ff.

[13] Martínez Martínez V. (2019), "El derecho a la Seguridad Social ante el Comité Europeo de Derechos Sociales", *Estudios de Deusto* 67/1, p. 268.

[14] Artículo 72, nn. 5 y 6, del Código Europeo de Seguridad Social.

[15] En tal sentido, Jimena Quesada L. (2012), "Crónica de la jurisprudencia del Comité Europeo de Derechos Sociales 2012", *Revista Europea de Derechos Fundamentales*, 20/2, p. 364; Martínez Martinez V. (2019), "El derecho a la Seguridad Social", cit., p. 268; Ojeda Avilés A. (2009), "La convergencia europea en materia de Seguridad Social: los problemas de un Código internacional de prestaciones mínimas", *Revista del Ministerio de Trabajo y Emigración*, 84, pp. 15 ff.

[16] Martínez Martínez V. (2019), "El derecho a la seguridad social", cit., p. 270.

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Se acaba de mencionar a la Carta Social Europea, un texto bastante más pequeño que el Código Europeo de Seguridad Social[17] y dirigido al conjunto de derechos laborales, incluídos los de Seguridad Social. Aunque no le dedicamos atención, al tener mayor detalle el Código referido, ha dado un paso adelante en la justiciabilidad de tales derechos merced a un Protocolo de Reclamaciones Colectivas (1995) que veremos infra en el epígrafe 3.2, sobre litigiosidad.

B) Menor complejidad en sus objetivos, aunque no en su regulación, ofrecen las dos normas regionales dedicadas al *reparto* de obligaciones entre los sistemas nacionales que comprende. Sin pretender influir en la configuración de dichos sistemas nacionales, los dos Reglamentos de Coordinación de la Seguridad Social de la Unión Europea antes mencionados, y el Convenio Multilateral Iberoamericano de Seguridad Social y su protocolo de aplicación, fijan las obligaciones de los Estados implicados en la concesión de derechos aseguratorios de los migrantes y desplazados, para lo cual definen además las contingencias cubiertas y las autoridades responsables. En esencia dicha coordinación establece un cuadro de "competencias" entre los países implicados a la hora del reconocimiento de derechos a los migrantes, desplazados y transfronterizos, en ocasiones de gran complejidad, como es el caso de la situación en los accidentes de trabajo transfronterizos.

Un avance consagrado en ese grupo consiste en el cómputo conjunto de las cotizaciones de dos o más países en los que se ha trabajado, la totalización de períodos, quizá el mecanismo estrella de las normas internacionales de Seguridad Social, pues permite merced a tal sumatorio la posibilidad de alcanzar prestaciones con largos períodos de acreditación, como las de jubilación, que de mantener los cómputos por separado no alcanzarían en muchos casos la acreditación necesaria[18]. El sumatorio de períodos se admite también en el Convenio Iberoamericano para la coordinación entre las cotizaciones al régimen de seguro público de un país y las aportaciones a uno privado de otro, cuando fueran insuficientes por sí mismos para causar pensiones (art. 16).

Hay otro tipo de concurrencia de normas que, a diferencia del anterior, podríamos denominar conflictiva. Hablamos ahora de una solución alternativa, o en otros términos, de cuál de esos instrumentos concurrentes debe prevalecer, un tema descuidado en el grupo anterior de normas sobre mínimos, más centrado en el pormenor de los porcentajes. El tema viene

[17] Cuatro Partes, con una Segunda de derechos reconocidos por 31 artículos y donde varios de ellos se refieren a la Seguridad Social, Servicios Sociales y Asistencia Social.

[18] Arts. 5 y 13, Convenio Multilateral Iberoamericano.

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planteado con nitidez en el caso del Convenio Multilateral Iberoamericano, el cual se pronuncia por la aplicación del principio de norma más favorable para el "beneficiario" en caso de concurrir con otros convenios bilaterales o multilaterales de seguridad social (art. 8), que alcanzan por ejemplo el número de ocho bilaterales con países de la misma región en el caso de España. Se trata de convenios internacionales, sin que existan referencias en éste Iberoamericano, o en ninguno otro, la mención a posibles conflictos con normas internas, ya sean legales o colectivas, al respecto. También hay referencias en los Reglamentos europeos al tema de la concurrencia, de nuevo con los convenios bilaterales internacionales suscritos en la materia por cada Estado miembro, que se solventan igualmente por el principio de norma más favorable[19].

C) Normas de principios comunes. Un tercer grupo de países viene representado solo por la *Declaración para el Reforzamiento de la Protección Social* de ASEAN, los diez países del Sudeste asiático, en 2013. Una Asociación del Sudeste Asiático creada sobre tres pilares normativos, uno de ellos sociocultural, y que tras la Declaración Cha-am Hua Hin de 2009 reconoció el rol de la protección social en el enaltecimiento del bienestar de los pueblos que la componen. La Declaración para el Reforzamiento de la Protección Social se configura en dos bloques, uno de ellos de Principios, y el otro de Estrategias y Mecanismos.

Cabe preguntarse por el motivo de una declaración de principios y políticas en una materia tan baqueteada como la Seguridad Social. En realidad, otros textos acabados de analizar también disponen de una parte de principios, después articulados en derechos concretos en la una Parte posterior. Aquí hallamos, pese a todo un segundo motivo: si nos fijamos, el concepto elegido es el de Protección Social, una visión más amplia de la temática, lo cual nos lleva a enlazar con una idea cada vez más clara en el fenómeno de la globalización: la Seguridad Social, el conjunto de prestaciones contributivas o de seguro obligatorio puesto en marcha por Birmark, no parece ser ya el objetivo primordial de las políticas sociales, su punta de lanza, sino a lo sumo una parte de aquéllas, en tanto que van cobrando impulso las prestaciones no contributivas y asistenciales, lo que llamamos Asistencia Social, debido a fenómenos como el aumento de autónomos, el trabajo informal, la debilidad financiera de muchos países para hacer frente a una cobertura general, y el abandono por una multitud de obligados de sus deberes de cotización.

[19] Artículos 8 y 9 del Reglamento 883/2004. Distinto es el tema de la competencia respecto a la legislación y jurisdicción competentes en materia de contratos de trabajo, sobre los que disponen en detalle los Reglamentos Roma I y Bruselas I.

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Así, la información de la OIT sobre Filipinas es contundente: el seguro social cubre alrededor del 34% de la población, con un acceso muy limitado para los trabajadores de la economía informal y los pueblos indígenas. Muchas personas elegibles no contribuyen al SSS ni al GSIS y no recibirán pensiones al jubilarse. A pesar del alto crecimiento demográfico y del alto desempleo, no existe ningún seguro de desempleo. El paquete de beneficios sanitarios de PhilHealth excluye la atención preventiva (beneficios ambulatorios y chequeos físicos), lo que genera importantes gastos de bolsillo en salud. El sistema de protección social se ve afectado por una alta fragmentación, falta de coordinación entre agencias y mecanismos de focalización ineficientes. Los sistemas de seguimiento y evaluación requieren unificación para lograr economías de escala[20].

Volvamos a la Declaración ASEAN. Aparentemente nos hallamos ante el documento más débil de los analizados, pues no plantea normas, sino *principios y políticas de acción* impulsadas por el Consejo ASEAN de Ministros de Bienestar y Desarrollo Social, "*reconociendo los diversos mecanismos nacionales de coordinación de los países miembro*" (punto 20). Las medidas contempladas ofrecen una gran amplitud, pues abarcan tanto la seguridad social como la asistencia y los servicios sociales, con un horizonte de progresiva realización y de adaptación a los cambios económicos y sociales (punto 10), sin que falte la extensión del seguro social al sector informal (punto 12), y el avance acelerado hacia la cobertura sanitaria universal (punto 17). En todo momento se alude a la Protección Social como concepto amplio donde tienen cabida fórmulas de protección social de variado tenor.

Un punto a destacar consiste en la preocupación por el sector informal, algo que también se percibe en Iberoamérica y, probablemente, en África. Por ejemplo, la revista oficial *The ASEAN – Social Protection for All* analiza el tema en diversas ocasiones, donde se estudian las medidas tomadas frente a este grupo social para extender la protección a ellos, siendo así que suponen el 80 por 100 de la fuerza laboral de la región, en total 244 millones de personas[21]. Quizá sea el sector informal el talón de Aquiles de la región, pues todos los Estados miembros cuentan con leyes de Seguridad Social, pero la cobertura sobre la población parece dispar. Así, la pandemia Covid ha sacado a flote el gran número de personas carentes de cobertura sanitaria en algunos

[20] OIT (2015), *Social Protection in Asia: Philippines Social Security System*, p. 1. También, González E.T., Mansan R.G. (2002), *Social Protection in Philippines*, Friedrich Ebert Stiftung, pp. 171 ff.; Orbeta A.C. (2011), "Social Protecion in Philippines: Current State and Challenges", *Philippines Institute for Development Studies, Discussion Paper Series 2011-02*.

[21] Agbisit J.B. (2020), "A Look at Long-term Solutions Studies on Informal Employment Reveal Progress, Gaps, and Future Directions", *The Asean* (Yakarta) 3, p. 35.

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de los países miembros, como indica un estudio del Ministerio de Sanidad de Indonesia sobre los porcentajes de cobertura de cada Estado[22].

Repárese en que ninguno de los países miembros de ASEAN han ratificado el Convenio OIT norma mínima, por lo que no se sujetan a la tipología o estructura sistemática de las contingencias habitualmente conocidas. De ahí que sea esperable una cierta desviación de los estándares conceptuales manejados, y que sus instituciones de protección social difieran en más de un punto del *status quaestionis*.

A la vista de los tres grupos de normas regionales y de sus diferencias, cabe preguntarse si podrían combinarse unos tipos con otros. Nada impide la combinación, aunque parece difícil mezclar reglas de coordinación con mecanismos de mínimos. Sí, en cambio, sería pensable la introducción de principios o bases en esos dos grupos, o de contenidos de ellos en el tercero. Y desde luego hay todo un arsenal de contenidos neutros, las "disposiciones comunes", como por ejemplo los de administración y gestión o los de control judicial o extrajudicial de los conflictos, factibles de introducir indistintamente. No obstante lo cual, cada Norma regional despliega diferentes sistemas de gestión y control, como veremos enseguida. Un tema, este último, que parece refractario a la introducción de los sistemas privados de solución, pues solo en el caso del Convenio Multilateral hallamos su admisión sin ambages, aunque muy concretamente referido al arbitraje de los conflictos entre los Estados parte (art. 28).

[22] Primadi O., Secretario General del Ministerio de Salud (2020), "Universal Health Care in ASEAN", *The Asean*, n. 3, p. 12: Cobertura del seguro en Brunei el año 2019, 100%; en Camboya, el 24%; en Indonesia, el 84%; en Laos, el 94%; en Malasia, el 100%; en Myanmar, el 2%; en Filipinas, el 78%; en Singapur, el 93%; en Tailandia, el 100%; en Vietnam, el 89%. Si comparamos la cobertura de Filipinas con las que dábamos más arriba del informe OIT sobre este país, del 34%, la discrepancia podría derivar de la fórmula de descansar sobre informes de los respectivos países posiblemente adoptada por ASEAN, en donde es habitual una visión muy optimista de la propia situación.

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A study on caregiver leave in Taiwan's labor law system from comparative law research

Yueh-Hung Hou[1]

1. Introduction

The United Nations' World Population Ageing 2017 Highlights pointed out: "*The world's population is ageing: older persons are increasing in number and make up a growing share of the population in virtually every country, with implications for nearly all sectors of society, including labour and financial markets, the demand for goods and services such as housing, transportation and social protection, as well as family structures and intergenerational ties*"[2].

According to the population age structure statistics published by the Ministry of the Interior, Taiwan officially became an aging society as of the end of March 2018. The number and proportion of the population aged 65 and above have been increasing year by year. As of 2021, it has reached 3.939 million people, accounting for 16.85% of the total population[3]. According to the National Development Council's 2022 population estimation data, it is projected that Taiwan will become a super-aged society by 2025 (See *Fig. 1*)[4].

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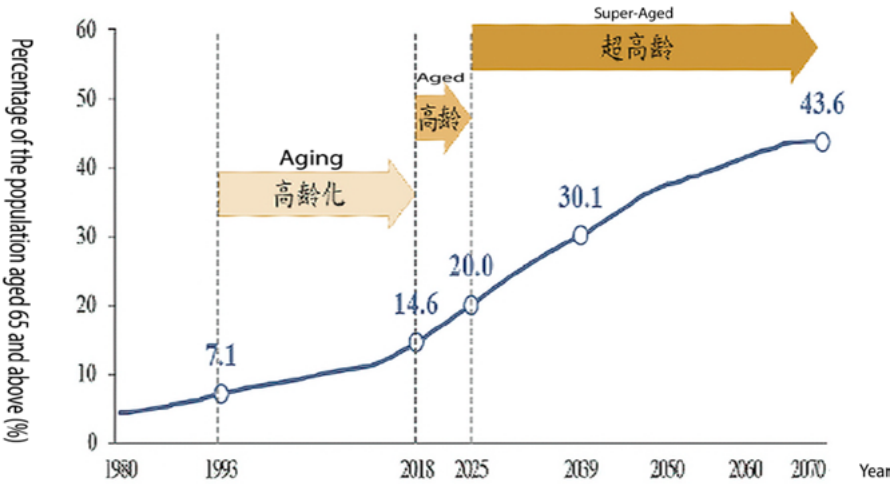
[2] United Nations (2017), *World Population Ageing 2017 Highlights*, available at: *www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2017_Report.pdf*.

[3] Department of Household Registration, Ministry of the Interior, *Taiwan, Demographic Data, Indicators of Population Age Structure* (available at: *www.ris.gov.tw/app/portal/346*).

[4] National Development Council, *Population Estimation of the Republic of China (Taiwan) (2022 to 2070), First Edition*, *www.ndc.gov.tw/nc_14813_36128* (Aug. 2022).

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Fig. 1. Taiwan projected aging population timeline – medium estimate[5]



Additionally, from 2052 onwards, the proportion is expected to surpass many major countries, such as Japan, but still be slightly lower than South Korea. Starting in 2057, the proportion is anticipated to exceed 40% (*Fig. 2*)[6]. The aging population structure will increase the burden on the working-age population to support the elderly. For example, in 2022, the old-age dependency ratio is 24.9, meaning that approximately every 4 working-age individuals have to support 1 elderly person. By 2070, the estimated old-age dependency ratio is projected to reach 91.3, approximately equating to every 1.1 working-age individuals having to support 1 elderly person (*Fig. 3*)[7]. It is evident that addressing the caregiving pressure on the working-age population and meeting the needs of the elderly in the future will become crucial issues in the design of social welfare, long-term care (LTC), and related systems.

[5] National Development Council, *supra*, note 3, at 17.

[6] National Development Council (2022), *Compilation of Population Projection Charts 15* (available at: *ws.ndc.gov.tw/Download.ashx?u=LzAwMS9hZG1pbmlzdHJhdG9yLzEwL3JlbGZpbGUvMC8xMTI4LzBkOTZlZjBjLTkwMTUtNDc0ZS05MzBkLTY1MWVkZGFhZjQ0OS5wZGY%3d&n=5Lq65Y%2bj5o6o5Lyw57Wx6KiI5ZyW6KGo5b2Z57eoLnBkZg%3d%3d&icon=.pdf)*.

[7] National Development Council, *supra*, note 3, at 19.

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Fig. 2. The proportion of elderly population to total population in Taiwan compared to other major countries[8]

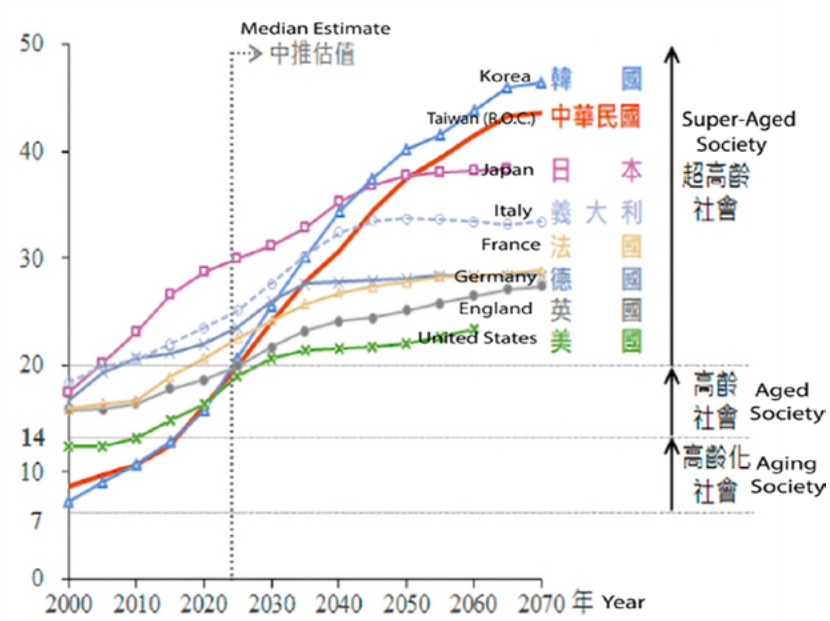
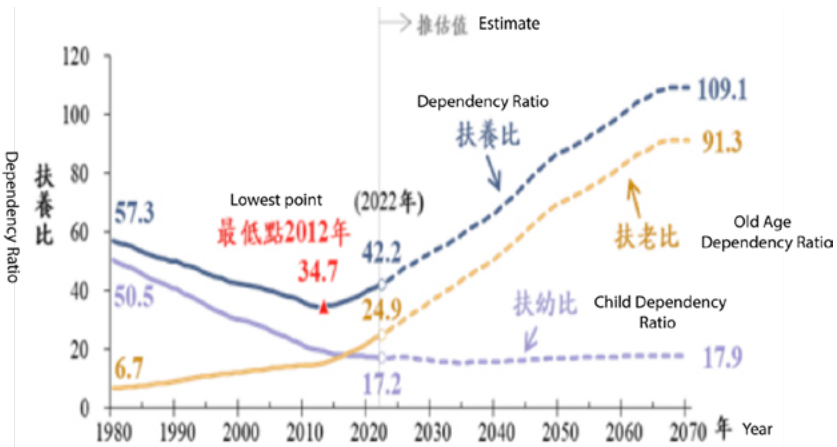


Fig. 3. Taiwan's dependency ratio – medium estimate[9]



[8] National Development Council, *supra*, note 4.
[9] National Development Council, *Figure 12*, *supra*, note *3*, at 19.

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With the promotion of the concept of aging in place (i.e., growing old in one's own home) relying on informal caregivers (e.g., friends and family) to supplement professional long-term care has become a common phenomenon in many major countries. In addition to needing to meet the needs of elderly care, alleviate the pressure on family caregivers, and supplementing long-term care services, aging in place also gives rise to the dilemma of how family caregivers can balance the dual roles of "work" and "care". When family caregivers simultaneously hold the role of wage earners, addressing the need for them to continue working and earning income to maintain a normal life becomes a critical issue.

In this regard, as early as 1981, when the International Labour Organization (ILO) adopted Convention n. 156[10] and Recommendation n. 165[11], it was pointed out that countries must consider the needs of "workers with family responsibilities" to ensure equal treatment and opportunities for them in the labor market. Subsequently, due to the promotion by international organizations and advanced countries, "work-life balance" gradually became a topic of importance and a direction for policy legislation in many countries. The "Work for A Brighter Future" report[12] presented by the ILO in 2019, as part of the Global Commission on the Future of Work, also mentioned that work begins at home. From parental leave to investing in public care services, policies need to address the issue of the need for unpaid caregiving work at home in order to truly create equal opportunities in the workplace between those who have caregiving responsibilities at home and those who do not[13].

According to studies conducted by scholars on the development of family structures in Taiwan, it is evident that the average family size in Taiwan continues to decrease. The studies include projections indicating that the average household size will be below 2 people by 2042[14]. However,

[10] Convention Report, *Workers with Family Responsibilities Convention*, ILO n. 156 (adopted 1981) (available at *www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312301:NO*).

[11] Convention Recommendation, *Workers with Family Responsibilities Recommendation*, ILO n. 165 (adopted 1981) (available at *www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R165*).

[12] International Labor Organization (2019), *Work for a Brighter Future: Report of the Global Commission on the Future of Work*, ILO (available at *www.ilo.org/digitalguides/en-gb/story/global-commission-intro*).

[13] See: Chih-Yu Cheng (成之約) (2019), "International Labour Organization's 'Work for a Better Future' Report and Its Policy Implications for Our Country" (國際勞工組織「致力於更美好的未來」報告及其對我國的政策意涵), *58 Taiwan Labor Quarterly*, 26, at 30.

[14] Hsinmu Chen (陳信木) (2017), *Estimation of the Development of Family Structures*

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the family is the most basic social unit, and in the traditional Taiwanese social environment, the family has always played roles in social support, economic support, emotional support, and caregiving support. Eldercare and childcare have traditionally been considered the responsibilities of the family. Therefore, the impact of changes in family structures will be felt in all aspects of life and work across the nation.

The trend towards smaller household sizes can lead to the weakening of various social and economic support functions within traditional families[15]. In the past, larger extended families might have had sufficient manpower to cope with both living expenses and the care of elderly family members without significant difficulties. However, as mentioned earlier, with changes in family structures, smaller household sizes, and the weakening of family functions, family members who are also workers will face both greater economic burdens and insufficient caregiving support for elderly family members.

Civil groups point out that, according to estimates from the Ministry of Labor, within the 11.53 million work force in Taiwan, approximately 2.31 million people (about one-fifth of the workforce) are affected in their work due to caring for family members with disabilities, dementia, or physical and mental disabilities[16]. This indicates that family caregivers in the workforce are not a small minority. In practice, workers often face difficulties, such as being unable to transfer to positions that accommodate caregiving responsibilities and may even be forced to resign[17].

This is problem already exists within Taiwan's current work force and society. It can be anticipated with a significant degree of certainty that, in the near future, more workers will face the challenging dilemma of balancing their careers with the caregiving needs of elderly family members. How to reconcile the demands of the workplace and familial obligations is a crucial issue that policy and legislation should address and provide assistance for.

In this context, this article aims to provide an overview of the current situation of eldercare leave in Taiwan (sometimes referred to as long-term care arrangement leave, but this article will use the term eldercare leave).

in Our Country from 2017 to 2026 (106 年至115 年我國家庭結構發展推計), National Development Council Research Commission Plan, at 99.

[15] Pei Shan Yang (楊培珊) (2019), "The Aging Society Issues and Solutions Faced by Our Country amid Population and Family Structure Changes" (我國面對人口與家庭結構變遷下的高齡社會議題與解方), Public Governance Quarterly, Vol. 7:1, at 27, 28.

[16] Taiwan Association of Family Caregivers, *Petition for Long-Term Care Leave Arrangements* (「爭取長期照顧安排假」連署行動) (available at: *www.familycare.org.tw/policy/11427*) (15.12.2022).

[17] See: Taiwan High Court Taichung Branch Civil Court Decision (2022) Lao Shang Zi n. 14 (臺灣高等法院臺中分院111年度勞上字第14號民事判決).

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It will also explore the discussions and legislative developments related to eldercare leave in Taiwan. Finally, the article will conduct a review to serve as a reference for future discussions.

2. Current situation in Taiwan

Balancing family caregiving and work has become an undeniable problem in Taiwan. Below, we will first introduce relevant legal provisions on this matter and then outline legislative proposals and discussions by civil organizations to understand the current situation.

2.1. Current regulations

According to the Ministry of Health and Welfare's 2017 Report of the Senior Citizen Condition Survey, 31.77% of primary family caregivers also work, while 9.38% are forced to stop working to fulfill their family caregiving responsibilities[18]. Among those caregivers who continued to work, 32.21% indicated that caregiving affected their work, with 18.12% having to adjust their work schedule flexibly, 17.45% having to reduce their working hours, and 10.07% feeling the need to take leave[19].

The issue of meeting the caregiving responsibilities of workers who also serve as family caregivers is mainly addressed through providing leave or adjusting work hours flexibly. However, under the current Long-term Care Services Act, assistance provided by family caregivers is only defined for those who meet the criteria specified in Article 3, Paragraph 1, Subparagraph 3, which refers to "*primary relatives or family members providing regular care to a disabled person within the family*". Such individuals are entitled to family caregiver support assistance under Article 9, Paragraph 1, Subparagraph 4 of the same law. These services include alleviating caregiving stress, providing respite services, and maintaining the physical and mental health, economic security, and employment rights of family caregivers. However, these services are subject to specific subsidy limits, and any excess requires additional fees. It is apparent that these services are not sufficient to truly meet the needs of family caregivers who also hold worker status.

[18] Ministry of Health and Welfare (2017), *2017 Survey Report – Primary Family Caregivers* (106年調查報告-主要家庭照顧者) (available at: *dep.mohw.gov.tw/dos/lp-5095-113-xCat-y106.html*).

[19] Ivi, at 4.

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The provisions of the Long-term Care Services Act seem more suited to serve a supplementary role in resolving the issues faced by workers with family caregiving responsibilities. Eldercare leave provisions have not actually been included in any legislation seeking to address this issue. This has left the challenges faced by individuals juggling work and caregiving unaddressed.

Article 20 of the Gender Equality in Employment Act also regulates family caregiving leave. Paragraph 1 of the same article stipulates, "*An employee may take family caregiving leave when it is necessary to personally care for family members who need preventive vaccinations, suffer from serious illnesses, or experience other major accidents. The number of leave days shall be included in the calculation of personal leave, with a maximum limit of seven days per year*". Paragraph 2 further specifies that "*the calculation of family caregiving leave pay according to the rules for personal leave*". As provided for by the regulations for taking leave outlined in Article 7 of the Labor Leave Rules, an employee is only entitled to take personal leave for up to fourteen days per year in the case of personal affairs that require their personal attention, with no pay during the leave period.

Taking the above provisions together, we can conclude that, other than in the case of caring for family members who require vaccination or who have suffered a serious illness or major accident, individuals with family caregiving needs are only entitled to a maximum of seven days of family caregiving leave per year, and the overall limit for personal leave is only fourteen days. When faced with the need to care for an elderly family member requiring long-term care at home, the current regulations are clearly inadequate. Furthermore, family caregiving leave falls under personal leave and does not come with salary compensation. Family caregivers who are employed are often crucial economic contributors to their households. For those who must bear high medical expenses for the care recipients, taking leave for caregiving also an additional sudden loss of income. For long-term family caregivers, the family caregiving leave stipulated by the Gender Equality in Employment Act is evidently insufficient to meet their needs.

Regulations on flexible working hours in the current laws are primarily found in Article 19 of the Gender Equality in Employment Act and Article 30, Paragraph 8 of the Labor Standards Act. Article 19, Paragraph 1 of the Gender Equality in Employment Act states: "*An employee who is employed by an employer with thirty or more employees may request the employer to choose one of the following for childcare of children under three years of age: 1. To reduce the daily working hours by one hour; no compensation shall be claimed for the reduced working hours. 2. To adjust the working hours*".

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It is evident that the eligibility is limited to employees who are caring for children under three years old and does not cover caregiving for elderly family members.

On the other hand, Article 30, Paragraph 8 of the Labor Standards Act also stipulates that "*for the normal working hours in the first to third paragraphs and in Article 30-1, an employer may, in consideration of the need for an employee to care for family members, allow the employee to flexibly adjust the start and end times of work within a one-hour range without changing the daily normal working hours*". While the eligibility criteria encompassing a wide range of family caregiving responsibilities, including the caregiving needs of elderly family members, the adjustment is limited to shifting work hours and does not include flexible adjustments to the total working hours. However, workers who simultaneously serve as family caregivers often face prolonged caregiving demands. Whether a simple one-hour shift in working hours can effectively address the caregiving pressures and needs of family caregivers who are also workers remains questionable.

Currently, only the Gender Equality in Employment Act stipulates a 7-day unpaid family caregiving leave, which is evidently lacking both in terms of the number of days and other related support. Additionally, the provisions of the Long-term Care Services Act, besides having subsidy limits, also fail to meet the desire of care recipients to be cared for by familiar individuals in a familiar environment. The Long-term Care Services Act still cannot fully address the caregiving needs of family caregivers who are also workers. Furthermore, the regulations on flexible working hours seem to lack diversity and specificity, making them ineffective in solving the underlying problem. Therefore, it is necessary to discuss whether regulations such as eldercare leave should be established to address these issues comprehensively.

2.2. Legislative proposals and advocacy by civil organizations

Due to the current shortcomings in regulations regarding eldercare leave, legislators from various political parties and civil organizations are actively pushing for legislation on this issue. In terms of legislative proposals, it is evident from reports that there are multiple different versions. Among them, Democratic Progressive Party (DPP) legislator Huang Shiou-Fang's version takes inspiration from Japan's "Eldercare Leave" and proposes 93 days of extended caregiving leave without pay, along with other related allowances to be determined annually according to Congressional budget. Kuomintang (KMT) legislator Wayne Chiang's version, influenced by a civil organization's long-term care arrangement proposal, advocates amending

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Article 20-1 of the Gender Equality in Employment Act, proposing 90 days of extended caregiving leave without pay, with 30 days eligible for caregiving allowances. DPP legislator Liu Chien-Kuo's version refers to the regulations on extended caregiving leave without pay for civil servants, allowing workers to apply for extended caregiving leave without pay for the care of family members, not exceeding two years[20]. These related controversies surrounding eldercare leave are not isolated incidents; they have long been intertwined with social issues that directly concern us as members of Taiwanese society.

In addition, many civil organizations have urged the government to pay attention to this issue. For instance, organizations such as the Awakening Foundation, the Taiwan Association of Family Caregivers, the Confederation of Taipei Trade Unions, and the Taiwan Alzheimer's Disease Association initiated a petition campaign in 2019 called "Advocating for Long-Term Care Arrangement Leave". They demanded that there should be a special leave system in place in labor policies to address the need for stable employment for families in an aging society requiring long-term care. A total of 104 organizations signed the petition, hoping that the friendly workplace policy of "care without quitting" for working families would garner attention. They advocated for each employee (including both workers and civil servants) facing a period of long-term care responsibilities for family members (averaging about ten years) to enjoy statutory 30 days of leave with 60% of their salary and 150 days of unpaid flexible leave[21].

Awakening Foundation board member and lawyer Zhuang Qiaoru, speaking from a gender perspective on eldercare leave, pointed out that currently, nearly 80% of family caregivers are women. Due to lower average wages and the influence of stereotypical perceptions that women are more inclined to take on caregiving responsibilities, they are often "decided" to resign and return home to care for family members. This results in women

[20] Economic Daily News (經濟日報), *Legislator Proposes An Eight-Year Parental Leave; Concerns About Financial Resources* (立委提八年親職假 財源有憂) (available at: *today.line.me/tw/v2/article/5yErRax*) (26.03.2022). Regarding the proposal of Legislator Hsiu-Fang Huang: *lci.ly.gov.tw/LyLCEW/agenda1/02/pdf/10/01/03/LCEWA01_100103_00021.pdf* (2022). For the proposal of Legislator Wayne Chiang: *lci.ly.gov.tw/LyLCEW/agenda1/02/pdf/10/03/12/LCEWA01_100312_00591.pdf* (2022). For the proposal of Legislator Chien-Kuo Liu: *lci.ly.gov.tw/LyLCEW/agenda1/02/pdf/10/04/07/LCEWA01_100407_00130.pdf* (2022). In addition, the issue was discussed at the 23rd full committee meeting of the Legislative Yuan's Social Welfare and Health Environment Committee on November 29, 2021, 111: 6 *Legislative Yuan Gazette* (立法院公報) at 282-312 (available at: *lci.ly.gov.tw/LyLCEW/communique1/final/pdf/111/06/LCIDC01_1110601_00003.pdf*) (2021).

[21] Taiwan Association of Family Caregivers, *supra*, note 15.

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with family caregiving responsibilities facing a more disadvantaged situation in the workplace. She emphasized that, in the face of Taiwan's aging society, the legislation for long-term care arrangement leave is urgently needed. Supporting caregiving without leaving the job is crucial to truly safeguarding the right to work[22].

The Taiwan Association of Family Caregivers also uses data to highlight the challenges faced by family caregivers when caring for family members that are disabled, suffer from dementia, or are physically or mentally handicapped. They point out that, currently, there are approximately 790,000 individuals that are disabled, suffer from dementia, or are physically or mentally handicapped in Taiwan. About 30% of them hire foreign caregivers, over 50% are solely cared for by their families, and only about 20% use long-term care services. According to the association's 2017 "Status Survey of Employed Caregivers", nearly half (49%) of employed caregivers experienced confusion and instability in the first six months. This led to an "increase in frequency of taking leave (86%)", "inability to attend gatherings outside of work (84%)", "inability to accommodate overtime (83%)", "increased frequency of late arrival and early departure (73%)", and "inability to focus on work (72%)".[23]

Given the recent impact of the Covid-19 pandemic, the importance of eldercare leave has become more apparent. This is especially true when the elderly at home require care. Without clear institutional regulations, employed family caregivers may face uncertainties. Jenny Chen, the Secretary-General of the Taiwan Association of Family Caregivers, expressed from this perspective that, considering the fluctuating nature of virus variants, the suspension of services by long-term care facilities may become a common occurrence. The Ministry of Labor should coordinate with the Ministry of Health and Welfare to promptly initiate "long-term care arrangement leave" due to the impact of the pandemic to ensure the employment rights of employed caregivers[24].

[22] Taiwan Association of Family Caregivers, *Advocating for '30 Days Paid Leave + 150 Days Flexible Leave' Long-Term Care Arrangement Leave* (推動「30天有薪假+150天彈性請假」長期照顧安排假) (available at: *www.familycare.org.tw/policy/11550*) (15.12.2023).

[23] Taiwan Association of Family Caregivers, *supra*, note 15.

[24] Taiwan Association of Family Caregivers, *Escalation of The Pandemic Leads to The Closure of Adult Day Care Centers, Leaving Family Caregivers 'Burning The Candle At Both Ends' Between Long-Term Care And Work'* (疫情升級關閉日照中心，家庭照顧者「長照與工作兩頭燒」) (available at: *www.familycare.org.tw/policy/11513*) (15.12.2023).

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3. Academic discussion and other countries' development

The aging population has undoubtedly become a topic of significant concern in Taiwanese society, with eldercare leave being one of the associated issues. However, discussions on the problems arising from the aging population can be primarily divided into two areas: those addressing the employment issues of older individuals who still possess the capability to work and determining how to meet the caregiving needs of the elderly. The former was addressed in November 2019 with the passage of the Middle-Aged and Elderly Employment Promotion Act, which provides detailed regulations to prevent discrimination against middle-aged and elderly workers and outlines guidance and assistance for their employment. In terms of legislative policy, it can be considered relatively comprehensive. The latter issue regarding how to meet the caregiving needs of the elderly is discussed with a focus on the long-term care system[25], while the aspect of eldercare leave for family caregivers receives little attention.

Discussions around the long-term care system have been a focal point for addressing the caregiving needs of the elderly. The discourse on the long-term care system began with the approval of the "Ten-Year Long-Term Care Plan" by the Executive Yuan in 2007, aiming to achieve localized aging as a policy objective and construct an integrated healthcare community care model. Subsequently, the Long-Term Care Services Act was enacted in 2015. Starting from 2016, the promotion of the Long-Term Care Ten-Year Plan 2.0 addressed previous shortcomings and progressively integrated resources from different regions, offering a more diverse range of long-term care service solutions. However, discussions and policy designs have predominantly focused on integrating family and community healthcare resources and institutional regulations. Examining the provisions of the Long-Term Care Services Act, it is evident that the assistance provided primarily focuses on alleviating caregiver stress, offering respite services, and maintaining the physical and mental health of family caregivers. Therefore, discussions within the long-term care system rarely touch upon issues related to whether workers can take eldercare leave.

However, according to scholars who have compiled data from the Ministry

[25] See: Ministry of Health and Welfare (2016), *Long-Term Care Ten-Year Plan 2.0* (長期照顧十年計劃2.0). See also: Li-Yu Hsiao (蕭立伃), Ching Fu Liao (廖欽福) (2019), "Long-Term "Care" or "Nursing Care" Services: Positioning Dilemma and Reflections on the Long-Term Care Act in Taiwan", *7 Health Law and Policy Journal*, 45-72; Long Guan Huang (黃龍冠), Pei Shan Yang (楊培珊) (2021), "Reviewing the History of Taiwan's Long Term Care Policy and Analyzing its Future Challenges – Based On Long-term Care Plan 2.0", *9:2 Journal of Gerontechnology and Service Management*, 212-236.

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of Health and Welfare's Statistics Department, it is indicated that only about 1.5% of the elderly in Taiwan reside in caregiving institutions[26]. This suggests that long-term care services primarily play a supportive role and cannot completely replace the care provided by family caregivers. The main responsibility for caregiving still falls on family caregivers. Consequently, in recent years, scholars have gradually begun to discuss the issue of eldercare leave.

In the early stages, many scholars used European countries with better social welfare systems as comparative subjects for research. Some researchers summarized the experiences of European countries, noting that Sweden has been providing caregiving leave since 1989, allowing informal caregivers to apply for paid leave for up to 100 days and receive 80% of their income. This leave is intended for caring for terminally ill family members or handling other urgent situations, but does not offer the option to apply for flexible working hours[27]. In the Netherlands, there are three basic arrangements for caregivers balancing work. First, workers can voluntarily save a portion of their salary in advance to meet potential caregiving needs in the future. Second, caregivers can take two weeks of caregiving leave for immediate needs, typically receiving 70% of their salary during this period. Long-term caregiving leave is usually unpaid, with a leave duration equal to half of the agreed working time, limited to a maximum of 12 weeks per year. Third, family members can also become hired caregivers based on their individual budget plans. Eligible family caregivers can apply for a subsidy of 250 euros[28]. Although the United Kingdom does not provide caregiving leave, it alleviates caregiver stress through caregiving allowances and has clear legal regulations allowing caregivers to apply for flexible working hours[29]. In Germany, the design of caregiving leave is governed by both the "Care Leave Act" and the "Family Care Leave Act", providing assistance to family caregivers who are also employees. The latter complements the former, offering greater flexibility for family caregivers and providing them with enough time. Caregivers can also benefit from caregiving support allowances specified in the social security code to supplement their income. Additionally, Germany offers

[26] Jeng Liu, Chi Li (齊力) (2019), "Residential Conditions and Institutional Care Needs Trends of the Elderly in Taiwan", *7:1 Public Governance Quarterly*, 77.

[27] Yi Chuang Zhu (朱貽莊), Ping Tao (陶屏), Yu Feng Chen (陳玉芬) (2012), "Examining the Care Rights in Taiwan's Long-Term Care Policy Through International Experiences", *138 Community Development Quarterly*, 266-267.

[28] Ivi, at 268-269.

[29] Ivi, at 270.

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interest-free loans and flexible working hours to assist family caregivers in alleviating their stress[30].

"Filial piety" has always been a core value of East Asian family ethics. Japan, as an important neighboring country to Taiwan, also faces the issue of an aging population and is deeply influenced by Confucianism. In terms of social environment, family structure, and the culture of caring for elderly family members, Japan is quite similar to Taiwan. Regarding the issues related to eldercare leave, Japan, as early as the 1990s, embraced the concept of work-life balance as an important principle in labor and social security policies. In 1991, Japan enacted the "Act on Childcare Leave", which was expanded in 1995 to include the eldercare leave system, which evolved into the "Act on Childcare Leave, Caregiver Leave, and Other Measures for the Welfare of Workers Caring for Children or Other Family Members" (hereinafter referred to as the "Childcare-Caregiver Leave Law"). Subsequently, it underwent multiple amendments in 2001, 2004, 2009, 2016, and 2022, adjusting the short-term leave and leave systems for caregiving. Professor Hsing-Ju Lin has given an overview of Japan's system of benefits under the Employment Insurance Law. She explained in detail the eligibility criteria, amounts, and legislative intentions behind the benefits during eldercare leave[31]. The research paper on family caregiving prices published by the Ministry of Labor's Institute of Labor and Occupational Safety and Health provides a general overview of the current regulations under Japan's Childcare-Caregiver Leave Law[32]. From these introductions, we can understand that Japan has a long history of development in balancing the needs of family caregivers and the work responsibilities of laborers.

Furthermore, as a representative of liberal ideology, the United States has traditionally maintained lower regulatory density regarding labor protections, adopting a laissez-faire attitude to uphold the principles of at-will employment and maintain flexibility in the labor market. Social security for workers is generally lower in the U.S. However, even in this context, the United States enacted the Family and Medical Leave Act (FMLA) in

[30] See, *e.g.*: Ku Yan Lin (林谷燕) (2021), "Arrangement of Caregiver's Leave for Long-term Care: Referring to Two German Caregiver Leave Acts", *30 Taiwan The Law of The Sea Review*, 25-58. Bing Cheng Chung (鍾秉正) (2019), "German Care Allowance and Family Care Leave" (德國照護津貼及家庭照護假), *204 Taiwan Jurist*, 60-72 (regarding the discussion of German family care leave).

[31] Hsing-Ju Lin (2018), "The System for Childcare and Caregiver Leave Benefits in Japan and Its Legal Trends", *222 FT Law Review & Publications*, 104-115.

[32] Yu Yan Zhang (張玉燕), Yun Xiang Xu (許雲翔) *et al*. (2020), *A Study on Family Care Leave in Different Countries*, Institute of Labor, Occupation Safety and Health, MOL, at 52-61.

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1993, providing workers with 12 weeks of unpaid leave to meet their family caregiving needs. While different from European countries that offer paid leave or allowances as income substitutes to address workers' economic difficulties, the FMLA still provides an extended period of leave to meet the caregiving needs of family caregivers. Professor Cing-Kae Chiao has provided detailed explanations of the FMLA and offered critiques and reviews of family caregiving leave in Taiwan[33].

Moreover, in recent years, various states such as Maryland and California have initiated legislative amendments to provide paid leave for workers to recover from illness, care for children, and attend to family members[34]. This indicates that the challenges faced by workers who are also family caregivers, in terms of balancing caregiving responsibilities and work demands, as well as economic difficulties, have become a significant issues that cannot be ignored. Even in the United States, which is recognized for its lower regulatory density concerning labor protection, there are corresponding eldercare leave provisions to safeguard workers. Recently, several states have initiated legislative changes to address economic challenges faced by workers.

4. The issues regarding eldercare leave in Taiwan

The issue of eldercare leave involves how employed family caregivers balance their work and life and ensure that the elderly receive adequate care. This concept aligns with the notion of "care rights" proposed by Professors Trudie Knijn and Monique Kremer in 1997. They divide the concept of "care rights" into the "right to time for caregiving" and the "right to receive care". The former refers to the right of citizens to provide care to others and themselves at specific times, while the latter implies that citizens have the right to quality and affordable care[35]. Whether Taiwan could consider this concept of caregiving rights and establish it as a legal right, providing a foundation and legitimacy for eldercare leave, is a topic that deserves future discussion.

[33] Cing-Kae Chiao (2010), "Critical Review and Analysis of the Implementation of Family Care Leave System in Our Country" (對我國實施家庭照顧休假制度之檢討評析), *24 Taiwan Labor Quarterly*, 52-61.

[34] Labor Policy Research and Training Institute (労働政策研究・研修機構), *Paid Family and Medical Leave Law Enacted in the State of Maryland – 10th State Nationwide* (メリーランド州で有給家族・医療休暇法が成立 － 全米で10州目) (available at: *www.jil.go.jp/foreign/jihou/2022/05/usa_01.html) (May 2022).*

[35] Knijn T., Kremer M. (1997), "Gender and the Caring Dimension of Welfare States: Toward Inclusive Citizenship", *4(3) Social Politics*, 328-361.

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On another note, contemporary societal concepts reflect an intergenerational cooperative support relationship, transcending narrow family frameworks. It views every member of society as part of a single community sharing a common destiny, eliminating narrow family interests and individual generational interests. Therefore, childcare and eldercare should move away from the previous family-centered and individualistic approach and instead utilize the collective power of society to provide caregiving[36]. This shift must include planning, supervising, and coordinating a well-designed social security system by the state, offering childcare facilities, or planning family allowances, thereby socializing the responsibility of caregiving. Taiwan's Constitution, in Articles 153 and 155, emphasizes the state's duty to protect laborers and farmers, implement policies for their protection, and establish a social insurance system for social welfare.

Caring for the elderly is not only the responsibility of workers who are also family caregivers but is a shared responsibility of society and the state. The duty is to collectively establish a better environment and system to provide more protection and assistance to these workers, enabling them to carry out their family caregiving work with better mental health and economic resources. Simultaneously, it ensures a higher quality of care for the elderly.

To cope with the future challenges of an aging society, satisfy citizens' caregiving rights, enhance workers' quality of life, and meet the elderly's caregiving needs, the state should take responsibility for regulating the eldercare leave system. However, the design of the eldercare leave system, including its actual requirements, definitions, eligibility criteria, duration, applicable business unit size, employer manpower allocation and funding, leave procedures, salary during leave, prohibition of adverse treatment, and post-leave remedies, needs clarification. These aspects will become ongoing research topics.

[36] Mei-Chun Liu (劉梅君) (1999), "The Connection Between the 'Gender Equality in Employment Law' and 'Maternity Protection' – A Brief Discussion on the Legislative Reasons for Measures Such as 'Parental Leave' and 'Family Care Leave' Aimed at Promoting Workplace Equality" (「兩性工作平等法」與「母性保護」之關聯 － 淺談「育嬰假」、「家庭照顧假」等「促進工作平等」措施的立法理由), *242 Taipei Bar Journal*, 36-37.

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Childcare leave and income security for employees with children: failure of coordination among government, employers, and employees

Yusuke Tsunemori[1]

1. Introduction

What is the best way to balance work and childcare?

Generally, there are two ways to achieve the work-childcare balance. One is childcare leave and income security; and the other is daycare with a subsidy for the copayment. Whether people with children choose childcare partly depends on a sense of value about childcare, which is better childcare by parents or daycare staff. The choice of work and childcare is influenced by labor policy and social security policy[2]. If both policies collaborate well, parents can continue to work and have time with their children.

It is a shared agenda on how workers continue stable work with childcare. Female workers' careers tend to be interrupted by having children, and they unavoidably choose part-time jobs. In several developed countries, childcare leave provides an income subsidy, and public daycare systems are the central social policies for the agenda (Tayler-Goody, 2004, pp. 2-3, 8).

However, both policies are often exclusive of each other. For example, when a parent has childcare leave, the older children cannot use daycare even though they have attended the daycare center for 5 years. Some cities continue this rule in Japan. This rule assumes that parents who have childcare leave should care for all their children who stay home. The rule does not consider the difficulty of childcare immediately after giving birth.

The public daycare system has rules that strictly judge the need for daycare. With a long waiting list for daycare centers, judging needs and

[1] Tokyo Keizai University, Tokyo.

[2] After the 1980s, the significance of housework was discussed with the employment of female workers (Yasukawa, 2005, p. 8).

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rationing for using these services are more severe. How long parents work per month is the most important thing for the rule. The rule for childcare leave also focuses on how long parents work only. Both policies often overlook the difficulties and risks of childcare.

This paper is organized to address the following topics. First, the government should allow a mix of childcare leave with income security and daycare use. Second, the government should provide daycare for parents who do not work. Third, childcare leave should be more flexible, including shortening working hours.

2. Child care leave or day care? Social policy for work-life balance in Japan

2.1. Child care leave and income security in Japan

2.1.1. Child care leave and the childcare leave benefit

In Japan, childcare leave is limited to a year (twice). With some exceptions, workers must give up working to stay at home to raise their children for a year[3].

The essential childcare leave benefit is for workers whose children are under 1 year old, with some exemptions. The basic childcare leave is[4] 67% of the previous salary, provided for 180 days after birth, and 50% of the previous salary from the 181th day of a year[5].

2.1.2. Childcare leave and daycare for children

Childcare leave is used to get over the most challenging period until children become 1 year old. If workers want to continue their career track, they use daycare.

[3] ACL Article 5. The exemption is when the parents who have custody are dead, sick, disabled, divorced, or on maternity leave. When they cannot use the daycare center, they can extend their childcare leave. Ordinance for Enforcement of ACL Act Article 6.

[4] Employment Insurance Act 61-4. several exemptions that allow workers to receive benefits are common with the exemption for the extension of childcare leave. Ordinance for Enforcement of the EI Act 101-25.

[5] If workers earn 13%-80% of previous income during childcare leave, 80% of their previous income is deducted for wages workers who receive childcare leave. When workers earn more than 80% of their previous salary, the benefits are not paid. Ministry of Health, Labor and Welfare (2024), *Public Employment Security Offices*, pp. 10-11.

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However, there is a significant exception to the limitation of the periods of childcare leave. Workers can take leave and receive childcare leave benefits until their children become 2 years old when they cannot contract with daycare centers[6]. Childcare leave and income security must be understood in relation to public daycare systems.

There are three kinds of parents' interest in childcare leave. First, workers can continue to earn wages. Second, they can acquire satisfaction in raising children. Third, they can choose what they do, working or raising children. On the other hand, children's interests are not prioritized in childcare leave[7].

The core purpose of childcare leave is to keep the possibility of choice of pursuing a career and private life (Araki *et al*., pp. 220-221). Employers are restricted from ordering workers to work to maintain workers' "welfare". On the other hand, public daycare systems as child welfare are purposed for the children's and their parents' interest[8].

With differences in the purpose of childcare leave and public daycare systems, the two systems are not regarded as alternatives. However, both systems have standard functions that enable workers to maintain a work-life balance. Although the two systems have common functions, their social policy directions differ. Childcare leave frees workers from work while daycare frees them from childcare[9]. This distinction has made the two systems complementary.

2.2. Public day care systems in Japan

In Japan, governments have controlled daycare centers and services' supply amounts, prices, and benefit procedures. Parents must get certified

[6] ACL Act Article 5 (3)(2), Ordinance for Enforcement of ACL Act Article 6(2), Ordinance for Enforcement of EI Act 101-25.

[7] "The balance of their working and family lives" (Act on Childcare Leave, Caregiver Leave, and Other Measures for the Welfare of Workers Caring for Children or Other Family Member ACL Article 1) means "*to engage in a productive working life by making effective use of their abilities throughout their working life, as well as smoothly fulfilling their role as a family member in terms of raising their children or providing caregiving for family members*" (ACL Article 3-1(1)). "To promote the welfare of those workers" (Article 1) means interest of parents by raising their children by themselves. The interest is not for children (MHLW2002:304-305).

[8] Child Welfare Act Article 1,3-2, Child and Child Care Support Act Article 1.

[9] Childcare leave has means of request for reproduction and childcare in the workplace. The government coordinates the relationship between the employer and employee and intervenes in the alliance in reproduction and daily life in the family (Makita, 2005, p. 61).

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and contract with the daycare center to receive benefits. They must pay an earnings-related copayment for daycare (Cabinet Office, 2022)[10].

There are long waiting lists for daycare in many cities. The waiting lists provide background on the exceptional extension of childcare leave. However, the daycare waiting list has been shorter because of the declining birth rate and increasing number of daycare centers and services. The connection between childcare leave and the public daycare system should be redesigned.

2.2.1. Daycare needs

Children are divided into three types in Japan's public daycare systems[11]. There are common requirements for children and their families who experience hardships with home care[12]. The main cause of the hardship is the working obligation of parents. Therefore, dual-career parents (full-time workers) may be prioritized when many parents are on a long waiting list (Cabinet Office, 2022).

2.2.2. Childcare leave and availability of daycare

However, excessive prioritization of working hours in certifying hardship causes some problems. In some cities, when parents whose children have used daycare centers use childcare leave, the children who have used the centers must leave the centers. This local rule has caused a legal conflict[13].

The rule assumes that parents who use childcare leave and stay home

[10] Public daycare systems socialize childcare and reduce the burden of care at home. The system frees parents (especially mothers) from the burden of childcare and promotes their economic independence. In other words, it is the defamilialization of childcare (Makita, 2005, p. 65).

[11] Type 1 children (over 3 years old or older) use kindergartens and certified nursery schools for education, Type 2 children (over 3 years old or older) use daycare centers and certified nursery schools for custody and Type 3 children (under 3 years old) use daycare centers, certified nursery schools and small daycare centers for custody (CCCS Act Article 19,27,29).

[12] CCCS Act Article 19.

[13] Saitama District, December 17,2015 Case n. (Ku)34 of 2015 Chingin to Shakaihosho No.1656, pp.45. In the current certification of daycare systems, parents who use childcare leave are able to use daycare centers (Ordinance for Enforcement of CCCS Act Article 1-5.).

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can care for children who have used daycare centers. In other words, the "hardship" as a requirement only means that working parents do not stay home or do not have the physical condition (sickness, etc.) required to care for their children. However, it is difficult for the mother to care for both the baby and his or her sibling. The sibling who has used the daycare center may lose a friendship relationship. The assumption of the rule ignores the burdens of parents after birth and the interest of children who want to continue to use the same daycare centers.

2.3. Failure of coordination among government, employers, and employees

2.3.1. Childcare leave or daycare, allowance or subsidy

are childcare leave and public daycare systems alternatives to each other?

The symbolic problem of the conflict between the two systems is the extension of childcare leave with the daycare waiting list. Workers with children can extend childcare leave and the allowance until their children become 1 year and 6 months old (second extension to 2 years old. because they cannot use daycare centers[14].

Some parents who want to take longer leave apply for daycare centers that are competitive to contract. They do not want to use daycare centers and intend to be registered on the waiting list because they want to take childcare leave with their children at home. The government changes the rules more rigidly to eliminate fraud[15].

Connecting childcare leave and public daycare systems is complicated because they work through different principles. The government assumes workers do not need childcare leave because they use daycare centers. However, this assumption ignores the opportunity of selection in childcare leave or daycare centers by workers. While the purpose of childcare leave is to decide their career and how to raise children, current systems of childcare leave do not allow workers to carry on their own family life.

As pointed out above, the childcare period is too short, although public daycare systems have a long waiting list. Workers can choose to take childcare leave or use daycare until their children become 1 year old. However, after

[14] Ordinance for Enforcement of ACL Act Article 6.

[15] Workers need more proof of applying for using daycare centers through tighter rules. For example, workers prove they do not apply to daycare centers too far to go without reasonable reason (MHLW).

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1 year of age, most workers have no choice but to use daycare to be able to continue working. They must give up their careers if they want to continue raising children at home.

The main question in this paper is whether childcare leave and public daycare systems are alternatives. There are three points of conflict between both systems.

First, the principle of childcare leave does not necessarily contradict using daycare centers. Childcare leave is contracted gradually. Workers can use childcare leave while working shorter hours. Workers who shorten their prescribed working hours may also use daycare centers. Considering several considerations for workers with children, it is unreasonable that workers on childcare leave are prevented from using daycare centers.

Second, public daycare systems may accept children whose parents are on childcare leave. The principle of public daycare systems is the interest of children. For example, workers on childcare leave can use daycare centers for their older children who have used the centers. With the expansive interpretation of the hardship of custody at home, more parents have begun to use daycare centers. In addition, to working, sickness, and disability, the hardship of raising children should also be approved as a hardship requirement for using daycare centers.

Third, following the previous points, childcare leave and public daycare systems may be alternatives to each other. However, the relationship between the childcare leave benefit and subsidy for using daycare centers should be reconsidered.

3. Changing systems in 2024

In 2024, the government will revise several laws related to childcare leave and public daycare systems in Japan. The revision has a background of measures for the declining birth rate. Support for work-life balance is the main policy for the measures. On the other hand, the government proposed the slogan that children should be prioritized (Children and Families Agency – CFA, 2024).

3.1. Wage subsidy for workers who shortened their working hours

The government created a wage subsidy for workers who shortened their working hours. Workers whose children are under two years old can receive 10% of wages corresponding to shortened working hours (CFA,2024). The

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subsidy has some functions for workers. First, the subsidy may incentivize workers to shorten their working hours, although employers reduce wages. Second, it may be an incentive to continue a career. Third, the subsidy may indirectly incentivize daycare use by shortening working hours and disincentives to extend childcare leave. Shortening working hours is an effective way for balancing work and childcare. The change may be the first step for workers to use shortening working hours without wage reduction.

3.2. Daycare for "all" children

Another change is about the public daycare systems. This year, an important pilot program began in daycare systems. Parents who do not work in the program can use daycare facilities with public subsidies. The period they use daycare is limited to 10 hours per month in the first year. The government is going to extend the hours (CFA, 2024).

Although it is a small pilot program, there are significant changes in Japanese daycare systems. The conditions for using daycare have been too rigid, excluding homemakers. The program intends to support parents who have difficulty with childcare and prevent them from child abuse (CFA, 2024). Daycare for children primarily has the function of reducing the strain of childcare. However, current public daycare systems have emphasized letting parents work because of the increasing number of dual-income households in the Japanese labor market.

3.3. Flexibility in work-life balance

In current systems, childcare leave and daycare are distinguished rigidly so that many workers must make an undesired choice 2 years after their children's birth. If they can use daycare when they do not work, childcare leave and daycare will work together to reduce the burden of work and childcare. If workers who shorten working hours use daycare longer, they will be able to balance work and childcare substantially.

Therefore, the 2024 revision is essential. Workers can continue to work and earn wages while raising children by shortening their working hours. Wage subsidies for shortening working hours expand workers' flexibility by lowering the risks of reduction of income. If workers who shorten their working hours can use daycare centers and receive a subsidy from the public daycare system, workers on childcare leave can use the centers and receive the subsidy both. The availability of the centers and the subsidy

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must not be definitive factors in using childcare leave and the childcare leave benefit. There may be various combinations of childcare leave and daycare.

Daycare for all children may also expand the flexibility of using daycare centers. The program allows workers to use daycare centers whether they work or not (Enomoto, 2024, pp. 65-66). When workers use childcare leave or work for very short hours, they may have the burden of raising children because childcare leave and shortening working hours do not always solve the hardship of childcare. Considering the balance of work and childcare and the difficulty of childcare, the connection between working and the subsidy for using daycare centers should not be rigid.

Childcare leave interrupts work but is not a respite from childcare. With a mix of childcare leave and using daycare, childcare leave may give workers options: devoting themselves to childcare, balancing working and childcare, or resting from both working and childcare. The possibilities are significant for female parents with childcare burdens.

4. Conclusion

If social risk urges workers to change their behavior toward work and childcare in the labor market, the government should support workers who cannot change their behavior because of the distorted gender roles in the labor market and families (Taylor-Goody, 2004, pp. 10-11).

In traditional discussions, childcare leave and public daycare systems have a common purpose of supporting female workers to continue working. Workers must choose between the two options: care or work. However, the two systems have different purposes and functions. With the objective of releasing parents from the burden of childcare, the public daycare system can support parents to continue to work and care in the long term. If the flexibility of childcare leave used by both parents is expanded, female workers may be released from the burden of work and care because childcare leave and the participation of male workers in childcare may help correct the distorted gender roles in families.

Although childcare leave and public daycare systems should pursue common purposes, these systems should be discussed in terms of the original purpose of each system.

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Part III
The new trends in the collective labour law

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The right to strike in Romania, between freedom of expression and democracy

Carmen Constantina Nenu[1]

1. Introduction

The freedom of expression is a fundamental right of Romanian-European citizens, expressly declared by the Constitution (art. 30). According to the fundamental law, the freedom of expression of thoughts, opinions or beliefs and the freedom of creations of any kind, through live speech, writing, images, sounds or other means of public communication, are inviolable.

In the same register of fundamental rights, the Romanian Constitution (art. 43) also establishes the right to strike for employees in order to defend their professional, economic and social interests. Law 367/2022 on social dialogue establishes the conditions and limits for the exercise of this right, as well as the guarantees necessary to ensure essential services for society. Thus, the law defines a strike as the voluntary and collective cessation of work by employees/workers.

Restrictions on the right to strike are established for certain professional categories, thus protecting the public interest. Regarding the exercise of the two fundamental rights, with their legal limitations, the natural question arises, whether the Romanian legislator's measure to limit the exercise of the magistrates' right to strike is consistent with the social reality in which this professional category understands to exercise its right to free expression.

The Romanian magistrates, on several occasions, chose to protest against the legislative intentions, by refusing to judge all the cases pending in the courts and granting new trial terms. As the refusal to judge essentially represents a voluntary and collective cessation of work, through which the magistrates exerted pressure on the Romanian legislator not to change their

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conditions for obtaining a service pension, the protest itself circumscribes the notion of a strike.

Nevertheless, the magistrates, although they did not judge the cases pending in the courts in which they carried out their activity, were remunerated and benefited from all the rights that have their source in the performance of work. However, those who declared a strike in compliance with the legal provisions, such as the teachers, suffered the consequences of the voluntary and collective termination of work, their employment contracts being suspended and salaries not being paid for the entire period of the strike.

Thus, the natural question arises whether the protest of Romanian magistrates, declared by them to be a form of freedom of expression, does not, in reality, represent a strike, a form of protest prohibited by law for this professional category. We are going to answer this question in the present study.

2. Restrictions on the right to free expression of magistrates

When analyzing the right to free expression, we must consider, in addition to the constitutional provisions those of art. 10 of the European Convention on Human Rights according to which:

1. Everyone has the right to freedom of expression. This right includes freedom of opinion and the freedom to receive or communicate information or ideas without the interference of public authorities and regardless of borders […].
2. The exercise of these freedoms, which entails duties and responsibilities, may be subject to formalities, conditions, restrictions or sanctions provided for by law, which constitute necessary measures, in a democratic society, […] for the protection of the reputation or the rights of others.

The guide regarding art. 10 of the European Convention on Human Rights includes provisions relating to the special status of actors in the field of justice and their freedom of expression in the context of judicial proceedings. It states that the general principles applicable to the freedom of expression of judges are summarized in points 162-167 of the Baka judgment against Hungary (MC). The special mission of the judiciary in society imposes on judges a duty of discretion [Morice v. France (MC), point 128].

However, the latter pursues a certain goal: the word of the magistrate, unlike that of the lawyer, is considered the expression of an objective assessment that engages not only the one who expresses himself, but also,

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through him, the entire institution of justice (ivi, point 168). The Court, exercising its control, must take into account the fact that, when the freedom of expression of public officials is at stake, the "duties and responsibilities" referred to in art. 10 § 2 are of particular importance, which justifies granting a certain margin of appreciation to the national authorities to decide whether the imputed interference is proportionate to the above-mentioned purpose [Baka v. Hungary (MC), § 162; Vogt v. Germany, § 53; Guja v. Moldova (MC), point 70; Albayrak v. Turkey, § 41].

Given the prominent position of the judiciary among state institutions in a democratic society, this approach also applies to the freedom of expression of judges in the exercise of their duties, even if the magistrates are not part of the administration in the strict sense (Albayrak v. Turkey, § 42; Pitkevich v. Russia (dec.)).

In the case of magistrates, their right to free expression has a number of significant restrictions. Nevertheless, the Romanian magistrates publicly expressed, even during the court sessions, their opinions regarding the Government's social policy, in the name of "judicial independence" and "protection of the rule of law". The form of expression consisted of a protest by the magistrates, materialized in the refusal to judge, by granting new trial terms, against the will of the trial participants, invoking the principle of judicial independence. Was this protest correct, moral, ethical or legal?

In order to identify a legal framework for the Romanian magistrates' protest, regarding the pension law draft, it is necessary to present and analyze the principle of the independence of the judiciary. Through the Declaration on judicial ethics, adopted by the General Assembly of the European Network of Judicial Councils, during the meeting in London, June 2-4, 2010, it was emphasized that "*independence is the right of every citizen in a democratic society to benefit from a justice which is independent of the legislative and executive power and which protects the freedoms and rights of citizens in a state of law*". Also, "*it is up to each judge to respect and work in order to maintain the independence of the judiciary, both in terms of individual and institutional aspects*".

The magistrate's right to free expression has a limit, namely the citizen's right to independent justice, equidistant from politics, balanced and vertical. Also, a judge's freedom of expression is limited by the protection of the reputation or rights of other fellow magistrates.

In the "Bangalore Principles of Judicial Conduct" it is stated that they are intended to establish standards for the ethical conduct of judges. These principles "*start from the premise that judges are responsible for their conduct towards institutions specifically created to ensure compliance with judicial norms, institutions that are themselves independent and impartial*".

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Also, art. 4 of Law n. 303/2022 regarding the status of judges and prosecutors[2] provides that "*Judges and prosecutors are obliged, through their entire activity, to ensure the supremacy of the law, to respect the rights and freedoms of individuals, as well as their equality before the law and to ensure a non-discriminatory legal treatment to all participants in judicial proceedings, regardless of their quality, to comply with the Code of Ethics of judges and prosecutors and to participate in continuous professional training*".

Consequently, magistrates must demonstrate morality and enjoy a good reputation. Morality resides mainly in a philosophy of "communication" with other people. Kant separates morality from any pursuit of happiness: "*Morality is therefore not, properly speaking, the doctrine that teaches us how to be happy, but how we ought to be worthy of happiness*" (*Critique of practical reason*, 1788). The only moral feeling is respect: "*This is the true motive of pure practical reason. It is nothing but the pure moral law itself, in so far as it makes us feel the sublimity of our own supersensible existence*". Also, it is the pure moral law in so far as it subjectively produces respect for people's superior decision… respect for the moral law dictates the formula of a "categorical imperative". This is true for people who are at the same time conscious of their sensible existence and of the dependence which results for them regarding their nature, pathologically affected: "*They act according to the saying which at the same time can itself become a universal law*" (*The foundation of the metaphysics of morals*, 1783). Everyone carries within themselves the moral law and must, therefore, be an object of respect: "*For rational beings are all subjects of the law according to which no one must ever treat himself and treat others simply as means, but always at the same time as ends in themselves*".

Therefore, regardless of their opinions, magistrates must carry out their work with professionalism and balance, and their political beliefs must not be reflected in the decisions taken. Yes, they are free to express their opinions, but this right of magistrates has several limitations and restrictions.

The Charter of Fundamental Rights of the European Union regulates, in art. 11, freedom of expression and information. The first paragraph of this article provides: "*Every person has the right to freedom of expression. This right includes freedom of opinion and freedom to receive or impart information or ideas without interference by public authorities and regardless of frontiers*".

[2] It will undergo changes brought by Law n. 282/2023 for the modification and completion of normative acts in the field of service pensions and Law n. 227/2015 regarding the Fiscal Code.

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CCJE opinion n. 25 (2022) on the freedom of expression of judges[3], was developed on the basis of previous opinions of the CCJE, the Magna Carta of the CCJE Judges (2010) and the relevant instruments of the Council of Europe, in particular the European Charter on the Statute of Judges (1998) and the recommendation of the Committee of Ministers CM/Rec(2010)12 on judges: Independence, Efficiency and Responsibilities, Report of the European Commission for Democracy through Law (Venice Commission) on the freedom of expression of judges (CDLAD(2015)018).

The opinion takes into account the UN Basic Principles on the Independence of the Judiciary, the Bangalore Principles of Judicial Conduct and the Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, which also concerns the exercise of freedom of expression by judges. Also, the opinion is based on the jurisprudence of the European Court of Human Rights and takes into account the answers of CCJE members to the questionnaire on the freedom of expression of judges.

The opinion deals with the freedom of expression of judges and discusses the main issues regarding judicial expression. It addresses the legal and ethical obligation of a judge to rule to protect the rule of law and democracy domestically, but also at the European and international level. It examines judicial expression on matters of interest to the judiciary as well as controversial topics of public interest and examines the reserve duty of judges.

The reserve obligation is definitive as a reserve duty imposed on the judge either by the judicial authority itself or by the legislator. Judicial reserve includes the notion of judicial discretion, reserve or moderation.

From the point of view of the magistrates, the reserve obligation imposed on them cannot suppress the freedom of thought and expression, but it nevertheless prohibits any scandalous critical expressions, likely to undermine the trust and respect that their office should inspire litigants[4].

Magistrates must express their opinions in a prudent, measured manner, because the obligation of impartiality they are bound by must satisfy the demands of the public service whose functionality they ensure. The sanctions applied in case of deviation from these principles must be weighted, however, in order not to produce a discouraging effect on those

[3] Advisory Council of European Judges (CCJE), *CCJE opinion n. 25 (2022) on the freedom of expression of the judges*, Strasbourg, December 2, 2022 text available at: *www.forumuljudecatorilor.ro/wp-content/uploads/Avizul-CCJE-nr.-25-2022-privind-libertatea-de-exprimare-a-judecatorilor.pdf* (accessed: 05.09.2024).

[4] Conclusion of professor Elena Simina Tănăsescu, member of the Superior Council of the Magistracy, expressed during the conference "Freedom of expression of magistrates. Limits and vulnerabilities".

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who would like to participate in the public debate on the effectiveness of judicial institutions[5].

The principle of separation of powers supports the freedom of expression of judges, if a matter of public interest, such as the functioning of the justice system, is at issue. The rule of law ensures the equality of all (citizens or state actors) before the law. Its effectiveness depends in part on public confidence in the independence and authority of the judiciary.

The separation of powers presupposes both judicial independence and the freedom of expression of judges, resulting in a tension between the objective of preventing judges from behaving like politicians and, at the same time, that of supporting the freedom of expression of judges as evidence of judicial independence.

The CCJE takes a broad view on the personal scope of the right to freedom of expression of judges as an individual right. Accordingly, a judge enjoys the right to freedom of expression like any other citizen. The right to free expression of judges extends to personal opinions expressed in connection with the exercise of their office and gives judges the right to make statements outside court as well as in court, both in public and in private, and to engage in public debate and in social life in general.

In their official capacity, judges have an important role in society as guarantors of the rule of law and justice. The very essence of the judicial profession is the ability to look at the subjects of litigation in an objective and impartial manner. It is equally important that judges are seen to have this ability. This is because they need the public's confidence in their independence and impartiality to be successful in carrying out their duties and maintaining the judiciary's authority to resolve legal disputes or to determine a person's guilt or innocence following a criminal charge.

It follows that judges must affirm these values through their behavior. Therefore, it is legitimate for the state to impose on judges a reserve obligation to pay due attention to their role in society.

Limitation of freedom of expression always requires substantiated justification. In the jurisprudence of the European Court of Human Rights (ECHR), an interference is considered necessary in a democratic society when it responds to a "pressing social need" and is proportional to the legitimate aim.

The proportionality of a measure requires that it be the least restrictive measure. It follows that a balance must be struck between a particular

[5] See opinios expressed during the debates within the conference "*Freedom of expression of magistrates. Limits and vulnerabilities*", available at: *www.forumuljudecatorilor.ro/index.php/archives/608* (accessed: 05.11.2023).

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judge's fundamental right to freedom of expression and a democratic society's legitimate interest in preserving public confidence in the judicial system. When an interference is assessed, the proportionality of the sanction or other measures should also be examined. Sanctions should not have an inhibitory effect on the exercise of freedom of expression by other judges, that is, they should not prevent other judges from exercising it in relation to the administration of justice and the judicial system.

In all public interest statements, judges should express themselves with caution, moderation in tone, balance and respect. They should refrain from discriminatory statements, politics, philosophical or religious proselytizing or militancy.

3. The Romanian magistrates' protest, between the right to free expression and the right to strike

Did the protest of Romanian magistrates, launched in June 2023, consisting in the refusal to judge the cases pending before the courts and to grant new trial terms, meet the constitutive elements of a strike or a protest as a form of freedom of expression?

Dissatisfied with the project on service pensions, magistrates in several courts and prosecutor's offices protested, postponing indefinitely all but urgent cases. The initiative of the protest actions started from the Superior Council of the Magistracy (CSM). The position expressed by the magistrates in the General Assemblies regarding the draft law on special pensions and supported by the Superior Council of the Magistracy was that the situation is of particular gravity and fundamentally damages the independence of the judiciary and the status of the magistrates, with direct consequences on the act of justice.

The Government and the Parliament were accused of "*lack of transparency, predictability*" and "*disloyal behavior*" in relation to the proposals to amend the law on the status of magistrates. It was stated by the magistrates that the legislator did not take into account "*the inhuman volume of work, among judges, aggravated by the massive departures from the judicial system. That happened in the context of the incoherence and lack of transparency of the legislative power, the chronic undersizing of personnel schemes, not adapted by years of the huge volume of cases, the incompatibilities and prohibitions of the profession*" at the time of drafting the legislative proposal.

The CSM claimed that it did not oppose to the reform of the service pension system, but that "*normative solutions must be found to give efficiency to this process, respecting the independence of the judiciary and the jurisprudence of*

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the Constitutional Court in the matter". The demands of the magistrates aimed at "*regulating a real method of phasing the increase in the retirement age, over a reasonable period of time, so as not to create discriminatory situations between professionals with similar seniority in the judicial system, but with a different biological age*". In addition, it was requested that the legislative solution also provide for the possibility of early retirement of magistrates, similar to the solution that is regulated in the public pension system.

The point of view of the executive, expressed through the voice of the Minister of Justice, was that "*it respects the magistrates' right to free expression, but it starts from the premise that dialogue is the solution to solving any problem of the judicial system, not protest*".

The Romanian magistrates argued that their protest was a form of freedom of expression, circumscribed by the principles that govern the independence of the judiciary. In support, they brought arguments from the CCJE, which said that statements regarding matters of concern for the judiciary as an institution are part of the statements that could negatively affect the authority and reputation of the judiciary.

Judges have the right to make requests and comments regarding their status, their working conditions, as well as any other questions related to their professional interests. Judges' associations play a prominent role in this matter. Judges should also exercise restraint to avoid compromising their impartiality or independence.

According to art. 28 of the Charter of Fundamental Rights of the European Union[6], workers and employers or their organizations have the right, in accordance with Union law and national laws and practices, to negotiate and conclude collective agreements at the appropriate levels and to have recourse, in case of conflicts of interest, to collective actions to defend their interests, including strikes.

In Romania, a strike can only be triggered during a collective labor conflict, during the negotiation period of a collective labor contract. The strike is illegal when it was triggered for reasons other than those expressly provided for by the law. The Romanian legislator limited the exercise of the right to strike both from a temporal point of view, being limited to specific operations, and from the point of view of the categories of employees who

[6] The *Charter of Fundamental Rights of the European Union* is a document adopted by the European Commission, the European Parliament and the Council of the European Union on December 7, 2000, at the Nice European Council. It contains civil and political rights, as well as economic, social and cultural rights and benefits from the same legal value as the European Union treaties. The Charter acquired binding legal force with the entry into force of the Treaty of Lisbon, in December 2009, it now has a legal force equal to that of the EU treaties, published in *OJ C 202*, 7.6.2016, pp. 389-405.

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can declare a strike, as a means of protest to defend their economic and professional interests.

In considering the normative aspects that regulate the exercise of the right to strike in Romania, it follows that the protest of the magistrates, in the form chosen by them, constituted a true strike, which did not comply with the requirements to be considered legal.

4. Conclusions

At the end of CCJE Opinion n. 25 (2022) regarding the freedom of expression of judges, a series of recommendations are formulated, among which we mention:

1) A judge enjoys the right to freedom of expression like any other citizen. In addition to this individual right of the judge, there is a requirement for the free participation of judges in debates of public interest, especially regarding matters related to the judicial system, a requirement imposed by the principles of democracy, separation of powers in the state and pluralism.
2) In situations where democracy, the separation of powers in the state or the rule of law are threatened, judges must be firm and have the obligation to express themselves in defense of the independence of the judicial system, the constitutional order and the restoration of democracy, both at the national level, as well as international. This includes views and opinions on matters that are politically sensitive and extends to both the internal and external independence of individual judges and the judiciary in general. Judges speaking on behalf of a judicial council, professional association or other representative body of the judicial system enjoy a greater freedom of appreciation in this respect.
3) Apart from associations of judges, judicial councils or any other independent body, judges individually have the ethical duty to explain to the public the judicial system, its functioning and its values. By increasing understanding, transparency and helping to avoid erroneous public representations, judges can contribute to promoting and maintaining public confidence in judicial activity.

In the Guide on the jurisprudence of the European Convention on Human Rights[7], Mass Protests – prepared by the Registry of the European Court of

[7] *Guide on the case-law – Social rights*, available at: *rm.coe.int/guide-social-rights-eng/1680aae067* (accessed: 05.09.2024).

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Human Rights, it is stated that protests constitute a form of expression of opinion, in the sense of art. 10 of the ECHR.

However, analyzing the international, European and national normative provisions, it follows that the magistrates' protest, from the summer of 2023, constituted a form of strike, not permitted by law for this professional category, and its consequences were harmful, affecting public confidence in the independence of the judiciary, in the force law, in democracy and in the separation of powers in the state.

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Necessary compliance with the principle of progressivity on labor collective agreements as a fundamental labor right

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Abstract

Through a bibliographical review based on books, articles, and journals addressed on themes and doctrinal axles that will assign its theoretical basis, this scientific paper intends to introduce, on a general basis, the importance of the progressivity principle of labor rights to be established on labor collective agreements as compliance for the human rights essential importance on constitutional democratic countries. The research problem intended to be dealt with is whether an eventual labor rights reduction stated on collective bargaining agreements has the potential to mitigate the labor relationships protective object and, in consequence, to confront the democratic constitutional pillars, as the human rights international legal instruments. The elaboration of labor collective agreements represents one of the methods legitimated to the participation of worker's categories on its interests, being stated in 1988's Brazilian federal constitution in article 7, item XXVI. In this respect, labor rights progressiveness essentially presents itself to the civilization basis and integrity of democratic countries. More attention should be given that progressiveness is stated in the 1988 Brazilian federal constitution, as an internationally binding basis. Therefore, labor collective agreement show itself as one of the democratic instruments for guarantees of freedom and human rights ensuring the central core of

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multidimensional democracy. In conclusion, effective compliance with the collective agreement, effective observance of labor rights, and the establishment of public labor policies are closely related to the improvement of employees' and labor forces living conditions, ensuring the essentiality of human rights and constitutional countries. As a research method, the bibliographic descriptive method will be used, analyzing books, scientific papers, and further written sources on those selected themes.

Keywords: Human Rights; Labor Law; Progressivity, Labor Collective Agreement, Democracy.

1. Introduction

Labor is a social phenomenon that involves society and its members, and its main object is the reciprocal exchange of obligations for each part of the relationship with a social purpose. In the Brazilian framework, the regulation of those reciprocal obligations follows the 1988 Brazilian Federal Constitution that, despite its norms, recognizes either the legislation, as a heteronomous source of law, and also the collective autonomy of the labor categories, represented by the labor collective agreements.

Those labor agreements accomplish important roles in society, one of the is the civilization function, which runs by the humanist constitutionalism launched by the mentioned Federal Constitution, the international compromises the Brazilian state has enrolled, and the ordinary legislation approved as the constitutional rules, appreciating a fair balance between the social value of workers and the capital, the decent work and the human dignity as a way for the people to acquire the citizenship for the maximum effect of the democracy, according to the social justice.

Nevertheless, in the last 10 years, the Brazilian National Congress has launched some reforms in the law, modifying the traditional labor understanding in Brazil, and promoting severe modifications on the mechanism of understanding the legislation, some of them being considered by the Federal Constitution by the Supremo Tribunal Federal, the Supreme Court. One of those changes is the understanding of the progressivity of the labor agreements that have faded after those reforms.

So, this article intends to demonstrate the importance of progressiveness as a principle of human rights, and its necessary compliance, to the labor relationships along with the traditional humanistic interpretation that values the dignity of the work and the human being.

This article is divided into three chapters, which the first one explains

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the structure of labor agreements in Brazil by the Federal Constitution and the ordinary law and the legal origin of the collective instruments as an instrument of human basic rights.

The second chapter examines the main functions accomplished by the bargaining agreements, the traditional protection by the Constitution, international compromises and how the reforms over the last 10 years changed the understanding of the institute, running in the opposite direction from the constitutional terms.

The third and last chapter shows the progressivity related to the improvement of working conditions, the main constitutional term on article 7th and the international covenants the Brazilian state has celebrated, and the way this increase of conditions is essential in ensuring the decent work by protecting the dignity of work, guaranteeing the citizenship to assure the democracy. On the bottom line, the conclusions will be presented.

2. Labor collective agreements as an expression of democracy on Brazilian legal framework

A modern concept of democracy surrounds the existence of a strong and dynamic public space in which general interest themes can be freely debated (Sarmento, 2006). That is the reason why legal standards allow not only legal rules but also collective autonomy to be the regulators of citizen's duties and rights. Collective autonomy is a consequence of the misalignment between social and economic relationships and individual freedom, serving as a means to prevent or address the abuses of those who obtain more economic and political powers than employees.

Labor collective agreements are a corollary of collective autonomy and form one of the bases that society has to emphasize citizenship in its entirety through the constitutional guarantees of fundamental human rights. Historically it is important to note that the key milestones in the acquisition of fundamental rights are the North American Declaration of Independence (1776) and the French Revolution (1789), as they represent the distribution of political power to those who, until this referred moment, had no access to political instruments.

Not only the liberal democracy has the written constitutions as the main instrument to expose the principal rules of the states, but especially to strengthen the conquered guarantees that represented the civil and political freedom of that historical period, revealing as essential the primacy of constitutions on each legal standards states (Delgado, 2015a; Brandão, 2022).

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Nevertheless, even though some important political space had been ensured in the liberal state, democracy did not reach its entire extent. The concentration of political power held by the small portion of the society whose economic power was on their hands, associated with the industrialization effects (Sarlet, 2015). Made the less favored portion of that society organize themselves towards to fight for the political space and rights never had before, by requesting the government´s presence in that (Delgado, 2008). Not only did the welfare state reinforce civil and political freedoms, but also conquered another sort of freedom like the social, economic, and cultural ones, allowing those portions of society to participate more often in political decisions.

Considering all the events that happened in the first half of the twentieth century, most of them known as experiences that horrified humanity, the constitutional structures moved towards the sense of ensuring human dignity purposes, protecting the rights of solidarity and amplifying the legal representation beyond the political sphere. In this way, democracy turns out to protect the be seen by a multidimensional perspective (Delgado, 2015a). In which are still present in the social, economic, cultural, and institutional spheres. That is exactly one of the roles played by labor collective agreements protecting the workers' and employers' concerns, ensuring the values of society to establish democracy.

In Brazil, the 1988 Federal Constitution states the recognition of labor collective agreements on items XIII, XIV, XVI, and XXVI of article 7, affirming fundamental employee's rights and allowing the legal reception of the ordinary legislation as the main labor rule: Consolidação das Leis do Trabalho (CLT).

Even though the democratic values of the Brazilian Federal Constitution and from the international conventions the nation compromised itself have been attached to the society – except for the ILO´s International Convention n. 87 – as of 2017, some ordinary legislation reforms faded the main humanistic idea incorporated into the legal documents mentioned before. The Brazilian National Congress approved ordinary laws modifying several articles from the general law (CLT), highly diverging from the traditional labor humanistic understanding of the Federal Constitution, especially on labor collective agreements themes.

One of the most significant and insecure measures taken by those job instability standards was the extinction of the Ministry of Labor and Employment and the consequent incorporation of the themes to the Ministry of Economic Affairs. This extinguished Ministry represents a historic heritage from the beginning of organized labor law in Brazil in the 1930s, and by its end not only the process of discussion of labor issues had reduced, but also

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had a significant decrease in the patterns of surveillance and compliance of the legislation.

Concerning themes related to the collective labor law, CLT's articles 611-A and 611-B have been created and nominated as "the agreement over the legislation" in which the collective agreements can overcome the legislation, even in some unavailability themes, such as occupational safety and health issues, and unnecessarily gathering constitutional rights unsusceptible to be overcome by agreements.

In terms of working hours, those laws created on general law (CLT) the article 59-A that states the work based on a rotating shift of twelve hours of job per thirty-six of resting time could also be celebrated by individual agreement, in opposition as stated on the Federal Constitution.

The Brazilian Supreme Court on the judgment of the General Precedent n.1046 also attributed to the labor collective agreements a diverse interpretation of the democratic Federal Constitution values. In this legally binding precedent, the court understood that bargaining agreements could reduce or limit rights stated in the law, provided not reducing absolute unavailable rights.

Even though democracy and its values have been strongly attached in Brazil over the years, the labor law has to deal with some attempts to hurt its fundamental basis, especially on the labor collective agreements issues, part of the fundamental constitutional nucleon, which had been scratched by the ordinary law and event by the Supreme Court understanding.

3. Functions of labor collective agreements

Once the Labor Law is a branch of social law, its content is driven by legal principles that establish distinct functions revealed by political behaviors, public purposes, and the expression of some societal values, including the appreciation of labor collective autonomy, already shown as a fundamental tool for the balance between the labor force and the employers, as stated on the Federal Constitution.

The economic role of the labor collective agreements recognizes the power of the instrument to enhance the regulation of the rights and duties of workers and employees. Assuming there are some unavailable legal standards, Mauricio Godinho Delgado (2015a) asserts that the prevalence of the bargaining agreements while in conflict with the legislation happens in cases where the collective agreements are composed of a higher level of guarantees than the legislation or in the case the labor agreements to negotiate relative standardized unavailable rights.

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As the author´s interpretation, those collective instruments occur to harmonize the relatively unavailable labor rights (Delgado, 2015), being previewed on the Federal Constitution and the ILO's International Convention n. 154, to improve a better balance between the labor condition for the employee and even preserve the social costs for the employer (Meirelles, 2008), before a constant neoliberal tendency (Carvalho, Santos, Lima, 2023; Pereira, Freitas, 2023).

Once the main political decisions over the years have always been made by the members of a wealthier portion of the society (Carvalho, Santos, Lima, 2023), collective agreements also have a relevant social-political function to spread the collective interests towards other actors responsible for the political decisions, legitimating them to represent the interest of the workers.

In these terms, not only does the Brazilian Constitution affirm trade unions as the main actors legitimated for those negotiations, but also a large number of international documents reveals the importance of collective agreements as a factor in decreasing disputes, ensuring more social and political balance, as ILO´s International Conventions n. 98 and 154, item II of the International Covenant of Economic, Social and Cultural Rights Article 6th, the San Salvador Additional Protocol, and, especially on South American ambiance The Social and Labor Declaration of Mercosul.

On equal importance, ILO's 1998 Declaration on Fundamental Principles and Rights at Work and its Follow-up mentions that members compromise themselves to "*freedom of association and the effective recognition of the right to collective bargaining*" clearly revealing as a principle the highlighted importance of the instrument for the democracy.

It needs to be highlighted that the mandatory and constitutional participation of trade unions in those labor collective discussions is justified for one of their main roles to be responsible for ensuring the fundamental rights on the legal framework, either creating guidelines for all state powers or requesting better work conditions for the workforce, allowing this person to reach its citizenship (Pereira, 2007) as also stated in the Declaration of Philadelphia as one of the axles for the recognition of the dignity of the worker (Delgado and Ribeiro, 2013), which has been affirmed by the ILO's Committee on Freedom of Association entries (Nicoladeli, 2022).

Civilization patterns are one of the main pillars of a humanistic perspective and need to take the lead in all interpretations of the legal instruments in a democratic rule of law state. Concerning the labor bargaining agreements, there is an important civilization role accomplished by the fact the creation of legal standards by them is surrounded either by the absence of protection on individual ones or also some portion of lethargy from the legislation before a dynamic society influenced by globalization and neoliberalism. The

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humanistic purposes of labor collective autonomy searches to fill the gap of representation and ensure more democratic standards to guarantee the fundamental labor rights.

Once the main functions of the bargaining agreements represent the essential democratic and humanistic spirit expressed in the Constitution, those collective terms need to be understood as a manner to acquire better work and life conditions for the employees, allowing the society to have their actors with the interests more balanced each other, spreading the sources of decision all over the society, not limiting to restrict groups and to addition some fundamental contents on themes either the individual agreement or the heteronomous sources left a lack of democratic content.

4. Progressivity as a main tool for democracy

As per Universal Declaration of Human Rights, human labor is considered an object of human rights protection, so is labor law considered a human rights branch and its standards have legal superiority not only by the hierarchy of legal terms (Ramos, 2023; Canessa Montejo, 2007; Mazzuoli, 2022), but also by principles (Delgado, Alvarenga, Guimarães, 2019) which abstract nature allows the resolution of the issues in a wider range than the rules.

In that manner, along with other principles like the *pro persona* (Piovesan, Facchin, Mazzuoli, 2019), even the *maximum effectiveness of human rights standards* (Ramos, 2023), and the *nondiscrimination of human rights*, the principle of progressivity is shown as one of the most important legal institutes for the protection of human rights.

As a corollary institute from the civilization role, the improvement of workers and workforce conditions is also known as one of the main functions inserted on the labor law and also on labor collective agreements structure (Meirelles, 2008; Delgado, 2015a).This progressive increase in labor conditions is directly related to a contemporaneous conception of human rights that understands freedom never could be interpreted as disrupted from equality, being universal and indivisible (Piovesan, 2018), due to those characteristics, the governments must be the main subjects responsible for their guarantees (Caldas, 2017).

Other fundamental international documents of human rights also affirm the essentiality of the progressiveness for labor rights, as the International Covenant of Economic, Social and Cultural Rights, either the San Salvador Additional Protocol to the American Convention of Human Rights, the Social and Labor Declaration of Mercosul, and the Sustainable Development Goal n.

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8 (Decent Work and Economic Growth), once their General Comment n. 18 from the Economic, Social and Cultural Rights Committee of United Nations.

Multidimensional democracy is in complete accordance with the modern concept of democracy and perfectly applied to the labor collective agreements since they are intended to improve life conditions. Its division not only into the political perspective, but also from a social, economic, cultural, and institutional shows a dynamic view of society and its needs to reach the requirements to be considered the democratic rule of law state.

The social perspective of labor agreements allows the creation of some public policies responsible for those less favored, improving the public institutions. In consequence, the economic perspective is directly related to the role the bargaining agreement has in harmonizing relative unavailable terms, reducing the income concentration. The institutional and cultural ones are related to themselves which means that labor agreements can change the way of thinking for the society to reduce the distances for access to public institutions and culture, and in a row, reduce de unbalance between the members.

In this way, progressiveness as a principle means once the fundamental nucleon of our Constitution is the respect of dignity, the Brazilian framework must be watched by the progressiveness lenses, to allow the society to acquire the democratic spirit.

5. Conclusions

Improving better conditions for workers is an evident reflex of the human dignity that is being set up in each society. Decent work is recognized the productive and quality, exercised in equity, safety and human dignity, and constitutes one of the fundamental conditions to poverty overcoming, the social inequality, the democratic governance and the sustainable development, which goals converge themselves to its characterization. Denying work on these conditions is, ultimately, denying human rights and the opposite of decent work is slavery or forced work (Brito Filho, 2014; Arruda, Mohana, 2023).

As can be observed, labor collective agreements are a legal institute with a clear purpose to reinforce the democratic legal basis of balancing the employment relationship by irradiating dignity to the workers. As the Brazilian Federal Constitution on the head of its article 7th and several international covenants celebrated by Brazil, those bargaining agreements have a strong function (beyond others) to increase the employee's life conditions by the humanism incorporated by 1988 multidimensional democratic rule of law.

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Sindicatos y negociación colectiva en el Derecho Internacional: el problema no está en la regulación[1]

Luis Antonio Fernández Villazón[2]

1. Introducción

Los nuevos escenarios laborales que han ido conformándose en las últimas décadas (surgimiento de nuevas formas de empleo, aparición de nuevos modelos de empresa, impacto disruptivo de las nuevas tecnologías, etc.) parecen haber conformado un entorno hostil para la actuación de los sindicatos y su principal medio de acción: la negociación colectiva[3]. A ello se unen una tendencia constante al decrecimiento de la tasa de afiliación a los sindicatos en todo el mundo y una caída general de la confianza de los ciudadanos en esta figura. En este contexto, han vuelto a cobrar fuerza fórmulas alternativas de interlocución con los trabajadores como la negociación directa con el conjunto de la plantilla o con comisiones provisionales elegidas específicamente para la ocasión.

Sin embargo, el sindicato y la negociación colectiva son fórmulas de defensa y acuerdo de intereses de eficacia probada y gran relevancia para la dimensión social de los derechos humanos. Por ello gozan de importante protección en la normativa internacional. El presente trabajo realiza un análisis de esa normativa internacional, tanto la universal como la regional europea. El objetivo no es sólo aquilatar el rol encomendado por los diversos instrumentos a ambas instituciones, sino valorar la potencialidad

[1] La presente comunicación ha sido realizada en el marco del Proyecto Proyecto de Investigación NEGOCIA2: "NEGOCIAción colectiva y Diálogo social para una Ordenación Sostenible del trabajo" (Ref.: PID2022-137853NB-I00), financiado por MCIN/ AEI/10.13039/501100011033/ FEDER, UE).

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[3] Sobre el particular *vid*., entre otros, Álvarez Alonso (2018), Miranda Boto (2022), Pastor Martínez (2028), Weil (2014).

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que su regulación les otorga para enfrentar los retos planteados por los ya mencionados nuevos escenarios laborales. En definitiva, trata de determinar si las normas internacionales sobre libertad sindical y negociación colectiva proveen soluciones adecuadas para enfrentar los nuevos retos.

2. La normativa de la ONU y de la OIT

El derecho a la libertad sindical es un derecho humano que se encuentra reconocido ya en la Declaración Universal de Derechos Humanos en su artículo 23.4. La formulación parece insistir principalmente en la vertiente asociativa del derecho, donde lo relevante es la libertad para fundar las organizaciones y la opción de afiliarse o no a ellas. No obstante, cabe destacar que la declaración separa el derecho general de asociación (art. 20) del específico de sindicación, que es abordado en el ya mencionado artículo 23, junto con otros derechos de marcado tinte laboral, como son el derecho al trabajo y a la libre elección de profesión y oficio, la protección por desempleo o una remuneración equitativa. De esa manera, la propia distribución del texto destaca el carácter específico de la libertad sindical como derecho asociativo y su vinculación funcional al ámbito de las relaciones laborales.

Esa dimensión funcional o finalista es clave para calibrar el alcance y el contenido del derecho, pues fundar sindicatos y asociarse a ellos no es algo que se haga en el vacío o sin una finalidad. Por el contrario, se trata de actividades con un objetivo muy definido, al que alude expresamente el precepto al usar la formulación "*para la defensa de sus intereses*". La creación de sindicatos y la afiliación a los mismos carece de sentido si no sirve para conseguir el objetivo que la caracteriza: la defensa de los intereses de las personas que los fundan y los componen. Si el sindicato no puede acometer adecuadamente esa defensa no se estaría respetando la libertad sindical, por mucho que la fundación y afiliación sean libres. Es por ello que el Pacto Internacional de Derechos Económicos, Sociales y Culturales de 16 diciembre 1966 incluye dentro de su descripción del contenido de la libertad sindical el derecho de los sindicatos "*a funcionar sin obstáculos y sin otras limitaciones que las que prescriba la ley y que sean necesarias en una sociedad democrática en interés de la seguridad nacional o del orden público, o para la protección de los derechos y libertades ajenos*" (art. 8.1 c).

Por esa vía se han ido agregando a la libertad sindical otros contenidos no expresamente mencionados en los textos internacionales citados, como la negociación colectiva. En este punto son decisivos los trabajos de la agencia de la ONU especializada en materia laboral, la Organización

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Internacional del Trabajo. No podía ser de otra manera, teniendo en cuenta que el preámbulo de su constitución ya señala desde 1919, entre los medios susceptibles de mejorar las condiciones de trabajo y de garantizar la paz, "*la afirmación del principio de la libertad de asociación sindical*". Por otra parte, la Declaración de Filadelfia, añadida a la Constitución en 1944, proclamó nuevamente que "*la libertad de expresión y de asociación es esencial para el progreso constante*". Además, incluyó como "obligación solemne" de la organización fomentar entre todas las naciones programas que permitan "*lograr el reconocimiento efectivo del derecho a la negociación colectiva*".

Esta importancia que la organización otorga, ya en sus textos fundacionales a ambos derechos, se confirma con la aprobación de diversos instrumentos específicos sobre estas materias. Dos de esos instrumentos son los convenios n. 87, sobre la libertad sindical y la protección del derecho de sindicación, de 1948 y n. 98, sobre el derecho de sindicación y de negociación colectiva, de 1949, ambos incluidos dentro de los llamados convenios fundamentales, que todos los estados miembros de la OIT tienen la obligación de ratificar. De estos dos convenios fundamentales, el primero se centra principalmente en los aspectos puramente asociativos del derecho de libertad sindical (fundación, afiliación, libertad para redactar estatutos, confederación, etc.).

El segundo, por su parte, apunta una perspectiva más funcional en la que se aprecia una clara conexión con el derecho de negociación colectiva, tal y como sugiere ya su propio título. En concreto, su artículo 4 señala que los estados firmantes deberán adoptar medidas adecuadas "*para estimular y fomentar entre los empleadores y las organizaciones de empleadores, por una parte, y las organizaciones de trabajadores, por otra, el pleno desarrollo y uso de procedimientos de negociación voluntaria, con objeto de reglamentar, por medio de contratos colectivos, las condiciones de empleo*". Aunque se trata de un reconocimiento de la negociación colectiva muy suave, en la medida en que se habla de fomentar y estimular y no de garantizar, hay aquí ya un primer reconocimiento del papel preponderante de las organizaciones sindicales en la negociación, en la medida en que ésta sólo parece contemplarse entre los empleadores y sus organizaciones, por una parte, y las organizaciones de trabajadores por otra. Nótese que, en el marco de la normativa de la OIT, la libertad sindical es derecho del que gozan tanto empleadores como empleados. Por tanto, cuando hablamos aquí de sindicato nos referimos tanto a las organizaciones de unos como a las de los otros.

Ese papel prioritario del sindicato vuelve a afirmarse en la Recomendación n. 91 sobre contratos colectivos de trabajo de 1951. En este texto se admite la posibilidad de que la negociación colectiva sea llevada a cabo, no por el sindicato, sino por "*representantes de los trabajadores interesados,*

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debidamente elegidos y autorizados por estos últimos, de acuerdo con la legislación nacional". Ello, no obstante, la recomendación deja claro que ello sólo será en caso de "ausencia" de organizaciones representativas de trabajadores. Así pues, aunque las organizaciones sindicales no tengan la exclusividad de la negociación colectiva, sí parecen gozar de prioridad en su ejercicio.

El principio quedará definitivamente consagrado en el Convenio n. 154 sobre la negociación colectiva (1984). El artículo 2 de este tratado internacional define la negociación colectiva como "*todas las negociaciones que tienen lugar entre un empleador, un grupo de empleadores o una organización o varias organizaciones de empleadores, por una parte, y una organización o varias organizaciones de trabajadores, por otra*". La idea del sindicato como sujeto preferente de la negociación colectiva queda plasmada, así, ya en la formulación del propio concepto de negociación. El convenio admite la posibilidad de que otros sujetos asuman también la labor de negociar, pero lo hace de forma que queda claramente afirmada la posición preferente del sindicato en esta materia.

En efecto, el artículo 3.1 de la norma internacional señala que "*Cuando la ley o la práctica nacionales reconozcan la existencia de representantes de trabajadores que respondan a la definición del apartado b) del artículo 3 del Convenio sobre los representantes de los trabajadores, 1971, la ley o la práctica nacionales podrán determinar hasta qué punto la expresión negociación colectiva se extiende igualmente, a los fines del presente Convenio, a las negociaciones con dichos representantes*". La referencia se hace al Convenio n. 171 de la OIT, en el que se establece una regulación internacional de la representación de las personas trabajadoras en la empresa, permitiendo que ésta se articule de dos formas posibles: la representación sindical (art. 3 a) o a través de representantes elegidos libremente por los trabajadores (art. 3. b). Esta representación electa, no necesariamente sindical, no debe en ningún caso interferir en la actividad sindical. Por ello, el artículo 5 señala que, cuando convivan en una misma empresa ambas representaciones habrán de adoptarse medidas apropiadas "*para garantizar que la existencia de representantes electos no se utilice en menoscabo de la posición de los sindicatos interesados o de sus representantes*".

Fiel a esta idea, el convenio n. 154 admite que esa representación electa pueda asumir funciones de negociación, pero señala que, en tal caso, deberán adoptarse medidas apropiadas "*para garantizar que la existencia de estos representantes no se utilice en menoscabo de la posición de las organizaciones de trabajadores interesadas*". En definitiva, el sindicato goza de una posición prioritaria sobre la negociación colectiva, derivada del carácter esencial que la actividad tiene para la propia existencia de la

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organización. De este modo, aunque es posible que otros sujetos puedan intervenir en esa labor, debe garantizarse en todo caso que ello no se hace en detrimento de la posición de las organizaciones de trabajadores[4].

Así lo han entendido, por lo demás, los órganos encargados de velar por la aplicación e interpretación de las normas de la OIT. El Comité de Libertad Sindical ha señalado con rotundidad que el derecho de "*negociar libremente con los empleadores las condiciones de trabajo constituye un elemento esencial de la libertad sindical*", en la media en que los sindicatos deben "*tratar de mejorar las condiciones de vida y de trabajo de aquéllos a quienes representan*", mientras que las autoridades públicas deberían "*abstenerse de intervenir de forma que este derecho sea coartado o su legítimo ejercicio impedido*"[5]. Es evidente aquí la importancia de la perspectiva funcional en la determinación del contenido del derecho de libertad sindical. De hecho, el comité considera la negociación colectiva "*uno de los principales fines de la garantía de la libertad sindical*"[6]. La afirmación la toma el Comité del Informe preparatorio de la aprobación del convenio n. 85 sobre libertad sindical y es especialmente significativa, si recordamos que el texto del mencionado convenio no aborda expresamente la dimensión finalista del derecho a la libertad sindical[7]. Con esta cita a los trabajos preparatorios, el Comité destaca que tal dimensión finalista estaba presente en la mente de quienes lo elaboraban y, por tanto, puede entenderse implícita en el convenio.

Esta preocupación por sostener que la dimensión funcional de la libertad sindical ya se desprende del Convenio n. 87 y no sólo de los instrumentos posteriores, se aprecia también en el caso n. 2460, en el que el Comité afirma que uno "*de los principales objetivos buscado por los trabajadores al ejercer el derecho de sindicación es el negociar colectivamente sus términos y condiciones de trabajo. Por consiguiente, el Comité considera que las disposiciones que prohíben a los sindicatos entablar la negociación colectiva, inevitablemente, frustran el objetivo y la actividad principales para los cuales fueron creados, lo que es contrario no sólo al artículo 4 del Convenio núm. 98 sino también al artículo 3 del Convenio núm. 87*". El art. 4 del convenio 98 se refiere a la negociación colectiva voluntaria, el artículo 3 del Convenio 87 estipula que los sindicatos tienen el derecho a

[4] Esta disposición ha planteado dudas sobre la compatibilidad de la legislación española sobre representación de los trabajadores en la empresa con la normativa internacional, Landa Zapirain (2021).

[5] OIT (2018), §1232.

[6] Ivi, §1233.

[7] Informe VII, Conferencia Internacional del Trabajo, 30ª reunión, "Libertad sindical y relaciones de trabajo", VII punto del orden del día, Genève, 1947, p. 51.

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"*organizar su administración y sus actividades y el de formular su programa de acción*"[8].

En relación con la posibilidad de que la negociación colectiva sea llevada a cabo por representantes de los trabajadores no sindícales también existen varios pronunciamientos del Comité de Libertad Sindical. De hecho, son varias las decisiones que, basándose en la Recomendación n. 91 y en los Convenios n. 135 y 154, señalan la preeminencia que tienen en esta materia las representaciones sindicales[9], lo que hace que el recurso a otros sujetos posibles de negociación se encuentre sujeta a ciertas exigencias previas. En concreto, el organismo ha abordado la posible interferencia con la libertad sindical que podrían tener la negociación con órganos representativos no sindicales, por un lado, y la negociación directa con la plantilla, por otro.

Respecto del primero de los asuntos, la negociación a través de representantes electos y no de las organizaciones sindicales, el comité ha recordado en numerosas ocasiones la exigencia del Convenio n. 154 de que, en esos casos, se adopten medidas apropiadas para garantizar que la existencia de tales representantes no se utiliza en menoscabo de la posición de los sindicatos. Así, entendió que tales interferencias existían cuando la empresa Royal Air Maroc se negó a reconocer al Sindicato de Técnicos Aeronáuticos de Marruecos y a negociar con él, prefiriendo la interlocución con los delegados de personal, pese a que se trataba de una organización legalmente constituida y que tenía la condición de sindicato más representativo[10]. También cuando la empresa Ryanair rehusó entablar conversaciones con Asociación de Pilotos de Líneas Aéreas de Irlanda (IALPA), prefiriendo utilizar el mecanismo de los Consejos de representantes de los empleados, y el "*derecho a administrar una empresa sin sindicatos*"[11]. Igualmente, el Comité planteó sus dudas sobre la introducción de Comités permanentes de Trabajadores en las empresas de Costa Rica, que podrían haber recibido un trato favorable por parte de la legislación en detrimento de la negociación directa con los sindicatos[12].

En lo que se refiere al segundo asunto, la negociación directa con los

[8] El razonamiento sirvió para declarar que la legislación del Estado de Carolina del Norte (EUA) según la cual se consideraba legal, nulo y sin efecto todo acuerdo entre las entidades públicas del Estado de Carolina del Norte y cualquier organización de trabajadores públicos, fuese declarada por el Comité como contraria al derecho de libertad sindical, Informe n. 344 (2007), Caso n. 2460 (Estados Unidos de América), párrafos 991 y 999. La sentencia forma parte ya de la recopilación de decisiones del Comité, párrafo 1234.

[9] OIT (2018), § 1343, 1344, 1345 y 1346.

[10] Informe n. 342 (2006), caso n. 2455 (Marruecos), párrafos 768 y 770.

[11] Informe n. 363 (2012), caso n. 2780 (Irlanda), párrafo 813.

[12] Informe n. 348 (2007), caso n. 2518 (Costa Rica), párrafo 494.

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trabajadores, el Comité ha destacado que la celebración de pactos colectivos con los trabajadores que no están sindicalizados o que se desafilian de las organizaciones sindicales y que ofrecen mayores ventajas que los convenios colectivos no constituyen una práctica que fomente la negociación colectiva, tal y como dispone el artículo 4 del Convenio n. 98[13].En la misma línea, ha considerado que la firma de un pacto colectivo con los trabajadores no sindicalizados o con un "comité ad hoc" constituido al efecto no debe ser utilizado para menoscabar los derechos de los trabajadores afiliados al sindicato[14], utilizándolo como instrumento de desincentivación de la afiliación sindical[15].

En definitiva, los sindicatos son considerados en la normativa internacional como sujetos preferentes de la negociación colectiva y ello es así, precisamente, porque dicha negociación forma parte del núcleo esencial que conforma el derecho a la libertad sindical. En consecuencia, no se respeta tal derecho cuando se priva a las organizaciones sindicales de la posibilidad de negociar o cuando se menoscaba su papel en la negociación a través del recurso a otros sujetos negociadores. Estos últimos sólo resultarían admisibles en ausencia de sindicatos con capacidad suficiente para llevar a cabo la negociación.

Otra cuestión relacionada relevante para afrontar los desafíos que plantean los nuevos escenarios laborales es qué tipo de trabajadores están cubiertos por el derecho a la libertad sindical. A este respecto, la posición del Comité de Libertad Sindical de la OIT es bastante flexible y abierta. El organismo es muy consciente del impacto adverso que las formas inseguras de empleo tienen sobre los derechos sindicales y los derechos de los trabajadores[16]. Por ello, no ha dudado en afirmar que el criterio para determinar los sujetos cubiertos por ese derecho no se basa en la existencia de una relación laboral formal. El Comité considera que en algunos casos en los que no existe esa relación laboral, como en el caso de los trabajadores por cuenta propia o en de quienes desarrollan una profesión liberal, debería reconocerse también el derecho de sindicación[17]. De esta manera, parece convertirse el derecho de libertad sindical en una garantía universal, no sólo para los trabajadores asalariados *strictu sensu*, sino también para todas aquellas personas trabajadoras que se encuentren materialmente en una situación similar de dependencia o subordinación.

[13] Informe n. 350 (2008), caso n. 2362 (Colombia), párrafo 426.
[14] Informe n. 340 (2006), caso n. 2241 (Guatemala), párrafo 824.
[15] Informe n. 349 (2008), caso n. 2493 (Colombia), párrafo 700.
[16] OIT (2018), §326.
[17] Ivi, §387.

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3. Sindicatos y negociación colectiva en el marco del consejo de Europa

El Convenio Europeo de Derechos Humanos reconoce en su artículo 11.1 el derecho de toda persona a la "*libertad de asociación, incluido el derecho a fundar, con otras, sindicatos y afiliarse a los mismos para la defensa de sus intereses*". Se trata de una formulación muy similar a la del artículo 23.4 de la declaración de derechos humanos, aparentemente centrada en la vertiente "asociativa" del derecho. Esa vertiente asociativa es más acusada, si cabe, en el convenio europeo que en el texto internacional. De hecho, en la formulación europea el derecho a fundar sindicatos se entiende como un elemento del más general derecho de asociación y reunión pacífica. No sucede lo mismo, como vimos, en la declaración universal, donde queda mucho más clara la especificidad del derecho y su vinculación funcional al ámbito de las relaciones laborales.

Ya hemos señalado que es ese elemento finalista el que es susceptible de dotar a la libertad sindical de un contenido más complejo más allá de su contenido específicamente asociativo. Podemos afirmar, por ello, que en este punto la redacción del convenio europeo es deficiente y menos acabada que la de la declaración universal. Ello, no obstante, aunque no tan evidente, el elemento funcional existe, en la medida que la fundación de organizaciones y la afiliación a las mimas se hace "*para la defensa de sus intereses*", coletilla que, sabemos otorga a la definición del derecho un potencial expansivo que una lectura superficial del texto podría fácilmente pasar por alto.

La jurisprudencia del Tribunal Europeo de Derechos Humanos sobre el art. 11.1 de la convención es buena muestra de ello. Ya en sus sentencias más antiguas el tribunal señaló claramente que la frase "*para la protección de sus intereses*" no puede considerarse redundante. Por el contrario, entiende que esas palabras "*que denotan claramente un propósito, muestran que el Convenio salvaguarda la libertad de proteger los intereses profesionales de los miembros de un sindicato mediante la acción sindical, cuya conducta y desarrollo los Estados contratantes deben permitir y hacer posible*"[18]. Es esta idea de la acción sindical como medio de defensa de intereses profesionales la que va a permitir desgravar un contenido detallado del derecho de libertad sindical, que lo lleva mucho más allá de la vertiente puramente asociativa.

El proceso en la jurisprudencia del TEDH, no obstante, será paulatino y progresivo (Goñi Seín 2017). De hecho, en la misma sentencia que acabamos de citar se señala también que la libertad sindical se regula en el

[18] Sentencia de 27 de octubre de 1975, National Union of Belgian Police vs. Belgium (Ap. 4464/70).

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artículo 11 del Convenio como un aspecto o forma especial de la libertad de asociación, lo que no garantiza ningún tratamiento especial de los sindicatos o de sus miembros por los estados. Parece querer indicar aquí el tribunal que los sindicatos no tienen en la convención europea ningún derecho especial respecto al que tiene las asociaciones en particular, lo que implica que actividades como la negociación y consulta no constituyen un elemento esencial del derecho a la libertad sindical. El Estado debe garantizar que el sindicato pueda proteger los intereses profesionales de sus miembros, pero goza de libertad para determinar que medios pueden usarse con ese fin. La consulta y la negociación son sólo uno de los mecanismos posibles, pudiendo optarse por otros como la presentación de quejas o la elevación de protestas. Se trata de una primera formulación muy restrictiva del derecho, formulada además en el contexto de un caso para cuya solución no era necesaria. Después de todo, lo que estaba en juego no era la negativa del gobierno belga a negociar con sus sindicatos policiales, sino el hecho de que, para evitar tener que negociar con un número excesivamente elevado de organizaciones hubiese limitado la posibilidad de participar en el proceso sólo a las organizaciones consideradas como más representativas[19].

Esta interpretación restrictiva se mantendrá inalterada hasta el siglo XXI. Un primer, y ligero, cambio de actitud, empieza a producirse en el año 2002 con la resolución del caso Wilson[20]. En esta sentencia, en principio, se reafirman las ideas de que el artículo 11 no garantiza ningún trato especial para los sindicatos y de que la negociación colectiva puede ser uno de los medios utilizados por estas organizaciones para la defensa de los intereses profesionales pero no el único y, en todo caso, no con carácter indispensable. De hecho, se afirma expresamente que "*el tribunal no está todavía preparado para sostener que el derecho de los sindicatos a ser escuchados se extiende a imponen al empleador la obligación de reconocer al sindicato*" (como sujeto negociador). De tal modo, un sistema de negociación colectiva voluntaria, como el existente en el Reino Unido no sería contrario al artículo 11.

Ello no obstante, se da en esta resolución un paso importante, en la medida en que la Corte se hace eco de la doctrina sostenida por el Comité de Expertos Independientes de la Carta Social Europea y por el Comité de Libertad Sindical de la OIT, para concluir que permitir a los empleadores usar incentivos financieros para inducir a los empleados a renunciar a sus derechos sindicales implica un incumplimiento del Estado de sus obligaciones

[19] Muy similar a este, y resuelto de idéntica manera, es el caso resuelto en la STEDH de 6 de febrero de 1976, Swedish Engine Drivers'Union vs. Sweden (Ap. 5614/72).

[20] STEDH de 2 de julio de 2002, Wilson, National Union of Journalists and others vs. The United Kingdom (Ap. 30668/96 y 30678/96).

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positivas de asegurar el ejercicio de la libertad sindical. De este modo, se condena el hecho de que la norma británica considerase legal el recurso a pactos individuales en masa en los que se ofrecían ventajas económicas importantes a cambio de la renuncia a la afiliación a un sindicato.

El cambio definitivo será dado en el caso Demir y Baykara[21]. Los señores Demir y Baykara eran respectivamente miembro y presidente del sindicato "Tüm Bel Sen" de funcionarios civiles de las administraciones locales en Turquía. El sindicato había acordado con el consejo municipal de la ciudad de Gaziantep un convenio colectivo cuya vigencia seria de dos años. Ante el incumplimiento por parte del consejo municipal de los acuerdos alcanzados el sindicato, inició acciones legales para reclamar su cumplimiento. Aunque el tribunal de distrito dio la razón al sindicato, la corte de casación turca entendió que, aunque no existía en la normativa turca ninguna prohibición expresa para que los funcionarios civiles fundasen y se afiliasen a sindicatos, éstos no están autorizados por la norma para concertar convenios colectivos. Dado que el tribunal de distrito volvió a reiterarse en su posición, alegando la aplicación de los convenios internacionales de los que era parte la República Turca, la corte de casación volvió a pronunciarse, declarando esta vez que, mientras la normativa interna no se adaptase a los citados convenios internacionales, no estaba autorizada la formación de sindicatos por parte de los funcionarios civiles, por lo que las organizaciones no tenían personalidad jurídica que les habilitase a la conclusión de convenios colectivos.

Al resolver este asunto, el tribunal reconoce que, inicialmente, en su jurisprudencia anterior consideraba que el artículo 11 del convenio europeo no aseguraba a los sindicatos ningún trato particular y, concretamente, no les reconocía el derecho a concluir convenios colectivos. No obstante, con cita expresa de la sentencia del caso Wilson, se afirma que esa jurisprudencia "*no excluye la posibilidad de que el derecho a concluir convenios colectivos pueda representar, en las circunstancias particulares del caso concreto, uno de los medios principales, incluso el más importante de todos ellos, que tiene un sindicato para defender los intereses profesionales*" que le son propios. Se trata de un evidente cambio de orientación en la jurisprudencia formulado todavía de forma tímida y algo ambigua.

El caso fue llevado a revisión ante la gran sala, que emitirá un nuevo pronunciamiento en 2008[22]. Lejos de cambiar el sentido del fallo inicial, la nueva sentencia abordará el tema de forma mucho más directa y contundente. Lo hace tanto respecto de la posibilidad de los funcionarios de fundar sindicatos, tema al que se dedican buena parte de los argumentos, como

[21] SEDH de 21 de noviembre de 2006, Demir and Baykara vs. Turkey (Ap. 34503/97).
[22] *Ibidem*.

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respecto de la cuestión de si la negociación colectiva forma parte o no del contenido básico de la libertad sindical. Respecto de este último aspecto, la Gran Sala no duda en afirmar tajantemente que, a la luz de la evolución de la cuestión en el ámbito internacional, la "*jurisprudencia que afirmaba que el derecho a la negociación colectiva no constituye un elemento inherente del artículo 11 debería ser reconsiderada*". En consecuencia, "*considera que, teniendo en cuenta la evolución del Derecho del Trabajo, tanto nacional como internacional, así como la práctica de los Estados contratantes en estas materias, el derecho a la negociación colectiva se ha convertido, en principio, en uno de los elementos esenciales del derecho de libertad sindical*".

En las sentencias más recientes del tribunal ya se insiste de manera directa y sin rodeos en el hecho de que la libertad sindical reconocida en el artículo 11 del convenio europeo incluye, como parte de su contenido esencial, el derecho del sindicato y de sus miembros a negociar colectivamente. Ello no obstante, los estados conservan libertad para organizar sus sistema de negoción colectiva y dar, si se considera apropiado, un estatus especial a los sindicatos más representativos o más relevantes. Ello permite, por ejemplo, que sea posible limitar la posibilidad de aprobar un convenio colectivo de empresa al sindicato que cuente con mayor número de afiliados en la misma[23]. Además, se ha insistido en que la protección de los intereses profesionales exige que se garantice al sindicato la posibilidad de manifestarse y expresarse libremente sobre asuntos que afectan a dichos intereses[24].

En el marco del Consejo de Europa debe reseñarse también la Carta Social Europea, tratado elaborado con la idea de reforzar el Convenio Europeo de Derechos Humanos, precisamente en el ámbito de la protección de la dimensión social de los derechos humanos. El artículo 5 de la carta recoge el derecho de libertad sindical y lo hace con el mismo contenido finalista que ya hemos observado en otras normas internacionales: "*para la protección de sus intereses económicos y sociales*". Pero, además, la Carta incluye un reconocimiento expreso del derecho a la negociación colectiva. Lo hace en su artículo 6. La proximidad de ambos preceptos ya apunta a la existencia de una relación o vinculación de los derechos proclamados en ambos. Por si hubiera alguna duda, el texto del artículo 6 señala que deben promoverse procedimientos de negociación colectiva "*entre empleadores u organizaciones de empleadores, por una parte, y organizaciones de trabajadores, por otra parte, con objeto de regular las condiciones de*

[23] STEDH de 5 de julio de 2022, Association of Civil Servants and Union for Collective Bargaining and others vs. Germany (Ap. 815/18).

[24] STEDH 2 de septiembre de 2022, Straume vs. Latvia (Ap. 59402/14).

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empleo por medio de convenios colectivos". Esta redacción pone de relieve el protagonismo de sindicatos y organizaciones sindicales en los procesos de negociación y elaboración de convenios colectivos. También es significativa la diferencia de matiz empleada al referirse a una y otra parte de la negociación: Mientras que para los empresarios se apunta a que pueden negociar a través de sus organizaciones o por sí mismos, en el caso de los empleados se menciona exclusivamente a las organizaciones. También parece claro que esas organizaciones de trabajadores son, precisamente, las que el artículo 5 les reconoce libertad para crear libremente para la protección de sus intereses. La conexión libertad sindical / negociación colectiva y el carácter del sindicato como sujeto prioritario de esta última quedan, así pues, mucho más claramente reflejados en el propio texto de la norma.

El organismo encargado de supervisar la aplicación de la carta, el Comité Europeo de Derechos Sociales o Comité de Expertos Independientes ha tenido también muy clara esa conexión. Así, en diversas conclusiones ha señalado que ciertos incumplimientos del artículo 5 de la carta, sobre libertad de asociación, implican también incumplimiento del artículo 6, sobre negociación colectiva[25]. Esas conclusiones, que apuntarían a la existencia de una relación orgánica entre el derecho de libertad sindical y el de negociación colectiva, fueron tenidas en cuenta por el TEDH la hora de adoptar el cambio de jurisprudencia sobre esta materia que se produjo en las ya estudiadas sentencias Demir.

El Comité también ha defendido una interpretación extensiva del ámbito subjetivo de ambos derechos, señalando sin ambages que la distinción entre trabajadores asalariados y trabajadores autónomos no es un criterio suficiente para determinar qué tipo de negociación colectiva está protegida por la Carta. Por el contrario, considera que el criterio esencial aquí debe ser la existencia de un equilibrio de poder entre los proveedores y los contratadores de trabajo. Allí donde los proveedores de trabajo carezcan de capacidad sustantiva de influir sobre el contenido de las condiciones en que aquél se realiza, debe dárseles la posibilidad de equilibrar su poder a través de la negociación colectiva[26]. Como se ve, se trata de un posicionamiento muy próximo al que ya pusimos de relieve al hablar de los pronunciamientos del Comité de libertad Sindical de la OIT.

[25] *Vid*. Conclusiones del Comité XIV-1, 1998 sobre Irlanda, Dinamarca y Malta.

[26] Irish Congress of Trade Unions v. Ireland, Complaint n. 123/2016, decision on the merits of 12 September 2018, §38.

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4. Conclusiones

Las conclusiones de la investigación nos llevan a afirmar que la libertad sindical es un derecho humano que va mucho más allá de la simple asociación y que incluye todos los medios necesarios para la defensa de los intereses profesionales de trabajadores y empresarios, entre ellos destacadamente la negociación colectiva. El sindicato es para la normativa internacional, sujeto prioritario de defensa de intereses profesionales. No se prohíbe el recurso a otros mecanismos de negociación y representación de los trabajadores y empleadores, pero siempre con la garantía de que éstos no sean utilizados en detrimento de la posición de los sindicatos. La formulación del derecho es, además, muy abierta y permite su extensión a prestaciones de servicios no consideradas formalmente como trabajo asalariado, pero que se encuentran en una situación de subordinación o dependencia similar, lo cual le otorga una gran capacidad de adaptación a nuevas realidades.

En consecuencia, podemos concluir que los problemas que la libertad sindical y la negociación colectiva no derivan de carencias en su regulación. Parafraseando el título de nuestro trabajo "*el problema no está en la regulación*". ¿Dónde está el problema entonces? Es ese, preciosamente, uno de los temas que han sido objeto de discusión a lo largo de este Congreso Internacional. Una cuestión muy debatida actualmente y sobre la que no se acaban de alcanzar respuestas claras y definitivas. De hecho, la OCDE en su informe sobre la negociación colectiva, trató de identificar las causas por la que la densidad de afiliación de los sindicatos ha decrecido de forma constante en las últimas décadas en todos sus Estados miembros. Su conclusión fue que no existe una causa común, sino una colección de historias específicas de cada país[27]. La tendencia es global, pero las causas parecen diferentes y particulares para cada Estado.

Ello, no obstante, en nuestra modesta opinión, es posible identificar al menos una explicación global al fenómeno: Desde el momento en que la libertad sindical es un derecho humano y, por tanto, uno de los valores democráticos esenciales, se estaría viendo afectada por la disminución general del apoyo a esos valores que se advierte desgraciadamente en todas las sociedades alrededor del mundo. En este punto, deberíamos plantearnos qué tipo de relaciones laborales queremos. Si se defiende la necesidad de que éstas se articulen de forma pacífica y se sustenten en el diálogo y la colaboración desde la diferencia, resulta necesario reivindicar el papel de los sindicatos y las organizaciones de empleadores. Para eso, como acabamos de ver, el derecho internacional nos brinda instrumentos potentes, flexibles y adaptables.

[27] OECD (2019, p. 44).

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The employer negotiated financing of funds managed by professional unions: trade union freedom and acts of interference based on the goals of workers' material well-being and transparency

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Introduction

Trade union freedom is an essential principle of labor law, guaranteed by Article 8 of the 1988 Brazilian Constitution (CF/88) and widely supported by International Labour Organization (ILO) Convention n. 98, ratified by Brazil, as well as by Convention n. 87, which remains unratified. This principle ensures the independence of unions from the state, employers, and other external influences, allowing them to defend workers' interests effectively and without interference.

Among the acts safeguarding trade union freedom, particularly for collective entities representing workers, is the prohibition of acts of interference. These are actions aimed at placing workers' organizations under the control of employers or employers' associations, as stipulated in ILO Convention n. 98.

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There are collective labor agreements (CCTs) negotiated between professional and employer unions that include clauses requiring employers to contribute financially to funds managed by professional unions for various purposes, such as vocational training, medical and social assistance for workers, and union activity funding.

However, the jurisprudence consolidated by the Collective Disputes Section (SDC) of the Superior Labor Court (TST) considers such clauses, regardless of their content, to violate the trade union freedom of professional unions, declaring them invalid.

Despite this jurisprudence, many CCTs currently in effect include clauses stipulating employer contributions to funds managed by professional unions.

Within this thematic limitation, the research aims to investigate whether CCT clauses that establish permanent financial contributions by companies to funds managed by professional unions inherently constitute acts of interference under Article 2.2 of ILO Convention n. 98 and, therefore, violate the principle of trade union freedom set forth in Article 8º da CF/88?

The research hypothesis is that, as long as the fund's purpose is the material well-being of workers and its management is transparent, clauses providing for employer financial contributions to funds managed by professional unions do not violate the trade union freedom established by ILO Convention n. 98.

To address the research question and test the hypothesis, applying the hypothetical-deductive method, the work is divided into three sections. The first section examines trade union freedom in Brazilian union organization, addressing individual and collective trade union freedom, as well as acts of interference under ILO Convention n. 98. The second section discusses trade union financing, including regular and extraordinary contributions, the recent jurisprudence of the Supreme Federal Court (STF) on assistance contributions, and examples of negotiated clauses imposing employer financial contributions to funds managed by professional unions. Finally, the last section outlines prevailing labor jurisprudence and proposes solutions to the problem, considering the purpose and transparency of the funds, based on the understanding of the ILO Committee on Freedom of Association.

1. The extent of freedom in brazilian Trade Union organization

It is necessary to analyze trade union freedom based on parameters that indicate the characteristics defining this condition and the extent to which a legal framework fully, partially, or not at all complies with these characteristics.

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These parameters are defined by ILO Conventions n. 87 e 98 (the former not ratified by Brazil and the latter ratified[3]), which are considered legitimate frameworks as they were approved by tripartite assemblies composed of representatives of workers, employers, and member states.

From these defined parameters, one can assess whether the Brazilian legal system corresponds to the outlined standards.

Conventions n. 87 and n. 98 delineate both an individual and a collective dimension of trade union freedom.

It is pertinent, however, to heed the cautionary note of Maurício Godinho Delgado, who asserts that the collective notion of freedom "*must also be associated with the individual notion of freedom in the context of examining workers' collective actions and their trade union entities*", as "*an overly individualistic interpretation of freedom, if exaggerated and disproportionate, may undermine the very idea of collective freedom*"[4].

Thus, while analyzing individual trade union freedom separately from collective freedom may seem somewhat artificial, it becomes necessary in this study to identify the points in Brazilian legislation that meet the standards set out in each dimension of trade union freedom.

Additionally, it is crucial to understand acts of interference and their prohibition as stipulated by Article 2.2 of ILO Convention n. 98.

1.1. Individual Trade Union Freedom

Freedom, as a first-generation fundamental right, corresponds to "*faculties or attributes inherent to individuals, characterized by their subjectivity; essentially, these are rights to resist or oppose the State*"[5].

This is a fundamental right and one of the cornerstones of the French Revolution: individuals are responsible for choosing the purposes of their actions, assuming the risks of success or failure; the State, in turn, must establish the general and abstract rules of the game[6].

However, like all other fundamental rights, this one materializes through the fundamental principle of human dignity, enshrined in the Brazilian Constitution under Article 1, I.

[3] Aprovada pelo Decreto Legislativo n. 24, de 29/5/1956. Promulgada pelo Decreto n. 41.721, de 25/06/1957 (SUSSEKIND, Arnaldo. Convenções da OIT. SP: LTr, 1994, p. 406).

[4] Curso de Direito do Trabalho, 18ª ed., SP: LTr, 2019, p. 1590.

[5] Bonavides P. (2003), *Curso de Direito Constitucional*, XIII ed., SP: Malheiros, 2003, pp. 563-564.

[6] Irti N. (1992), *La edad de la descodificación*, Barcelona: Jose Maria Bosch, pp. 17-18.

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Individual freedom, as an attribute manifested in various subjective expressions across all spheres of social life, is an essential condition for human dignity[7].

In this context, individual freedom must, as in any other social dimension, be guaranteed to workers in their relationships with trade union entities.

Therefore, ILO Convention n. 87 recognizes workers' rights to join any organization and to remain affiliated, with the sole condition of observing the respective statutes (Article 2)[8].

Article 11 of Convention n. 87 further reinforces the guarantee for workers and employers to freely exercise the right to unionize, imposing an obligation on all member states to "*adopt all necessary and appropriate measures*" to ensure this right[9].

ILO Convention n. 98, Article 1, in turn, addresses the protection of individual trade union freedom against any acts that undermine the right to unionize, particularly when employment is threatened by requiring workers not to join a union, leave a union, or by dismissing or harming them "*in any way due to their union membership or participation in trade union activities*"[10].

From the perspective of individual freedom, the Brazilian legal framework fully aligns with the international propositions.

Indeed, three provisions in the Brazilian Constitution recognize individual trade union freedom as outlined in ILO Conventions n. 87 and n. 98.

The first, Article 8, V, which states that "*no one shall be compelled to join or remain in a union*", corresponding to Article 2 of Convention n. 87.

The second, Article 8, VII, which guarantees that "*retired union members have the right to vote and be voted for in trade union organizations*", aligning with the conventional rule of allowing broad worker participation in trade union entities.

The third, Article 8, VIII, which prohibits "*the dismissal of unionized employees from the registration of their candidacy for union leadership or representation positions, and, if elected, even as alternates, for up to one year after the end of their term*", except for just cause.

[7] Sarlet I. (2006), *A eficácia dos direitos fundamentais*, VI ed., Porto Alegre: Livraria do Advogado, p. 435.

[8] Sussekind A. (1994), *Convenções da OIT*, SP: LTr, p. 406.

[9] Ivi, pp. 406-407.

[10] Ivi, p. 204.

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1.2. Collective Trade Union Freedom and Acts of Interference

Collective trade union freedom pertains to the union entity, understood as a "*collective association, of a private nature, aimed at defending and advancing the collective professional and material interests of workers, whether subordinate or self-employed, and employers*"[11].

It is possible to analyze the freedom of union entities, particularly those representing workers, in relation to the State and employers.

Essentially, the protection of collective trade union freedom from the State is addressed by Convention n. 87, while protection from employers is covered by Convention n. 98.

Indeed, Convention n. 87 establishes the right of workers and employers, without distinction and without prior authorization, to form organizations they deem appropriate (Article 2)[12].

The same Convention also grants workers' and employers' organizations the right to "*draw up their own statutes and regulations, to elect their representatives freely, to organize their administration and activities, and to formulate their programs of action*" (Article 3.1)[13].

To ensure the exercise of this right, the Convention prohibits public authorities from interfering in ways that could impair or restrict its lawful exercise (Article 3.2) and also prohibits the dissolution or suspension of workers' or employers' organizations through administrative means (Article 4)[14].

The exercise of collective trade union freedom also includes the prerogative of workers' and employers' organizations to "*establish federations and confederations and affiliate with them*", as well as allowing any organization, federation, or confederation to affiliate with international workers' and employers' organizations (Article 5)[15].

Convention n. 87 also prevents restrictions on the acquisition of legal personality by workers' and employers' organizations that contravene the conditions set out in Articles 2, 3, and 4[16].

It is evident, therefore, that Convention n. 87 is concerned with safeguarding the creation and existence of union entities against actions by public authorities.

[11] Delgado M.G. (2019), *Curso de Direito do Trabalho*, XVIII ed., SP: LTr, p. 1590.
[12] Sussekind A. (1994), *Convenções da OIT*, SP: LTr, p. 206.
[13] Ivi, p. 207.
[14] *Ibidem*.
[15] *Ibidem*.
[16] *Ibidem*.

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Conversely, Convention n. 98 seeks to protect union entities, particularly those representing workers, from acts originating from the other party – namely, employers – that aim, in some way, to hinder the free exercise of the prerogatives inherent to defending workers' interests[17].

ILO Convention n. 98, with this scope, addresses the protection of workers' and employers' organizations "*against any acts of interference by each other, whether directly or through their agents or members, in their formation, functioning, and administration*" (Article 2.1)[18].

The Convention defines acts of interference as including "*measures designed to promote the establishment of workers' organizations dominated by an employer or an employers' organization*" and "*maintaining workers' organizations by financial or other means, with the aim of placing these organizations under the control of an employer or an employers' organization*" (Article 2.2)[19].

According to legal doctrine, the protection against acts of interference, characterized as anti-union practices, aims to "*prevent, remedy, or penalize any act that unduly harms workers or trade union organizations in the exercise of trade union activity*"[20].

In the specific case of trade union entities, based on the parameters established in ILO Conventions n. 87 and 98, there is a significant contrast with the Brazilian legal framework, which explains Brazil's decision not to ratify Convention n. 87.

The criteria of trade union unicity, the prohibition against creating unions with a territorial scope smaller than a municipality, as established in Article 8, III, of the Brazilian Constitution, and the representation of unions by categories, as provided for in Article 570 of the Consolidation of Labor Laws (CLT), are the main obstacles to the application of Convention n. 87 in Brazil.

In fact, unicity prevents the establishment of more than one union within the same territorial base, and the prohibition against creating unions smaller than a municipality, combined with union representation by categories, hinders the formation of company-specific unions.

However, the rules set out in ILO Convention n. 98 regarding the prohibition of employer interference in professional unions align with Brazilian laws, which explains its ratification by Brazil.

[17] *Ibidem*.

[18] *Ibidem*.

[19] *Ibidem*.

[20] Uriarte O.E. (1989), *A proteção contra atos anti-sindicais*, trad. Irany Ferrari, SP: LTr, p. 17.

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The compatibility of the non-interference rules with negotiated clauses providing for the allocation of resources by companies to funds managed by professional unions is the central focus of this study.

Before addressing this, however, it is necessary to analyze the sources of trade union financing in Brazil.

2. Financing of professional unions in Brazil: the impact of Law n. 13,467/2017 and Supreme Court topic 935

The obstacles introduced by Law n. 13,467/2017 to union financing, which weakened unions, significantly affected collective bargaining, resulting in an unequivocal qualitative reduction in workers' rights. Exceptions to this trend are rare and typically involve "*categories with a stronger tradition of union organization and a higher unionization rate*"[21].

Adding to this is the end of the *ultratividade* of collective norms, through the repeal of the relevant article and the cancellation of TST Precedent n. 277. This change forced unions to "*negotiate merely to maintain rights historically achieved and consolidated in collective labor agreements*"[22].

However, the Supreme Court, through Topic n. 935, allowed the collection of assistance contributions from non-unionized workers negotiated in agreements or collective conventions, provided the right to object is guaranteed. This decision helped mitigate the blow suffered by unions under Law n. 13,467/2017.

2.1. Sources of union financing

Based on Article 548 of the CLT, union financing sources in Brazil can be classified as ordinary or extraordinary.

The ordinary sources are four:

1) Social or union membership dues;
2) Union contribution;
3) Confederative contribution;
4) Assistance contribution.

[21] Batista F.R., Seferian G. (2020), "Financiamento sindical, direito do trabalho e crise: aproximações empíricas ao tema da funcionalidade do direito do trabalho para o capitalismo", *Revista Direito & Práxis*, vol. 11, n. 4, pp. 2669-2695.

[22] *Ibidem*.

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The social, associative, or union membership dues, authorized by Article 548(b) of the CLT, are stipulated in the social statutes of the respective unions and are payable only by unionized workers, who must pay them voluntarily. Given the extremely low unionization rates in Brazil, the collection of union membership dues represents a very small portion of union financing[23].

The union contribution, according to Article 579 of the CLT, as amended by Law n. 13,467/2017, is payable only by workers who provide prior and express authorization. It is deducted from wages in favor of the union representing the corresponding professional category, collected once a year, and corresponds to "*one day's remuneration, regardless of the form of said remuneration*".

Until the enactment of Law n. 13,467/2017, the union contribution was mandatory for all workers. For over 70 years (since the CLT was enacted through Decree-Law n. 5,452/1943), it was the primary source of funding for union activities.

According to widely reported data, particularly in the press, there was a 90% reduction in the revenue collected by professional unions between 2017 and 2018 due to the changes introduced by Law n. 13,467/2017. Union revenue fell from R$ 2.24 billion in 2017 to R$ 207.6 million in 2018. In 2019, the reduction was reportedly even greater, with collections falling below R$ 90 million[24].

The confederative contribution, provided for in Article 8, IV, of the Constitution, must be determined by a general assembly and deducted from wages to fund the confederative system of the respective union representation.

It is important to note that, according to the constitutional text, the confederative contribution is independent of any other contributions owed to the union as stipulated by law.

STF Binding Precedent n. 40 establishes that "*it is unconstitutional to impose contributions on non-unionized employees of the category through agreements, collective conventions, or normative rulings*".

[23] De acordo com o Instituto Brasileiro de Geografia e Estatística (IBGE), em 2023, das 100,7 milhões de pessoas ocupadas no país, apenas 8,4 milhões eram associadas a sindicatos, o que correspondia a 8,4% de sindicalização. Trata-se do menor contingente e o menor percentual da série iniciada em 2012, quando havia 14,4 milhões de trabalhadores sindicalizados, representando 16,1% de sindicalização (BRASIL. Instituto Brasileiro de Geografia e Estatística (IBGE). Agência IBGE Notícias. Data da publicação: 21 jun 2024. Disponível em: *agenciadenoticias.ibge.gov.br/agencia-noticias/2012-agencia-de-noticias/noticias/40445-em-2023-numero-de-sindicalizados-cai-para-8-4-milhoes-o-menor-desde-2012* (acesso: 12.08.2024).

[24] Batista F.R., Seferian G. (2020), "Financiamento sindical, direito do trabalho e crise…", cit.

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Based on this precedent, it became a settled understanding in jurisprudence that the confederative contribution cannot be charged to non-unionized workers[25].

However, this perspective seems to have been modified by the Supreme Federal Court (STF) itself when ruling on declaratory appeals in ARE 1018459. The Court established, as a general repercussion thesis, that "*it is constitutional to impose assistance contributions through agreements or collective conventions on all employees in the category, even non-unionized ones, provided the right to object is guaranteed*" (Topic 935)[26].

The assistance contribution is stipulated in agreements or collective conventions to fund collective bargaining, based on Article 513(e) of the CLT.

The STF's interpretation, consolidated in Topic 935, is expected to partially mitigate the substantial revenue losses experienced by professional unions.

The extraordinary sources, as provided in subparagraphs "c", "d", and "e" of Article 548 of the CLT, include:

- assets and income generated from them;
- donations and bequests;
- fines and other occasional revenues.

Given this context, as noted in the introduction, the central issue is the extent to which provisions in agreements or collective conventions requiring employers to contribute to funds managed by professional unions align with or violate the principles enshrined in the Brazilian legal framework.

2.2. Negotiated clauses requiring employer contributions to funds managed by professional unions: examples

There are collective labor agreements (CCTs) that impose obligations on employers to contribute financially to funds managed by the professional union parties to the agreement. These contributions aim to support medical

[25] Brasil, Tribunal Superior do Trabalho (TST). Agravo de Instrumento em Recurso de Revista (RRAg) n. 461-21.2015.5.09.0567, 7ª Turma, Relator Ministro Alexandre de Souza Agra Belmonte, Data do julgamento: 19 jun 2024. Data da publicação: 28 jun 2024. Disponível em: *www.tst.jus.br/* (acesso em: 12.08.2024).

[26] Brasil. Supremo Tribunal Federal (STF). Recurso Extraordinário com Agravo (ARE) 1018459. Tribunal Pleno. Relator Ministro Gilmar Mendes. Data do julgamento: 12 set 2023. Data da publicação: 18 set 2023. Disponível em: *www.stf.jus.br* (acesso: 12.08.2024).

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assistance, professional training, social inclusion for workers in the corresponding category, and also to help cover union activities.

An example is Clause 23 of the CCT, effective from 03/01/2024 to 02/28/2025, signed between the Federation of Workers in Cleaning and Maintenance Companies of the State of Paraná and other professional unions of the same category on one side, and the Union of Companies Providing Services to Third Parties, Workforce Placement and Temporary Work of the State of Paraná on the other. The clause reads as follows[27]:

CLAUSE TWENTY-THIRD – PROFESSIONAL QUALIFICATION FUND

The companies providing services in the territorial bases and representation of this collective instrument will contribute to the Foundation for Cleaning and Maintenance of the State of Paraná, with a monthly amount of R$26.00 (twenty-six reais) per employee, aimed at professional training and qualification.

Paragraph One: The amount due (based on the number of employees in the company, as per CAGED by CNPJ) must be paid by the 15th of each month. The Foundation will issue a bank slip specifying the bank, agency, and account for the deposit. Companies must send copies of the paid slips along with the CAGED report. The total number of employees to be considered is that described in the CAGED for each company's CNPJ within the territorial base.

Paragraph Two: A penalty of R$39.00 (thirty-nine reais) per employee, per month, is stipulated for non-compliance with this clause.

Another example is Clause 72 of the CCT signed between the Federation of Workers in Chemical and Pharmaceutical Industries of the State of São Paulo and 28 other professional unions on the workers' side, and 10 employer unions on the employers' side, representing various economic categories in São Paulo and nationwide. These include industries such as plastics, chemical products for industrial purposes, petrochemical industries, and others. The clause, effective from 11/01/2021 to 10/31/2023, reads as follows[28]:

CLAUSE SEVENTY-SECOND – SOCIAL INCLUSION FUND 2021/2022 AND 2022/2023

2021/2022

With the aim of funding social assistance, leisure activities, life insurance policies, funeral assistance, courses, research, incentives, and social and educational campaigns,

[27] Disponível em: *www.sindaspp.org.br/acordos/cct-sescap-2024-2025.pdf* (acesso: 07.08.2024).

[28] Brasil, Tribunal Superior do Trabalho (TST). Recurso Ordinário (RO) n. RO – 86-31.2017.5.08.0000. Seção Especializada em Dissídios Coletivos. Relator: Mauricio Godinho Delgado. Data do julgamento: 18 mar 2019. Data da publicação: 26 mar 2019. Disponível em: *jurisprudencia.tst.jus.br/-7457ed88bdf46cd90fcb92c7bf764727* (acesso: 11.08.2024).

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among other initiatives to promote workers in the category while respecting the social function of the employment contract, in accordance with Article 513(e) of the CLT, companies covered by this CONVENTION will pay, at their expense, the value corresponding to the social inclusion fund for each employee, equally for members and non-members, to the respective Workers' Union and Federation. Payments will follow the dates, percentages, and methods outlined below:

a) Payments will be made to the representative unions of workers who benefit from this agreement, as signatories: […]

Lastly, Clause 47 of the Collective Labor Agreement (ACT) 2016/2017 between the Union of Road Transport Workers in Passenger, Cargo, and Related Companies of Parauapebas and Canaã dos Carajás (SINTRODESPA) and the company Vix Logística S/A, which was the subject of a nullification action brought by the Public Labor Ministry, reads as follows[29]:

CLAUSE FORTY-SEVENTH – FUNDING CONTRIBUTION

The company will transfer once per year to the professional union an amount corresponding to 1.5% (one and a half percent) of the payroll value (based solely on the sum of respective base salaries) of its employees for December 2016. This transfer must be made by January 10, 2017 (at no cost to the workers) as a funding contribution.

There is an extensive number of CCTs requiring companies to contribute to funds for professional training, medical assistance, social inclusion, and the funding of union activities, with broad professional and employer representation across various categories.

Recent examples include:

- The CCT between SIEMACO-SP (Union of Workers in Cleaning and Urban Maintenance Services of São Paulo) and the Union of Cleaning and Maintenance Companies in São Paulo, effective 01/01/2024 to 12/31/2025 (Clause 22)[30];
- The CCT between SINEEPRES (Union of Employees in Temporary Staffing and Workforce Placement Companies in Paraná) and SINDEPRESTEM-PR (Union of Companies in Temporary Staffing and Workforce Placement in Paraná), effective 03/01/2024 to 02/28/2025 (Clause 23)[31];

[29] Disponível em: *sinproquim.org.br/wp-content/uploads/2021/11/CCT-FEQUIMFAR-2021-2023.pdf* (acesso: 07.08.2024).

[30] Disponível em: *www.siemaco.com.br/wp-content/uploads/2024/02/CCT-SEAC-x-SIEMACO-SP-2024-2025-REGISTRADA.pdf* (acesso: 11.08.2024).

[31] Disponível em: *wordpress-direta.s3.sa-east-1.amazonaws.com/sites/587/wp-content/uploads/2024/03/04090652/CCT-SINEEPRES-SINDEPRESTEM-PR-2024-2025.pdf* (acesso: 11.08.2024).

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– The CCT between the Pharmaceutical Products Industry Union (SINDUSFARMA) and the Union of Pharmacists in São Paulo, effective 04/01/2023 to 03/31/2025 (Clause 66)[32].

It is essential to analyze whether these clauses conflict with the principle of non-interference by employers in the management of professional unions, as established by ILO Convention n. 98, which, having been ratified by Brazil, is part of the Brazilian legal system.

3. Employer-financed funds administered by Professional Unions and Trade Union Freedom

Based on the preceding analysis, this section examines whether negotiated clauses obligating employers to contribute to funds managed by professional unions conflict with Brazilian legal principles, particularly the principle of non-intervention by employers in professional unions as established by ILO Convention n. 98.

The key question is whether the assessment of potential violations of the principle of non-intervention should: (i) be conducted a priori, assuming an absolute presumption that merely including such a clause in a collective bargaining agreement constitutes employer interference, or (ii) be conducted a posteriori, examining in each specific case whether the clause in question resulted in employer interference with the professional union's activities.

3.1. Absolute presumption of violation of Trade Union Freedom: jurisprudence from the TST Collective Disputes Section

It is important to emphasize the purpose of negotiated clauses requiring employers to contribute financially to professional unions.

As highlighted above, such clauses serve various purposes, the most common being: Training and professional qualification for workers; Medical assistance for workers; Funding social assistance and leisure activities for workers; Procuring life insurance policies and funeral assistance; Providing courses, research, and incentives; Supporting social and educational campaigns; and Financing union operations.

The consolidated jurisprudence of the Collective Disputes Section (SDC) of

[32] Disponível em: *sindusfarma.org.br/uploads/CCT_FARMACÊUTICOS_SINFAR_2023_20.doc-clicksign (1).pdf* (acesso: 11.08.2024).

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the TST (Brazilian Superior Labor Court) uniformly considers that, regardless of their purpose, these clauses violate Article 2.2 of ILO Convention n. 98, which defines acts of interference as "*maintaining workers' organizations by financial or other means, with the aim of placing these organizations under the control of an employer or an employers' organization*"[33].

Under the SDC's interpretation, the mere inclusion of a clause in a collective bargaining agreement requiring employers to contribute to a fund managed by a professional union creates an absolute presumption of "*employer interference in the economic support of the union, whether directly or indirectly*". This is deemed to violate the principle of union autonomy enshrined in Article 8, III, of the Brazilian Constitution and the principle of non-intervention by employers in unions outlined in Article 2 of ILO Convention n. 98[34].

Additionally, this interpretation is supported by the argument that, although collective bargaining is constitutionally guaranteed under Article 7, XXVI, "*as the best means of addressing the interests of both segments", the "freedom to negotiate is not absolute*". Therefore, clauses that ostensibly establish worker benefits – such as medical assistance – but involve contributions paid by companies and passed on to the professional union are not permissible. According to this jurisprudence, there is an absolute presumption of "*undue interference in union activities, resulting in financial submission of the union to a particular business group*", which consequently constitutes a violation of Article 8, I and III, of the Brazilian Constitution and Article 2 of ILO Convention n. 98, regardless of whether direct or indirect interference is proven[35].

However, it is possible to adopt a different perspective. This view posits that the mere inclusion of a clause requiring employer contributions to a fund managed by a professional union does not create an absolute presumption of employer interference, provided that certain conditions are met.

[33] Brasil, Tribunal Superior do Trabalho (TST). Recurso Ordinário (RO) n. RO – 1000412-39.2017.5.02.0000. Seção Especializada em Dissídios Coletivos (SDC). Relatora: Dora Maria da Costa. Data do julgamento: 11 nov 2019. Data da publicação: 19 nov 2019. Disponível em: *jurisprudencia.tst.jus.br/* (acesso: 11.08.2024).

[34] BRASIL. Tribunal Superior do Trabalho (TST). Recurso Ordinário (RO) n. RO – 1690-63.2018.5.09.0000. Seção Especializada em Dissídios Coletivos (SDC). Relatora: Dora Maria da Costa. Data do julgamento: 14 out 2019. Data da publicação: 17 out 2019. Disponível em: *jurisprudencia.tst.jus.br/* (acesso: 11.08.2024).

[35] Brasil, Tribunal Superior do Trabalho (TST). Recurso Ordinário (RO) n. RO – 1690-63.2018.5.09.0000. Seção Especializada em Dissídios Coletivos (SDC). Relatora: Dora Maria da Costa. Data do julgamento: 14 out 2019. Data da publicação: 17 out 2019. Disponível em: *jurisprudencia.tst.jus.br/* (acesso: 11.08.2024).

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3.2. No violation of Trade Union Freedom: assumptions of workers' material well-being and transparency

Reconciling the inherent antagonism between capital and labor with the solidarity required for economic and social development is essential.

The construction of a free, just, and inclusive society, as well as the eradication of poverty and marginalization, the reduction of social inequalities, and the promotion of the common good – as set forth in Article 3 of the Brazilian Constitution – requires broad cooperation among all social actors, especially between employers and workers.

However, this desired social cooperation must not undermine guarantees, particularly those for collective entities that represent workers. The full existence of these entities is a necessary condition for achieving the constitutional objectives outlined above.

Both individual and collective trade union freedoms, as guaranteed by ILO Conventions n. 87 and n. 98, are indispensable prerequisites for such cooperation. A professional union manipulated by employers will not improve workers' material conditions; instead, it will exacerbate inequality and exclusion by exclusively advancing employer interests.

It is not, however, possible to rule out the potential for employers to contribute financially to funds managed by professional unions without first verifying certain conditions.

To harmonize the autonomy and freedom of professional unions with the cooperation and solidarity essential for achieving the aforementioned constitutional objectives, two conditions should be included in negotiated clauses:

– The purpose must directly contribute to the material development of workers.
– The clause must establish transparency mechanisms that allow for the verification of resource allocation and the achievement of the proposed objectives.

a) Purpose

As demonstrated in the previously cited negotiated clauses, employer contributions to professional unions serve a variety of purposes, the most common being: Training and professional qualification for workers; Medical assistance for workers; Funding social assistance and leisure activities; Procuring life insurance policies and funeral assistance; Providing courses,

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research, and incentives; Supporting social and educational campaigns; and Financing union operations.

Regarding purpose, the clause should be analyzed from the perspectives of directly fostering workers' material development and avoiding interference.

In terms of material development, clauses aimed at training and professional qualification fulfill the inclusive goals outlined in the Constitution, as they effectively enable workers to acquire professional skills that facilitate their employment opportunities. Of particular importance is the need to train workers with disabilities, given companies' repeated non-compliance with quotas under Article 93 of Law n. 8,213/1991, which is often attributed to a lack of qualified individuals with disabilities (PCD) to fill the positions. Thus, such a clause benefits not only workers and employers but society as a whole. This also includes clauses that finance professional courses and educational campaigns.

Clauses addressing medical assistance, social assistance, and leisure activities likewise appear to meet the constitutional requirement for social development, as they ultimately enhance workers' health and well-being, which are essential conditions for social progress.

Similarly, clauses providing for life insurance policies and funeral assistance offer security against misfortune and can also be considered measures that contribute to social well-being.

In contrast, clauses aimed at union funding lack a clear and direct connection to workers' material development. On the contrary, they raise concerns about employer interference in union interests, potentially aligning unions with employer priorities rather than worker needs.

For clauses related to training, medical assistance, social assistance and leisure, and insurance, there is no inherent perception of employer interference, provided that their management is transparent.

b) Transparency in fund management

Transparency is a fundamental principle in collective labor law and "*leads to the necessity of clarity regarding the subjective and objective conditions involved in the negotiation*". Given the collective nature of these agreements, "*the level of transparency required here is undoubtedly greater than that in strictly individual legal transactions*", thereby demanding the broadest possible "*access to adequate information to formulate norms compatible with the involved social segment*"[36].

[36] Delgado M.G. (2019), *Curso de Direito do Trabalho*, XVIII ed., SP: LTr, pp. 1572-1573.

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It is evident, therefore, that it is not sufficient for a collective agreement clause to merely state that the funds provided by employers to a union-managed fund will be used for professional training, health, social assistance, and leisure activities for workers. The agreement must include transparency mechanisms for fund management. These should cover:

- Objective criteria for selecting fund managers, including professional qualification requirements;
- Timelines and goals for the utilization of the funds.

As seen in the clauses cited earlier, none of them specify how the funds provided by employers will be used. This omission creates the impression of covert employer interference in the professional union.

This approach aligns with the jurisprudence of the ILO Committee on Freedom of Association, which emphasizes the importance of ensuring that contributions from employers do not compromise the autonomy of unions or result in undue influence.

When analyzing a similar situation involving mutual associations – worker associations that receive resources from employers for "*socio-economic purposes of material well-being (savings, credit, investment, housing programs, educational initiatives, etc.) and to foster union and cooperation between workers and employers*" – the ILO Committee on Freedom of Association determined that such arrangements do not violate ILO Conventions n. 87 and n. 98. The Committee stated[37]:

773. Mutual associations are worker associations whose contributions depend on employer contributions. These associations operate under the mutualist principle, funded by workers and employers, with socio-economic goals of material well-being (savings, credit, investment, housing programs, education, etc.) and fostering cooperation between workers and employers. Their governance must primarily include workers, though employer representatives may participate with voice but no vote. In the Committee's view, while nothing prevents workers and employers from seeking cooperative forms to achieve social goals under Conventions n. 87 and n. 98, the Committee must ensure that these arrangements, when formalized into permanent structures, do not interfere with unions' activities and functions.

[37] Organização Internacional do Trabalho (OIT) (1997), *Liberdade Sindical: Recopilação de Decisões e Princípios do Comitê de Liberdade Sindical do Conselho de Administração da OIT*, traduzido do original espanhol por Edilson Alkmim Cunha, Brasília: Organização Internacional do Trabalho, I ed., p. 168 – total de páginas 264.

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There is, therefore, room within collective bargaining for social actors representing workers and employers to establish mechanisms that enhance the role of professional unions in implementing policies aimed at social inclusion and the development of social well-being.

4. Discussion and conclusion

From the perspective of ILO Conventions n. 87 and n. 98, it can be inferred that the Brazilian legal framework guarantees broad individual trade union freedom but imposes restrictions on collective trade union freedom.

This conclusion stems from the provisions of Article 8 of the 1988 Federal Constitution, which grants workers the right to join and remain affiliated with any organization, provided its statutes are observed. Workers are also protected against acts that undermine their right to unionize, especially those that threaten employment. For instance, the dismissal of unionized employees running for leadership or representative positions, whether as titular members or alternates, is prohibited until one year after the end of their term, except for just cause.

However, in the realm of collective trade union freedom, there is an incompatibility between the broad freedom to establish unions, federations, and confederations envisaged in ILO Convention n. 87 and the restrictions imposed by the principle of union unity established by Article 8, III, of the Federal Constitution, which limits the creation of new unions.

ILO Convention n. 98, ratified by Brazil, prohibits acts of interference where employers or employers' organizations attempt to control workers' organizations through financial or other means.

In this context, this study sought to address whether the negotiation of clauses in collective agreements requiring employers to contribute financially to funds managed by professional unions constitutes acts of interference and, consequently, violates trade union freedom.

The consolidated jurisprudence of the TST's Collective Disputes Section (SDC) considers such clauses invalid, asserting that there is an absolute presumption of interference and, therefore, a violation of trade union freedom, regardless of the fund's purpose.

Nevertheless, there are numerous clauses in current collective labor agreements that establish employer contributions to funds managed by professional unions. These funds serve diverse purposes, such as professional training and qualification, social, medical, and leisure assistance for workers, life insurance policies, funeral assistance, and even union activities.

Considering the values and objectives of the Brazilian Constitution

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– especially the construction of a just and inclusive society through the collaboration of all social actors – a different approach to the issue is possible.

While safeguarding the guarantees of existence and freedom of professional unions, it is feasible to recognize the validity of clauses requiring employer contributions to funds managed by unions, provided that two conditions are met:

- Purpose: The fund's purpose must directly aim to improve workers' material well-being. Contributions to funds supporting professional training, qualification, medical, social, and leisure assistance, as well as life insurance policies and funeral assistance, would meet this condition. Conversely, employer funding of union activities would constitute interference and violate trade union freedom, as it has no direct connection to workers' well-being. In such cases, employer contributions would flow directly into union accounts, mingling with other sources of union funding, which would clearly demonstrate employer influence over the union's activities.
- Transparency: The management of the fund must be transparent, with clauses specifying objective criteria to ensure accountability. This includes verifying the total contributions made by employers, identifying the fund's managers, listing the number of workers directly benefiting, and other measures to confirm at any time that the funds are being used as intended.

This perspective aligns with the jurisprudence of the ILO Committee on Freedom of Association, which allows for cooperative initiatives between workers and employers, provided they respect union autonomy and serve social goals.

Thus, the hypothesis proposed in this study is validated: negotiated clauses obligating employers to contribute financially to union-managed funds, provided they are intended for workers' material well-being and include transparent management mechanisms, do not violate trade union freedom under ILO Convention n. 98.

It is believed that clauses drafted under these conditions could encourage a new interpretation by Brazilian labor jurisprudence.

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A study about the possibilities of the union's action to create gender equality – Brazilian experience and global action

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1. Introduction

Since the Universal Declaration of Human Rights[3], everyone knows that all people are equal without any distinction, including gender. In turn, the United Nations Charter reaffirms the equality of rights between men and women. The ILO published Convention 100[4] on equal pay for women in 1951 and Convention 156[5] about equal opportunities and treatment for men and women.

However, as of today, it will take 131 years for gender pay equity to be achieved[6]. Can Unions help to mitigate the current scenario, accelerating the process?

In Brazil, the Salary Transparency and Remuneration Criteria Report

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[3] United Nations, Universal Declaration of Human Rights, 1948, available at: *www.unicef.org/brazil/declaracao-universal-dos-direitos-humanos*.

[4] C100 – Igualdade de Remuneração de Homens e Mulheres Trabalhadores por Trabalho de Igual Valor. (2014, February 3). *www.ilo.org/brasilia/convencoes/WCMS_235190/lang--pt/index.htm*.

[5] C156 – Sobre a Igualdade de Oportunidades e de Tratamento para Homens e Mulheres Trabalhadores: Trabalhadores com Encargos de Família. (2014, February 3). *www.ilo.org/brasilia/convencoes/WCMS_242709/lang--pt/index.htm*.

[6] World Economic Forum (2023, June), *Global Gender Gap Report 2023*, World Economic Forum, available at: *www3.weforum.org/docs/wef_gggr_2023.pdf*, p. 5.

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issued by the Ministry of Labour in March 2024[7], revealed that the gender pay gap in Brazil is around 19.4%, reaching 25.2% in executive and managerial positions.

To reduce the disparity and considering the global trend, Brazil enacted Law 14611 in July 2023[8], with measures to eliminate the gender pay gap. This includes the obligation for companies to present reports about the situation[9] and improvement plans, which must involve Union participation or employee committees[10], opening a new path for Unions actions.

This article aims to analyse the current Union scenario and its challenges in reducing the gender pay gap. The analysis of the Brazil situation will be done through research in collective bargaining agreements officially registered with the Ministry of Labour in Brazil, seeking rules related to the reduction of the gender compensation disparity. It will also be done through a comparison analysis of trade union activity in European countries, with Spain and Portugal chosen for their cultural proximity to Brazil.

The role of trade unions in collective bargaining is decisive in reducing wage inequality, but to be effective, the Unions need to have more balanced boards, with female participation in them and in negotiations directly as well.

This article intends to present how trade unions currently act and how they can be more assertive on the issue of gender equality, and whether their composition (in terms of women's participation) influences their agendas.

2. Equality for women as a human right – transnational rules

Since its foundation, the United Nations has promoted equality between men and women as one of the fundamental principles of human rights. The United Nations Charter[11] establishes equal rights for men and women as one of its main objectives. The Universal Human Rights Declaration[12], adopted

[7] Brazil Government (2023), Equal pay Report Research, available at: *www.gov.br/trabalho-e-emprego/pt-br/assuntos/estatisticas-trabalho/relatorio-empresarial/relatorio-empresarial*.

[8] Brazil, Federal Republic – Planalto (2023), Law 14.611/2023, available at: *www.planalto.gov.br/ccivil_03/_ato2023-2026/2023/lei/L14611.htm*.

[9] Brazil, Federal Republic – Planalto (2023), Decreto n. 11.795/2023, available at: *www.planalto.gov.br/ccivil_03/_ato2023-2026/2023/Decreto/D11795.htm*.

[10] Labor Ministry – Imprensa Oficial (2023), Portaria 3.71/2023, available at: *www.in.gov.br/web/dou/-/portaria-mte-n-3.714-de-24-de-novembro-de-2023-525914843*.

[11] United Nationd – United Nations Charter (1945), Chapter 1.3, available at: *www.un.org/en/about-us/un-charter/chapter-1*.

[12] United Nationd (1948), *Universal Human Right Declaration*, available at: *www.un.org/en/about-us/universal-declaration-of-human-rights*.

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in 1948, states that human rights apply equally to men and women, without distinction of gender. The Human Rights Commission of the United Nations (UN) has drafted international treaties such as the "International Covenant on Civil and Political Rights" and the "International Covenant on Economic, Social, and Cultural Rights", which together with the Universal Declaration form the International Bill of Human Rights[13].

These treaties prohibit discrimination on grounds of sex and guarantee equal rights for men and women in all respects. The International Covenant on Civil and Political Rights protects rights such as life, liberty, equality before the law, freedom of thought, and religion, among others. The International Covenant on Economic, Social, and Cultural Rights guarantees rights such as work, education, health, and an adequate standard of living. States that ratify these treaties must periodically report on how they are fulfilling their obligations, and experts issue recommendations to ensure gender equality in the application of human rights[14].

The Sustainable Development Goals (SDGs)[15] also address the issue of gender equality, especially in SDG 5[16]. These goals were established as a global agenda during the United Nations Summit on Sustainable Development in September 2015.

About the efforts that countries are doing to achieve the equality of gender in labour relations, the ILO published a report in 2022, "Pay transparency legislation: Implications for employers' and workers' organizations"[17].

Chapter 3[18] of the document explores various practices and common approaches to enhance salary transparency. Some of the most common methods include salary transparency reports, salary audits, employees' right to request salary information, employer-employee engagement, and digital tools.

Transparency salary reports are a common practice in various countries. Employers are asked to periodically disclose information about their employees and gender pay disparities. The purpose of these reports is to facilitate communication between employers and workers regarding wage

[13] Organização das Nações Unidas (2014), *Derechos Humanos. Los derechos de la mujer son derechos humanos*, available at: *www.ohchr.org/sites/default/files/Documents/Publications/HR-PUB-14-2_SP.pdf*.

[14] *Ibidem*.

[15] United Nations Sustainable Development Goals (2024), available at: *sdgs.un.org/goals*.

[16] United Nations Sustainable Development Goals (2024), available at: *sdgs.un.org/goals/goal5*.

[17] ILO (International Labour Organization) (2022), available at: *www.ilo.org/publications/pay-transparency-legislation-implications-employers-and-workers*.

[18] Ivi, pp. 10-13.

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practices, particularly concerning gender. Salary audits necessitate employers to analyse and comprehend the identified wage disparities and take steps to address them[19].

The right of employees to request salary information has been implemented in various countries, often exercised through a workers' representative, as the trade unions. Thus, trade unions can play a key role in the transparency ecosystem by offering information and guaranteeing that collective agreements are free of gender bias[20].

What we can see, however, is that access to the equal pay report by trade unions or company employee representatives is a common rule in several of the countries examined by the ILO in this report.

Of the conditions set out, Brazil has adhered to the presentation of a report on equal pay, which is public, the possibility of supervision by the State through the Ministry of Labour, and the obligation to create an equality plan with the participation of employee representatives, either an internally elected committee or the union of the category.

3. Equality for women's remuneration and condition to work – Brazilian's rules

Brazil already has rules about equality of gender payment, and recently introduced and enacted laws to protect and empower women.

Some rules date back to the CLT – Consolidation of Labour Laws, Decree-Law n. 5,452/1943[21], as its article 5º that was so simple, saying "*All work of equal value shall correspond to equal pay, without distinction as to sex*"[22]. However, this is not enough to have significant progress over the decades.

To narrow the gap and considering the global trend, Brazil enacted Law 14.611/2023[23], with measures to close the wage disparity between men and women. However, the law focuses on salary criteria and not on more profound issues to address this situation.

[19] *Ibidem*.

[20] *Ibidem*.

[21] Decreto-lei n. 5.452, de 1º de maio de 1943. Aprova a Consolidação das Leis do Trabalho. *www.planalto.gov.br/ccivil_03/decreto-lei/Del5452compilado.htm*.

[22] *Ibidem*.

[23] Lei n. 14.611 de 3 de julho de 2023. Dispõe sobre a igualdade salarial e de critérios remuneratórios entre mulheres e homens; e altera a Consolidação das Leis do Trabalho, aprovada pelo Decreto-Lei n. 5.452, de 1º de maio de 1943. *www.planalto.gov.br/ccivil_03/_ato2023-2026/2023/lei/l14611.htm*.

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The Decree n. 11,795/2023[24] regulates the law 14.661/23 and establishes in its article 2. º the contents of the "Salary Transparency and Remuneration Criteria Report", which aims to "*objectively compare salaries, remunerations, and the proportion of positions held*".

The Ordinance n. 3714/2023[25] sets out the rules detailing how to prepare the "Transparency Report on Salary and Remuneration Criteria": the report consists of two distinct parts, one related to the issue of gender-based remuneration and its remuneration ratio, with data obtained directly by the Ministry of Labour through the company's payroll system in Brazil, the e-Social (Brazil, 2019), by establishment. The second part of the report focuses on the information provided by companies on the Employer Portal, addressing questions related to women's development policies.

The reports were published in March and September 2024. The report published in September showed that the pay gap between men and women persisted, presenting that woman, on average, continuous receiving 20% less than the amount received by men[26]. All the Brazilian's report can be accessed on the Labour Ministry website[27].

The government has published a Normative Instruction (IN 6/2024[28]) detailing the role of the inspectorate, as well as the possibility of union action

[24] Decreto n. 11.795 de 23 de novembro de 2023. Regulamenta a Lei n. 14.611, de 3 de julho de 2023, que dispõe sobre igualdade salarial e de critérios remuneratórios entre mulheres e homens. *www.planalto.gov.br/ccivil_03/_ato2023-2026/2023/decreto/d11795.htm?hsCtaTracking=8db f00ec-3047-42cb-bdec-5135b6af0ce5%7C75c3cf15-d229-48dd-ad4a-7c2ca608a1d7#:~:text=DECRETO%20N%C2%BA%2011.795%2C%20DE%2023,remunerat%C3%B3rios%20entre%20mulheres%2*.

[25] Portaria n. 3.714, de 24 de novembro de 2023. Regulamenta o Decreto n. 11.795, de 23 de novembro de 2023, que dispõe sobre a igualdade salarial e de critérios remuneratórios entre mulheres e homens, em especial o Relatório de Transparência Salarial e de Critérios Remuneratórios, o Plano de Ação para Mitigação da Desigualdade Salarial e de Critérios Remuneratórios, o protocolo de fiscalização contra a discriminação salarial e de critérios remuneratórios entre mulheres e homens e a disponibilização de canais específicos para denúncias de discriminação salarial. (Processo n. 19955.201311/2023-38). Diário Oficial da União, Brasília, ed. 224, seção 1, p. 177, 27 nov. 2023. *www.in.gov.br/en/web/dou/-/portaria-mte-n-3.714-de-24-de-novembro-de-2023-525914843*.

[26] Brazilian Government – Labor Ministry (2024), *www.gov.br/trabalho-e-emprego/pt-br/noticias-e-conteudo/2024/Setembro/mulheres-ganham-20-7-menos-que-homens-em-empresas-com-mais-de-100-funcionarios-aponta-2deg-relatorio-de-transparencia-salarial/Apresentacao.MTE.17092024final.pdf*.

[27] Brazilian Government – Labor Ministry (2024), *www.gov.br/trabalho-e-emprego/pt-br/assuntos/estatisticas-trabalho/relatorio-igualdade/relatorio-transparencia*.

[28] Brazilian Government – Labor Ministry (2024), *www.in.gov.br/en/web/dou/-/instrucao-normativa-gm-/mte-n-6-de-17-de-setembro-de-2024-585124105*.

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in the companies' compensation adjustment plans, in which there will be union participation.

But until now, we have not been able to find any collective instruments published after the enactment of the law that deal either with women's working conditions or with rules for union participation in action plans.

Although this situation may have several explanations, we believe that one of them is significant, which is the absence of female participation in union relations.

4. Women's social participation

Benhame and Pedreira (2020)[29] analysing the women's social situation and the impact this has on labour relations, and especially collective labour relations, said that the challenge of women's social inclusion began with the struggle for equal rights with men, and continues to this day. Feminist movements face economic, social, legal and cultural barriers that prevent the integration of women into society, the job market, politics and trade unions.

Social studies shows that situation. In the article entitled *Absent or invisible? The participation of women in trade unions*, Bertolin and Kamada (2012, p. 31)[30], when dealing with "excluded insertion", show the reality of women in the labour market, showing the difficulty women have in entering the labour market, which "*goes back to the sexual division of labour*". Historically, economic activities, carried out in the public sphere, have been considered "productive" and endowed with social recognition, while domestic work, still considered women's responsibility and carried out in the private sphere, is considered a "reproductive" activity, aimed only at enabling the development of productive activities.

Not otherwise, Bertolin and Kamada (2012, pp. 47-48)[31] conclude that the democratization of trade union relations in Brazil requires the acceptance of women and the integration of demands for gender equality.

How is this scenario today?

[29] Benhame M.L., Pedreira C.A. (2020), "Women and the union mouvment in Brazil", *Revista LTr – Legislação do Trabalho*, 84, pp. 328-333.

[30] Bertolin P.T.M., Kamada F.L. (2012), "Ausent or invisible? The participation of women in trade unions", *Caderno Espaço Feminino-Uberlândia-MG*, 25, 1, available at: *www.seer.ufu.br/index.php/neguem/article/view/13656/11077* (accessed: 15/03/2020).

[31] *Ibidem*.

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5. The Unions' law in Brazil – union structure and freedom of association. Composition of Union's boards

Brazil's union structure in the 21st century is still the same as it was in the 1930s, with a single union based on economic and professional categories. In addition to the professional category, which depends on economic activity, there are differentiated professional categories and liberal professionals, with a territorial base fixed by law.

In this way, the law determines which union will represent an employee depending on which category of company and location he/she will be working in, just as it determines which union represents the employer. There are no choices. There is no freedom. Brazil did not sign Convention 87 of the CLT.

This is the stage on which we will analyse the gender equality agenda.

6. Collective Bargains in Brazil on gender equality and women's working conditions

Collective Bargaining Agreements (CBAs) are negotiated annually between employer associations and labour unions, outlining terms for employees within the same industry or economic category. These agreements cover salary increases, benefits, job security, and other key employment conditions. CBAs are registered in the Ministry of Labour and Employment's "Sistema Mediador" platform, allowing users to search by trade union, state, or municipality, and filter by specific rights or clauses for targeted analysis.

To assess the effectiveness of CBAs in promoting gender equality in the workplace, a search was conducted within CBAs that were registered in "Sistema Mediador" and in effect from 05/31/2023 to 05/31/2024. The selection criteria were based on the group "Labour Relations – Labour Relations, Personnel Norms, and Job Stability", with the keyword "woman". This resulted in the identification of 229 CBAs within this specific theme.

The conditions outlined in the identified CBAs either merely repeat the legal provisions without adding new rights for women nor obligations for the companies, or they introduce modest advancements that ultimately do not lead to significant improvements for women. Examples of this include the following:

> The parties commit to encouraging both workers and employers to make efforts aimed at increasing the participation of women in the civil construction industry's labour market[32].

[32] *www3.mte.gov.br/sistemas/mediador/Resumo/ResumoVisualizar?NrSolicitacao=MR021900/2024.*

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The companies commit to ensuring equal conditions and opportunities for women to compete for any position, including leadership roles, provided they meet the job requirements. The companies are also required to maintain sanitary pads in the first aid kits, to be provided to female employees in emergencies[33].

The companies will hire women and treat them equally to men in terms of opportunities and treatment[34].

It is prohibited for the contracting companies to adopt any discriminatory practices in the hiring or execution of services performed by women. The companies will make every effort to prioritize the hiring of women, provided they meet the same requirements expected of male workers[35].

The signing entities, in an effort to promote the inclusion of women in activities related to metallurgy, mechanics, and electrical materials, will establish policies to encourage such inclusion. This will include the organization of lectures, seminars, vocational courses, and other educational and professional development activities. Additionally, a joint effort will be made to create a curriculum database, aiming for female representation of at least 5% of the workforce in each company[36].

As demonstrated by the examples above, the normative clauses analysed do not introduce new obligations or establish rules for employers regarding the development of women's careers in the workplace. It is necessary to consider new conditions that could represent a genuine union effort to achieve meaningful gains for women. These weak provisions may hinder women's advancement by not addressing issues like unconscious bias or work-life balance challenges.

7. Possible rules in collective bargaining agreements and the 1943 chapter on the protection of women in work

Brazilian labour law includes a dedicated chapter safeguarding women's employment. Enacted in 1943, Articles 372 to 401 of the Labour Code

[33] *www3.mte.gov.br/sistemas/mediador/Resumo/ResumoVisualizar?NrSolicitacao=MR002715/2023.*

[34] *www3.mte.gov.br/sistemas/mediador/Resumo/ResumoVisualizar?NrSolicitacao=MR011528/2022.*

[35] *www3.mte.gov.br/sistemas/mediador/Resumo/ResumoVisualizar?NrSolicitacao=MR017430/2023.*

[36] *www3.mte.gov.br/sistemas/mediador/Resumo/ResumoVisualizar?NrSolicitacao=MR022411/2024.*

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impose restrictions on overtime, night shifts, and Sunday work, in addition to offering maternity protection. While maternity protections remain relevant, the other provisions may hinder women's access to the job market and should be reevaluated[37].

In 2022, the Brazilian government introduced the "Emprega + Mulheres" law[38] in an effort to modernize labour regulations. This law includes provisions promoting shared parental responsibilities and encouraging women's professional development in strategic fields.

Although the federal government has yet to issue regulations for the "Emprega + Mulheres" law, preventing the immediate implementation of certain programs like shared maternity leave, these provisions can still be incorporated into CBAs. In fact, it can be argued that such agreements are the ideal place to tailor these rules to the specific needs of each industry.

While the reviewed CBAs mentioned in the item above show some positive steps, they lack concrete measures that could lead to substantial improvements for women in the workplace. Future CBAs could consider provisions like:

1) Maternity leave extensions or additional paid leave for childcare needs.
2) Mentorship programs specifically designed to support the career advancement of women.
3) Training programs focused on unconscious bias and strategies to promote gender equality in the workplace.
4) Financial support for childcare or elder care services to help women manage work-life balance.
5) Establishment of clear targets and accountability measures for increasing the number of women in leadership positions.

Collective bargaining agreements could also introduce parental leave policies, allowing women to return to work while their partners care for their children; mandate that women be given priority when there is a tie with men in promotions, flexible work arrangements, provide additional leave for women that demonstrate a need for special care for their children and/or elderly, among others.

[37] For example, Article 386 establishes that women may only work on Sundays on an alternating basis (once every two weeks). This provision was recently deemed constitutional by the Supreme Federal Court on the grounds that women have domestic work to perform at home on weekends. The authors argue that the responsibility for household chores should fall equally on men and women. Therefore, the perpetuation of this rationale further distances women from the labour market, as men are not subject to the same restriction.

[38] Law n. 14, 457/2022.

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By incorporating these types of measures, unions could demonstrate a stronger commitment to achieving gender equality within the workforce.

8. Conclusion

This Union's agenda for gender equality and women's rights is not restricted to Brazil.

In fact, it is a global concern. IndustriALL Global Union addressed the matter in 2019[39], following the issuance of the ILO report "Global Wage Report" on unequal pay between genders, the "Global Wage Report". Jenny Holdcroft, Deputy General Secretary of IndustriALL, highlighted an issue in Union's actions: "*But we need more women in union leadership and at the negotiating table to achieve pay equality*". In other words, the lack of women in Union's negotiations directly impacts the results.

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Desafíos a la negociación colectiva: la influencia del discurso neoliberal en el sujeto trabajador, en la sociedad y en la jurisprudencia

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Resumen

A pesar de la flexibilización y la desregulación de las leyes laborales ampliadas por la Reforma Laboral de 2017 en Brasil, no se observa una reacción colectiva o individual frente a la profundización de la precarización del trabajo en el país. El conjunto de problemas objetivos y subjetivos que debilitan a los sindicatos y perjudican las negociaciones colectivas será analizado mediante investigación bibliográfica y el estudio de sentencias dictadas en conflictos colectivos resueltos por el Tribunal Superior del Trabajo y en sentencias del Supremo Tribunal Federal. La hipótesis plantea que el discurso neoliberal ha difundido entre los trabajadores y la sociedad una falsa idea de libertad, debilitando la estructura sindical y profundizando las desigualdades sociales, bajo la premisa de que el individuo debe ser libre para ser lo que desea, dependiendo exclusivamente de su esfuerzo para mejorar su condición social.

Palabras clave: Negociación Colectiva; Sindicalismo; Libertad; Neoliberalismo; Flexibilización.

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1. Introducción

Brasil, cediendo a las presiones del mercado, promovió a partir de la Reforma Laboral de 2017 la desregulación y flexibilización de diversos derechos laborales arduamente conquistados a lo largo de más de un siglo de lucha, permitiendo que el trabajador se desvincule del sistema de protección laboral y social existente en el ámbito de la legislación constitucional vigente.

A pesar de la precarización implementada por la Reforma Laboral, se percibe en el contexto actual de las relaciones sociales la predominancia del individualismo, de la falsa idea de libertad individual y del discurso de la meritocracia, lo cual se refleja en el universo del trabajo a través del avance de la fragmentación de las categorías, ya sea mediante la ampliación de la tercerización, el crecimiento del trabajo en el ámbito de la informalidad o del emprendimiento individual, lo que, en sí mismo, impide que el trabajador se perciba como parte de un colectivo.

No se observa en Brasil una reacción colectiva ante esta tendencia hacia la precarización, razón por la cual se justifica la presente investigación, que se dedicará a analizar si la influencia del discurso neoliberal sobre el trabajador impedirá la continuidad de la actuación colectiva, persistente y no accidental de las entidades sindicales, ejerciendo de forma amplia y adecuada sus funciones de regulación y disciplina de las normas laborales, mediante acuerdos y convenios colectivos, con el objetivo de equilibrar las relaciones laborales e influir moralmente en la actuación individual y colectiva de los individuos.

Para responder al problema planteado, se llevará a cabo una amplia investigación bibliográfica a través de obras doctrinarias, la Constitución de 1988 y la legislación infraconstitucional, además del análisis de fallos del Tribunal Superior del Trabajo y del Supremo Tribunal Federal sobre cuestiones relacionadas con el tema.

El presente artículo se dividirá en dos capítulos. El primero aborda la flexibilización y desregulación a partir de la Reforma Laboral de 2017, que promovió la profundización de la precarización del trabajo en Brasil, y el segundo capítulo ofrece un análisis de la jurisprudencia del Tribunal Superior del Trabajo y del Supremo Tribunal Federal, que, a pesar de defender la negociación colectiva, actúan de forma que debilitan a los sindicatos, lo que ha resultado en la reducción de los derechos para los trabajadores.

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2. El derecho laboral y el debilitamiento de los sindicatos a partir de la reforma laboral de 2017

Según Mauricio Godinho Delgado (2015), los dos principales hitos en la evolución sindical en Brasil coinciden con los del Derecho Laboral: 1930 y 1988. Esto se debe a que las primeras asociaciones de trabajadores libres, aunque asalariados y no organizados en sindicatos, surgieron en las décadas finales del siglo XIX, ampliándose la experiencia asociativa a lo largo del inicio del siglo XX. A partir de la Constitución Federal de 1988, se instauró en Brasil una perspectiva de régimen efectivamente democrático, rompiendo con todos los paradigmas anteriores, ya que a partir de entonces surgieron fundamentos para consolidar un nuevo modelo sindical basado en la libertad y la autonomía, a pesar de la permanencia del sistema de unicidad sindical, que contrasta con los preceptos del Convenio 87 de la OIT (Organización Internacional del Trabajo, 1948).

En este sentido, la Constitución Federal de 1988 (Brasil, 1988) garantiza la libertad sindical y da relevancia a la negociación colectiva. Basándose en esta premisa, Mauricio Godinho y Gabriela Delgado (2017) enumeran las funciones específicas que cumple el Derecho Laboral y que lo distinguen de las demás ramas del derecho a partir del ejercicio de la actividad sindical. Estas funciones son: buscar la mejora en las condiciones de contratación y gestión del trabajo, garantizar una evolución económica de tipo progresivo en el marco del capitalismo y asegurar una influencia civilizadora y democrática en el contexto de la sociedad civil y la sociedad política.

Sin embargo, la Reforma Laboral en Brasil promovió significativas alteraciones a través de la Ley n. 13.467/2017 (Brasil, 2017), que, bajo el falaz argumento de valorar el diálogo entre trabajadores y empleadores, implementó una efectiva violación a la libertad sindical mediante la alteración de pilares básicos del ejercicio de la actividad sindical, tales como: el cambio en la jerarquía de las normas regulatorias, con la prevalencia de lo negociado sobre lo legislado; la prohibición de la ultraactividad de los instrumentos colectivos negociados; la ampliación de las posibilidades de negociación individual entre empleador y trabajador; la eliminación de la contribución sindical obligatoria; la extinción de la homologación de rescisiones contractuales; la quita anual de las obligaciones laborales; y la restricción al acceso a la justicia, mediante la imposición de condiciones específicas para la concesión de la gratuidad de justicia y la implementación de los costos de sucumbencia en el ámbito del proceso laboral, además de la imposición de tales costos en casos de asistencia sindical gratuita.

La Reforma Laboral de 2017 promovió la alteración más drástica de los derechos sociales laborales en la historia de la legislación brasileña,

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fundamentándose en una propuesta elaborada por la Confederación Nacional de la Industria (CNI) (2024), titulada "*101 propuestas para la modernización de la legislación laboral*", así como en sugerencias presentadas por otras entidades sindicales patronales y autoridades del poder judicial. Todas las modificaciones realizadas en el ámbito del Derecho Colectivo del Trabajo tuvieron como objetivo debilitar las entidades sindicales y la negociación colectiva, ya fuera mediante la eliminación de las fuentes de financiación sindical o la permisibilidad exagerada de negociar derechos de forma individual, en detrimento de la negociación colectiva de esos mismos derechos que, antes de la entrada en vigor de la Ley n. 13.467/2017 (Brasil, 2017), solo podían ser negociados colectivamente.

Una investigación realizada por Repórter Brasil, tras analizar más de 150 textos de los tres principales periódicos de proyección nacional – Folha de S.Paulo, O Globo y Estadão – y 30 minutos de reportajes de los dos principales noticieros – Jornal Nacional y Jornal da Record–, reveló que el Jornal da Record fue el menos crítico hacia la propuesta de reforma laboral presentada por el Gobierno Federal, con el 100% de sus reportajes favorables a la reforma. O Globo fue el segundo menos crítico, con el 88% de su contenido en defensa de la postura del Gobierno Federal respecto al texto reformista en su momento. En la misma línea, Jornal Nacional mostró un 77% de reportajes favorables, seguido por el periódico Estado de São Paulo con el 68%. Por el contrario, Folha de S. Paulo presentó solo el 42% de sus reportajes en defensa de la reforma laboral, dedicando más del 50% de su contenido a críticas hacia la reforma laboral de 2017 (Brasil, 2017).

Sin embargo, los medios de comunicación propagaron en su momento esta restricción de los ingresos sindicales como una medida para moralizar y restaurar la representatividad de los sindicatos, así como una medida para resolver todos los problemas de los trabajadores brasileños, como si los bajos salarios, la inflación, el incumplimiento de las normas de derecho laboral individual y colectivo por parte de los empresarios brasileños y la sobreexplotación de la mano de obra humana fueran culpa exclusiva de la acción sindical. Este argumento, unido a la imagen trillada de los sindicatos, ha llevado a legos e incluso a académicos y juristas a defender la Reforma Laboral como una medida para modernizar y solucionar las relaciones laborales en su conjunto en Brasil.

Además de la influencia de los medios de comunicación en la concepción peyorativa de la acción colectiva, hubo varias campañas de criminalización de los movimientos sociales, enfatizadas por el gobierno reformista e incluso por el Poder Judicial, a través de la actuación del Supremo Tribunal Federal (STF), que pasó a utilizar una lógica económica para justificar la supresión de los derechos laborales y valorizar la libre empresa.

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Del mismo modo, el Tribunal Superior de Trabajo también ha contribuido a las interpretaciones restrictivas en el ámbito del derecho sindical.

3. El debilitamiento de los sindicatos en la jurisprudencia del TST y de la STF

A partir de la entrada en vigor del texto reformista, el Supremo Tribunal Federal fijó la tesis de repercusión general n. 935, que determinó la "*inconstitucionalidad de la contribución asistencial impuesta a los empleados no afiliados al sindicato, mediante acuerdo, convenio colectivo o sentencia*". Asimismo, mediante las decisiones dictadas en la Reclamación 36185/RJ y la Reclamación 47.102/SP, que anularon decisiones regionales que reconocían la validez de resoluciones tomadas por asambleas de trabajadores para suplir la manifestación expresa e individual de los miembros de la categoría profesional respecto al pago de la contribución sindical, la jurisprudencia de la Corte Suprema difunde el entendimiento de que el sindicato, como sujeto colectivo, estaría en condiciones de ofrecer resistencia a las ofensivas del sector económico en igualdad de condiciones, lo cual no corresponde a la realidad.

Por oportuno, también podemos citar la decisión del Supremo Tribunal Federal en la ADI 5794, que, basándose principalmente en la naturaleza jurídica tributaria de la contribución sindical, declaró la constitucionalidad del artículo reformista que condicionó el cobro de la contribución sindical a la autorización previa y expresa del trabajador (Brasil, 2019).

De igual manera, la decisión emitida por el Supremo Tribunal Federal en el juicio de la ADI 6363 permitió que la pandemia de la Covid-19 justificara una medida de excepción a la negociación colectiva de trabajo, llegando al punto de permitir que asuntos como la reducción de la jornada laboral y del salario, así como la suspensión temporal del contrato de trabajo, fueran tratados y flexibilizados mediante acuerdos individuales entre empleado y empleador, sin la participación de la entidad sindical de la respectiva categoría profesional. Esto permitió la negociación de derechos irrenunciables entre partes en evidente desequilibrio y falta de equivalencia de poderes, desequilibrio que desvirtúa como auténtica y justa cualquier negociación de este tipo.

De las sentencias mencionadas se desprende que el Tribunal Supremo ha venido sobreprotegiendo el principio de libre empresa, en detrimento del principio del valor social del trabajo (Gomes, 2020).

Sin embargo, es un hecho pacífico que, en el ámbito de las relaciones individuales de trabajo, el empleado no se encuentra en igualdad de condiciones jurídicas y económicas con su empleador, estando en una situación de

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absoluta desventaja debido a la evidente necesidad de supervivencia derivada de esa relación laboral. Por ello, los "acuerdos" celebrados con el empleador son, en realidad, imposiciones, sin que exista ningún tipo de "negociación individual", sino una mera determinación unilateral del empleador.

De esta forma, la extinción del importante poder sindical, mediante la institucionalización de la prevalencia de "*lo negociado sobre lo legislado*" y de los "*acuerdos individuales*", resulta en el predominio de los intereses del capital en detrimento de la vida, la salud y la mejora de las condiciones sociales y laborales del individuo que enajena su fuerza de trabajo.

Por otro lado, los cambios implementados por la Reforma Laboral de 2017 (Brasil, 2017) respecto a la exclusión del carácter compulsorio de la contribución sindical alteraron el trípode de sustentación de las entidades sindicales al eliminar la contribución sindical obligatoria. Esto resultó en el impedimento de que los sindicatos continuaran actuando en la búsqueda de formas más eficaces de organización para defender los derechos de sus representados, ya que es imposible para cualquier organización social colectiva operar sin recursos financieros, como concluye una investigación realizada por el Centro de Estudios Sindicales y de Economía del Trabajo de la Universidad de Campinas (Galvão, 2017).

La investigación constató que los sindicatos con mejor estructura y recursos económicos conseguían negociaciones colectivas más ventajosas para sus afiliados, y también constató que los sindicatos con menos recursos económicos y menos organizados empezaban a sustituir el discurso de lucha por mejores condiciones laborales por un discurso asistencialista y de simpatía hacia el discurso de la "*necesaria modernización promovida por la Reforma Laboral de 2017*" (Galvão, s.d., pp. 211-212).

En este sentido, es posible afirmar que la extinción de la contribución sindical obligatoria y la mantención de la unicidad sindical agravaron el problema de la representatividad sindical, que desde hace tiempo ya afectaba a los sindicatos en Brasil debido a la propia concepción de los sindicatos bajo el sistema de unicidad sindical. Tras la Reforma Laboral, los sindicatos comenzaron a enfrentar una mayor presión por parte del sector patronal durante las negociaciones colectivas, obligándolos a aceptar la flexibilización de derechos, ya que ahora cuentan con menos recursos financieros para llevar a cabo sus actividades. Esto compromete su actuación plena, dado que la limitación financiera les impide desde contratar y mantener una asesoría jurídica calificada hasta organizar y realizar un movimiento de huelga con el propósito de presionar al sindicato patronal para que presente mejores propuestas de negociación o acepte las provenientes de las demandas de los trabajadores.

Para revertir el problema, cabe señalar que la fracción IV del artículo 8

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de la Constitución Federal de 1988 (Brasil, 1988) señala que la asamblea general fijará la cuota, que en el caso de los trabajadores se deducirá de la nómina, para financiar el sistema confederativo de representación sindical; sin embargo, esta disposición se refiere a la cuota confederal que, para el Supremo Tribunal Federal, mucho antes de la llegada de la Reforma Laboral de 2017, sólo podía deducirse a los agremiados.

Así, se observa que tanto la contribución confederativa como la contribución sindical tienen respaldo en la Constitución Federal de 1988. Sin embargo, la Reforma Laboral, además de exigir la autorización previa y expresa del trabajador para la aplicación del descuento de estas contribuciones, consideró el cobro de dichas contribuciones, sin el cumplimiento de los requisitos establecidos por el texto reformista de manera individual, como un objeto ilícito. Esto se fundamentó en que la falta de cumplimiento de la autorización individual, previa y expresa del trabajador reduciría o suprimiría su libertad de asociación.

De esta forma, con el objetivo de combatir la premisa del fundamento inferido, se presentaron numerosas Acciones Directas de Inconstitucionalidad (ADI) cuestionando la inconstitucionalidad del texto reformista, como en la ADI 3794 y en otras 18 ADI, así como en la Acción Declaratoria de Constitucionalidad (ADC) 55, solicitando que la Corte Suprema reconociera como válida la autorización previa y expresa de los trabajadores, otorgada en asamblea general de la categoría profesional, para el descuento de las contribuciones sindicales (Supremo Tribunal Federal, 2024). Sin embargo, menos de un año después de la entrada en vigor del texto de reforma, el Tribunal Supremo Federal decidió declarar la constitucionalidad de la norma que suprimía las cuotas sindicales obligatorias.

Así, siete años después de la entrada en vigor de la Reforma Laboral en Brasil (Brasil, 2017), la situación para los sindicatos se ha vuelto aún más difícil, porque además de la crisis, los sindicatos han tenido que agravar la crisis de representatividad que ya estaban experimentando incluso antes de la Reforma Laboral y que se ha agravado por el avance de la tecnología y la aparición de nuevas formas de trabajo en el contexto del mundo del trabajo, como el trabajo en plataformas digitales, pejotização, entre otros.

Y además de las dificultades mencionadas anteriormente, no es raro que la Justicia Laboral actúe con el objetivo de desalentar un ejercicio más amplio de la libertad sindical, funcionando como un supervisor de la autonomía privada colectiva y marcando el ritmo de las negociaciones colectivas de trabajo, ya sea mediante el ejercicio de su poder normativo o mediante la evaluación de la validez de las normas colectivas.

En cuanto a la labor del Tribunal Superior de Trabajo, destacamos la sentencia dictada el 28 de octubre de 2024 sobre el Tema 28, en la que se

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analizó la validez de las normas de negociación colectiva que permiten compensar el valor de los pluses por funciones con el valor de la retribución de las horas extraordinarias judicialmente determinadas, cuando se produce un abandono del cargo de confianza.

En el caso concreto se trataba de la Cláusula 11 del Convenio Colectivo del Banco Itaú Unibanco, vigente entre 2018/2020, en la que también se cuestionaba el alcance de la indemnización, si se limitaría únicamente al periodo de vigencia del convenio colectivo, o si sería posible extender la indemnización a todo el periodo contractual no vigente y cuestionado en las demandas interpuestas por los trabajadores.

Además, la Sección Especializada en Conflictos Colectivos (SDC) del Tribunal Superior del Trabajo (TST) también ha emitido decisiones (no unánimes) que limitan la actuación sindical, incluso en conflictos relacionados con huelgas. Un ejemplo de ello es la decisión del pasado 19 de septiembre de 2024, en la que la SDC consideró abusivas dos huelgas en el sector de transporte colectivo porque no se cumplieron las formalidades exigidas por la Ley de Huelga (Brasil, 1989), principalmente en lo que respecta a la comunicación previa a los empleadores y a la comunidad. Estas decisiones se refirieron a movimientos huelguísticos ocurridos en São Luís (MA) y en Brasilia (DF) en el año 2020, en los cuales los trabajadores argumentaron que solo habían sido paralizaciones provisionales y espontáneas, sin la participación de la entidad sindical y con una duración limitada. Sin embargo, prevaleció el entendimiento de que dichas paralizaciones constituían efectivamente movimientos huelguísticos y que, al no cumplir con el requisito de comunicación previa con al menos 72 horas de antelación a la comunidad y al empleador, se configuraba su carácter abusivo.

En este sentido, es posible concluir que, aunque parte de la doctrina y la jurisprudencia laboral defienden teóricamente la negociación colectiva, en la práctica se niegan a garantizar una forma segura de financiación sindical y criminalizan las huelgas.

4. Conclusión

Es un hecho comprobado, incluso a través de las jurisprudencias mencionadas en el presente artículo científico, que los cambios subjetivos y objetivos impuestos por la Reforma Laboral de 2017 han debilitado enormemente la negociación colectiva en la actualidad. Asimismo, el discurso sobre la libertad individual, el emprendimiento y la meritocracia ha contaminado el imaginario de los trabajadores, dificultando la formación de una conciencia de clase y alejándolos de los sindicatos.

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De esta manera, se observa que, en el contexto actual de las relaciones sociales, el individualismo, la falsa idea de libertad individual, el discurso de la meritocracia, el avance en la fragmentación de categorías, la expansión de la tercerización, el aumento del trabajo informal y del emprendimiento, sumados a los ataques de los medios de comunicación y a las acciones del Legislativo y del Judicial que promueven el debilitamiento de los sindicatos, han contribuido a la pérdida de derechos de los trabajadores y al debilitamiento del ser colectivo, históricamente responsable de las grandes transformaciones sociales y de las conquistas de derechos laborales.

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Navigating the just transition: industrial relations in a sustainable era

Ligia Ramia Munerati[1]

Abstract

The present research aims to provide elements for an in-depth understanding and mitigation of the current dilemmas encountered by labor legislation. Through a critical analysis of the confluence of labor, and environmental factors, this research goals is to shed a light on the intricate issues that are sculpting the contemporary labor market and the nature of labor relations.

The ecological transition exerts a direct impact on the economy, industries, and consequently, the employment, training, and health of the workforce. More stringent climate regulations may culminate in the cessation of industries and the attrition of jobs in carbon-intensive sectors, such as coal mining or the production of oil and gas.

The article highlights the permanent correlation between labor and the environment legislation, showing how environmental and labor issues must be studied together so that the implementation of environmental protection laws do not have a negative impact on the labor market (and vice versa). To this end, it is imperative to ensure a just transition that safeguards the rights of workers and the communities most susceptible to the vicissitudes of climate change.

Trade unions play a pivotal role in environmental and social policies. They can contribute to the edification of a just transition by representing the interests of the workforce and lobbying governments and corporations to adopt measures that preserve labor rights and the environment.

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The research proposed by this abstract will focus on the critical role of trade unions in environmental and social policies, as well as the measures undertaken at the international level to ensure a just transition towards a low-carbon economy.

In pursuit of its aims, this research employs a multidisciplinary approach, drawing on insights from legal studies, law making policies, and industrial relation analysis. Primary methods include a comprehensive review of existing literature and empirical data on labor law, international agreements, and environmental policies. Additionally, the study incorporates qualitative analyses of legislative initiatives, stakeholder perspectives, and international case studies to assess the efficacy of various regulatory approaches.

The findings of this research underscore the intertwined nature of labor, and environmental issues in contemporary society. It aims to reveal growing recognition of environmental concerns as integral to labor rights and social justice, emphasizing the need for coordinated policy responses that prioritize both ecological sustainability and decent work opportunities.

In conclusion, this research emphasizes the imperative for policymakers, employers, and civil society stakeholders to adopt a new approach to addressing the challenges posed by the transition towards ecological sustainability. By integrating labor and environmental considerations into policy frameworks and promoting inclusive dialogue, it is possible to achieve a just transition to a sustainable economy that ensures the well-being of workers and the preservation of the planet's resources.

Keywords: technological transition, ecological transition, decent work, just transition, trade unions, climate governance.

1. The evolution of trade union action and its impact on environmental legislation

Over the past two decades, social and environmental sustainability has emerged as a transnational topic of significant relevance to the international trade union movement. Indeed, the transition towards greater environmental responsibility in the economy will have a significant direct impact on the labor market, creating substantial economic opportunities whilst also eliminating certain forms of labor with negative effects on various activities.

The present economic transition programs which are being implemented in numerous countries, are the consequence of negotiations and deliberations that were initiated with the Stockholm Convention in the 1970s. These initiatives have led the international community to recognize the necessity

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of protecting the environment, not only through the enactment of domestic legislation but also through global action undertaken by all major stakeholders in the international economy. In the context of mounting concern about climate change and the implementation of increasingly stringent environmental policies, the international community is engaged in a process of reviewing and reformulating its domestic legislation in order to align with the criteria set out by member countries at the Conferences of the Parties (COP)[2]. This is in recognition of the necessity for a significant structural transformation of the economy in order to safeguard the environment.

Trade unions have been engaged in the discourse from its inception, striving to shape the formulation of policies pertaining to social and environmental sustainability. They have participated in negotiations, international conventions, and public campaigns, with the overarching objective of safeguarding the interests of workers and mitigating the environmental consequences of occupational activities. Nevertheless, despite the fact that the trade union movement is an important stakeholder in environmental law, its work on climate issues remains relatively unknown. The principal representative of workers in the international context is the International Trade Union Confederation (ITUC), which was preceded by the International Confederation of Free Trade Unions (ICFTU) before the year 2006.

The international trade union movement has developed a climate policy within a complex context, which has been influenced by internal political disputes within the unions themselves, as well as by contrasting coalition strategies within the institutional environment of the United Nations Framework Convention on Climate Change (UNFCCC)[3]. Nevertheless,

[2] The Conference of the Parties (COP) constitutes the principal organ of the United Nations Framework Convention on Climate Change, which was adopted in 1992. It constitutes an association of all the member countries, or "Parties", that have signed the Convention. Following the Convention's ratification in 1994, the Parties have convened annually since 1995 for a period of two weeks to assess the situation of climate change on the planet and to propose mechanisms to ensure the effective implementation of the Convention. The 2022 Conference of the Parties (COP27) was attended by 197 member countries and the European Union, which represents the 193 member countries of the United Nations (UN) plus five territories. In 2024, Azerbaijan has been selected as the Presidency of the 29th Conference of the Parties (COP29), to be hosted in Baku in November. The Conference of the Parties (COP) is held annually with the Presidency rotating between the five recognized UN regions.

[3] The environmental policies of international trade union federations have been characterized by tensions and conflicts. Disagreements between the central affiliates, based on different sectoral interests and understandings of the role of trade unions in society, led to an internal impasse during the initial phase of trade union involvement in climate change. It wasn't until the foundation of the ITUC and the discussion on a follow-up agreement to

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climate change mitigation policies have evolved as a direct result of these heterogeneous influences.

The ICFTU (International Confederation of Free Trade Unions) has been engaged in environmental policy since the United Nations Conference on Environment and Development, formally inaugurated in 1992 in Rio de Janeiro. Agenda 21, adopted at Rio conference, recognized trade unions as one of nine key groups for decision-making on sustainable development, thereby establishing a mandatory requirement for trade unions to participate in conventions[4]. This recognition serves as a pivotal source of legitimacy for international trade unions, affording them the opportunity to represent the interests of workers in multilateral negotiations at both national and global levels[5].

During the initial phase of the formulation of international climate policies in the 1990s, particularly at the Earth Summit in Rio de Janeiro in 1992, the internal politics and organizational structure of the international trade union movement constrained its capacity to adopt a stance on climate policies. This was due to the tradition of consensual decision-making by international trade union federations. Central affiliates, whose primary concern was to defend the interests of their members in carbon-intensive industries, exerted an outsized influence that effectively obstructed the development of comprehensive climate strategies by the international trade union leadership[6]. This dynamic remained in place until the adoption of the Kyoto Protocol in 1997.

the Kyoto Protocol that the international trade union movement engaged more proactively with climate policies, going beyond the reiteration of the dichotomy between jobs and the environment.

[4] Trade unions were initially accorded only the status of "observer" at UNFCCC meetings, in contrast to companies and environmental NGOs, which were recognized from the outset as official constituents. In 2008, the status of official constituent was granted to trade unions, with the International Trade Union Confederation (ITUC) acting as the focal point of the constituent group and as an intermediary with the United Nations Framework Convention on Climate Change (UNFCCC) secretariat. This status enables the holder to speak during plenary sessions, receive technical information and facilitate access to COP meeting facilities. Prior to the granting of constituent status, the UNFCCC defined its expectations, which included the submission of consolidated and coordinated contributions by trade unions and regular attendance at sessions (see the 2007 UNFCCC letter).

[5] The requirement for ITUC delegations to attend COP meetings has resulted in a notable strengthening of these delegations. In light of this, the suggestion has been made that the structure of trade union delegations attending future meetings should align with that of the political structure of UNFCCC conferences. This would entail the host country's trade union leadership, in collaboration with the ITUC leadership, assuming responsibility for the proceedings.

[6] Carbon-intensive industries and their unions have historically played a pivotal role in the industrial relations system. They represent one of the earliest industrial fields to organize as

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However, during the debate on a follow-up agreement to the Kyoto Protocol in the second half of the 2000s, an internal realignment and the creation of specific union groups enabled the international trade union movement to deviate from its previously established organizational procedures and to formulate more proactive climate policies. This marked the advent of a new phase of environmental action.

It is of great importance that trade unions participate in the COP meetings, both for the purpose of engagement and effective participation in the creation of climate policy.

During COP meetings, the ITUC and other affiliates participate in the formal plenary sessions of the UNFCCC, sit on committees, conduct bilateral meetings with government delegations, and organize side events such as conferences and panels.

In 2000, the trade union delegation at the COP held in city of The Hague, the Netherlands, comprised a mere 15 members, all from developed countries such as the USA, Spain, Germany, Norway, and the Netherlands. This reflected the tacit exclusion of countries with developing economies from regions such as Africa, Latin America, and Asia-Pacific in the initial climate negotiations, which remained under-represented for many years.

However there has been a notable increase in the number of trade unions present at COP meetings, both in terms of numerical growth and geographic diversity. This expansion has been particularly evident among unions from developing countries. The situation began to change gradually from the 2007 COP meeting in Bali, Indonesia, where the trade union delegation had 91 members. At the 2009 COP in Copenhagen, the number of registered participants from the trade union delegation increased to 290, while 173 individuals took part in the 2010 COP held in Cancún, Mexico.

The increase in participants from countries with developing economies can be attributed to the fact that the ITUC, in collaboration with trade unions from developed countries, secured financial resources to offset the travel expenses of delegates from developing countries. This was exemplified at the Copenhagen COP in 2009, where multiple ITUC-affiliated trade union bodies, including the British Trades Union Congress and the Danish Trade Union Confederation, provided financial assistance to enable the participation of trade unions from developing countries.

unions, and it was within this context that the core labor rights demands were first articulated and subsequently achieved. It is, therefore, unsurprising that this sector initially encountered significant resistance to accept changes due to the eventual transition to a green economy.

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2. Trade unions are taking action to incorporate the concept of social justice into the process of ecological transition

In recent years, trade unions have engaged in collaborative efforts with national governments and the UNFCCC secretariat to integrate the concept of just transition into international climate policies. Subsequently, this concept has been adopted by national governments in accordance with their respective interests and priorities. The adaptability of this concept to the diverse interests of the various categories of workers and companies clearly reflects the maturity of trade union action in the environmental context. This confirms the great potential of this action to adapt to social interests and respond quickly to evolving concerns about climate problems.

The concept of a "just transition",[7] which originated in US labor movements during the 1970s, is based on the understanding that environmental progress and social justice are not mutually exclusive but rather inherently interconnected, and complexity of this relation. This concept was introduced into the international context during the 2000 COP in The Hague. During this conference, the ICFTU (International Confederation of Free Trade Unions) advocated for a "social and labor transition" to avoid conflicts between occupation and the environment[8]. In order to ensure a successful ecological transition, it is essential to consider several factors, including training, re-employment, compensation, and other forms of ongoing assistance for the categories of workers who will be most affected.

The inclusion of the concept of a just transition as a fundamental principle of the ecological transition was a significant point of contention in political discussions, as it was contingent upon the implementation of measures to mitigate the potential adverse effects of the ecological transition on the workforce. Without such measures, it would have been challenging to gather the necessary support from workers and trade unions for environmental protection measures[9].

[7] In light of the evolving climate policy landscape, it is imperative to ensure that workers, particularly those in carbon-intensive sectors, are not left behind. A just transition requires a comprehensive approach that prioritizes retraining, job creation, and social safety nets.

[8] ICFTU (2001), "Trade union statement to COP 6 bis, Bonn, Germany", July 16-27, 2001.

[9] In the latter half of the 2000s, in the context of a growing involvement of trade unions in the UNFCCC and internal reorganizations following the establishment of the ITUC, the international trade union movement gradually redefined the concept of just transition as a proactive approach to supporting the ecological transition. In 2000, the ICFTU, TUAC, and ETUC published a joint report. In a historic move at the 2000 World Climate Change Meeting, the unions reached a consensus on this matter after extensive deliberations.

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In 2007, the International Trade Union Confederation (ITUC) adopted a declaration that constituted a substantial departure from the organization's historical position. This declaration explicitly called for the adoption of emissions reduction targets that were consistent with the recommendations of the Intergovernmental Panel on Climate Change (IPCC). Furthermore, the document emphasized the necessity of establishing a fair transition process and underscored the imperative for ambitious climate action, namely, a firm commitment to reducing greenhouse gas emissions.

The ITUC's shift in stance is a significant development, as it acknowledges the compatibility of environmental stewardship and job creation. This underscores the imperative nature of robust climate action.

In light of these considerations, a framework was established to guide the transition to a decarbonized economy in a manner that is both equitable and sustainable. This framework comprises five core elements:

1) government support for workers who may be adversely affected by decarbonization;
2) planning the transition process;
3) the importance of social dialogue;
4) training and retraining workers;
5) the definition of new and specific social protection schemes[10].

The concept of just transition, as defined by the international trade union movement, appears to align more closely with the circumstances of developed countries. These countries often possess established social protection schemes, social dialogue institutions, and a recognition by public authorities of trade unions as legitimate interlocutors[11]. As a result, most aspects of the global labor reality remain outside the purview of this concept.

As previously noted, this notion of just transition was first included in the UNFCCC process in 2009. In that context, it was defined as a transition that is "fair to all", with particular attention to the needs of those most vulnerable

[10] The five pillars of the just transition were first delineated during the preparatory meetings for COP15 in Copenhagen in 2009. For further details, please refer to the ETUC 2009 report, which is available for download from the ETUC website archive (*www.etuc.com*).

[11] It is also noteworthy that international unions which tend to consider the formation of environmental policies, and which maintain that the just transition should be based solely on the perspective of collaborative industrial relations do not necessarily reflect the specific national realities of many developing countries. This is particularly evident in South America, where trade unionism is still marked by various contentious situations and political violence, and in Africa and Asia, where the dynamics of industrial relations are still in their early stages or non-existent for different reasons.

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to the adverse effects of climate change. The text of the official negotiating document highlighted the necessity for a "*gradual and just transition in the most impacted economic sectors*" – i.e. those likely to be negatively affected by emissions-reduction policies.

The concept of a "just ecological transition" has since been incorporated into all major international environmental policy documents[12]. For instance, at the 2010 COP meeting in Cancun, a reference was made to the necessity of ensuring "*a just transition of the workforce that creates decent work and quality jobs*". Furthermore, the concept was incorporated into the "shared vision" for a prospective global climate agreement[13]. The non-binding preamble to the 2015 Paris Agreement explicitly recognizes the necessity to "*take into account the imperatives of a just transition of the workforce and the creation of decent work and quality jobs*".[14]

In a recent development, the 2023 Convention of the Parties in Dubai saw the unanimous agreement of member countries that an equitable and fair ecological transition is essential, especially for developing countries and communities reliant on fossil fuels[15].

From this perspective, the UNFCC's first "Just Transition Work Program" (JTWP) was approved, establishing five priorities:

1) just transition pathways, i.e. the importance of developing and sharing just strategies that take into account socio-economic, workforce and other dimensions and help systematize actions by avoiding disruptions, identifying barriers and seizing opportunities;
2) adaptation and resilience: highlights the importance of providing social protection for workers and communities affected by extreme and slow-onset events;

[12] In 2015, the OIT published *Guidelines for a Just Transition towards Environmentally Sustainable Economies and Societies for All*, which is available at: *www.ilo.org/wcmsp5/groups/public/-ed_emp/-emp_ent/documents/publication/wcms_432859.pdf*. This publication demonstrates that the concept of a "just transition" was already well-established within the international context.

[13] On the subject, see the UNFCCC's 2010 report, *Outcome of the work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention*. UN Doc. n. FCCC/CP/2010/7/Add.1.

[14] In order to fully comprehend the intricacies of these discourses and the gravity of the resolutions that have been reached, it becomes imperative to delve into the 2015 United Nations Framework Convention on Climate Change (UNFCCC) report in its entirety. The "Adoption of the Paris Agreement. Twenty-first session of the Conference of the Parties". UN Doc n. FCCC/CP/2015/L9/Rev.1".

[15] To access all the documents related to COP28 see the link: *www.cop28.com/en/cop28-gender-responsive-just-transitions-and-climate-action-partnership*.

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1) workforce transitions: emphasizes the importance of "decent work and quality jobs in line with nationally defined development priorities", highlighting the need to promote labor rights;
2) inclusion and participation: highlights the need for meaningful participation of workers, local communities and indigenous peoples, micro, small and medium-sized enterprises, consumers and, in all of them, women and young people;
3) international cooperation: points to international cooperation as a facilitator of future action, highlighting the opportunities, challenges and barriers related to sustainable development and poverty eradication[16].

It is important to note that the success of the just transition concept in climate policy and its centrality in the discussion of the social problems caused by the ecological transition is not solely a result of its ability to unify diverse approaches within the international trade union movement. It has also resonated with the priorities and interests of various national governments, contributing to its prominence in the discourse on climate policy.

3. Sustainability and collective bargaining

The importance of trade union action in the ecological transition is clear, as is the essential role of collective agreements and contracts in providing companies and workers with the necessary channels to participate actively in efforts to achieve the objectives of the fight against pollution.

National and international systems of industrial relations and the autonomy of social partners play a key role in determining the production system of one or more companies, and issues relating to the green transition should be the subject of greater attention through collective bargaining at the appropriate levels.

Engaging in collective bargaining with a strong emphasis on environmental sustainability across all sectors and levels of negotiation is considered the most powerful and efficient approach to driving the green transition. This method involves stakeholders from various industries and spheres of influence coming together to discuss, negotiate, and agree on policies and practices that support environmentally friendly initiatives. By aligning goals and strategies through this collaborative process, it becomes possible to implement changes that reduce carbon footprints,

[16] The full text of the program is available at: *unfccc.int/sites/default/files/resource/cma2023_L14_adv.pdf*.

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promote sustainable resource management, and encourage eco-friendly innovations. Such comprehensive and united efforts help ensure that the transition toward a greener future is both effective and inclusive, benefiting society.

3.1. The Enel case: sustainability applied to industrial relations and collective bargaining

It is mutually beneficial for social partners to promote the inclusion of specific environmental provisions in collective bargaining and collective agreements at all levels. Such measures would provide a tangible pathway for fostering collaboration between employers' and workers' organizations and create incentives for companies to comply with environmental regulations[17].

In the context of the pressing European climate goals, Eni, a significant actor in the fossil fuel industry, has clearly initiated a substantial and evidenced-based sustainable transition, a process undertaken in collaboration with its unions. This proactive approach acknowledges the interdependent nature of the factors required for achieving carbon neutrality, namely technological innovation and financial investment, alongside a fundamental commitment to social equity and the well-being of the workforce.

On 3 December 2020, Eni and the Filctem-Cgil, Femca-Cisl and Uiltec-Uil trade unions signed an agreement called "Together", which establishes a novel model of industrial relations to facilitate the transition to a low-carbon economy.

The document outlines a plan for Eni to transition its core business activities in line with the Green Deal parameters, with the goal of reducing oil dependency to 20% by 2050. This protocol is significant as it provides a framework for collaborative engagement with the company in navigating the complex and challenging path of change. The document represents the culmination of a period of intense industrial relations activity, during which the company engaged in significant dialogue with Filctem-Cgil, Femca-Cisl and Uiltec-Uil. Together, the social parties have established a labor relations protocol, entitled "INSIEME-TOGETHER"[18].

In accordance with the terms of the protocol, the three union leaders have collectively identified the objective of sharing and governing this significant

[17] This concept is clearly outlined in the ILO Guidelines for a just transition towards environmentally sustainable economies and societies for all, see note n.15.

[18] *www.eni.com/static/en-IT/infographics/just-transition/workers*.

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challenge through a participatory, anticipatory, and inclusive model that considers both economic and social sustainability. This approach aims to reposition work at the core of the transition, ensuring its social acceptability and laying the groundwork for the advancement of employment and national development.

The agreement provides for the maintenance of existing industrial sites, with the goal of consolidating these through the implementation of environmentally focused reconversion projects. In order to achieve this, it is crucial that Eni's investments in Italy become more resilient, thereby strengthening the country's industrial system, reducing its energy dependence, and increasing competitiveness. This will require the creation of conditions conducive to sustainable economic development and improved quality of life for future generations. It is imperative that these considerations are reflected in the policies and actions of the relevant authorities.

In light of the prevailing economic circumstances and the inherent difficulties associated with Eni's strategic approach to decarbonization, as elucidated in their Plan for 2050, there is a pressing need for a unified and resolute commitment. This commitment underscores the significance of sustained information dissemination, consensus on objectives, and cooperative efforts aimed at reaching quantifiable outcomes. In light of the necessity for a unified approach, Eni and its unions are developing a novel relational strategy to facilitate the company's evolutionary trajectory. This strategy is predicated on the assumption that a participatory industrial relations system is indispensable for successfully navigating the transformative processes currently underway and anticipated in the future.

A significant element of this framework is the formation of a Generational Pact, which seeks to facilitate the renewal and enhancement of professional skills within the workforce. Furthermore, there is an emphasis on identifying collaborative initiatives with a range of stakeholders with the aim of establishing a regulatory environment that not only encourages investment but also effectively balances economic and financial sustainability with environmental and social concerns.

Furthermore, this strategic approach addresses critical areas such as diversity and inclusion, health and safety, environmental stewardship, asset integrity, and the promotion of research and technological innovation. The strategy advocates for the development of internal competencies, supports the implementation of agile working practices, and seeks to enhance welfare and organizational well-being. The adoption of this comprehensive framework by Eni is intended to align its operations with both current demands and future development strategies, thereby fostering a more sustainable and inclusive corporate environment.

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Eni's commitment to carbon neutrality by 2050[19] is not solely defined by technological innovation and financial investment, but fundamentally by a dedication to a just transition that prioritizes workers, unions, and labor rights. This ambitious plan, underpinned by significant financial investments in low-carbon projects and sustainability-linked financial instruments, recognizes that the energy transition's success hinges on equitable outcomes for all stakeholders. A crucial component of Eni's strategy is actively engaging with workers and their representatives to address potential social and economic impacts, ensuring a fair and inclusive transformation. This commitment is evident in their proactive engagement with workers and unions to mitigate job displacement through reskilling and upskilling initiatives, fostering collaboration to navigate the complexities of this transition.

This multifaceted approach encompasses a series of operational alterations, extending from the upstream sector through to the downstream sector. In the upstream sector, a strategic shift towards a portfolio comprising a larger proportion of gas is coupled with a reduction in methane emissions and routine flaring. This approach demonstrates a commitment to environmental responsibility, taking into account its impact on the workforce. In the downstream sector, the expansion of biorefineries for sustainable aviation fuel (SAF) and biofuels, in conjunction with refinery conversions, exemplifies a transition to renewable energy that is designed to facilitate the creation of new, sustainable employment opportunities. Furthermore, the company's diversification into renewable energy and electric vehicle charging through Plenitude serves to reinforce its commitment to long-term employment opportunities. The investment in carbon capture, utilisation and storage (CCUS) technologies not only serves to reduce emissions but also presents the potential for the creation of new skilled labour. The acquisition of high-quality carbon credits from National Carbon Capture and Storage (NCS) projects serves to mitigate environmental impact while also supporting sustainable development in the communities where these projects are located[20].

The companys extensive international collaborations (OGCI, IETA, WEF, IPIECA, WBCSD, UN Global Compact, EITI, The Council for Inclusive Capitalism, and the UN Energy Compact) and partnerships with human rights institutions further underscore their commitment to ethical

[19] For more information concerning Eni's dedication to a socially responsible transition, emphasizing fairness, collaboration, and respect for human rights throughout the process, please see *www.eni.com/en-IT/sustainability/people-community/human-rights.html*.

[20] As it can be seen in the many reports at the company's web site, Eni aims to balance its ambitious decarbonization goals with the needs of all stakeholders.

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and socially responsible practices. Their active role in sustainability-focused events, the creation of guidelines, and best practice sharing demonstrate a dedication to workforce training and capacity building, especially pertinent to emerging low-carbon sectors. Eni's engagement with local business and trade associations ensures that the energy transition benefits local communities and supports the sustainable development of their workforce. In essence, Eni's strategy for a responsible energy transition is fundamentally interwoven with a commitment to workers, unions, and the upholding of strong labor rights, demonstrating that a just and sustainable energy future demands social equity and economic fairness.

4. Conclusion

The process of ecological transformation, which is aimed at decarbonising the global economy by 2050, represents a significant challenge that will require the attention of all world economies. It is inevitable that the transition to a sustainable economy will result in the loss of jobs and the extinction of certain skills. A significant number of workers in various sectors, including mining, the nuclear energy industry and oil extraction, are facing severe challenges and are likely to experience a substantial decline in employment opportunities.

The advent of the "green" economy, particularly within the energy sector, has given rise to novel challenges that are readily discernible within the energy industry's value chain. These challenges manifest at both the initial stages of the energy chain, notably in the mining of uranium and lithium in developing countries, and at the conclusion of the chain, specifically in the processes of disposal and recycling of these ores.

In the context of ongoing developments and the formulation of new guidelines, trade unions have promptly introduced the importance of protecting workers' rights into the international debate, emphasising the need for these rights to be considered in conjunction with the development of new environmental policies. The two issues have a common origin, since human (labor) activity is responsible for modifying and damaging the environment. Consequently, they must be addressed collectively to ensure the sustainability of the new global economy, which encompasses social welfare as well as the environment. The concept of just transition aims to expand the environmental discourse by situating it within a socio-environmental framework.

The slow pace of legislation, which is particularly problematic in the current context of urgent decision-making, creates a significant opportunity for the use of alternative forms of collective regulation, such as contracting

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and collective bargaining. While the advantages of a factory agreement lie in its capacity to address specific issues, transnational contracting can offer a broader framework for regulating industrial relations across multiple jurisdictions.

It is becoming increasingly common for social responsibility clauses to be included in collective bargaining agreements. This development serves to reinforce the role of collective bargaining as a complement to the concept of "green public procurement" within the broader framework of social responsibility. The chemical sector in Europe is a notable pioneer in this regard. The implementation of the European Green Deal will necessitate the establishment of a new, specific, and homogeneous labeling framework that provides relevant economic and ecological information for the guidance of public and private decision-making.

The integration of social considerations into environmental governance and environmental concerns into labor agreements signals a paradigm shift towards more holistic and sustainable policy. This integrated model, exemplified by the European Green Deal's labeling framework and Eni's best practices, offers a promising approach to addressing complex environmental challenges while promoting social equity and fostering environmentally responsible practices. Further research, however, is needed to evaluate the effectiveness of integrating social considerations into environmental legislation and the impact of incorporating environmental concerns into collective bargaining agreements, particularly within the framework of initiatives such as the European Green Deal.

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Employees' participation, a challenge within collective bargaining

Felice Testa[1]

1. The terms of the problem (the topic of the research) and its reasons

The topic of the research that I have carried out and that I am presenting today is that of the employees' participation in the management of the company; it is a comparative research between legal systems of different countries of the European Union (Germany and France, on the one hand, Spain and Italy on the other) and it's a research that maintains, as a reference, the regulatory evolution of the European Union itself on this topic.

The participation of workers in the management of the company is an issue that, in the legal systems of the member countries of the European Union (EU), takes on several meanings and a consequent multiplicity of declinations.

These are always facets of a single broad topic that, in my opinion, can be treated from a common point of view, that of the search for useful tools so that employees can have influence, or control, over the entrepreneur's decisions, especially those that have repercussions on working conditions.

The possibility of success of this point of view depends on the capacity, or strength, of the participatory activities of workers, and their representatives, to succeed in directing the two "classic" objectives of participation (i.e.

[1] Associate Professor in Labour Law at European University of Rome. Note of the author: unfortunately it was not possible to express all the technical aspects of the research in just 25,000 characters (including spaces). I had to force myself, therefore, to publish here the only text of the intervention pronounced in Rome on September 19th, 2024 on the third day of the ISLSSL World Congress. I reserve the publication of the complete research, including bibliographic references, subsequently in legal journal specialized in labour law. I hope in the benevolent understanding of the reader.

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influence and control over company decisions) essentially on the knowledge (or rather awareness) of the needs of the company; in other words, we are talking about the "involvement" of workers.

The research does not pretend to carry out a complete and exhaustive illustration of the systems of worker participation in the company in the different systems addressed.

In the short space available for this text I must limit myself to a few notes and refer to the writing that I will publish (which is over 30 pages in its final presentation paper)

Without a doubt, the German experience is the most significant in terms of tradition and systematicity; it is a model of strong and institutionalized participation both through channels of direct representation of workers in the administrative and control bodies, and through channels of indirect union representation. A rigid system because it is governed for the most part by law which, de facto, removes the substantial possibility for trade unions to build different systems. This model is probably the main characteristic of German labour law.

But we must ask ourselves whether the German model, beyond the results produced on its own national industrial relations system also in terms of productivity and competitiveness of companies, is the one most usefully pursued by other countries where the participatory experience is maximally carried out through the information procedures of collective agreements and where the tradition of representation is the indirect one through trade unions and not the direct one carried out by workers (as in Spain and Italy); that is, one wonders, whether the German system is useful in countries where the participation experience has mainly been resolved through employee share ownership (as in France)

The necessary question, in fact, is whether the German model, all centred on direct representation, would maintain its functional identity or could be distorted, in those countries, into a further instrument of conflict that would hinder the growth of competitiveness and productivity with not always certain results of increased protection.

2. Wires and knots of the fabric of participation; comparative conclusions

The experience of the European Union – of which it should be noted a rethinking of the original policy of harmonization towards a rigid and institutionalized model of participation (and which I will mention a little later) – and the experiences of the countries object of this comparison, which

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are among the most relevant in the Union, I believe can highlight a common fabric with which we can dress the topic of the participation of employees in the life of the company, although it is not a particularly refined fabric not because of the wires (threads) of which it is composed but because these are often poorly woven.

The fabric is that of the consideration of the centrality of work in the company and for society; therefore, a fabric that, in itself, should be precious but that is worked with a multiplicity of wires that do not always find suitable looms to weave them.

The wires most frequently used are those of the search for models of industrial relations capable of interpreting the national traditions of the representation of labour interests, without betraying them; the wires are those of the search for greater possibilities of stability and economic development also through the remodulation and redistribution of labor protection; are those of knowledge and, not always consequent, awareness of the needs of the company and the interests of workers; the wires are those of consensus in place of dissent.

This happens, first of all, mainly because of the differences – which, up to now, time has not yet filled – between the traditions of declination of the models of representation of the interests of the parties in the employment relationship.

The European Union had taken an interventionist approach on the issue of workers' participation but with an ineffective method.

It is a topic that involves intercultural profiles, even before the legal ones, and certainly cannot adopt the method of harmonization and, moreover, towards the highest level (the German one, precisely).

The risk is that the consequent community legislation must assume epic characteristics to achieve useful effects from that type of approach.

The issue is that of identifying, as I believe the Treaty on the Functioning of the European Union indicates, the intimate characteristics of the different systems and then synthesizing them, rather than overriding them or, uselessly, placing them side by side.

The provision of art. 151, paragraph 2, of the Treaty on the Functioning of the European Union relating to what can also be accepted as a hendiadys in the interpretative context of the relationship between participation and maintaining the competitiveness of the economy of the Union itself can be an indication for legislative policies precisely for the profiles of that hendiadys linked to competitiveness.

The indication could suggest an approach of public and private initiative on the regulation and management of collective labor relations in terms of market governance; a vision common to the different experiences, the European one and the national ones, which acts as a catalyst for regulatory

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requests; taking this direction, the theme of participation, broadly understood, could be less affected by the genetic differences mentioned above, in the sense that those differences, however essential, could now be commonly addressed also under a profile that, although accidental with respect to those different essences, characterizes them anyway.

Defining a market discipline also for collective labour relations means supporting a balance, in my opinion necessary, between a microeconomic and a macroeconomic dimension of the topic we are talking about. Participation, in fact, in the broad sense that we want to accept here, that is, the involvement of workers in the enterprise and for society, requires going beyond the purely private confines of the employment relationship and exploring the spaces of the so-called "governance of the economy".

3. (*continued*) The "wire" of the European direction towards the development of collective negotiation of business management

It is important to note a new direction of the European Union in the policies of regulation of the topic that is consolidating towards the increase of relevance of negotiation rights to be declined also in the broad sense of the involvement of workers in the life of the business. A consequent and important slowdown concerns, instead, the attention of the European legal system to the "project" of the Societas Europaea that is characterized by its foundation on the model of direct representation in the participation stage which, as we have seen, is a model that does not reconcile with the same intensity with the traditions of collective representative action of the various member countries, in particular the reference is to those in which tradition records a predilection for collective representation conducted by trade union organizations.

It is a direction that represents a new course of European legislative policies aimed at introducing tools for understanding the needs of the company that lead to evaluating choices that have an impact on the working conditions of its employees; a direction towards participatory industrial relations in a broader and more useful sense.

However, it is a direction that still needs to be remodelled to avoid the difficulties already encountered in the context of the so-called European social dialogue, generated, above all, by the non-fluent relationship between the representativeness of the unions and ownership of the negotiation. It is also a direction that needs to be strengthened to make its scope more incisive with respect to the differences between the various countries regarding the importance of company bargaining compared to national or category bargaining.

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4. (*continued*) "Existential" problems of participation

As much as the proposed approach can be strengthened, it will necessarily have to be placed within the scope of workers' involvement in the company, in the sense that the debate on legislation on collective bargaining rights will have to address the issue of its relationship with the needs of the company and resolve it in a manner consistent with the theme of developing protections compatible with economic development.

I do not believe at all that such an approach to collective bargaining rights distorts the essence of trade union action, which remains that of seeking agreement, and not conflict, and which can also be characterized, depending on time and place, by the variety of other subjects discussed.

But such an approach requires a prior assessment of at least three other "existential" problems of trade union debate.

I am referring to the role of conflict in negotiation dynamics, to the relationship between channels of direct representation of workers and channels of indirect union representation, and, above all, to the need to rationalise the selection of negotiating interlocutors which, up to now, has been carried out according to a presumptive approach involving notions of representativeness which are merely factual but, in truth, not objective and equivocal.

5. Concluding remarks

In conclusion, I would like to make a consideration that is fundamental to me and that would really open up a consequent reasoning on which, however, the necessarily limited duration of this speech puts a brake: if it is true, as I believe it is, that participation should be understood as one of the many possible instruments for protecting the conditions of the person who works (an aim towards which labour law in general is entirely oriented), then, more than ever now, that protection must pass through knowledge (or rather understanding) of the problems and the resulting needs which is the only way that, yesterday, as today, allows us to distinguish in order to effectively protect.

Participation is, in this sense, a potentially effective instrument but which, if understood univocally, by supporting rigidities that are incompatible with the traditions of representation of the different legal systems, risks being concretely ineffective.

Herein lies the need to identify solutions that reconcile protection with development but through the belief that, in any case, the first term

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of comparison, that is, protection, has a value meaning that in itself, in its essence, also includes the care of the second term of comparison, that is, development, which cannot be reduced to mere economic development.

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What protections for new forms of work: the role of collective bargaining

Pasquale Passalacqua, Antonio Leonardo Fraioli[1]

1. Introduction

The labor protection system, as is well known, was born alongside the employment relationship, having been created, since the Industrial Revolution, around this archetype (D'Antona, 1988; De Luca Tamajo, 1990).

Indeed, the entire world of labor was built around the figure of the dependent worker, and the system of social protection measures similarly centers on the category of employees (Pedrazzoli, 1985; Persiani, Proia, 2011).

The rationale of the social protection system lay in the weaker bargaining position of those performing work under the authority of an employer, which is why protections were reserved for the category of employees, leaving the vast world of self-employment on the margins for a long time. This was based on the assumption of the absence of a situation of weakness for the self-employed, who were considered to occupy a privileged socio-economic position (Ichino, 2000).

Today, in a profoundly changed socio-economic and productive context, evolving progressively since the 1980s, the current system of protections, built on the paradigm of subordination, appears anachronistic when faced with a fragmented and continuously transforming labor market, characterized by new forms of work, often structured in phases, projects, and objectives (Aa.Vv., 1997; Pedrazzoli, 1998; Pera, 1998).

The epochal changes in the organization of companies and in the labor

[1] Both from Tor Vergata University, Italy. This contribution is the result of the joint reflection of the two authors. At the same time, paragraphs 1, 2, 3 are to be attributed to Antonio Leonardo Fraioli; paragraphs 4, 4.1 and 5 to Pasquale Passalacqua.

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market compel us to address, once and for all, the crucial issue of redefining the criteria for assigning labor protections, which until now have been reserved solely for dependent work (Romagnoli, 1995; Perulli, 1997).

A strong need emerges to provide protections to those working personally, continuously, and under a single client, even without a formal employment relationship.

This topic has, in recent years, attracted increasing attention both in academic debate and among legislators in various countries, who have sought to guarantee protection to self-employed workers characterized by varying degrees of economic dependence or bargaining weakness. Within this perspective, the category of economically dependent work emerges, which in Italy finds resonance in the notion of dependence under Article 2094 of the Civil Code, as already suggested in the European Commission's Green Paper of November 2006 (Perulli, 2003; 2021; Pallini, 2013; Fraioli, 2022).

In this context, the Italian legislator has worked in two directions: on the one hand, through interventions aimed at facilitating the classification of so-called quasi-subordinate work as dependent work, even though it is formally classified as self-employment (*i.e.*: collaborations organized by the client); on the other hand, by introducing ad hoc regulations to protect self-employment.

Therefore, beyond the pathological situations linked to non-genuine forms of self-employment, which result in judicial reclassification as employment relationships with the corresponding protections, there is a need to design labor protection systems tailored to weak self-employment, considering the real needs for protecting the individual worker in both the employment relationship and the labor market (Giugni, 1982; De Luca Tamajo, 1997).

2. System references for the protection of self-employment in the Italian legal system and national legislative milestones

The issue of social protection for self-employed workers was already at the center of the debate during the Republican period. However, as we have seen, the problem has resurfaced in a "new" and more pressing form compared to the past, characterized by the evident economic insecurity defining the lives of self-employed workers (Bologna, Fumagalli, 1997; 2007).

In the Italian Constitution, the references to worker protections do not distinguish between self-employment and dependent work. The terms "self-employed" and "dependent worker" are absent in constitutional provisions, which instead make general reference to "workers" (Treu-Perulli, 2022).

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Specifically, Article 35, paragraph 1, of the Constitution establishes the principle that "*The Republic protects work in all its forms and applications*".

Similarly, Article 38 of the Constitution, which establishes principles on social security, does not explicitly refer to dependent workers when it states in paragraph 2: "*Workers are entitled to adequate means to meet their needs in case of accident, illness, disability, old age, and involuntary unemployment*".

Thus, the historical evolution of ordinary legislation unilaterally favored the protection of dependent workers, adapting to the historical-economic-productive context of the 20th century. However, the constitutional provisions remain open to extending protections to self-employed workers (Ichino, 1989).

The problem began to arise concretely in the 1970s and found its first legal recognition in Article 409, paragraph 1, number 3, of the Code of Civil Procedure, which introduced the concept of coordinated and continuous collaborations without providing a specific regulatory framework. According to the majority of scholars, this new type of work falls within the broader category of self-employment (Santoro Passarelli, 1979; Napoli, 1993; Ballestrero, 1987).

Later, the legislator, through Article 2, paragraphs 25-32, of Law n. 335 of 1995, introduced the obligation to pay pension contributions for coordinated and continuous collaborators by creating a special separate fund (*gestione separata*). Initially, the contribution rate was set at 10%, covering only pension benefits, but this percentage was progressively increased over the years.

Specifically, with Law n. 247 of 2007, the contribution rate was raised to 26%, while the range of covered benefits was expanded to include maternity allowances, family benefits, and illness benefits. Additionally, pension benefits were enhanced, with their calculation based on the contributory method. With Article 22, paragraph 1, of Law n. 183 of 2011, the contribution rate was further increased by one percentage point. Subsequently, Law n. 92 of 2012 (Article 2, paragraph 57) gradually aligned the contribution rate for self-employed collaborators with that of dependent workers, setting it at 33% starting from 2018.

As for protection against workplace accidents, Article 5 of Legislative Decree n. 38 of 2000 established mandatory INAIL insurance for coordinated and continuous collaborators.

In 2003, as part of an anti-fraud initiative, the legislator introduced the concept of "project work", allowing coordinated and continuous collaborations only when linked to a specific project, work program, or phase of a project. This regulatory intervention provided minimum protections and

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introduced a basic set of rules (Ghera, 2005; Napoli, 2005; Pellacani, 2005; Perulli, 2004; Pinto, 2006; Santoro Passarelli, 2007).

In 2012, with Law n. 92 of 2012 (the so-called Fornero Reform), the rules governing project work, which had been subject to widespread criticism, were revised in several respects. One significant revision was the introduction of Article 69-*bis* of Legislative Decree n. 276 of 2003, which used a system of legal presumptions to protect workers who were in a situation of organizational dependency on the client, circumstances that prevented them from acting freely in the market (Passalacqua, 2012; Novella, 2012; Magnani, 2013).

The intense and growing criticism of the project work framework eventually led to its repeal (Article 52, paragraph 1, of Legislative Decree n. 81 of 2015). At the same time, the legislator introduced a new framework for "hetero-organized" work under Article 2 of Legislative Decree n. 81 of 2015. This regulation sought to facilitate the reclassification of certain relationships as dependent work, applying corresponding protections to collaborations organized by the client (Vallebona, 2015; Ciucciovino, 2016; Ferraro, 2016; Passalacqua, 2018; Persiani, 2016; Santoro Passarelli, 2016).

The legislator further intervened with Law n. 81 of 2017, commonly referred to as the "Jobs Act for Self-Employed Workers". This law can be considered the first general legislative intervention specifically addressing non-entrepreneurial self-employment, as it applies to all self-employed relationships under Title III, Book V of the Civil Code, excluding entrepreneurs (even small-scale ones) (Giubboni, 2016; Perulli, 2017).

This regulation has two key merits: it introduces general protective and promotional measures applicable to all self-employed workers, thereby establishing a basic framework of minimum protections; however, it fails to fully address the different and specific protection needs of various categories of self-employed workers (Tursi, 2020; Fraioli, 2022).

The legislation can be divided into three main groups of provisions. The first group includes so-called "commercial" protections for workers, such as rules on payments and unfair contractual terms. The second group includes social security measures covering maternity, illness, and injury. The third group focuses on enhancing and improving the professional skills of workers (Zilio Grandi, 2018).

Finally, mention must be made of the legislative intervention contained in Article 1, paragraph 1, letter c), of Legislative Decree n. 101 of September 3, 2019, converted with amendments into Law n. 128 of November 2, 2019.

This measure introduced Chapter V-bis into Legislative Decree n. 81 of 2015, entitled "Protection of Work Performed Through Digital Platforms". Despite its general title, this legislation provides protections only for

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autonomous delivery workers (so-called riders). Specifically, Articles 47-*bis* to 47-*octies* of Legislative Decree n. 81 of 2015 focus solely on delivery workers who operate autonomously and perform delivery services for others, creating a form of "occupational" protection (Fraioli, 2020; Tursi, 2020; Passalacqua, 2020).

It is also worth mentioning Law n. 49 of 2023 on fair compensation. This legislation regulates fair compensation for the diverse world of freelance professionals, defining it as "*compensation proportional to the quantity and quality of the work performed, as well as the content and characteristics of the professional service*". It also nullifies contractual clauses that fail to provide fair and proportional compensation, basing such assessments on the ministerial parameters that define the minimum amounts for professional services. This law highlights how economic and contractual weakness has now reached even the most traditionally autonomous professions (Garofalo, 2024; Fraioli, 2022; De Mozzi, 2021; Ticozzi, 2003).

3. The problem analyzed in the contributions of the actors at a supranational level

The intervention of the Italian legislator is part of a broader international and European Union framework aimed at extending social protection to all workers, regardless of the existence of a formal employment relationship.

The concept of economic dependency lies at the heart of the scientific and political debate in European legal systems and is reflected in the legislation of many member states and in several international and community documents (Fraioli, 2022; Ichino, 2015; Countouris, 2011; Deakin, 2007).

Indeed, since 1990, the International Labour Organization (ILO) has begun discussing the issue of the contractual weakness of self-employed workers, regardless of any fraudulent use of such contractual arrangements by employers (Resolution on the Promotion of Self-Employment, adopted on June 27, 1990, Conclusions parr. 4, 8, 17, 21, 23 in OIL, Record of Proceedings, International Labour Conference, 77th Session, Genève, 1990).

In 1997, the ILO examined the phenomenon of so-called contract labor, which refers to individuals who "*perform work or provide services for another person under a civil or commercial contract but are, in fact, dependent on or integrated into the enterprise for which they perform the work or provide the service*". Regarding this phenomenon, the ILO proposed adopting minimum levels of protection and identified the scope of the need for protection based on the condition of economic dependency, irrespective

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of the formal contractual type used (OIL, Contract Labour, Report VI, International Labour Conference, 85th Session, Genève, 1997).

In 2003, during the ILO Conference on the Decent Work Agenda, a report entitled "The Scope of the Employment Relationship" was presented. This report highlighted the inability of the employment relationship to offer protections for all forms of personal collaboration exposed to risks of insecurity and poverty. The report underscored both the ambiguity of the concept itself and the uncertainty in case law regarding this area (OIL, The Scope of Employment Relationship, Report V, International Labour Conference, 91st Session, Genève, 2003).

Similarly, ILO Recommendation n. 198/2006 on the Employment Relationship was aimed at discouraging employers from misclassifying employment relationships to achieve economic savings. This recommendation urged member states to clarify the distinction between self-employment and dependent work, emphasizing the actual modalities of the relationship over formal criteria (ILO Recommendation n. 198/2006, Point 4(b) and Point 9).

At the European Union level, beginning in the 1990s, attention was focused on the phenomenon of work performed under conditions of socio-economic vulnerability. The Supiot Report (1998) is particularly noteworthy in this context.

This report highlighted the problems of post-industrial production systems, which continued to provide protections only to dependent workers. It noted that the distinction between self-employment and dependent work was increasingly uncertain in certain sectors and that the category of dependent work was no longer sufficient to encompass all workers in need of protection. The report also emphasized the growing phenomenon of continuous self-employment, which, although autonomous, was equally deserving of protection (Supiot Report, published by P. Barbieri, E. Mingione, Il Futuro del Lavoro, Rome, 2003).

In 2001, the European Economic and Social Committee (EESC) also addressed the issue of "*new trends in self-employment: the specific case of economically dependent self-employment*". However, it expressed doubts about the advisability of introducing a new legal category of quasi-subordinate work, fearing that this might overlap with existing categories and create further ambiguities (Opinion 2011/C-18/08, Official Journal of the EU, 19.1.2011).

In 2003, the European Commission commissioned a new study on the legal, social, and economic aspects of economically dependent self-employment. This study advocated for intervention at the European level to harmonize legal systems and combat social dumping. In particular, it suggested a soft law approach that would not alter the legal classifications of individual member

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states but would instead introduce minimum protections for economically dependent self-employed workers (Subordinate, Autonomous, and Economically Dependent Work: A Comparative Analysis of Selected Countries – The Employment Relationship: A Comparative Overview, Genève, 2011).

In 2007, the European social partners conducted a joint analysis of the challenges faced by European labor markets, focusing on the concentration of employment in the service sector. They concluded that there was a need to rethink the concept of subordination, moving beyond its purely legal dimension (Key Challenges Facing European Labour Markets: A Joint Analysis of European Social Partners, 17.10.2007).

In 2013, the European Economic and Social Committee (EESC) recommended that member states adopt clear rules regarding the classification of work relationships to prevent abuses. It even proposed a common and generalized definition of dependent work as "*work performed in exchange for remuneration for an activity that belongs to the client and from which the worker does not derive any direct profit*" (Opinion 2013/C-161/03, Official Journal of the EU, 6.6.2013).

The European Pillar of Social Rights, established in 2017, sought to broaden the definition of workers deserving protection, leaving the door open for defining economically dependent self-employment (European Commission, EU Recommendation 2017/761 on the European Pillar of Social Rights).

Finally, it is worth mentioning the recent EU Directive 2024/2831 on work through digital platforms, which forms part of the actions contained in the European Pillar of Social Rights. This directive aims to ensure fair working conditions for platform workers, regardless of their contractual classification, and guarantees rights to information, health protection, and personal data protection at work.

4. The role of collective bargaining: a) the so called inclusive intervention

The brief overview provided of the interventions by the Italian national legislator, which have been developed within a supranational context highly sensitive to the issues examined here, highlights, in any case, the legislator's difficulty in adopting solutions tailored to each specific sector amidst the complexity of diverse productive realities. Indeed, these issues lend themselves to more appropriate solutions developed through collective bargaining, owing to its inherent competence in identifying and distributing protections across various concrete productive sectors.

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In this context, collective bargaining, as already occurs in certain sectors, could play a fundamental role in identifying and regulating the protective needs of weak self-employed workers in different productive settings (Rainone, Countouris, 2021; Topo, 1997; Tomassetti, 2018; Deleonardis, 2023).

To this end, Article 2, paragraph 2, of Legislative Decree n. 81/2015 explicitly encourages collective agreements to establish specific regulations concerning the economic and normative treatment of collaborations organized by the client.

Collective bargaining takes two distinct regulatory approaches:

1) Extending certain contractually established rights for dependent workers to coordinated and continuous collaborators (so-called inclusive bargaining);
2) Negotiating specific contracts/collective agreements solely for these autonomous collaborators (so-called exclusive bargaining).

Moreover, collective agreements regulate workers' rights, including those of self-employed individuals, through the establishment of bilateral bodies (so-called negotiated welfare). These are joint entities responsible for the mutual management of funds allocated to training, income supplementation, and the implementation of actions related to workplace health and safety.

Such bilateral bodies are examples of the "intermediate social formations" referenced in Article 2 of the Italian Constitution. They reflect the principle of horizontal subsidiarity, perfectly integrating into the public-private partnership model of the social security system outlined in Article 38 of the Constitution (Bavaro, 2007; Bellardi, De Santis, 2011; Del Punta, 2003; Napoli, 2005; Passalacqua, 2010; Vallebona, 2006; Lai, 2006; Leonardi, Arlotti, 2012).

The value of promoting such intermediate entities lies, on the one hand, in their ability to specifically address the concrete needs of individual productive sectors, and, on the other, in their capacity to provide welfare benefits at more favorable conditions – including cost savings – than what individual workers, especially self-employed ones, could secure in the free market (Nogler, 2014; Loi, Nunin, 2018; Peruzzi, 2022).

An example of inclusive bargaining can be found in the National Collective Labor Agreement (CCNL) for Professional Studies, which extends access to the sector's bilateral bodies to autonomous and coordinated collaborators, thereby allowing them to benefit from services related to training and supplementary health assistance. This CCNL also guarantees supplementary health assistance to freelancers – whether employers or not – who decide to join and contribute to the bilateral fund (Garofalo, 2022; 2024; Olivelli, 2023).

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Specifically, this CCNL, in its section dedicated to Bilateralism and Welfare, outlines several bilateral tools aimed at satisfying the needs of workers:

- The National Joint Committee;
- The Working Group for Equal Opportunities;
- The National Bilateral Entity of the Sector (E.BI.PRO.);
- The Supplementary Health Insurance Fund (C.A.DI.PROF.).

Although many welfare tools are dedicated to dependent workers, there are provisions, such as Article 14 ("Supplementary Welfare for Freelancers"), that are specifically aimed at self-employed individuals. This article states: "*The Parties aim to guarantee freelancers – whether employers or not – forms of supplementary health assistance. To this end, an autonomous and separate management structure will be established within E.BI.PRO*".

Art. 15 then establishes that the national bilateral sector body constitutes the instrument aimed at "*offering a multiple system of qualitative services aimed at all sector employees (owners and workers) who operate in professional activities*".

In particular, it is specified that E.BI.PRO. "*implements and promotes*": "*the development and dissemination of integrative forms in the field of social security and healthcare, according to the agreements made between the social partners and according to the guidelines/objectives prepared by the bilateral instruments for this purpose established by the signatory parties of this CCNL*" (letter l) and, above all, "*the management and coordination of assistance initiatives for professionals*" (letter r). Even the letter h) argues in favor of negotiated welfare, as it is envisaged that the bilateral body can promote "*initiatives regarding the development of the organization of professional firms aimed at launching quality procedures and protecting health and safety in workplaces work*", since the owner of the studio or, in any case, other freelancers or collaborators also operate in the work environment.

Also Art. 13, in the context of financing bilateral bodies, clarifies that "*the contribution includes forms of assistance for all those who work within the professional firm, employers, clients and workers*". Also in the preamble to the Annex to the CCNL of professional firms, on the bilaterality of the sector it is explicitly provided that "*the parties intend to extend forms of assistance also to freelancers*", therefore in the amount that the employer will have to pay for each worker for bilateral services there will be a quota intended "*to finance supplementary assistance for freelance employers*".

A further source of negotiated welfare for self-employed collaborators of professional firms is the Supplementary Health Care Fund (C.A.DI.PROF.),

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a body that manages health care treatments supplementing compulsory public health services. Pursuant to art. 16 beneficiaries of the Fund's benefits are all employees with the different forms of employment provided for in the CCNL including owners and collaborators. And indeed, according to the administrative regulations of C.A.DI.PROF. the latter have the possibility of enrolling in the supplementary health care fund for professionals if they hold contracts lasting no less than 6 months; this option is also allowed to practitioners who are carrying out the period of professional practice required by their respective legislation, until they register for a compulsory contribution form.

Another example of a so-called collective agreement inclusive is the Unirec CCNL (National Union of Companies for the Protection of Credit), which regulates in the same collective agreement employed workers and so-called independent collaborations so called outbound, i.e. those collaborators who deal with debt collection by making only outgoing calls.

The protection measures that this CCNL extends to coordinated and continuous collaborators range from supplementary healthcare, to a minimum variable compensation equal to at least 30% of the salaries of employees, to the possibility of withdrawal by the client only for fair cause or with a minimum notice of 15 days.

The CONFLAVORO, CONFSAL, FESICA CCNL, which operates in the same sector as the Unirec CCNL, also regulates both employed and self-employed workers in the same collective agreement, providing, among other things, that the compensation for so-called self-employed collaborators *outbound* cannot deviate by more than 30% of the remuneration expected for workers who carry out the same tasks on a subordinate basis.

Other examples of so-called bargaining inclusive are found in the CCNL for the Family Help Service and in the CCNL for non-state schools.

The CCNL for the Family Help Service provides (art. 14, Chapter I) for the establishment of a specific bilateral body, the EBINAF, to which self-employed collaborators can also register and whose services concern supplementary healthcare, professional training, employment development, the correct application of the CCNL and forms of support for foreign workers.

4.1. The so called exclusive intervention

In contrast to inclusive bargaining, exclusive bargaining is characterized by the creation of contracts and agreements that exclusively regulate the figure of coordinated and continuous collaborators, thereby establishing specific protections for them.

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For example, in the sector of Civil Society Organizations (CSOs) – which include non-governmental organizations (NGOs) involved in international development cooperation – specific collective agreements have been established to regulate the economic and normative treatment of autonomous collaborators.

This contract regulates coordinated and continuous collaborations with particular reference to income protection, providing specific tables with compensation for the different professional profiles; Furthermore, provisions are made for mental and physical rest, reimbursement of expenses, suspension of the contract in the event of illness or injury, maternity leave, termination of the parties only for just cause or with a minimum notice of 45 or 90 days based on the profile covered professional. Furthermore, trade union rights are recognised, such as participation in meetings and the right to appoint representatives. For collaborators who carry out activities abroad, the CCNL guarantees a series of insurance measures for accident, illness, maternity, as well as repatriations in the event of death or hospitalization due to life-threatening danger of a family member.

Still in the so-called call center sector outbound, the Assoteconomia, Asstel and Assocontact CCNL dictates the rules only for outbound self-employed collaborators, providing that their compensation cannot be less than 80% of the remuneration of comparable subordinate workers; the right to supplementary healthcare is also established in case of risk of major operations, maternity, long-term care services (the costs of which will be borne by the client within a maximum limit of Euro 7,000.00 provided that the relationship lasts exceeding 30 days) and the possibility of withdrawal for the parties only for just cause or professional unsuitability of the collaborator.

The Assocall CCNL (again in the outbound call center sector) also exclusively regulates continuous coordinated collaborations and establishes the minimum hourly remuneration for the collaborator (8 euros), provided that he does not receive a higher remuneration based on the objectives established and achieved. In terms of pregnancy, illness and injury, the CCNL provides for the suspension of the relationship without payment of compensation and not termination (the client can withdraw only if the deadlines established therein are exceeded).

In this prolific call center sector, it is worth mentioning the establishment of the bilateral body Ebincall which provides a series of additional protections for call center collaborators. Specifically, this body has the aim of: promoting training and professional qualification through the organization of study courses; prepare measures to integrate particular social benefits such as illness, accident, maternity; carry out the functions delegated to it by the CCNL regarding the protection of the health and safety of workers in the workplace.

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Finally, in the so-called sector delivery (home deliveries carried out by independent riders), the Assodelivery-UGL CCNL provides for the free supply of safety equipment and coverage against INAIL accidents and for damages against third parties to the digital platforms (in accordance with the provisions of art. 47 septies of Legislative Decree 81/2015).

Furthermore, professional training is provided for the platforms in the fields of road safety and food transport and preservation.

Specifically, this collective agreement establishes the introduction of the minimum wage and other supplementary economic benefits, of an hourly incentive system and of specific protections in the cities where delivery has recently been introduced, in addition to productivity bonuses that are triggered after a minimum number of deliveries.

Now, if the free provision of safety equipment such as high visibility clothing and helmets for those who cycle by bicycle, insurance coverage against accidents (INAIL) and for damages against third parties are measures already imposed by law, the collective agreement has activated further protection institutes in favor of the so-called riders. A first measure concerns professional training, as established by art. 18, letter. e), where it is envisaged that the platforms "*at their own expense make training courses available to the Rider on road safety and food transport and conservation via an e-learning platform, also organized collectively by the Parties*".

Art. 25, however, then provides for the establishment of a Joint Commission with national participation which must evaluate the possible activation of active employment policies in favor of the rider and establish and regulate a possible bilateral sector body for the management and application of the tools of welfare. Consequently, the art. 26 provides that "*the parties recognize bilateralism as the tool for seeking the best integrative conditions for the provision of welfare and assistance tools in favor of Riders, postponing the constitutive documents of a Bilateral Body in the sector or the possible choice of use of a pre-existing Bilateral Body, the methods of contribution to the same, to the competence of the commission referred to in the previous art. 25*".

5. Conclusions

The regulatory framework outlined, both from a legislative source and through the analysis of certain examples of collective autonomy, reveals a system that is still evolving.

The path taken appears, at the same time, difficult to decipher due to its complexity, but also clear in its direction: we reaffirm that this direction

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involves calibrating specific protections for these increasingly common forms of work.

Indeed, the system set up through collective autonomy enables the collective protection of the rights of collaborators. This begins with the regulation of the salary, which constitutes the primary element of protection for collaborators in the working relationship, and gradually extends to the creation of further measures of subsidiary negotiated welfare.

In this perspective, the role of collective bargaining is central. However, for its further development, legislative support appears necessary. This should be in line with the constitutional principles established by Articles 3, 35, 38, and 39 of the Italian Constitution, as is generally the case for dependent work, especially concerning incentives and contribution relief granted for the application of collective agreements.

The necessity of action through collective autonomy is particularly evident, especially regarding the central issue of salary for self-employed collaborators. This is further confirmed by the widespread skepticism already expressed by many regarding the introduction of a legal minimum wage for dependent work, a measure that would apply uniformly across all sectors.

In our opinion, a minimum wage imposed from above would only rigidify the system, generating counterproductive effects that fail to respect the peculiarities of individual sectors. This is particularly true for the broad and varied world of weak self-employment, which requires tailored and flexible solutions.

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Collective bargaining in the field of digital working platforms: a comparison between Italian and French systems[1]

Giulia Danesin[2]

Introduction

For timing reasons, today I will focus only on the actors of collective bargaining, and in particular on the right of digital platform workers to be collectively represented.

For the purpose of this presentation, I would like to stress that digital platform workers encompass both employees and self-employed persons. There are two reasons for that: first the algorithmic management makes the distinction between employees and self-employed persons extremely blurry, and second in Italy collective rights encompass both employees and self-employed persons, as also provided by European social charter[3] and International Labor Organization[4]. This trend in France is limited to drivers and riders working precisely throw digital platforms[5].

[1] The oral style of the presentation has been intentionally maintained. This presentation is a short version of a paper which will be published in a French book edited by Éditions Management et Société in 2025. This presentation is also the evolution of the article Danesin G. (2023), "La contrattazione colletiva nel settore delle piattaforme digitali: Italia e Francia a confronto", *Lavoro Diritti Europa*, n. 3, text available at: *www.lavorodirittieuropa.it/images/DANESIN.pdf*.

[2] PhD student at the University of Parma, Italy, in a joint supervision program with the University of Lorraine, France.

[3] Kresal B. (2023), "La négociation collective pour les travailleurs des plateformes et la Charte sociale européenne", in Boto J.M.M., Brameshuber E. (eds.), *Négociation collective et plateformes numériques*, Dalloz, pp. 80-81.

[4] *Freedom of Association. Compilation of decisions of the Committee on Freedom of Association*, Geneva: International Labour Office, VI ed., 2018, pp. 59-75, text available at: *www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_632659.pdf*.

[5] Chapter III, Title IV, Book III, Part VII of French labour code.

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Among these social rights for everyone, there's the right to be collectively represented by trade unions. But, is this representation truly protective for workers, as organized in Italy and in France? In other words, are the representative bodies truly representative?

In order to verify it, I divided my presentation into two parts: in the first part I will talk about the trade unions' representation and I will start by analyzing before the Italian system, which doesn't fix the representativeness's criteria, and then the French one which fixes them. This analysis will show the lack, in any circumstances, of trade unions' representativeness.

So this conclusion will take us, in the second part, to verify whether the representativeness can't be better provided by organizations other than classical trade unions.

1. The trade unions' representation of digital platform workers

First of all, when we talk about collective representation, we refer to the representative trade unions' action to promote workers' interests[6]. The question that raises my reflections is the following: is this representation, as established, effective? In other words, are workers' representatives truly representative?

To ascertain this, in this first section we will examine before the representativeness in regard to the Italian model, which doesn't establish criteria of representativeness, and then in regard to the French model, which strictly establishes them.

1.1. The Italian system

In Italy the criteria for certifying the representativeness of a trade union aren't established by the legislator[7]. So the major trade union confederations, from 2011 to 2014, concluded three agreements[8] in order to define the criteria, and they gave importance to the union's associated number (the

[6] Azuero G., Baugard D., Dockès E. (2023), *Droit du travail*, collection "Prècis", XXXVII ed., Dalloz, p. 1391.

[7] The Italian legislator has never really intervened in regulating the collective labour relations. Giugni G. (1977), *Introduzione allo studio della autonomia collettiva*, Milano: Giuffré.

[8] The interconfederal agreement of 28 June 2011, the protocol agreement of 31 May 2013 and the interconfederal agreement of 10 January 2014. These agreements are called the trade union tryptich, Caruso B. (2014), "Per un intervento eteronomo sulla rappresentanza

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"associative representativeness" criterion[9]) and to the votes gained by a union during the elections for the representative body at the company level (the "elective representativeness" criterion[10]). These numbers must then be combined by the National Economic and Labour Committee (CNEL), a constitutional body with consultative functions.

Even the courts, in their rulings, established some other criteria, like the involvement of a union in the collective bargaining[11] or in strikes and its geographical diffusion[12].

The result of the lack of regulation is a multitude of different trade unions who certify themselves as representative and conclude different agreements without any coordination. So in Italy we have several agreements at different levels[13] negotiated by social partners fighting each other to contest the representativeness of the others and prevent their agreements' application.

So the question is: would it be desirable to establish the criteria of the representativeness to fix this situation?

1.2. The French system

In order to understand if un overregulated system can manage the situation, I have chosen France as a term of comparison. Indeed, in France the criteria of the representativeness of trade unions representing employees are strictly fixed by the legislator in the Article L2121-1 of the labour code. These criteria are:

1) the republican's values respect;
2) the independence;
3) the financial transparency;
4) a minimum of two years' seniority in the professional and geographical field covering the negotiation level;

sindacale: se non ora quando!", *Biblioteca "20 Maggio"*, n. 1, p. 363, text available at: *csdle.lex.unict.it/sites/default/files/Documenti/Articoli/2014-1_Caruso.pdf*.

[9] Carinci F. (2014), "Il lungo cammino della rappresentatività sindacale (dal Tit. III dello Statuto dei lavoratori al Testo Unico sulla Rappresentanza 10 gennaio 2014)", *Diritto delle relazioni industriali*, n. 2/XXIV, p. 329, text available at: *moodle.adaptland.it/pluginfile.php/17638/mod_book/chapter/177/dri_2_2014_carinci.pdf*.

[10] *Ibidem*.

[11] Constitutional Court, 03/07/2013, n. 231.

[12] Court of Cassation, 30/03/1998, n. 3341.

[13] Lamannis, M. (2023), *Collective bargaining in the platform economy: a mapping exercise of existing initiatives*, ETUI aisbl, pp. 55-56.

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5) the votes gained, according to the negotiation levels;
6) the influence, primarily characterized by activity and experience;
7) membership numbers and fees.

With regard to the particular case of riders and drivers working throw digital platforms qualified as self-employed persons, the legislator established seven other criteria for certifying the representativeness of trade unions[14], otherwise the representation of self-employed persons wouldn't be possible. These criteria reproduce substantially the ones established for the employees' representatives in all the working fields. The exceptions concern the criteria fourth and fifth and they are redesigned in order to better suit this kind of work. So, the seniority is one year minimum in the professional field of platform workers at the national level; and, regarding the votes gained during the elections, the level concerned is the sector level, and the organization must have received at least 8% of the votes cast.

However trade unions aren't representative despite their certification after the electoral cycle and despite the respect of all the other representativeness's criteria.

This lack of representativeness is demonstrated by the very weak participation rate of digital platform workers during the first two electoral cycles. Indeed, during the first electoral cycle of 2022 the participation rate in the riders' sector was 1,83% and in the driver's sector was 3,91%. In the last cycle of May 2024, it was 3,90% in the riders' sector and 19,96% in the drivers' one[15]. The reasons for this failure are linked to a variety of factors, including high worker turnover, language barriers and fear of any repercussions from the platforms.

This analysis demonstrates that the representativeness's problems remain in any case, with or without criteria. So, instead of focusing on the criteria, in order to improve the situation, let's focus on the representatives: could the solution be a representation system other than the trade unions' one?

2. A new form of representation

This leads us to the second part of the presentation where we will see another possible kind of representative body. I will illustrate the representation before in theory and then in practice.

[14] Article L 7343-3 of French labour code.

[15] The results are available at the following link: *bretagne.dreets.gouv.fr/Chauffeurs-VTC-livreurs-les-resultats-elections-2024-et-le-point-sur-les*.

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2.1. The representation by the peers

The theory of representation offers different representatives' models[16]. When it's about the particular interests of a category, it is possible to organize a representation within the category itself[17]. The particularity that distinguishes the category of platform workers is the invisibility of the entity responsible for making any decisions affecting workers' professional career. Indeed, workers don't have access to information about the algorithm that runs the platform. This aspect, in my opinion, deserves to be classified as of special interest. So the problem wouldn't be the union per se, but its composition. Outsiders are less sensitive and less aware of the problems of platform workers. As a result, platform workers should associate with each other to fight for their own social rights in the frame of collective bargaining.

2.2. The Italian unions of riders

In Italy there are some examples who can inspire us: I'm talking about the "unions" of riders. These are grassroots organizations including workers spontaneously associating with each other and linked to a city[18]. Workers affected by digital technology have exploited it to their advantage, using it as a tool to associate, communicate and act together to defend their interests. The most popular union is Rider Union Bologna[19] who in 2018 concluded with the major of Bologna a municipality agreement called "*the charter of the fundamental rights of digital platform workers in the urban context*"[20]. This charter, not only provides social rights for the workers involved, but also it's applicable to both employees and self-employed persons.

This experience should be repeated in a more general level because the difference between employees and self-employed persons seems to be less and less relevant.

[16] Fenichel Pitkin H. (1967), *The concept of representation*, University of California Press.

[17] Bobbio N. (1984), *Il futuro della democrazia*, Milano: Einaudi, p. 35.

[18] These cities are Bologna, Rome, Florence, Milan and Turin. Pacella G. (2019), "Le piattaforme del food delivery in Italia: un'indagine sulla nascita delle relazioni industriali", *Labour & Law Issues*, vol. 5, n. 2, p. 184, text available at: *labourlaw.unibo.it/article/view/10232/10117*.

[19] Marrone M. (2019), "Rights against the machines! Food delivery, piattaforme digitali e sindacalismo informale", *Labour & Law Issues*, vol. 5, n. 1, text available at: *iris.unive.it/bitstream/10278/3724867/1/9602-31093-1-PB.pdf*.

[20] The text of the charter is available at: *www.bollettinoadapt.it/wp-content/uploads/2018/06/CartaDiritti3105_web.pdf*.

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3. Conclusion

To conclude and to stress my main opinion, I would like to say that I believe that one way to establish an effective representativeness of digital platform workers could be the system of workers representing themselves without any distinction based on the qualification of their status.

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Collective bargaining for self-employed persons in the European Union. The approach of the Court of Justice

Gianluca Giampà[1]

1. Introduction on competition law and collective workers' rights in the European Union

The relationship between the principle of free competition in the European internal market and trade union freedoms has always been contentious. This conflict has been influenced by the significant expansion of social rights in the last century, which has challenged the rigidity of older competition law regulations (Minda, 1989; Ichino, 2001). Social and political changes, which have transformed the European Union from an organisation primarily focused on creating a common market to evolving into a complex political entity with diverse competences, have also influenced this process.

In the last decades, the tension between ensuring fair competition in the internal market and meeting social needs has become more evident. It is important to note that collective bargaining was not the sole battleground where the social principles of the Union clashed with competition rules (Corti, 2016, pp. 505-509). There was notable dispute also regarding matters like Sunday rest[2], job placement[3], and strikes[4], to give just some examples.

[1] Sapienza University of Rome, Italy. This text corresponds to the content of my presentation on the panel titled "Collective Bargaining for Self-Employed Persons in the European Union Framework: Italy and Spain", held on 19 November 2024 in Rome during the XXIV ISLSSL World Congress. Additionally, it is part of a paper that was previously published.

[2] CJEU C-145/88 *Torfaen Borough Council v B & Q plc* of 23 November 1989 (*Torfaen*).

[3] CJEU C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* of 23 April 1991 (*Macroton*); CJEU C-55/96 *Job Centre coop. arl.* of 11 December 1997 (*Job Centre)*.

[4] CJEU C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti.* of 11 December 2007 (*Viking*); CJEU C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska*

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As for European Union law, the conflict arises from the provision of Article 101 of the Treaty on the Functioning of the European Union, which prohibits agreements that have the potential to restrict or distort competition (Lianos, Countouris, De Stefano, 2019, p. 303; Lianos, 2021, p. 303). While collective agreements concerning individual rights of employees are generally considered compatible with free competition (Ichino, 2001, p. 189; Biasi, 2018a, p. 361[5]), issues can arise when provisions in collective agreements result in restrictions on competition in the service market.

However, in EU law, there are norms, including primary legislation, that establish trade union freedom without explicit constraints regarding the subjective qualification of those exercising it, whether they are employees or self-employed. This approach is also followed by the most prominent international sources on labour law and human rights (see, on the importance of taking a human right based approach in considering collective labour rights, Stylogiannis, 2023, pp. 167 ff.; Giovannone, 2023, p. 3). It has been argued that Article 152 of the TFEU, which recognizes and promotes the role of the social partners, introduced in the Treaty of Lisbon, has severed the functionalization constraint of social dialogue to the interests of the Union, recognizing it as an autonomous function (Caruso, Alaimo, 2011, pp. 281-282). The subsequent Article 155, with reference to social dialogue "at Union level" provides that this dialogue "*may lead to contractual relations, including agreements*".

Furthermore, Article 28 of the Charter of the Fundamental Rights of the European Union, which holds equal status with the EU Treaties, recognise to workers and employers and their respective organisations "*the right to negotiate and conclude collective agreements at the appropriate levels*". It was affirmed that Article 28 constitutes a fundamental vehicle for the principle of solidarity in the European Union (on the issue of solidarity in European labour law, see Zimmer, 2022, p. 46).

It is important to note that Article 28 mentions collective agreements for the first time in the context of primary European sources. In other provisions, including Article 152 of the TFEU, more generic expressions such as "social dialogue" are preferred (Caruso, Alaimo, 2011, p. 274; cfr. Sciarra, 2020, p. 86). However, it is believed that the recognition of social dialogue itself translates into the recognition of collective bargaining since the latter is the natural outcome of the former. Furthermore, the reference to the negotiation

Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet of 18 December 2007 (*Laval*).

[5] According to whom "*European competition law is specifically directed at undertakings (and their dealings) and it does not – apparently – cover individuals*".

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phase extends the scope of Article 28 to all the necessary steps leading to the conclusion of an agreement (Veneziani, 2002, p. 54), even if it is not ultimately reached (Ales, 2019, p. 43). No definition of "collective agreement" is provided. Since, according to Article 28, collective agreements should be negotiated and concluded "*in accordance with Community law and national laws and practice*", the norm appears to defer the definition to the legislation of the Member States. Additionally, the reference to "appropriate levels" seems to encompass the various forms and articulations of bargaining in individual national experiences, ranging from company-level agreements to those concluded within the framework of European social dialogue.

Another peculiarity of Article 28 is that it codifies the right to collective bargaining alongside the right to trade union action, in what has been called a "cumulative view" (Ales, 2019, pp. 43-43). The right to bargaining, in fact, lacks effectiveness when trade union action is not adequately supported by norms that legitimise and facilitate it within a framework characterised by democratic principles. Therefore, it is significant that the connection between these two rights has been recognized and codified at the European level in Article 28, based on the constitutional traditions of the Member States[6].

2. Analysis of the European Court of Justice Case Law. The Albany case

The first significant judgment that indirectly addressed the relationship between associations of workers and employers in the context of competition law is the one in the Becu case (CJEU C-22/98 of 16 September 1999). In this decision the Court of Justice of the European Union established that, for the purposes of competition law, workers are not considered undertakings[7].

A few days later, in the well-known Albany case (CJEU C-67/97 of 21 September 1999), the Court stated that collective agreements that pursue social policy objectives by implementing measures to improve conditions of work and employment can be considered exempt from the application of

[6] According to the ILO "General Survey on the Fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008": "*specific provisions in relation to collective bargaining are present in 66 constitutions*" (p. 4).

[7] Point 26: workers (in the specific case, dockers) "*do not therefore in themselves constitute 'undertakings' within the meaning of Community competition law*". According to CJEU C-179/90 *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* of 10 December 1991 (*Merci*) a person's status as a worker is not affected by the fact that "*the worker, whilst being linked to the undertaking by a relationship of employment, is linked to other workers by a relationship of association*".

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Article 101. In the Court's reasoning, since objectives of social relevance have a recognized space in the Treaties (cfr. De Vries, 2016, p. 221, according to whom the Court raises collective bargaining "*to a legitimate European social value*"), they must therefore be considered in a proper balance with competition rules.

The exemption from competition law established by the Court is subject to a "double filter" (Di Via, 2000, p. 283). The first filter concerns the nature of the agreement, that must be that of a "collective agreement". The second filter concerns the object of the collective agreement (cfr. Pallini, 2000, p. 242, according to whom the control over the object makes the freedom of bargaining "supervised"), that must consist in certain objectives of social relevance (Schiek, 2020, p. 402). The notion of social objectives has been further specified[8] (cfr. Evju, 2001, pp. 165 ff.)

For this reason, the exemption has been defined as "arguably narrow" (Freedland, Countouris, 2017, p. 59; cfr. Biasi, 2018b, p. 450; cfr. also Giubboni, 2016, p. 106, according to whom the scope of application of the Albany extempion is indeed wide)[9] and based on "at least too generic" argumentations (Ichino, 2001, p. 193), and the Albany ruling has been considered partially consistent with the Court's previous orientations (Allamprese, 2000, p. 35)[10].

3. The FNV Kunsten case

These decisions pertain to cases where the agreements were applicable only to employees. The Court of Justice, while referring to the workers in the Albany judgement, "*does not go on to specify who does and who does*

[8] Cfr. CJEU C-222/98 *Hendrik van der Woude v Stichting Beatrixoord* of 21 September 2000 (*van der Woude*), point 21; CJEU C-437/09 *AG2R Prévoyance v Beaudout Père et Fils SARL* of 3 March 2011 (*AGR2*), point 29.

[9] It's worth noting that AG Wahl, in the opinion given in *FNV Kunsten* (CJEU C-143/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* of 4 December 2014) affirmed: "*the notion of direct improvement of the employment and working conditions of employees must not be too narrowly construed*".

[10] The previous orientation of the judges emerges from the opinion of the Advocate General Lenz (20 September 1995) in the Bosman case (CJEU C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* of 15 December 1995): "*there is in my opinion no rule to the effect that agreements which concern employment relationships are in general and completely outside the scope of the provisions on competition in the EC Treaty*", points 273 and 274); see also CJEU C-241/94 *French Republic v. Commission of the European Communities* of 26 September 1996.

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not qualify as a worker for the purpose of this exception" (Risak, Dullinger, 2018, p. 21).

In many member states of the EU, collective agreements that regulate the working conditions of self-employed persons are common (Hiessl, 2021, pp. 279 ff.; the practice it's also very common in Italy: cfr. Piglialarmi, 2019, p. 388), although not as widespread and effective as it is for employees. The interests at stake and the established protections are indeed still of great relevance. This is true for those who perform personal work and are subject to a power imbalance with their counterpart (cfr. Contouris, De Stefano, 2021, p. 10). In some countries, this phenomenon has also developed with the collective regulation of the work relationship of platform workers, whose legal classification is still subject to extensive debates (an effective summary of the debate is provided by Bellomo, 2022, pp. 155 ff.).

The first judgement that indirectly gave some indication on the issue was the one on the Pavlov case (CJEU C-180/98 to C-184/98 of 12 September 2000). According to the Court, the Albany exemption "*cannot be applied to an agreement which* […] *is not concluded in the context of collective bargaining*". This kind of definition, although provided in a different context, was also considered to cover agreements applicable solely to self-employed persons.

A partially different assessment was made subsequently in the well-known FNV Kunsten case (CJEU C-143/13 of 4 December 2014). According to some scholars, a factor that influenced the Court of Justice's different approach was the entry into force of the Lisbon Treaty, which has equated the provisions of the Charter of Fundamental Rights of the European Union, including Article 28, with those of the Treaties themselves (Lianos, Countouris, De Stefano, 2019, p. 308).

The Court stated that the concept of an undertaking includes those who "*perform their activities as independent economic operators in relation to their principal*"[11]. Consequently, a service provider can't be considered as an undertaking, "*if he does not determine independently his own conduct on the market, but is entirely dependent on his principal*". Since the term "undertaking" is not defined in either primary or secondary European law, scholars have suggested a "functional approach" in interpreting this notion. This is because provisions that contain the term could serve very different functions in relation to the different fields of regulation (see. Arnold, Cerny, 2019, 188). If the self-employed persons to whom the agreement is applied

[11] Cfr. CJEU C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio (CEEES) and Asociación de Gestores de Estaciones de Servicio v European Commission* of 14 December 2006, point 38.

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can be said to be "entirely dependent", they are considered "false self-employed". In particular, the state of dependency arises from the fact that the worker does not bear any economic or financial risk with the counterparty and operates as an auxiliary within the principal's undertaking. The Court also specified that the classification of a self-employed person under national law does not prevent that person from being classified as an employee according to the EU definition[12].

As a result of the Court's ruling, only service providers in a situation comparable to that of workers are exempted from competition law. Therefore, only collective agreements that apply to "false" self-employed persons can be considered compliant with EU law.

The characteristics that the Court outlines to describe false self-employment seem to refer, partially, to the notion of economic dependence (Grosheide, Ter Haar, 2017, p. 37; Menegatti, 2019, pp. 80-81[13]), which has been occasionally used in some national legal systems as a basis for providing protections to workers. Consider, for example, the figure of the TRADE (Trabajador Autónomo Económicamente Dependiente) in the Spanish legal system. TRADEs, as outlined in the Estatuto del Trabajo Autónomo established in Spain in 2007, are the sole category of self-employed individuals granted the right to enter into collective agreements, known as "Professional Interest Agreements" (see Article 13 of the Estatuto) (García-Muñoz Alhambra, 2021, p. 237; and, in relation to the Italian context, Delfino, 2017, p. 46, where he affirms that almost all the requirements described by FNV Kunsten are formally present in "hetero-organised" employment relationships as regulated in Italy by article 2, d.lgs. 81/2015). FNV Kunsten has identified criteria that can be used to interpret the EU notion of worker for the purpose of applying the Albany exemptions, using an approach that has been defined "functional" (Lianos, Countouris, De Stefano, 2019, p. 313).

While this solution is reasonable in ensuring that even those who are only formally self-employed receive the protections guaranteed by collective agreements, on the other hand, it appears to be excessively cautious as it continues to strongly link the applicability of collective agreements to the qualification of "worker", albeit in the form of "false self-employed" (Perulli,

[12] As previously stated in CJEU C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* of 13 January 2003 (*Allonby*), point 71.

[13] According to whom the EU notion of worker is "*much broader to that of 'employee' commonly endorsed by national judiciaries, to the point of including intermediate categories workers – variously referred by some legislations to as dependent contractors, economically dependent, 'parasubordinate' workers, employee-like persons*".

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2024, p. 199[14]; cfr. Risak, Dullinger, 2018, p. 21; Loi, 2018, pp. 864-865). There are indeed several categories of self-employed persons who, although not falling within the Court's definition of false self-employment, deserve the protections provided by collective agreements (Lianos, Countouris, De Stefano, 2019, p. 314[15]).

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[14] "*Basically, in FNV, the Court did nothing but reaffirm an absolutely undisputed principle in all legal systems regarding the classification of the employment relationship, that is the 'primacy of facts'*". "False self-employed" cannot therefore constitute a third intermediate category between workers and entrepreneurs.

[15] They mention, for example, creative workers, who can easily be excluded by the Court definition of false self-employed because they "*have autonomy regarding the 'time, place, and content' of the task*".

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Singularity vs multiplicity of trade unions in Malaysia

Keat Ching Wong, Ameerah Nasri[1]

1. Introduction: a paradigm shift in Malaysian trade unionism

This paper explores the recent shift in Malaysia's trade union landscape, marked by the recognition of multiplicity of trade unions in Malaysia and its anticipated impact to a framework which previously only recognised and facilitated the concept of singularity of trade unions since the inception of the Malaysia Trade Unions Act 1959[2] ("TUA").

As a disclaimer, this article is authored by legal practitioners specializing in the employment and industrial relations sector, and not by academicians focused on the study of trade unions. While every effort has been made to ensure the accuracy and relevance of the contents, the perspectives offered are rooted in practical legal experience rather than academic analysis.

Trade unions in Malaysia serve as organized associations of workers that advocate for improved labour conditions, equitable treatment and the protection of workers' rights. Beyond traditional functions such as collective bargaining and legal representation, contemporary unions are increasingly engaged in broader economic and social debates. Unions also work to address systemic inequality, giving workers the power to improve their jobs and push for policies that create a fairer economic system. This expanded role reflects the ongoing shifts in labour markets driven by globalization and technological change[3].

[1] MSLSSL, Malaysia.

[2] Act 262.

[3] Economic Policy Institute (2023), *How Today's Unions Help Working People: Giving Workers the Power to Improve Their Jobs and Unrig the Economy*, Economic Policy Institute, available at: *www.epi.org/publication/how-todays-unions-help-working-*

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To understand the significance of the recent amendments to Malaysia's trade union laws, it is essential to first examine the broader context of union representation in the country. As of the latest data currently available from the Department of Statistics Malaysia (DOSM), the country's total population stands at 34.1 million[4], with a workforce of approximately 16.61 million[5].

Despite this substantial workforce, only about 6% – or 1 million workers – are unionized as of 2023[6], underscoring the limited reach of unions in the Malaysian labour market. However, recent developments suggest that this may soon change, which will be discussed further in this paper.

2. Evolution of the Malaysia Trade Unions Act 1959: from singularity to multiplicity

In Malaysia, the formation and operations of trade unions is governed by the Malaysia TUA. The TUA contains provisions which regulate the registration, formation and activities of trade unions in Malaysia, establish a systematic registration system/requirements of trade unions[7], and introduce rights, obligations and liabilities of trade unions.

A pivotal change occurred in 2023 when Parliament passed the bill for the Trade Unions (Amendment) Act 2024[8] ("Amendment Act") which came into force on 15 September 2024. The Amendment Act saw several notable amendments to the TUA, chief being that the TUA no longer restricts union memberships to individuals within the same trade, occupation or industry of such union. In other words, the Amendment Act has introduced in Malaysia what is more commonly known as the "multiplicity of unions".

people-giving-workers-the-power-to-improve-their-jobs-and-unrig-the-economy/ (accessed: 29.11.2024).

[4] Department of Statistics Malaysia (2024), *Population Dashboard*, OpenDOSM, available at: *open.dosm.gov.my/dashboard/population* (accessed 29.11.2024).

[5] Department of Statistics Malaysia (2024), *Labour Force Statistics, Malaysia, June 2024*, Department of Statistics Malaysia, available at: *storage.dosm.gov.my/labour/lfs_month_2024-06_en.pdf* (accessed 29.11.2024).

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[7] Fareez Shah & Partners (2020), *Trade Unions 101: All about Trade Unions in Malaysia*, Fareez Shah & Partners, available at: *fareezlaw.com/employment-law/trade-unions-in-malaysia/* (accessed 29.11.2024).

[8] Act A1700.

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Multiplicity of unions can essentially be translated to the formation of multiple trade unions in any establishment, trade, occupation or industry[9].

This change has sparked rigorous discussions and debate among the representatives of existing trade unions, the Malaysian Employers Federation and the Coalition against Multiplicity of Unions due to the radical and far-reaching effects of the Amendment Act to the current framework of trade union governance in the country[10].

3. Key amendments to the Malaysia Trade Unions Act 1959

We now turn to the key amendments to the TUA that, for the first time, introduce and enable the concept of multiplicity of unions in Malaysia.

The first major amendment is the deletion of the provision from the TUA which restricted union membership to individuals within the same trade, same occupation or same industry.

Section 2(1) of the TUA was amended to delete subsection 2(1)(a) from the following provision:

"trade union" or "union" means any association or combination of workmen or employers, being workmen whose place of work is in Peninsular Malaysia, Sabah or Sarawak as the case may be, or employers employing workmen in Peninsular Malaysia, Sabah or Sarawak as the case may be –

(a) Within any particular establishment trade, occupation or industry or within any similar trades, occupations or industries; and […]

To illustrate, prior to the deletion of subsection 2(1)(a) above, a postal worker could only join a trade union in the postal services, or a bank employee could only be a member of a trade union in the banking industry. This limitation has now been lifted, allowing workers to join unions across different sectors.

Even though the amended TUA now allows for multiplicity of unions within any organisation, the recognition of any particular union as the representative or bargaining authority for the workers must still be

[9] HR News (2023), *Dewan Rakyat Passes Controversial Amendment to Trade Unions Act*, HR News, available at: *hrnews.my/2023/10/11/dewan-rakyat-passes-controversial-amendment-to-trade-unions-act/* (accessed 29.11.2024).

[10] HR News (2023), *Dewan Rakyat Passes Controversial Amendment to Trade Unions Act*, HR News, available at: *hrnews.my/2023/10/11/dewan-rakyat-passes-controversial-amendment-to-trade-unions-act/* (accessed 29.11.2024).

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determined through the relevant processes under Section 9 of the Industrial Relations Act 1967[11] ("IRA"), including the secret ballot process so that only the union(s) with the requisite majority will be recognised by the employer for purposes of collective bargaining. Where there are more than one union recognised by the employer (through either voluntary recognition by the employer or through the secret ballot process), it remains to be seen whether this would result in various unions co-operating with each other in order to form a united front for purpose of collective bargaining with the employer.

According to subsection 9(4A) of the IRA, the Director General of Industrial Relations ("Director General") is vested with the authority to administer the process to decide which union(s) should be granted recognition by the employer. The provision prescribes that the Director General is required to ascertain the scope of union representation in accordance with the constitution of the union as well as the percentage of support for the union by carrying out a secret ballot.

The second major amendment is the repeal of the provision from the TUA which allowed the Director General to refuse to register a new trade union if there already exists a current trade union registered to represent the workmen in that particular establishment.

The relevant provision deleted by the Amendment Act is Section 12(2) of the TUA, reproduced as follows:

> The Director General may refuse to register a trade union in respect of a particular establishment, trade, occupation or industry if he is satisfied that there is in existence a trade union representing the workmen in that particular establishment, trade, occupation or industry and it is not in the interest of the workmen concerned that there be another trade union in respect thereof.

The impact is that existing trade unions are no longer able to object to the formation of or attempts by any other unions to represent employees in the same category or establishment.

In a similar vein, this change facilitates the formation of multiple unions within the same industry, whether they are in-house or national/regional unions, creating an environment where workers can choose from a broader range of representation options.

[11] Act 177.

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4. Why was the Malaysia TUA amended?

At the tabling of the Malaysia Trade Unions (Amendment) Bill 2023 in the House of Representatives on 10 October 2023, the then Minister of Human Resources had highlighted the main objective of the amendments to the TUA, which is to remove restrictions on the formation of a trade union based on particular establishment or similarity in trade, occupation or industry and to allow multiplicity of trade unions within any establishment, trade, occupation or industry.

Such amendments were proposed to align with the principle of freedom of association whereby workmen and employers would be free to establish or join any trade union of their own choice[12].

The amendments were also proposed to be consistent with the core principles outlined in the International Labour Organization ("ILO") Convention n. 87 (Freedom of Association and Protection of the Right to Organise)[13] as well as Chapter 19 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP Agreement), which upholds the ILO Convention on "*freedom of association and the effective recognition of the right to collective bargaining*" and which Malaysia is a signatory to[14].

The Malaysian government's decision to remove these restrictions is seen as a step towards enhancing workers' rights and promoting a more inclusive, flexible approach to union membership.

5. Potential impact: a surge in union membership?

One of the anticipated outcomes of these amendments is a rise in the number of trade unions and the proportion of employees represented by them.

Based on the data in *Table 1*, the rise in numbers of union membership among Malaysian workers have been modest in the past years. These numbers are expected to increase significantly after the introduction of multiplicity of unions.

[12] Parliament of Malaysia (2023), *Debates of the House of Representatives, 10 October 2023*, Parliament of Malaysia, available at: *www.parlimen.gov.my/files/hindex/pdf/DR-10102023.pdf* (accessed 29.11.2024).

[13] International Labour Organization (ILO) (n.d.), *Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)*, International Labour Organization.

[14] World Trade Organization (WTO) (2018), *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)*, New Zealand Ministry of Foreign Affairs and Trade.

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Tab. 1. Statistics of Number of Trade Unions and Membership in Malaysia in 2019-2023[15]

Year	2019	2020	2021	2022	2023
No. of Trade Unions	762	770	747	759	756
Membership	948,772	956,542	940,914	954,992	1,008,371

Source: A Compilation Trade Union Statistic in Malaysia 2019-2023, 2024, p. 8.

6. Multiplicity of unions: what are the implications?

While it is acknowledged that the concept of multiplicity of unions theoretically supports freedom of association and will increase the number of unionised workers in the country for better labour representation, is multiplicity of unions necessarily advantageous or disadvantageous to employees?

As discussed previously, as a result of the Amendment Act, workers or employers may join any trade union, including those with no direct connection to their specific profession.

From a practical viewpoint and as argued by critics, the proliferation of unions could lead to competition rather than collaboration among unions. Having trade unions with competing interests may lead to fragmented efforts and dilute the collective bargaining power of workers. The risk of fragmentation increases as multiple unions vie for membership within the same workplace or industry, potentially weakening their negotiating position[16]. This may also lead to omnibus unions being led by individuals who lack relevant expertise or interest in the members' welfare and specific needs within the particular trade, occupation or industry. A union not directly connected to a particular trade, occupation or industry may struggle to represent its members effectively, as its leadership may not fully understand the nuances of their work conditions, work culture or market trends.

[15] Department of Trade Union Affairs (2019-2023), *A Compilation Trade Union Statistic in Malaysia 2019-2023*, Ministry of Human Resources, Putrajaya, available at: *jheks.mohr.gov.my/wp-content/uploads/eBookStatistik/Statistik JHEKS 2019-2023.pdf* (accessed 29.11.2024).

[16] Free Malaysia Today (2023), *Multiple Unions: Boon or Bane to the Labour Movement?*, Free Malaysia Today, available at: *www.freemalaysiatoday.com/category/opinion/2023/12/08/multiple-unions-boon-or-bane-to-the-labour-movement/* (accessed 29.11.2024).

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7. Conclusion

The TUA amendments mark a significant turning point in Malaysia's industrial relations landscape. The flexibility introduced by the TUA amendments is poised to reshape the way unions operate, offering greater freedom of association for workers and expanding their representation options.

In the end, a lot may depend on the constitutions of the unions themselves. This flexibility is supported by the Malaysian legal framework's emphasis on allowing unions to operate according to their own constitutions, enabling unions to tailor their approaches to achieve the most effective representation and advocacy for their members.

The burden now lies on the trade unions to be more versatile in understanding the work conditions, business processes and industry norms in different types of companies and showcase its relevance and effectiveness in advocating for their members in an increasingly complex labour market.

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Negociación colectiva y sensibilidad religiosa y de creencias. Los cimientos de la libertad sindical en el interior de las confesiones religiosas[1]

Juan José Fernández Domínguez[2]

1. Autonomía religiosa frente a libertad sindical: una cuestión abierta

A diferencia de cuanto ocurre con otros colectivos –como miembros de las fuerzas armadas, cuerpos de policía o jueces y fiscales–, respecto de los cuales los textos internacionales permiten restricciones legítimas al ejercicio de la libertad sindical, ninguna limitación afecta, en principio, a quienes prestan servicio en favor de las confesiones religiosas. Y, sin embargo, la necesidad de conciliar su reconocimiento y manifestaciones con otros intereses públicos relevantes, como puede ser la libertad religiosa de las entidades empleadoras, ha servido, en algunos casos, para introducir limitaciones de mayor o menor calado; en otros – cuando se trata de ministros de culto y religiosos –, para cercenarlo de raíz al amparo de la excepción ministerial, llevando así a negar la premisa mayor, su condición de trabajadores.

En este último escenario, y afectando al núcleo duro de la autonomía confesional, se suscitó hace más de una década un conflicto capaz de remover cimientos y abrir una senda de democracia en un escenario poco propicio para la representación de intereses sociales, negociación de condiciones de trabajo o solución consensuada de los conflictos.

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2. La libertad sindical en el seno de las confesiones religiosas: el caso *Sindicato del Buen Pastor c. Rumanía*

En abril de 2008, un grupo de treinta y dos sacerdotes y tres laicos de la Iglesia Ortodoxa rumana decidieron formar el Sindicato del Buen Pastor, para organizarse en defensa de sus intereses laborales, dejando al margen de los aspectos religiosos (nunca pretendieron canalizar otro tipo de acciones que afectaran el dogma, la jerarquía o el modo de funcionamiento de la Iglesia) y actuando de manera conjunta y coordinada tanto frente a los superiores eclesiásticos como frente a las autoridades estatales en la materia.

La idea contó, desde el inicio, con la firme oposición de la Iglesia a partir de un doble argumento: de un lado, porque la conformación de un sindicato –como de cualquier asociación interna–, así como la posibilidad de que, en cuanto organización de religiosos, pudiera actuar en defensa y/o representación de sus miembros ante la Administración y los órganos judiciales, requería la autorización previa y expresa del Ordinario del lugar; de otro, porque el vínculo trabado entre los clérigos y la Iglesia traía causa en un acuerdo previo en forma de juramento, de modo tal que ningún sentido tenía la creación de un instrumento para la defensa de derechos derivados de la normativa laboral.

2.1. La valoración del asunto en los tribunales rumanos

En primera instancia, el Tribunal competente permitió la inscripción del sindicato, fundando su parecer en un triple motivo (Santiago, Navarro Gamboa, 2013, pp. 70-72):

1) En primer lugar, la existencia de otro tipo de instituciones sindicales que operan sin inconvenientes bajo el reconocimiento de la Iglesia y el Estado.
2) En segundo término, porque desde hacía tiempo (al menos en el período comprendido entre 2004 y 2011), al acuerdo bajo la forma de juramento se acompañaba la suscripción de contratos de trabajo de duración indefinida; y ello aun cuando una decisión del Ministerio de Trabajo, precisamente al hilo del conflicto en presencia, pusiera fin o tal práctica, por considerar que no resultaban de aplicación las prescripciones de Derecho del Trabajo rumano a las relaciones entre los sacerdotes y las congregaciones religiosas, pasando a ser reemplazadas por el nombramiento del obispo.

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3) Por último, a cambio del desempeño de las funciones asignadas, y con cargo a los fondos aportados a este fin por el erario público, percibían una retribución abonada por la Iglesia y cotizaban y resultaban beneficiarios de prestaciones de Seguridad Social.

El triple argumento anterior conduce a lógica conclusión para el órgano judicial de apreciar – bajo una perspectiva nítidamente laboral (Cañamares Arribas, 2018, p. 214) – que la creación de un sindicato no solo no perjudicaba a la Iglesia, sino que podía contribuir al establecimiento de un diálogo entre empleador y sus trabajadores sobre cuestiones estrictamente laborales; es decir, a negociar las condiciones de trabajo como vía para superar la solución unilateral de los conflictos suscitados al calor de la prestación de servicios.

El órgano judicial superior estimó el recurso planteado por la Iglesia, fijando la atención en tres consideraciones contrapuestas a las anteriores:

1) Los contratos suscritos eran claros respecto a la delimitación de las obligaciones de los sacerdotes en cuanto hace a la necesidad de observar todas las previsiones derivadas del juramento que realizaron cuando fueron ordenados, sometiéndose a la normativa de quien lo recibía en su seno, cuya violación estaría en disposición de llevar a la aplicación de los oportunos procedimientos disciplinarios, con las sanciones de distinto tipo que podrían, incluso, conducir a la separación del infractor; dando pie, por tanto, a un vínculo que exorbitaba las relaciones propias del ordenamiento laboral.
2) Resultaba inviable conferir la facultad de constituir sindicatos a quienes ejercían labores de dirección en sus respectivas parroquias.
3) Por último, y fundamental, el reconocimiento del sindicato entrañaría una vulneración de la autonomía de la Iglesia, pues sus estatutos disponen que para la constitución, funcionamiento y disolución de asociaciones resulta necesaria la autorización del Sínodo. Ponderaba, en este último sentido, que la aparición de un sindicato estaría en disposición de afectar a la autonomía organizativa y comprometer la estructura de la Iglesia, no en vano podría poner en cuestión su ordenación jerárquica tradicional y el modo de adoptar las resoluciones, al abrir las variantes de, o bien sustituir a los órganos consultivos y/o deliberativos existentes y amparados en los estatutos de la organización, o bien forzar a que estos trabajaran con un nuevo órgano no sujeto a las tradiciones de la Iglesia ni a las normas del Derecho Canónico que regulan las consultas y la toma de decisiones.

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2.2. El criterio de la Sala Tercera del Tribunal Europeo de Derechos Humanos (TEDH)

Agotada la vía previa, y después algunas vicisitudes internas de relieve (un Sínodo que decidió sancionar a los sacerdotes si seguían adelante con su propósito, el recuerdo del máximo órgano de la Iglesia sobre la prohibición de acudir a los tribunales nacionales e internacionales sin el consentimiento de la jerarquía eclesiástica y brotes de disidencia cuando algunos de los miembros del sindicato decidieron no seguir adelante en el empeño y hasta tres de ellos crearon una asociación al margen), la cuestión se eleva al TEDH, cuya primera decisión sobre los hechos en presencia llevó a apreciar una vulneración de la libertad sindical de los demandantes, pues la negativa del Estado rumano a reconocer el sindicato constituía una restricción del art. 11 del Convenio Europeo de Derechos Humanos (CEDH) que no reunía los requisitos "pertinentes y suficientes" para poder considerarla válida y, además, resultaba notoriamente desproporcionada para la tutela del fin perseguido (STEDH – Sala Tercera – 2330/09, de 31 de enero de 2012).

En su razonamiento, parte de constatar la existencia de una relación laboral evidente, derivada no solo de la existencia de contratos individuales de trabajo con el Arzobispado, sino también del salario abonado por los servicios prestados con cargo al erario estatal y de las entidades locales donde prestaban servicios, así como de la cotización de la Iglesia a la Seguridad Social para poder lucrar, según sucede con cualquier otro trabajador, prestaciones por contingencias profesionales y comunes, incluyendo la atención sanitaria y la jubilación. Sobre tal indubitada relación laboral se alza la conclusión de que sus peculiaridades no pueden ser de tal envergadura como para "clericalizarla" en este aspecto fundamental (Dorssemont, 2013/2014, pp. 751-757; *contra*, Schouppe, 2013/2014, pp. 744-746).

De este modo, y en cuanto trabajadores, no se les podía negar el disfrute de la libertad sindical sin que mediara una previsión legal en tal sentido y sin justificar su estricta necesidad para conseguir algún interés legítimo en una sociedad democrática.

La Sala constata la existencia de una ley, los Estatutos de la Iglesia, que prohibían la creación de cualquier forma de asociación sin previo acuerdo del Arzobispo como vía para la protección del orden público (Hervieu, 2012, p. 4); sin embargo, entiende que la negativa a registrar el sindicato distaba de ponderar los intereses de los trabajadores, tampoco entraba en la distinción entre miembros del clero y el personal laico, ni siquiera en si las normas eclesiásticas que prohibían la pertenencia a un sindicato eran compatibles o no con las normas nacionales e internacionales que regulaban los derechos sindicales de los trabajadores (González Ayesta, 2016, pp. 90-92).

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A sus resultas, considera que la restricción a la libertad sindical no resultaba imprescindible en Rumanía, pues la creación de un sindicato no entrañaba una amenaza razonable para la sociedad y, en tanto únicamente pretendía la defensa de los intereses económicos y sociales de los empleados, tampoco cabía sostener que afectara a la autonomía eclesiástica, porque las obligaciones específicas que un empleador cuya ética se asienta en la religión está en disposición de imponer a sus empleados no pueden mermar la libertad sindical. En este sentido, la Directiva 2000/70, donde se admite tal relación de especial sujeción, resulta concluyente cuando afirma, en el considerando quinto, que su aplicación se entenderá sin perjuicio de la libertad de asociación, la cual incluye la libertad de crear y afiliarse a sindicatos (Martucci, 2014, pp. 39: 13).

2.3. La primacía de la autonomía religiosa sobre la libertad sindical bajo el parecer de la Gran Sala del TEDH

La sentencia fue apelada por el Gobierno de Rumanía y sometida a nuevo examen a cargo a cargo de la Gran Sala del TEDH, en cuya parte sustantiva se propone dilucidar, a la vista de las posiciones de las partes y de terceros, y siempre "*teniendo en cuenta su condición de miembros al clero, si los miembros del sindicato demandante pueden invocar el artículo 11 del Convenio y, si es así, si la denegación del registro del sindicato vulneró la misma esencia del derecho a la libertad de asociación*".

Para contestar a las dos preguntas, sigue un esquema semejante al que había utilizado la Sala Tercera, articulado sobre tres aspectos sustanciales (González Ayesta, 2019, pp. 81-95):

A) En primer lugar, y a la luz del ordenamiento internacional (Convenio núm. 87 OIT, Directiva 78/2000/UE y, en particular, Recomendación núm. 198 OIT, sobre relaciones de trabajo), ratifica la idea de la Sala Tercera respecto a la esencia laboral de la relación que une a los ministros de culto con la Iglesia ortodoxa. Además de la existencia de contratos de trabajo, retribución y encuadramiento en el sistema de Seguridad Social, fija su atención en las actividades seculares que realizan, tales como la enseñanza o la gestión de bienes. Por este motivo, colige que el hecho de que otras tareas tengan una naturaleza especial (la "*dimensión espiritual de la misión*" que resalta en distintos pasajes) (Schouppe, 2013/2014, pp. 744-746; Ryabykh, Ponkin, Ponkina, 2012, pp. 13-14; González Ayesta, 2019, pp. 102-106; Cañamares Arribas, 2018, pp. 218-219) no constituye motivo suficiente para negar esa esencia laboral que conduce al reconocimiento del derecho

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al ejercicio de la libertad sindical (Botti, 2013, pp. 176-177), pues al amparo del art. 11.2 CEDH no conforman una categoría de trabajadores susceptibles de tener que padecer "restricciones legítimas" en su disfrute.

B) Reconocida la aplicación del art. 11 CEDH, la Gran Sala entra a valorar los factores de legalidad y necesidad en la decisión del Gobierno rumano de restringir el derecho. Coincidiendo en la habilitación legal dada por esa "fuente secundaria" que es el Estatuto de Iglesia [pues entiende que tales normas forman parte del ordenamiento jurídico rumano y han de ser atendidas por las autoridades estatales (Santiago, Navarro Gamboa, 2013, p. 78), la Gran Sala se aparta sustancialmente del pronunciamiento previo del propio Tribunal a la hora de ponderar la necesidad de la restricción a la libertad sindical en el marco de una sociedad democrática. La clave va a radicar en que ya no situará la cuestión en una finalidad relacionada con el orden público, sino con la protección de los derechos de terceros; reconduciéndola, por tanto, a un conflicto entre la vertiente colectiva de dos derechos con un sustrato individual: de un lado, la libertad sindical y el derecho a constituir un sindicato; de otro, la libertad religiosa y el derecho a la legítima autonomía de la Iglesia ortodoxa (Raduletu, 2014, p. 170; González Ayesta, 2019, p. 88).

En este sentido, el Tribunal proporciona un nuevo enfoque a la cuestión debatida sobre la existencia de una razón para restringir la libertad sindical, asentándola sobre la primacía de la libertad religiosa, pues considera que la inscripción del sindicato demandante en esta ocasión podía suponer un peligro real para la autonomía de la Iglesia.

A la hora de alcanzar tal conclusión, parte de considerar que en no basta la mera alegación de una amenaza real o potencial a la autonomía para justificar una injerencia en la libertad sindical, sino que la comunidad religiosa ha de estar en disposición de demostrar, a la luz de las circunstancias concretas del caso, que el riesgo es sustancial y la restricción no va más allá del afán de evitarlo, sin desviarse tampoco del objetivo final de proteger la autonomía de la comunidad religiosa (Cismas, 2014, p. 141; Angeletti, Benigni, 2019, pp. 838-840; López Ahumada, 2014, p. 129).

Hasta tres motivos aprecia el Tribunal para considerar que esta ocasión mediaba ese riesgo real (González Ayesta, 2019, p. 93):

1) En primer lugar, los atinentes al procedimiento seguido por los demandantes, pues no se ajustaron a los previstos en el Estatuto de la Iglesia para la constitución de asociaciones. Hacerlo, además, sin ofrecer ninguna explicación para no haber estado y pasado por ese camino regulado, y sin poder acreditar tampoco una negativa a su objetivo tras someterse a la vía formal prevista.

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2) En segundo término, al sopesar algunos de los fines concretos previstos por sus promotores, cuando se extendían a conseguir la representación institucional, fomentar la libertad de expresión, instar informes del arzobispo sobre distintos asuntos relacionados con su quehacer o servirse de huelgas y otras medidas de conflicto para defender los intereses laborales que le son propios. En este sentido, el reconocimiento del sindicato repercutiría sustancialmente sobre la autonomía, en tanto supondría incorporar, dentro de su funcionamiento, a una entidad extraña capaz de socavar la tradicional estructura jerárquica.
3) Por último, y habida cuenta de que repercute sobre la autonomía de la Iglesia, queda afectada la que cabría considerar como piedra angular de las relaciones entre el Estado y las confesiones y, a su través, se está en disposición de incidir en la tolerancia dentro de una sociedad democrática. En este sentido, la autonomía encuentra adecuada correspondencia con la neutralidad religiosa del Estado, al cual se le exige mantenerse al margen de cualquier disputa entre grupos en el marco de las relaciones en el seno de una confesión; a su vez, el deber de abstención entraña el correlativo reconocimiento a las confesiones del derecho a reaccionar, de manera adecuada, frente a cualquier movimiento disidente que pudiera surgir en su seno y comprometer su identidad (Cañamares Arribas, 2018, p. 220).

En el supuesto debatido, la presencia de órganos consultivos y deliberativos que trascienden la organización interna de la Iglesia, para proporcionar cobertura a las relaciones con el Estado, se podría ver afectada por la interferencia del sindicato como nuevo interlocutor, tanto en el interior de la entidad religiosa como en las relaciones externas de la organización sindical (dada la libertad de acción y expresión que merecen sus miembros), capaz de convertir al Estado en interlocutor y mediador en conflictos que le deberían resultar ajenos (González Ayesta, 2016, pp. 103-104; Thayer, 2012, pp. 525-526).

C) A juicio del Tribunal, en fin, la disparidad de modelos de relación entre el Estado y las confesiones religiosas en el seno del Consejo de Europa ha llevado a soluciones muy variadas respecto al tipo de relación que vincula a un ministro de culto con su confesión religiosa, y solo unos cuantos reconocen su eventual naturaleza laboral. Por esa misma razón, únicamente en algunos de ellos (Austria, Finlandia, Francia, entre otros) existen sindicatos de ministro de culto y sacerdotes como asociaciones organizadas en defensa de sus intereses profesionales (Santiago, Navarro Gamboa, 2013, p. 72).

Restringir el derecho a la sindicación no es, por consiguiente, una solución desproporcionada para conjurar el peligro de afectar a la autonomía de la

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Iglesia ortodoxa, en particular cuando la propia sentencia deja claro que la restricción no es absoluta, pues la solución hubiera podido ser otra distinta si se hubiera constituido un sindicato que persiguiera fines compatibles con el Estatuto de la Iglesia (sin cuestionar ni su organización jerárquica ni el proceso de adopción de las decisiones) o, también, si los sacerdotes y laicos hubieran decidido afiliarse a alguno de los sindicatos existentes.

3. Conclusiones

El pronunciamiento analizado, situado en el corazón de la autonomía religiosa, contiene una triple lección a ponderar con tiento:

1) En primer lugar, la existencia de una pluralidad de relaciones entre el Estado y las confesiones religiosas [que van desde la "separación total", hasta los denominados "Estados confesionales", pasando por cuantos mantienen un sistema híbrido de "*cultos reconocidos o recordados*" (Wattier, 2014, pp. 121-122), lleva a que la Corte Europea siga fiel a su línea de conceder un margen de apreciación muy amplio a todos los miembros del Consejo de Europa para resolver los conflictos que afecten a la libertad religiosa (García Roca, 2010, pp. 17-55). Cuanto en las libertades de expresión y de reunión y asociación es mínima interferencia, en la libertad religiosa se torna en una gran amplitud que impide crear un modelo europeo, fragmentando el concepto de sociedad democrática abierta (Solar Cayón, 2007, pp. 3-4).
2) En aras precisamente de la dimensión sobre la cual se asienta el Convenio, concebido –según recoge su Preámbulo– como el instrumento para la construcción de una concepción común de derechos, flaco favor presta el pronunciamiento comentado no solo al afianzamiento de algunos elementos mínimos de democracia interna en las organizaciones de tendencia religiosa (antes bien, el valor de la jerarquía aparece notablemente potenciado frente a las disidencias), sino a una neutralidad del Estado firmemente asentada sobre el *laissez faire* del más fuerte (Parisi, 2015, pp. 57-61).
3) El resultado, notoriamente discutido a través del significativo número de votos discrepantes, lleva a terciar en el debate entre la vertiente colectiva de dos derechos con sustrato individual, como son la libertad sindical y la autonomía religiosa, aferrándose a las peculiaridades del supuesto de hecho (ignorar el procedimiento adecuado, no ceñirse a los intereses económicos y sociales o poder ejercer el derecho individual a través de otros sindicatos) para hacer prevalecer el segundo. Quizá en otro

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contexto, o con otros jueces, ese bastión ahora impenetrable acabe siendo lo suficientemente permeable para convertir en compartido un terreno hasta el momento vedado.

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Formación continua en el diálogo social español[1]

Mª De Los Reyes Martínez Barroso[2]

1. El protagonismo de los agentes sociales en el impulso de la formación y de la contratación laboral en alternancia

La doble dimensión del sistema de formación profesional, educativa y laboral, repercute en el papel del diálogo social y, por ende, en la intervención de los agentes sociales, que no es tan activo o decisivo en la faceta más vinculada a la formación reglada. Con carácter general, dichos agentes sociales asumen una importante función conectada con la representación institucional, participando en la "*gobernanza ejecutiva y estratégica del sistema de formación profesional*", tal y como dispone el art. 117 LO 3/2022, de 31 de marzo, de ordenación e integración de la Formación Profesional, si bien la presencia de sindicatos y organizaciones patronales será más relevante en la faceta de formación profesional para el trabajo. Es más, el hecho de que todas las modalidades de formación profesional se integren en el mismo sistema no supone que todos los agentes implicados deban intervenir o participar en todas ellas de la misma manera y con la misma intensidad (Menéndez Sebastián, Rodríguez Cardo, 2022, pp. 76-77).

La LO 3/2022 atribuye a los sindicatos y a las organizaciones empresariales funciones relevantes, como el impulso, promoción y asistencia a proyectos de formación profesional; la participación colaborativa respecto del papel que han de asumir las empresas, con labores de asesoramiento y actuando como enlace para la integración en este nuevo entramado; también se

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encomienda a los agentes sociales la labor de promover la agrupación de empresas y entidades de tamaño pequeño y mediano en red para la rotación de las personas en formación durante los periodos formativos, de manera que complementen los resultados de aprendizaje y faciliten, a la vez, la trasferencia de conocimiento y nuevas prácticas entre pequeñas y medianas empresas; deben recibir información sobre los puestos de formación profesional en las empresas; y han de colaborar fomentando la creación de nuevas figuras, como, en primer lugar, los "*perfiles colaboradores*" en las empresas, en la forma de "*personas trabajadoras expertas sénior*", para facilitar la permanente actualización del currículo en el centro de formación profesional por parte del equipo docente; en segundo término, las "*personas prospectoras de empresas u organismos equiparados*", encargadas de facilitar los contactos de centros de formación profesional y empresas; y, en tercer lugar, "*personal de apoyo especializado*", con el fin de asesorar y facilitar el acompañamiento en el itinerario formativo de personas con discapacidad (art. 89 LO 3/2022); sin olvidar, por último, que los agentes sociales deben "promover" entre empresas y personas trabajadoras el "*valor añadido de acreditar las competencias*", así como colaborar en su difusión, seguimiento y evaluación (art. 91.4 LO 3/2022). Y ello porque dado que el trabajo humano no sólo tiene un rendimiento productivo consustancial evidente sino también un rendimiento en forma de residuo formativo, la ejecución del trabajo formativo ha sido considerada por la legislación (tanto laboral y de empleo como de formación profesional) una ocasión particularmente propicia para, mediante las reglas correspondientes, extraer utilidad formativa práctica y específica muy valiosa, a la que no cabe acceder por los circuitos formativos más regulares (Fernández Márquez, 2022, p. 182. Rodríguez Romero, 2023).

En determinados sectores productivos se han implantado estructuras formativas de gran éxito a lo largo de los años (*v.gr.,* Fundación Laboral de la Construcción u órganos equivalentes en el sector de la minería, metal o madera), que progresivamente han ido convergiendo con la formación profesional para el trabajo, a través de la colaboración con los servicios públicos de empleo y del diseño de cursos que permiten obtener el pertinente certificado de profesionalidad. Es razonable suponer que todas estas iniciativas habrán de integrarse en el sistema de formación profesional, pues es una formación que ha de ser igualmente acreditable y que, en esencia, encaja perfectamente en el propósito y objetivos de la nueva regulación. No obstante, como ha precisado el Consejo Económico y Social (CES), para impulsar la participación empresarial en la formación dual, fundamentalmente de las pymes en la formación intensiva, que es la más exigente, resulta imprescindible programar medidas de apoyo específico (financiero y no financiero), prestadas por las Comunidades Autónomas a

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partir de una cooperación de estas administraciones "*con las organizaciones sectoriales y territoriales de los interlocutores sociales y con las cámaras en el territorio*", contando asimismo con el apoyo de la Administración General del Estado y con las entidades locales, para tener en cuenta las características de los territorios y la estructura productiva regional (CES, 2023a), a fin de aprovechar sus fortalezas.

2. La coordinación entre las modalidades formativas del mundo académico y profesional

Desde hace ya varias décadas, la teórica separación entre formación/educación y actividad profesional no se ajusta a la realidad de un contexto socioeconómico y productivo sometido a cambios tan veloces e intensos que dan lugar a una rápida obsolescencia de los conocimientos teóricos. La persona que concluye una determinada etapa formativa ya no puede pretender que los conocimientos adquiridos le permitan prestar servicios en un sector profesional o ámbito durante toda la vida. El modo de ejecución de la actividad para la que se ha formado probablemente cambiará en un futuro cercano, o incluso es posible que la actividad en sí misma ya no tenga cabida en el mercado, por falta de rentabilidad, por lo que resulta imprescindible articular procesos formativos que faciliten la actualización y la recualificación permanente, al menos en competencias digitales y en seguridad, dotando a la plantilla de hábitos cibersaludables para actuar en un entorno repleto de trampas atractivas e imperceptibles, y en un proceso formativo permanente. En relación con la formación profesional para el trabajo, quizá una de las explicaciones de su escaso éxito, haya sido su compleja articulación, a través de varias modalidades, que responden a distintos objetivos y escasamente coordinadas entre sí: formación de oferta, de demanda, en alternancia. Caben también otras clasificaciones, como la clásica distinción entre la formación profesional "ocupacional", dirigida a desempleados, y la formación profesional "continua", cuyos destinatarios son las personas trabajadoras, pero lo cierto es que las sucesivas reformas no han mejorado sustancialmente su eficacia y efectividad, ni han articulado y coordinado convenientemente todas esas modalidades o acciones formativas, que se desenvuelven a menudo con completa independencia y sin atender a las necesidades individuales de la persona que recibe la formación (Menéndez Sebastián, Rodríguez Cardo, 2022, pp. 65-66. 77; Camas Roda, 2023).

Y el hecho de que unas acciones se enmarquen en las políticas activas de empleo, otras en las políticas pasivas, otras eventualmente en el sistema educativo y que, en general, las competencias administrativas residan en

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entidades y organismos muy distintos, que no siempre pertenecen a la misma Administración, da lugar a desajustes y, en último término, a cumplimientos de carácter meramente formal. La situación mantenida hasta ahora dista de resultar satisfactoria, porque la formación profesional reglada no ha resultado suficientemente atractiva para los jóvenes; la formación continua no cuenta con el necesario protagonismo (se dedican 17 horas al año por trabajador, frente a las 50 en Alemania, por ejemplo); un porcentaje muy elevado de personas trabajadoras no puede acreditar formalmente sus habilidades, competencias y conocimientos y además las fórmulas de formación en alternancia no se han desarrollado con toda la extensión e intensidad deseables por la escasa implantación de la formación dual (Nieto Rojas, 2015, pp. 19 ff., Igartúa Miró, 2017, pp. 91 ff.; García Viña, 2020, pp. 23 ff.). No obstante, la formación profesional dual puede contribuir a mejorar la productividad y la competitividad empresariales, al posibilitar a la empresa formar y posteriormente incorporar a personas con perfiles profesionales asociados a una formación específica que se adecúe a sus necesidades y facilite la adquisición de competencias transversales, permitiendo, al mismo tiempo, ahorrar costes de selección y de adaptación de las nuevas personas empleadas. Más allá de lo anterior, puede favorecer una alianza entre las empresas y la sociedad, contribuyendo aquellas a formar personas trabajadoras de acuerdo con las necesidades e intereses del entorno en el que operan, y con ello al desarrollo territorial y social (CES, 2023a).

3. La formación continua en el marco del diálogo social

Una política en materia de formación articulada exclusivamente por las autoridades públicas y totalmente ajena a las necesidades de las empresas, no serviría a ningún objetivo verdaderamente eficiente. Por ello, fruto del consenso, desde la década de los 90 del pasado siglo se ha intentado modificar el panorama de la formación profesional vinculándolo al empleo y configurando un mapa formativo moderno, ajustado a las demandas sociales, que beneficie a todas las estructuras implicadas o afectadas: Estado, empresas, interlocutores sociales, personas trabajadoras y sociedad en general, adoptando su máxima expresión en los acuerdos de formación profesional continua. En efecto, fruto de la negociación o diálogo social entre agentes sociales y autoridades públicas, y con la sana intención de coordinar las diferentes acciones adoptadas sobre la materia, estos acuerdos tienen su base jurídica en los arts. 83.3 y 90 del Estatuto de los Trabajadores (ET), en los que se contempla la posibilidad de negociación de cuestiones formativas, especialmente de la considerada como formación profesional continua. Esto

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no puede entenderse como una despreocupación sobre otras facetas de la formación – reglada y ocupacional –, sino como expresión de voluntad de la intención de mejorar aquellos aspectos sobre los cuales no ha existido una amplia producción legislativa y que están íntimamente conectados con las necesidades de formación de empresas y personas trabajadoras (Cano Galán, 2010, pp. 99 ff.).

En relación con la formación continua o formación para el trabajo, en el marco del diálogo social es posible asistir a tres niveles de negociación; el tripartito, el intersectorial y el sectorial. En el primero encajaría, como fenómeno de concertación social, el Acuerdo Tripartito sobre Formación Continua de los trabajadores ocupados. Mientras que este no reviste la naturaleza de convenio colectivo en sentido estricto sino de un contrato de derecho público, el Acuerdo Nacional de Formación Continua (ANFC), en sus sucesivas ediciones, sí sería producto de la autonomía negocial colectiva, de carácter intersectorial, al amparo de lo previsto en el art. 83 ET. Se trata de una norma jurídica con eficacia *erga omnes*, sin perjuicio del tenor potestativo que pueda impregnar el texto y con independencia de que sea lugar común que los sectores nacionales firmen acuerdos expresos de adhesión al ANFC y de la concurrencia de otros acuerdos interprofesionales de formación continua como tradicionalmente ha ocurrido, por ejemplo, con el País Vasco. En el tercer nivel se encuentran los convenios colectivos sectoriales de ámbito estatal y los acuerdos específicos sobre esta materia que tradicionalmente han concertado las organizaciones más representativas y que podrán someter las discrepancias a una comisión paritaria de formación creada *ad hoc* u orientar la redacción de los planes de formación[3]. La diversidad de objetivos aconseja mantener ofertas o iniciativas específicas para sectores concretos, situaciones de reestructuración, zonas menos pobladas, etc., a la vez que flexibilidad en los mecanismos para financiarlas.

4. Modelos de buenas prácticas convencionales

A partir de una muestra selectiva de convenios colectivos, tanto de carácter sectorial como de empresa o de grupo empresarial, se ha realizado

[3] A título de ejemplo, el VII CC general del sector de la construcción (BOE 23 septiembre 2023), alude al plan formativo a través de una previsión convencional específica. Art. 24.1.4.j): "*Se estará a lo que reglamentariamente se desarrolle respecto al alcance de la formación correspondiente al contrato de formación para la obtención de prácticas profesionales, particularmente, en el caso de acciones formativas específicas dirigidas a la digitalización, la innovación o la sostenibilidad, incluyendo la posibilidad de microacreditaciones de los sistemas de formación profesional o universitaria*".

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un rastreo de las principales aportaciones que, a modo de buenas prácticas, la negociación colectiva más reciente ofrece en materia de formación continua. Los grupos de empresas más potentes, por ejemplo, en el sector de seguros, reconocen expresamente en la negociación colectiva que la formación, concebida como un derecho-deber de la plantilla, se configura como un elemento básico y fundamental para contribuir al desarrollo profesional de la misma y un factor decisivo para aumentar la competitividad de la empresa, al incrementar el nivel de cualificación y desempeño de la plantilla, alineándolo con los objetivos y la estrategia empresarial. Adicionalmente se asume el compromiso de poner en conocimiento de la Comisión de Desarrollo Profesional, el Plan de Formación que periódicamente se establezca y de que "*con carácter general y en la medida de lo posible la formación planificada por la empresa, tanto de carácter presencial como e-learning, se desarrolle dentro de la jornada laboral, considerándose, en todo caso, el tiempo empleado en la misma como tiempo efectivo de trabajo*"[4]. En el convenio sectorial de la industria del calzado se dispone expresamente que "*las acciones formativas programadas por las empresas responderán a las necesidades formativas reales, inmediatas y específicas de aquellas y sus personas trabajadoras. Estas acciones se desarrollarán con la flexibilidad necesaria en sus contenidos y el momento de su impartición para atender las necesidades formativas de la empresa de manera ágil y ajustar las competencias de sus personas trabajadoras a los requerimientos cambiantes*"[5].

La negociación colectiva debe situar los aspectos formativos entre los principios más importantes de la política empresarial con el objetivo de incrementar los conocimientos y desarrollo personal de los empleados. No obstante, pese al protagonismo que corresponde asumir a la negociación colectiva para acercar la formación a las personas trabajadoras y cubrir las necesidades empresariales de mayor capacitación de la fuerza de trabajo y mejora de la productividad se detectan todavía numerosos vacíos en la práctica convencional. También es posible encontrar normas pactadas que otorgan un protagonismo destacado a la formación continua, a partir de su consideración como "*un elemento estratégico que permite compatibilizar la mayor competitividad y productividad de las empresas, con proporcionar a las personas trabajadoras los conocimientos y las prácticas adecuadas a las competencias profesionales requeridas en el marco de un proceso de aprendizaje permanente*". Entre los objetivos que los convenios analizados vinculan a las actividades formativas destacan:

[4] Art. 4 del CC de Mapfre Grupo Asegurador (BOE 12 septiembre 2022).

[5] DT primera del CC de la industria del calzado (BOE 10 abril 2023).

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1) posibilitar la eficacia en el desempeño de los puestos de trabajo mediante actuaciones directas o a través de actuaciones y planes formativos subvencionados[6];
2) favorecer la permanente adecuación profesional a los cambios organizativos y tecnológicos[7];
3) potenciar las expectativas de promoción y desarrollo profesional, en cuyo caso a veces las necesidades de formación derivadas de una posible promoción se cubren fuera de la jornada laboral[8].

Una valoración de conjunto permite anticipar que la práctica totalidad de los convenios colectivos contienen disposiciones en las que se regulan: cuestiones formativas relacionadas con los contratos para la formación en alternancia; el tiempo de trabajo, especialmente permisos de que disponen las personas trabajadoras[9] (incidiendo en ocasiones en que se podrán utilizar estos permisos para el acceso a los procesos de reconocimiento, evaluación y acreditación de las competencias adquiridas a través de la experiencia laboral o de otros aprendizajes formales o informales)[10] o ajustes de jornada por motivos formativos; formación en prevención de riesgos laborales y mantenimiento del derecho a la formación durante la excedencia[11] o tras ésta.

Resulta desigual la regulación de aspectos formativos en los convenios de sectores productivos de las distintas familias profesionales, detectándose un mayor interés en incluir cláusulas de formación, cuando la negociación colectiva sectorial estatal deriva a la de ámbito inferior la determinación de acciones

[6] Así, el art. 18 del CC del sector de industrias de panadería y expendedurías de pan de la provincia de Sevilla (BOPSE 11 julio 2023), determina que las partes firmantes del CC "*se comprometen a llevar a cabo conjuntamente, apoyar y potenciar todas las actividades formativas en el sector de panadería, bien por actuaciones directas o por actuaciones y planes formativos subvencionados, con independencia de que cada parte lleve a cabo iniciativas individuales*".

[7] Art. 67 del XX CC de Seat, S.A. (BOE 29 septiembre 2022). Estableciendo un régimen diferente para los cursos de promoción y de adaptación profesionales, art. 86 del CC de Menzies Aviation Ibérica y Menzies Aviation Services (BOE 21 diciembre 2023).

[8] Art. 67.2 del XX CC de Seat, S.A. (BOE 29 septiembre 2022).

[9] Concretando, por ejemplo, que "*el derecho se entenderá cumplido en todo caso cuando el trabajador pueda realizar las acciones formativas dirigidas a la obtención de la formación profesional para el empleo en el marco de un plan de formación desarrollado por iniciativa empresarial o comprometido por la negociación colectiva*". Art. 28 del XI CC nacional para las industrias de pastas alimenticias (BOE 21 marzo 2023).

[10] Tal y como dispone el art. 94 del XX CC general de la industria química (BOE 19 julio 2021).

[11] Entre otros, art. 76 del CC de Menzies Aviation Ibérica y Menzies Aviation Services (BOE 21 diciembre 2023).

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concretas, o cuando por las propias características de las actividades que se desarrollan en ese sector, se exige una formación especializada. Excepción meritoria constituye en este sentido el convenio general de la industria química que, dentro de la formación programada por las empresas, contempla acciones formativas con carácter gratuito, con remisión al procedimiento previsto en la normativa legal vigente en cada momento, dirigidas a la adquisición y mejora de las competencias y cualificaciones profesionales, así como de la promoción y desarrollo profesional de las personas trabajadoras y la mejora de la competitividad de las empresas[12]. En los sectores químico y del calzado se contempla incluso la creación de un "Observatorio de FP Dual"[13], paritario, con el objetivo de evaluar de forma constante su eficiencia a través de la elaboración de un mapa territorial de implantación de la FP Dual por número de alumnos y familias profesionales que se confronte con las necesidades de ocupación del sector. Un tercer tipo de categoría es aquella que permite detectar cierta vinculación entre cualificación (o participación en acciones formativas) y contratación (derecho preferente al ingreso)[14] o ascenso, especialmente en las familias profesionales de Hostelería y Turismo y Transporte y Mantenimiento de Vehículos. En otras ocasiones se opta por medidas económicas para incentivar la participación en acciones formativas, como ocurre, por ejemplo, en los convenios de la familia profesional Hostelería y Turismo y Servicios Socioculturales y a la Comunidad o directamente para consolidar un denominado "*plus de progresión económica*"[15], sin perjuicio de que se hagan extensivas a convenios de empresas de otros sectores, especialmente si se realizan fuera de la jornada laboral y con carácter voluntario[16]. O se introducen sanciones por

[12] Informando a la representación legal de las personas trabajadoras acerca del crédito disponible para formación y, caso de no programar ninguna acción formativa a cargo de dicho crédito, informando de los motivos que justifican esa decisión de forma periódica (en el último trimestre de cada ejercicio). Art. 89 del XX CC general de la industria química (BOE 19 julio 2021).

[13] Art. 89 del XX CC general de la industria química (BOE 19 julio 2021) y DT Primera del CC de la industria del calzado (BOE 10 abril 2023).

[14] El art. 12 del XX CC general de la industria química (BOE 19 julio 2021) determina que "*tendrán derecho preferente para el ingreso, en igualdad de méritos, quienes hayan desempeñado o desempeñen funciones en la empresa con carácter eventual, interino, o por cualquier otro contrato por tiempo determinado, contrato a tiempo parcial, contrato para la formación y el aprendizaje, incluida la actividad laboral en el marco de la formación profesional dual y contrato en prácticas*".

[15] Art. 82 del CC de Menzies Aviation Ibérica y Menzies Aviation Services (BOE 21 diciembre 2023).

[16] Así, en el art. 45 del II CC de Solplast, SA. (BOE 2 octubre 2023), se establece para cada hora de formación una cantidad (5,5 euros), por todas las horas de formación promovidas por la empresa, "que se realicen fuera de la jornada laboral y con carácter voluntario".

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no participar en acciones formativas obligatorias o se recoge el derecho a la formación en situaciones de reestructuración (especialmente en los convenios de la familia profesional Imagen y Sonido). Tampoco faltan medidas dirigidas a colectivos particularizados, normalmente dentro de la acción formativa programada por las empresas. Así, las acciones de formación "*podrán incluir acciones positivas respecto al acceso a la formación de personas trabajadoras pertenecientes a determinados colectivos (entre otros, jóvenes, inmigrantes, discapacitados, baja cualificación, personas trabajadoras con contrato temporal, víctimas de violencia de género, mayores de 45 años)*"[17], sin olvidar el lugar central que ocupa la formación continua ante el envejecimiento de las plantillas (Requena Montes, 2020, pp. 201-202).

5. Principales carencias del tratamiento convencional y propuestas de mejora

Cada vez se realizan mayores esfuerzos en formación y es posible dar cuenta de experiencias destacadas de formación dual que suponen un paso más en el proceso de mejora de las competencias profesionales de los estudiantes en formación (Muñoz Ruiz, 2014, p. 281). No obstante, los trabajos de campo más exhaustivos realizados sobre el particular reflejan cómo la negociación colectiva (salvo excepciones) sigue sin prestar suficiente atención a cuestiones tan esenciales (Cano Galán, 2010, pp. 485 ff.) como:

1) Requisitos y exigencias formativas para el acceso a determinados niveles de cualificación.
2) Ajuste de los sistemas de clasificación profesional a las familias y niveles del Catálogo Nacional de Estándares de Competencia.
3) Reconocimiento de competencias.
4) Importancia de la experiencia laboral y forma de acreditación[18].
5) Estudio de las necesidades de formación en el concreto sector productivo y en la empresa.

[17] Art. 89.a) 1 del XX CC general de la industria química (BOE 19 julio 2021).

[18] De modo paradigmático, en la DT primera del CC de la industria del calzado (BOE 10 abril 2023) las partes firmantes "*se comprometen a promover que las competencias profesionales adquiridas por las personas trabajadoras, tanto a través de procesos formativos como de la experiencia laboral, sean objeto de acreditación*". En parecidos términos se pronuncia el art. 88 del XX CC general de la industria química (BOE 19 julio 2021), añadiendo que al objeto de posibilitar la acreditación sectorial de la formación recibida y/o la experiencia adquirida, la persona trabajadora que lo solicite recibirá un diploma según el modelo que pueda elaborar el Comité Paritario Sectorial.

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6) Adecuación de las funciones a las cualificaciones de las personas trabajadoras.
7) Reconocimiento salarial en atención a la cualificación profesional.
8) Conexión entre adquisición de competencias y fomento del empleo y promoción profesional, etc.[19].

Y si bien no puede obviarse que existen dificultades en el desarrollo de los procesos negociadores para la incorporación de cláusulas de formación, éstas deberían salvarse teniendo en cuenta los enormes beneficios resultantes de los acuerdos que se alcancen durante los procesos de negociación, su escaso coste, y la facilidad para articular medidas de fomento de la formación. Por ello resulta fundamental no sólo mejorar las relaciones entre los sujetos negociadores, sino además intentar identificar en cada proceso de negociación, aquellas cuestiones formativas sobre las que se pueden lograr acuerdos beneficiosos tanto para las empresas como para las personas trabajadoras, y que revisten escasa influencia sobre otros bloques negociadores más conflictivos, como puede ser la jornada o los salarios. La labor educativa que podría asumir el convenio colectivo en esta materia adolece en ocasiones de una gran falta de imaginación, limitándose los sujetos negociadores a tratar aquellas cuestiones respecto de las cuales el legislador ha otorgado el protagonismo a la negociación, reproduciendo la norma sin modificaciones o remitiéndose a ella. Por tanto, para un correcto tratamiento de la formación en la negociación colectiva, resulta fundamental poner en práctica medidas de apoyo y acompañamiento, que sirvan para mejorar el conocimiento acerca de la estructura de la formación profesional y averiguar cuáles son las medidas que pueden negociarse, para lo cual se requiere formar a los propios negociadores en cuestiones relacionadas con la negociación de cláusulas de formación, además de dotar a los interlocutores sociales de ayudas para una adecuada realización de acciones formativas. Por último, se deberían desarrollar más planes de formación por familias profesionales (siguiendo los modelos de buenas prácticas analizadas en el presente estudio) y en ámbitos particularizados, sin olvidar el desarrollo de procedimientos de solución de las discrepancias que puedan surgir durante los procesos de negociación de cuestiones formativas.

[19] Lógicamente existen excepciones, como la representada por el art. 35.2 del III CC de CRTVE (BOE 22 diciembre 2020), donde se menciona que "*la formación recibida computará en el itinerario profesional cuando las materias impartidas estén incluidas en la carrera profesional aprobada para cada caso por la Comisión general de formación, valorando para la progresión de nivel aquella formación externa que tenga vinculación con su desempeño profesional*".

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La negociación colectiva del algoritmo en las plataformas digitales de trabajo[1]

Laurentino J. Dueñas Herrero[2]

1. Diálogo social bipartito, negociación colectiva y regulación del trabajo en plataformas: el reforzamiento del papel de los sujetos colectivos

El trabajo en plataformas digitales ha planteado en la UE importantes problemas de regulación de los derechos laborales colectivos. Actualmente menos de la mitad de los Estados miembros de la UE han tomado medidas directamente relevantes para solventar esta situación. A mi juicio, abordar esta realidad a través del diálogo social es muy oportuno, y digo esto, a pesar de que la consulta en dos fases a los interlocutores sociales por parte de la Comisión, de conformidad con el artículo 154 TFUE, sobre la mejora de las condiciones laborales en el trabajo en plataformas no diera lugar a ningún acuerdo. Este hecho no ha impedido actuar a la UE en este ámbito adaptando el marco jurídico en lo que respecta a la utilización de sistemas automatizados de seguimiento y de sistemas automatizados de toma de decisiones. Ante el fallido intento de acuerdo por los interlocutores sociales, el proceso ha concluido con la actual Directiva (UE) 2024/2831 del Parlamento Europeo y del Consejo, de 23 de octubre de 2024, *relativa a la mejora de las condiciones laborales en el trabajo en plataformas*, que persigue no solo mejorar las condiciones de trabajo y reglamentar la utilización de los algoritmos en las plataformas digitales, sino también fomentar el diálogo social sobre los sistemas de gestión algorítmica, mediante la introducción

[1] El presente trabajo se ha realizado en el marco del proyecto de investigación 1120122631-122631-4-21, *La inclusión social a través de la renovación de elementos de estructura, relación y contenido en la negociación colectiva*, PID2021-122631OB-C21, Ministerio de Ciencia e Innovación.

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de derechos colectivos en materia de información y consulta sobre los cambios sustanciales relacionados con el uso de sistemas automatizados de seguimiento y de toma de decisiones. La nueva Directiva (UE) 2024/2831 exige como ejercicio de transparencia, tal y como se dispone en su artículo 9, que las plataformas digitales informen y consulten a los representantes de los trabajadores sobre las decisiones de la gestión algorítmica, lo que no deja de ser un auténtico desafío para la negociación colectiva interna en cada Estado miembro. Nos preguntamos hasta que nivel de exigencia deben llegar los Estados para que las plataformas digitales informen debidamente a las personas que realizan trabajo en plataformas y a los representantes de los trabajadores de plataformas sobre la utilización de sistemas automatizados que se alimentan de algoritmos.

Las personas que realizan trabajo en plataformas desconocen con frecuencia las razones de las decisiones adoptadas o apoyadas por sistemas automatizados y no pueden recibir una explicación de esas decisiones ni hablar al respecto con una persona de contacto, impugnar dichas decisiones ni solicitar una rectificación o, si procede, una reparación, porque la gestión algorítmica es opaca y oscura (Serrano García, 2024, pp. 1-2). Asimismo, los representantes de los trabajadores, otros representantes de personas que realizan trabajo en plataformas, los servicios de inspección de trabajo y otras autoridades competentes tampoco tienen acceso a dicha información (Considerando (8) de la Directiva (UE) 2024/2831). Por otra parte, el derecho de información y consulta de los sistemas automatizados alimentados por algoritmos no puede quedar vaciado de efectividad, ni en cuanto a la forma de transmitir la información ni respecto a cuándo debe ser transmitida. El empleador debe facilitar una información completa, en un formato, vocabulario y lenguaje accesible y comprensible para una persona sin conocimientos especializados técnicos avanzados en la materia; además, debe hacerse con la periodicidad que proceda, antes de que se use o implante en la empresa un concreto algoritmo o sistema de inteligencia artificial (Cremades Chueca, 2022, pp. 126-127). En este contexto, la negociación colectiva se erige como un complemento necesario para articular la selección de los algoritmos que se utilizan para otorgar determinadas condiciones laborales, como el salario o la jornada, que tratan de potenciar las cualidades del individuo, pero evitando provocar discriminaciones, sobre todo de tipo indirecto (Domínguez Morales, 2020, pp. 545-548). No hay duda de que nos encontramos ante un derecho del comité de empresa a ser informado, significando además la trascendente importancia que tiene el hecho de que el comité conozca de forma directa los algoritmos o sistemas de inteligencia artificial, lo que está totalmente en línea con lo previsto en el Acuerdo Marco Europeo sobre digitalización de 2020.

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2. La participación de los representantes de los trabajadores en la transparencia de los algoritmos

La Directiva (UE) 2024/2831 responde a la necesidad de una regulación europea referente a la gestión algorítmica del trabajo que resultara aplicable a toda empresa que utilizara sistemas automatizados de decisión o control en el ámbito laboral, incluyendo los derechos de información y consulta transparentes a las personas trabajadoras y a su representación legal. Ante la ausencia de regulación específica se debieron adoptar como "punto de arranque" las reglas jurídicas que ordenaban con carácter general el tratamiento automatizado de datos personales, tanto a nivel internacional como a nivel interno, para, a partir de las mismas – y como un plus mediante el cual valorar las circunstancias presentes en la relación laboral – construir principios y reglas especiales para este sector del ordenamiento jurídico (Fernández Domínguez, Rodríguez Escanciano, 1997, p. 101). El Reglamento Europeo sobre Inteligencia Artificial creó una nueva obligación que recaerá sobre las empresas que hagan utilizar a su personal laboral sistemas de IA para la actividad empresarial, es la denominada "*alfabetización en materia de inteligencia artificial*" del personal laboral afectado porque en sus funciones opere con tales sistemas. Se puede afirmar que el deber de formación existente en el contrato de trabajo va a tener una nueva y trascendental dimensión al incorporarle esa "garantía" de alfabetización en materia de IA a la que se refiere el mencionado artículo 4 del Reglamento (Del Rey Guanter, 2024, p. 1). El reglamento incluye, además, diversas previsiones relativas a la incidencia de la IA en el ámbito laboral, entre las que cabe destacar la obligación del responsable del despliegue, de informar a los representantes de los trabajadores y a los propios trabajadores de que estarán expuestos a la utilización de un sistema de IA de alto riesgo (artículo 26.7). Que se incluya esta mención expresa a la representación de los trabajadores en una norma de alcance general ya es indicativo de la relevancia que el legislador comunitario da al asunto, en una apuesta porque la utilización de la IA en el lugar de trabajo sea, al menos, discutida con la representación colectiva (Fernández Villazón, 2024, p. 3).

Es oportuno significar que uno de los mayores problemas que tiene la normativa de protección de datos en su aplicación a las relaciones laborales es la inexistencia de derechos de carácter colectivo, pues no considera la diferencia del poder de negociación existente entre el empresario y el trabajador, ni se consideran los derechos colectivos en favor del sindicato en la gobernanza de la protección de datos; (Todolí Signes, 2018, pp. 81, 84). Por ello, se subrayó la necesidad de tutelar los derechos de los trabajadores en el sector de los servicios colaborativos, y en primer lugar,

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el derecho de los trabajadores a organizarse y el derecho a la acción y a la negociación colectiva, de conformidad con la legislación y la práctica nacionales (Serrano García, Borelli, 2017, pp. 252-254). En cualquier caso, la presunción de laboralidad revaloriza el derecho de información (Pérez Amorós, 2021, pp. 181-182). La Directiva (UE) 2024/2831 consigue suplir algunas de las deficiencias de la única regulación aplicable hasta ahora a la gestión algorítmica del trabajo, porque el artículo 22 RGPD no resulta de aplicación a decisiones automatizadas con intervención humana y no reconoce derechos de información a la representación legal de la plantilla. La Directiva del trabajo en plataformas es una norma que en su específico ámbito de aplicación amplía y mejora las previsiones del RIA y del RGPD en cuestiones de transparencia y de derechos de información y consulta de las personas trabajadoras, de los autónomos y de los representantes legales de los trabajadores, así como de las autoridades (Cavas Martínez, 2024, pp. 86-87). Por otra parte, la Directiva (UE) 2024/2831 del trabajo en plataformas cuando regula en su apartado 1 del artículo 13 la información y consulta, expresamente dice que se entiende sin perjuicio de la Directiva 89/391/CEE en lo que se refiere a la información y la consulta, y de las Directivas 2002/14/CE o 2009/38/CE del Parlamento Europeo y del Consejo.

La Directiva (UE) 2024/2831 introduce de manera expresa un derecho de información y consulta a los representantes de los trabajadores, y correlativa obligación de informar por parte de las empresas, que se extiende al doble canal de representación en la empresa. Este derecho es la manifestación del principio general de transparencia algorítmica, pero puede pensarse que su impacto potencial sobre los sistemas de inteligencia artificial en las empresas resulta muy débil y limitado, en la medida en que no permite a los representantes ejercer ningún tipo de influencia, ni sobre la implantación de dichos sistemas ni sobre su contenido ni sobre su funcionamiento. Para ello sería necesario el establecimiento de un deber de consulta como requisito previo a la introducción de los mismos, acompañado del deber de negociar con vistas a la adopción de un acuerdo (Sanguineti Raymond, 2024, p. 7). Sin embargo, esta previsión normativa generará dinámicas positivas sobre todas las decisiones empresariales adoptadas a partir de estos mecanismos. En particular, el derecho de información sobre los algoritmos no deja de ser un expresión de participación en la empresa y es acreedor de una inmensa potencialidad en materia de negociación colectiva, espacio en el que podrán acordarse aspectos que la norma legal no ha cerrado plenamente, como los criterios de periodicidad, las limitaciones de uso y las evaluaciones periódicas sobre los efectos que su aplicación provocan sobre la evolución de las condiciones de trabajo, con atención especial atención a la variable sexo (Gómez Gordillo, 2021, p. 161).

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Por otra parte, los Estados miembros velarán porque las plataformas digitales de trabajo supervisen y, con la participación de los representantes de los trabajadores, llevarán a cabo periódicamente y, en cualquier caso, cada dos años, una evaluación de los efectos de cada una de las decisiones adoptadas o respaldadas por los sistemas automatizados de supervisión y de toma de decisiones. La información sobre la evaluación se transmitirá a los representantes de los trabajadores de las plataformas (artículo 10.1 y 4 de la Directiva). Incluso, las personas que realizan trabajo en plataformas y, de conformidad con la legislación o las prácticas nacionales, los representantes que actúen en nombre de esas personas tendrán derecho a solicitar a la plataforma digital de trabajo que revise o modifique algunas decisiones adoptadas o respaldadas por los sistemas automatizados de supervisión y de toma de decisiones.

3. La adecuada transposición de la Directiva (UE) 2024/2831 del Parlamento y del Consejo

En el apartado 1 del artículo 9 de la Directiva del trabajo en plataformas se requiere a los Estados miembros para que en la transposición de la Directiva exijan que las plataformas digitales de trabajo informen a las personas que realizan trabajo en plataformas y a los representantes de los trabajadores de plataformas, sobre la utilización de sistemas automatizados de seguimiento o de sistemas automatizados de toma de decisiones. Y se hace una minuciosa enumeración de lo que comprende esa información, que las plataformas digitales de trabajo deben proporcionar a los representantes de los trabajadores, "*de manera completa y detallada*": antes de utilizar dichos sistemas, previamente a la introducción de cambios que afecten a las condiciones laborales, la organización del trabajo o el seguimiento de la realización del trabajo, y en cualquier momento a petición suya (artículo 9.4 de la Directiva del trabajo en plataformas). Además, las plataformas digitales de trabajo deben proporcionar la información en forma de documento escrito, que podrá estar en formato electrónico y de forma transparente, inteligible y fácilmente accesible, sirviéndose de un lenguaje claro y sencillo (artículo 9.2 de la Directiva del trabajo en plataformas). En concreto, en lo concerniente a la información y consulta, en el apartado 2 del artículo 13 la Directiva (UE) 2024/2831 se dirige a los Estados miembros con el mandato de que deben, no solo velar, sino garantizar "*que la información y la consulta, tal como se definen en el artículo 2, puntos f) y g), de la Directiva 2002/14/CE, a los representantes de los trabajadores por parte de las plataformas digitales de trabajo*

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también abarque las decisiones que puedan conducir a la introducción de sistemas automatizados de seguimiento o de los sistemas automatizados de toma de decisiones o a cambios sustanciales en la utilización de dichos sistemas". Más adelante, en el apartado 3 de este artículo 13 se permite a los representantes de los trabajadores la elección de un experto al objeto de recibir su asistencia para examinar el asunto objeto de información y consulta, y formular un dictamen. Se añade que "*cuando una plataforma digital de trabajo tenga más de doscientos cincuenta trabajadores en el Estado miembro de que se trate, los gastos del experto correrán a cargo de la plataforma digital de trabajo, siempre que sean proporcionados. Los Estados miembros podrán determinar la frecuencia de las solicitudes de expertos, garantizando al mismo tiempo la eficacia de la asistencia*". Y esto debe hacerse de forma cuidadosa en la transposición de la Directiva porque dada la complejidad técnica de los sistemas de gestión algorítmica, la información debe proporcionarse a su debido tiempo a fin de que los representantes de los trabajadores de plataformas puedan prepararse para la consulta, con la asistencia de un experto elegido por los trabajadores de plataformas o por sus representantes de manera concertada cuando sea necesario (Considerando 52 de la Directiva (UE) 2024/2831).

A la hora de transponer la Directiva del trabajo en plataformas, y debido al amplio contenido del derecho de información y consulta de los representantes de los trabajadores, hemos de preguntarnos si hay una propuesta de verdadera negociación colectiva en la Directiva, no solo porque los Estados miembros puedan exigir una transparencia a las plataformas en relación con los sistemas automatizados de seguimiento y con los sistemas automatizados de toma de decisiones, que se traduce en una detallada información a los representantes de los trabajadores en plataformas, por escrito, de modo inteligible y fácilmente accesible, sirviéndose de un lenguaje claro y sencillo; sino que también las plataformas digitales de trabajo deben proporcionar esa información, de manera completa y detallada, antes de utilizar dichos sistemas, previamente a la introducción de cambios que afecten a las condiciones laborales, la organización del trabajo o el seguimiento de la realización del trabajo, "*y en cualquier momento a petición suya*" (artículo 9 de la Directiva). En definitiva, debe facilitarse una información pormenorizada y detallada sobre los sistemas automatizados a los representantes de las personas que realizan trabajo en plataformas, a fin de que puedan ejercer sus funciones, y esto es lo más parecido a la apertura de un proceso de negociación de los sistemas automatizados que utilizan algoritmos[3].

[3] Puede verse el *XXIV Convenio colectivo del sector de la banca*, que fue suscrito en España, con fecha 29 de enero de 2021 (BOE del 30), en cuyo artículo 79 las partes reconocen

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En el artículo 17 de la Directiva (en concordancia con el Considerando 58) se requiere a los Estados miembros para que se aseguren de que las plataformas digitales de trabajo pongan a disposición de las autoridades competentes, así como de los representantes de personas que realizan trabajo en plataformas, la siguiente información, que se actualizará al menos cada seis meses:

1) el número de personas que realizan trabajo en plataformas a través de la plataforma digital de trabajo de que se trate desglosado por nivel de actividad y por situación contractual o laboral;
2) las condiciones generales determinadas por la plataforma digital de trabajo y aplicables a dichas relaciones contractuales;
3) la duración media de la actividad, el número de horas semanales trabajadas por término medio por persona y los ingresos medios derivados de la actividad de las personas que realizan trabajo en plataformas con regularidad a través de la plataforma digital de trabajo de que se trate;
4) los intermediarios con los que la plataforma digital de trabajo tiene una relación contractual. Por último, en el artículo 20 de la Directiva (Canales de comunicación para personas que realizan trabajo en plataformas) se solicita de los Estados miembros que adopten las medidas necesarias para garantizar que las plataformas digitales de trabajo faciliten o creen la posibilidad de que las personas que realizan trabajo en plataformas se pongan en contacto y se comuniquen entre ellas *en privado y de manera segura*, y de que los representantes de las personas que realizan trabajo en plataformas se pongan en contacto con ellas, *y ellas contacten con sus representantes,* a través de la infraestructura digital de las plataformas digitales de trabajo o de medios igualmente eficaces.

que la negociación colectiva, por su naturaleza y funciones, es el instrumento para facilitar una adecuada y justa gobernanza del impacto de la transformación digital de las entidades sobre el empleo del sector. Y más concretamente en el apartado 2 del artículo 80, sobre los derechos digitales, se acuerda que las empresas deberán elaborar con participación de la representación legal de los trabajadores protocolos en los que se fijen los criterios de utilización de los dispositivos digitales que, en todo caso, deberán garantizar, en la medida legalmente exigible, la debida protección a la intimidad de las personas trabajadoras que hagan uso de los mismos, así como sus derechos establecidos constitucional y legalmente". Por último, en el apartado 5 de este mismo artículo 80, también se precisa, que "*las empresas informarán a la RLT sobre el uso de la analítica de datos o los sistemas de inteligencia artificial cuando los procesos de toma de decisiones en materia de recursos humanos y relaciones laborales se basen, exclusivamente en modelos digitales sin intervención humana. Dicha información, como mínimo, abarcará los datos que nutren los algoritmos, la lógica de funcionamiento y la evaluación de los resultados*".

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Es lo cierto que la transposición será el momento de valorar la importancia de una Directiva que, hasta ahora, ha sido vista por las organizaciones empresariales del sector, y por algunos gobiernos, con especial importancia del francés, como un freno a su actividad empresarial y a la libertad de elección de cada persona trabajadora sobre la elección del vínculo contractual que más le interese, olvidando que esa pretendida libertad queda reducida a la mínima expresión cuando quien presta el servicio no tiene poder de negociación y que por ello es necesaria una regulación que establezca frenos a esa asimetría jurídica entre las partes (Rojo Torrecilla, 2024, p. 253). En ese sentido, los sindicatos españoles han valorado positivamente la Directiva del trabajo en plataformas porque para ellos va más allá de lo establecido actualmente en la legislación española, ya que los representantes de las personas trabajadoras adquieren un rol fundamental en esta Directiva. Hasta tal punto es así que subrayan el hecho de que en la exposición de motivos se afirma que la norma busca "*promover el diálogo social sobre la gestión algorítmica*". Por otra parte, destacan que si hasta la fecha la gestión algorítmica de la relación laboral en las plataformas digitales estaba únicamente amparada por el artículo 64.4.d) del Estatuto de los Trabajadores, que limitaba su rol a la información y consulta, la promulgación de esta Directiva abre un escenario completamente diferente. Por otro lado, la Directiva del trabajo en plataformas amplía su radio de acción a cualquier plataforma digital, sea de reparto a domicilio o de cualquier otra índole, como el sector del transporte (por ejemplo, Uber o Cabify), el de ayuda y cuidados a domicilio (Cuideo, Cuidum), de alquiler de recursos freelance (Mechanical Turk, Monster, Upwork), hostelería (Hosteleo), creación de contenidos (Lowpost), relaciones académicas (SuperProf) y un larguísimo etcétera de plataformas, actuales o por aparecer[4].

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Part IV
Occupational health issues

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Social Blockchain, Training and Paritarian Institutions in the Construction Sector: a "bridge" to regulatory compliance in OHS[1]

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Keywords: social blockchain; occupational health and safety; vocational training; paritarian institutions; construction sector.

Abstract

Studies concerning the application of modern technologies to the world of work usually identify the worker as a passive subject. On the other hand, the potential of technology for the functioning of the labour market is less studied. Almost completely absent is the idea that digitalization, even in the context of PNRR, can be used to strengthen the rights of the worker. Instead, Blockchain can be used in this "social" context. Some studies propose the Blockchain application and distributed ledgers for the functioning of the social security system, active policies, and for certified recordings of information regarding the skills and status of the worker. In the private sector, the digital recording of the training received by a worker during his

[1] Although the result of a common reflection can be attributed to Silvia Ciucciovino paragraphs 1- 8- 9, to Michele Faioli paragraphs 2-10, to Fabiola Lamberti paragraph 3, to Maria Giovannone paragraphs 4 – 7, to Luisa Monterossi paragraph 5, to Luisa Rocchi paragraph 6.

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or her working life was foreseen beginning in 2000. First with the "worker training booklet" (Act 276/2003), then with the "worker electronic file" (Act 150/2015). These tools allowed for the registration of compulsory training on occupational health and safety (art. 37, Act 81/2008). Registration was necessary both for the planning of training, and for verifying compliance with legal obligations by the supervisory bodies. To date, these regulations have remained unimplemented. From 2016, the SINP is expected to be at INAIL as an IT infrastructure that directs the surveillance activity and national prevention policies. Currently, the lack of infrastructures and suitable digital recording tools makes it difficult to monitor compliance with legal obligations and the compliance of companies (employers) in terms of safety training that is fundamental for the prevention of accidents. Act 146/2021 has extended and strengthened the training obligations of security actors. The involvement the so called "enti bilaterali", is envisaged that are obligated to provide useful data for planning supervision and managing the reward in INAIL tariffs. In the construction sector, art. 27 of Act 81/2008 that was not implemented and recently amended by d.l. n. 19/2024, has provided for a qualification system for companies (so-called "license with points") for access to contracts and subcontracts based, among other things, on targeted training courses. The administrative and digital management of this system has been fully assigned to INL.

In this frame, the paper shows some juridical preliminary results of the PRIN 2022 "SafetyChain – Social Blockchain for Implementation of a Digital Wallet for Occupational Health and Safety Training" project. Construction sector is the investigated branch since it's key to the funding lines of the PNRR and particularly exposed to the risk of injury. The research project involves an interdisciplinary team of Labour and Privacy Law and Engineering & IT experts. Roma Tre University is in charge for the scientific coordination of the entire project and will be exclusively responsible for designing the digital dossier as well as developing and finalizing it with public stakeholders. Cattolica University of Milan is in charge for the managing of the experimentation of the digital dossier in the construction sector.

The paper shows how social Blockchain can be a crucial legal tool and an innovative "bridge" between OHS training and participation machanisms (in the proper form of paritarian instituions) and a full regulatory respect of employers' and employees' obligations, while reducing workplace accidents and improving corporate safety compliance. The methodology increases transparency and trust between economic operators and workers while triggering virtuous processes of "selection" of suppliers in public and private contracts and facilitating impact assessments of training processes and the efficient use of public and private resources used for training.

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Finally there will be evidence of a good practice to be implemented to: optimize planning and monitoring of training; spread a culture of safety and prevention; facilitate regulatory compliance and trust between the various players and stakeholders in the health and safety system; improve labour inspection effectiveness of INL and planning of INAIL prevention policies; increase awareness and responsibility of the worker in the prevention system; reduce public spending on health and social security/welfare services thanks to the decrease in accidents at work; and contribute to the achievement of the PNRR objectives.

1. Introduction and theoretical framework

Studies concerning the application of modern technologies to the world of work usually identify the worker as a passive subject of the technology (we are speaking of the technological control of workers, substitute algorithms that replace the managerial power of the employer, etc.). On the other hand, the potential of technology for the proper functioning of the labor market is less studied. Almost completely absent is the idea that technology and digitalization, even in the context of PNRR, can be used to strengthen the rights of the worker.

Instead, Blockchain can be used in this "social" context. Some studies propose the Blockchain application and distributed ledgers (DTL) for the functioning of the social security system, active policies, and for certified recordings of information regarding the skills and status of the worker (Ciucciovino, 2022; Faioli, 2015; 2018a; 2018b; 2022; Ciucciovino, Faioli, 2018; Ciucciovino, Faioli, Toscano, 2020; Ciucciovino, Toscano, Crespi, Caravaggio, 2020). In the private sector, the digital recording of the training received by a worker during his or her working life was foreseen beginning in 2000. First with the "*worker training booklet*" (Act 276/2003), then with the "*worker electronic file*" (Act 150/2015).

These tools allowed for the registration of compulsory training on occupational health and safety (art. 37, Act 81/2008). Registration was necessary both for the planning of training, and for verifying compliance with legal obligations by the supervisory bodies. To date, these regulations have remained unimplemented.

From 2016, the SINP (National Prevention System), not yet operational, is expected to be at INAIL (i.e. the National Social Security Institute dealing with mandatory accidents at work insurance) as an IT infrastructure that directs the surveillance activity and national prevention policies. Currently, the lack of infrastructures and suitable digital recording tools makes it

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difficult to monitor compliance with legal obligations and the compliance of companies (employers) in terms of safety training that is fundamental for the prevention of accidents (Bena *et al*., 2009; Benedetti *et al*., 2015; Cavazza *et al*., 2010).

Act 146/2021 has extended and strengthened the training obligations of health ahd safety actors actors. The involvement the so called "enti bilaterali" (i.e. paritarian institutions – institutions that are created by means of collective bargaining and managed by unions and employers organizations representatives; among those also the "casse edili"), is envisaged that are obligated to provide useful data for planning supervision and managing the reward in INAIL tariffs.

In the construction sector, art. 27 of Act 81/2008, had provided for a qualification system for companies (so-called "license with points") for access to contracts and subcontracts based, among other things, on targeted training courses. One again OHS training is a key factor for the functioning of the "license with points" (Giovannone, 2024).

Finally the National Collective Bargaining Agreement of related to the construction sector (NCBA 3 March 2022 ANCE, COOP, CGIL, CISL, UIL) introduced the Construction Professional Identity Card ("CIPE").

2. Objectives of the research

In this frame the research conducted is aimed at developing a DWS prototype. The DWS is a digital tool referred to the individual/employee, that makes the safety training received by the worker transparent and records the safety training taken in a certain and unchangeable way. DWS also harnesses the potential and advantages of blockchain technology in a way that is compatible with the European Blockchain Services Infrastructure (EBSI). The use of this technology, appropriately configured, guarantees transparency, traceability, portability, certainty, and documentability of compliance with information and training obligations relating to health and safety at work.

The DWS accompanies the worker in the change of contracts and in the transition from an employer to a further employer. It also enhances the central role of training to prevent accidents at work, and optimizes management, planning, and monitoring of the fulfillment of training obligations with a view to preventing risks and accidents at work. In addition, DWS improves the planning of training according to actual needs, and verification of safety compliance with respect to prevention rules in implementation of Act 81/2008, and recent provisions that have strengthened training for safety. Furthermore, it enhances the learning outcomes achieved and the culture

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of safety, especially in the production sectors most exposed to the risk of accidents.

The DWS allows different actors and stakeholders to access (with specific authorization levels) registered information, as the blockchain consists of an architecturally decentralized registry accessible concurrently by different participants. In this way, the role of paritarian institutions, training institutions, inspection authorities (National Labor Inspectorate – INL), and social security authorities (INAIL) can be strengthened.

The research intends to test the DWS in the construction sector in collaboration with the Casse Edili, that are paritarian institutions which also deals with training and safety at work. This includes collaboration with the Casse Edili located in at least three Italian Regions.

3. The link between DWS and the certification of OHS training

The DWS is a prototype model of an individual dossier for recording worker training, specifically regarding mandatory safety training, in line with legal provisions that have recently strengthened educational obligations from a preventive perspective.

The certification is intended to ensure the traceability and verifiability of information (Lamberti, 2024) related to the mandatory safety training undertaken by the worker. In particular, within the mandatory training concerning safety, accountability is fundamental, as there may be risks regarding the accuracy and quality of the training provided. It often happens that safety training, although deemed mandatory, is perceived by companies as an unnecessary cost, and even as a process that requires excessive logistical and human resource efforts. Consequently, this training does not initiate a virtuous process but rather leads to the option of shortcuts: this refers to the too-frequent instances within the sector of training that is either not conducted or only superficially executed, with all the consequent risks for worker safety on construction sites.

The certification of training (and competencies) aims to address these shortcomings. Essentially, to ensure the certainty and controllability of data related to the training conducted, actions must be taken on three fronts:

1) rigorously enabling *ex ante* those individuals who can make "registrations" on the digital training dossier;
2) preventing tampering and/or interference that could compromise the truthfulness or completeness of the data;
3) allowing for precise control over the recorded data (Ciucciovino, 2021).

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This is a highly innovative system both functionally and technologically, structured to issue a "personal worker dossier" that serves as a digital tool for recording completed training and acquired competencies (Ciucciovino, 2022) which is connected to the training services portal for companies in the construction sector. Training is recorded using blockchain technology, which creates a digital training booklet for the worker that can systematically collect, over time, with data certainty, transparency, and immutability, the individual worker's professional history.

For the worker, the utility of the model lies in the ability to obtain a record and stratification of the training conducted and the skills acquired, also facilitating the portability of information during potential job transitions (Ciucciovino, Faioli, Toscano, 2021).

From a business perspective, the model of certified training allows for the planning of training interventions, increasing conformity to the current legislative framework, and triggering mechanisms for prudent selection of suppliers, especially concerning contractual integration phenomena between companies through outsourcing and subcontracting.

Ultimately, the digital dossier of certified mandatory training serves as a tool to ensure documentation, transparency, traceability, and portability of the training conducted and the skills acquired (Ciucciovino, Faioli, Toscano, 2023), assisting with regulatory compliance and, in perspective, with seamless interfacing with institutional operational systems, which are also connected to verification and assessment activities.

4. Why constructions sector?

Construction has been chosen has a "pilot sector" for the experimentation of the DWS. There are several reasons behind this choice.

First it is particularly exposed to the risk of occupational accidents. Indeed, looking at accidents rates in the sector, statistics (Inail, Report 2024) show that from January 1st to June 30th 2024, there were 17.730 accidents at work in the sector, a sharp increase compared to 2023 (15.453). The construction sector recorded a total of 68 fatal accidents, a significant increase compared to the 39 fatal accidents in the first half of 2023: 46 deaths were recorded in industrial construction, 19 in the artisan sector. This is the highest share recorded within the "industry and services" sector. More specifically, in the Lazio Region, out of a total of 20.662 accidents at work in the period January-June 2024, 1.111 are related to the construction sector. Accidents are increasing compared to the same period of the previous year. The sector also records the highest number of fatal accidents (4), out of a total of 52 reported cases.

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Secondly, more than others, it presents a strong fragmentation, a large use of contracts and subcontracts along the supply chains, a significant inter-company mobility, workers' personal and contractual vulnerabilities, undeclared work phenomena and a high accident rates.

On the other hand, following its characteristics, the sector has also progressively developed good practices even through collective agreements in the field of OHS. The social partners are evolving with such innovative collective bargaining dynamics both in the industry and in the artisan. Indeed the National Collective Agreement of the construction sector introduced the Construction Professional Identity Card ("CIPE"). It must contain all the data relating to the training courses carried out by workers. Construction Funds, on the other hand, also systematically deal with training and safety at work. More recently the afore mentioned "license with points" has been finally implemented in the sector.

5. Technical and professional suitability and regulatory compliance along the supply-chain of construction contracts and subcontracts

Looking at the regularity of working conditions along the supply chain it is important to underline that in the case of subcontracting, the coexistence of several companies within the same location increases the risk of accidents and makes it necessary to establish precise rules to identify the parties responsible for protecting the health and safety of workers.

Therefore, Legislative Decree n. 81/2008 establishes a special discipline, distinguishing between so-called in-house contracts (Art. 26) and those performed on construction sites (Art. 89 ff.). In both cases, within a more articulated and varied regulation, the law requires the client to verify the technical and professional suitability of the contractor (Art. 26, para. 1, lett. a); Art. 90, para. 9). More specifically, art. 26 states that this requirement must be ascertained through the acquisition of the certificate of registration with the Chamber of commerce, industry and handicrafts as well as the self-certification of the contractor or self-employed workers that possess the requirements of technical and professional suitability (on the theme Bonardi, 2013).

In the case of contracts performed at mobile or temporary construction sites, on the other hand, technical and professional suitability is described as the "*possession of organisational capacities, as well as the availability of manpower, machinery and equipment, with reference to the work to be carried out*" (Art. 89(1)(l)). This refers, therefore, more clearly to the requirement of

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entrepreneurship which, in addition to being relevant from the point of view of safety, also constitutes a requirement for the legitimacy of the contract in terms of the contractual framework (together with the business risk). In this respect, the institute of certification, introduced into the Italian legal system by legislative decree no. 276/2003, may acquire a special importance, as it allows the correct qualification of the contract to be ascertained and, more precisely, the correspondence of the concrete case to the legal type. As part of its assessment, the Certification Commission more specifically examines the existence of the entrepreneurial requirement by means of a series of circumstantial elements, ascertained also through the acquisition of information and documents by way of preliminary investigation (e.g. the Chamber of Commerce certificate and the contractor's DURC).

Specifically, the availability by the contractor of material means and equipment useful for the execution of the contracted service and, with reference to the so-called labour-intensive contracts, the exercise of the typical employer's powers exclusively by the contractor without any interference by the client is ascertained (Monterossi, 2024).

Therefore, although health and safety profiles are not extraneous to the scope of certification, the latter can be an effective tool to verify the requirement of technical and professional suitability, especially in a sector, such as construction, characterised, as mentioned above, by a high incidence of accidents at work.

6. The role of bilaterality for safety in construction sector

As for the development of good pratices, in the sector, increasing attention has also developed from the social partners, who have played a leading role in health and safety system.

A virtuous example are the so-called "Enti bilaterali", entities of a hybrid nature, created with the intention of overcoming the typical duality between representatives of workers and employers, combining the demands of both parties (Bellardi, 1989; Sandulli, Pandolfo, Faioli, Bozzao, Croce, Bianchi, 2016). This resulted in an articulated participatory model aimed at providing concrete responses to the parties' demand. Among the sectors in which bilaterality has found the most traction is construction (Faioli, 2021) which is, as seen, one of the sectors in which the risk of injury is highest.

Interest on this sector also stems from the strong fragmentation of production, including through the widespread use of contracting and subcontracting, significant inter-company mobility and the phenomena of undeclared work.

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In this context, the social partners with the construction collective agreement established a double level of bilaterality – national and territorial – expanding the areas of competence and moving from the classic mutualistic function to that of training certification (Faioli, Cappellazzo, Luccisano, Manfredi, Serra, 2021) anticipating the interventions of the legislature itself.

An example is the Construction Professional Identity Card (CIPE), through which the sector's collective bargaining has intended to provide an initial system of workers' professional qualification and certification through the inclusion of data on training courses carried out at the bilateral construction systeHowever, this system is also struggling to establish itself due to the lack of information interchange between the various parties called upon to ensure occupational health and safety.Only recently, as seen, the legislature has intervened in the construction sector by amending Article 27 of Law 81/2008 (with Decree Law n. 19/2024, converted, with amendments, by Law n. 56 of April 29, 2024,) and introducing by law a qualification system for companies (so-called "license with points") for access to contracts and subcontracts based on training courses.

This intervention undoubtedly prefigures an additional mechanism of connection and coordination for the exchange of information in order to ensure a system of training certification given to employees on health and safety, which, also combining with the DWS would allow the realization of a "single" digital dossier of the worker with positive implications both in terms of rewarding employers and in a more efficient supervisory activity.

7. The "license with points" and the role of OHS training in the construction sector

Recently, the sector has also distinguished itself for the introduction of a new discipline for the qualification of companies. Decree-Law n. 19/2024, converted into law with amendments by Law n. 56/2024 (the so-called PNRR 2024 Decree), regulated the qualification system for companies and self-employed workers by providing for the introduction of the "licence with points" for companies and self-employed workers operating in the context of temporary or mobile construction sites.

The implementing rules of the new system were introduced by the subsequent decree of the Ministry of Labour of 18 September 2024 no. 132 pursuant to which, as of 1 October 2024, companies and self-employed workers operating on temporary or mobile construction sites must possess a licence with points. The credit licence is issued, in digital format, by the INL subject to the possession of the following requirements: registration with

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the Chamber of Commerce for Industry, Crafts and Agriculture; fulfilment, by the employer, managers, supervisors, self-employed workers and workers, of the training obligations provided for by Legislative Decree no. 81/2008; possession of a valid single document of contribution regularity; possession of the Risk Assessment, in the cases provided for by current legislation; possession of the certification of tax regularity in the cases provided for by current legislation; designation of the person in charge of the prevention and protection service, in the cases provided for by current legislation. The possession of these requirements is self-certified and, pending the issuance, the activities in the temporary and mobile construction sites have been allowed to be carried out, unless otherwise notified by the INL. The license has an initial score of 30 credits and allows you to operate on temporary or mobile construction sites with an endowment equal to or greater than 15 credits.

The licence score is subject to the deductions related to the results of the final measures issued against employers, managers and supervisors of companies or self-employed workers, in the cases and measures indicated in Annex I-bis of Legislative Decree no. 81/2008. In addition, in the event that accidents occur on construction sites resulting in the death of the worker or permanent, absolute or partial disability, the INL may suspend, as a precautionary measure, the licence for up to twelve months, being able to appeal against this measure *pursuant* to Article 14, paragraph 14, of Legislative Decree no. 81/2008. From a procedural point of view, the final measures must be communicated within thirty days, also by electronic means, by the administration that issued them to the INL for the purpose of reducing the credits.

A crucial provision is that (paragraph 10) according to which an endowment of less than fifteen credits of the license does not allow companies and self-employed workers to operate on temporary or mobile construction sites, except for the completion of the activities subject to a contract or subcontract in progress, when the works carried out are greater than 30% of the value of the contract, without prejudice to the adoption of measures to suspend business activity (referred to in Article 14). The new Article 27 also establishes that all information relating to the licence must flow into a special section of the National Portal for Undeclared Work, together with any useful information contained in the National Information System for Prevention in the Workplace (SINP). The INL must start monitoring the functionality of the credit licence system within twelve months from 1 October 2024 and transmit the data collected to the Ministry of Labour for the possible update of the ministerial decrees provided for by the new Article 27 of Legislative Decree no. no. 81/2008. It is also possible for the credit licence to be extended to other areas of activity identified by decree of the Minister of Labour, after

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consulting the comparatively more representative trade unions of employers and workers.

Of particular importance for the purposes of the research is the fact that each person required to possess a credit licence can obtain an overall score of no more than one hundred credits. Thirty of them can be recognized "*for activities, investments or training in the field of health and safety at work*". On the other hand, some cases of failure to train workers are the cause of a reduction in the credits that the company has already acquired. In addition, in the assessment of the recovery of reduced credits, INL and INAIL take into account the fulfilment of the training obligation in relation to courses on health and safety in the workplace. The credit licence therefore prefigures further advantages of a system that, like the DWS, certifies the training of workers in the field of health and safety at work (Pascucci, Giovannone, 2024; Giovannone, 2024).

8. Functional Characteristics of the DWS

In this regulatory framework, the DWS experimentation was conceived. The DWS allows the employer to record, view, and manage the data of its employees relating to training activities and learning within and in relation to the employment relationship.

The integrity and availability of training data, as conceived, are enhanced by blockchain technology. The blockchain, by hash techniques, records, and times both the single data and all the data entered in the blockchain. It does not allow the alteration of the data gradually entered. Furthermore, since the new data can only be inserted in the queue, the same chain of information guarantees the availability and truthfulness of all the other data previously entered. The proposed technology also complies with the rules relating to the "*confidentiality of data which, if treated with blockchain technology consistently applied, can constitute a tool that strengthens citizens' autonomy*" (see Recital A, Resolution of the European Parliament 3 October 2018 on distributed ledger and blockchain technologies: building trust through disintermediation (2017/2772 (RSP)).

9. An innovative methodological approach

The principal methodological option of the research consists of placing the worker at the center of the health and safety system, recognizing the worker as the owner of the data concerning him or herself.

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Ownership of the DWS is a true revolution compared to the current system, which does not allow the worker to manage, dominate and know the data concerning the worker relating to training, learning outcomes, and other relevant information in the safety system and in the market of the work. These data are currently fragmented, rarely digitized, held by different subjects who do not communicate with each other, and do not allow easy access and use of the same. This determines a sort of expropriation of the personal identity of the worker who is deprived of the effective availability of his data. This information is important both for the protection of health and safety, and for facilitating employment transitions to allow the right of free movement.

For this fundamental methodological choice, the DWS is conceived and built as an individual wallet, in the name of the person who owns it throughout his life. This enhances greater individual awareness and responsibility in protecting against accidents at work, and in terms of spreading the culture of safety and prevention.

Furthermore, the research is inter-disciplinary, applied, shared, and experimental. Involvement of an inter-disciplinary team of labor law experts and communications and information technology experts is expected. The research is part of a broader interdisciplinary theme of the social blockchain that has seen several members of the research team engaged in for years through scientific publications, policy proposals presented in institutional settings (Labor Commission of the Senate of the Republic, National Council of Economics and Labor – CNEL, Regions), and with the organization of international conferences, and participation in funded research projects.

This approach implies the integration of skills related to different disciplinary areas that must certainly integrate with each other to propose a tool:

1) technologically advanced and innovative;
2) capable of responding efficiently to concrete and relevant social needs;
3) technically developed and coherent with the institutional, regulatory, and productive context in which it must be applied.

To make the technological solution truly useful it is necessary to adapt it to existing regulatory constraints and build the solution taking into consideration the reality and needs for the advancement of knowledge.

The methodology also provides that the research is applied and shared with the stakeholders. These are innovative themes from a scientific, technological, regulatory, and institutional point of view. It is therefore necessary that the DWS be designed with the participation of the actors

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directly involved and interested (Casse Edili, employers, workers, INL, INAIL, etc.). In this way it will be possible to consider all the variables necessary to efficiently implement the DWS and verify the applicative impact of the scientific research carried out.

The DWS prototype is going to be tested in at least three Italian Regions for a suitable time to highlight the results obtained, and to also provide useful elements to put emphasis on criticalities and advantages of the proposed model.

10. Expected results in a multistakeholders perspective

The social, economic, and digital impact of the research is relevant for at least five categories of stakeholders.

For persons institutionally responsible for planning prevention policies and for monitoring compliance in the field of health and safety in the workplace (INAIL, National Labor Inspectorate, ASL).

For these State's institutions, the DWS facilitates the supervision and assessment of non-conformities, especially in fragile sectors, or sectors with a high risk of accidents, or in the presence of interference between companies. The impact is significant for assessing compliance with the rules, but also for better management of reward policies for virtuous companies. This reward could be reflected in the determination of facilitated INAIL rates and in a more efficient planning of supervisory activities. Such new legal and tech frame can also bring advantages on the more general level of combating illegal work and undeclared work (Mission 5 of the PNRR). The DWS – engaging in a process of technological verification of the mandatory obligations – can allow the further integration, inter-operability, horizontality of information between different actors thus resulting in a speeding up of information exchanges, also with a view to an immediate and effective sanctioning procedure.

For paritarian institutions (e.g. the Casse Edili) that are delegated by law and/or collective agreement, to important support functions to companies and workers in the field of health and safety, and safety training (Article 51 of Act 81/2008). They must carry out and promote training activities and issue a certificate of performance of activities and support services to businesses (including certification of the adoption and effective implementation of safety organization and management models). The Casse Edili are also a forum for resolving disputes on the application of information and training rights. They are required to communicate the data in their possession annually to the National Labor Inspectorate and INAIL, for the purpose of

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identifying priority criteria in the planning of supervision and reward criteria in determining INAIL tariffs.

The DWS is a very useful tool for the dematerialization of processes and for the continuous certainty and verifiability of the above-mentioned data and information. Therefore, it is fully consistent and functional with the performance of all these functions by the Casse Edili.

The DWS is also useful for the various recipients of training obligations: workers, managers, supervisors, emergency workers, workers' safety representatives – RLS, territorial safety representatives – RLST. The DWS will allow them to obtain the certain and unchangeable registration and the chronological stratification of the training carried out and the learning achieve with a view towards portability of skills and learning for work transitions. The DWS is also configured as a tool for enhancing the wealth of skills and monitoring the progression of specific training needs.

Employers will also benefit from the DWS because they will be able to plan training interventions, also in collaboration with the workers' representatives and competent doctors, fulfilling the legal obligation of registration and related certification in the best possible way.

The research is also useful for the production system as the DWS makes it possible to verify and give external evidence of corporate behavior and safety compliance, triggering careful selection of suppliers, especially in the procurement chain (chains of contractors and subcontractors), based on criteria for reliability and responsibility. This can concretely help to achieve a system of qualification for companies to access tenders and subcontracts already provided for in construction by art. 27 of Act 81/2008 and so far, not implemented. The impact of the DWS will also be useful for workers, who are the real protagonists and final beneficiaries of the proper functioning of the health and safety system. The DWS makes the worker more aware and proactive, rather than a passive subject of safety. The solutions proposed by the research will always take into consideration the criterion of the easy usability of the tool by the worker, even those with low levels of education, or foreigners.

Civil society will benefit from the large-scale implementation of the DWS. Both for the diffusion of a safety culture based on individual responsibility; and for the availability of data that can feed studies on the correlation between training and accidents. It will be possible, even in a predictive mode, to assess the impact of training processes and to verify the effectiveness of training aiming towards to continuous improvement and better planning and use of public and private resources. Further indirect benefits are then obtained in terms of the reduction of accidents at work, increase of public health, and reduction of public spending on health and social security/welfare services for accidents and deaths at work.

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The impact of the research is also to increase the degree of the Italian digitization, in line with the objectives of the PNRR (Mission 1), on a topic of great social importance, with a view towards feeding the SINP and starting the implementation of the employee's electronic file.

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Burnout and employee's rights: case study in the Brazilian labor court in the post Covid-19 period

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Abstract

The concerns about workers' health were already a vast object of study in the field of Labor Law. With the arrival of the Covid-19 pandemic, Professional Exhaustion Syndrome (Burnout) began to occupy an even more significant space due to the virtualization of work and the mental overload to which many were subjected. The syndrome is recognized by the World Health Organization through the Pan American Health Organization (PAHO) in the International Statistical Classification of Diseases and Related Health Problems (ICD-10), by code Z 73.0 (exhaustion), defined as a state of vital exhaustion. Among the occurrences found in the Regional Labor Court of the Second Region (TRTSP) in the period selected, they were segmented for the type of document "Judgment" and in the subject "occupational disease" to verify the main common factors in the decisions when studying the 39 judgments found. From these pre-selected cases, the paper carried out a case study to identify:

1) whether or not there is judicial recognition of Burnout as an occupational disease;
2) whether there is a direct or indirect causal link between the activity performed and the onset of Burnout;
3) whether the employee or the employer had the burden of proving the causal link;
4) the form of condemnation in case of recognition of damage to the worker.

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The methodology used will be the quantitative empirical approach and case study with critical reading of the judgments. The article highlights the recognition of Burnout as an occupational disease and the difficulty in proving the issue, especially as it is the plaintiff's burden of proof. Furthermore, there is a preference for compensating moral damages and few cases with deferral of monthly pension on the subject. The paper deviates from the already discussed Burnout prevention analysis and aims to verify the whole, especially the research findings regarding the confirmation of the expert report, the work environment of financial institutions as a point of attention and it suggests assigning the burden to the defendant when the situation already has robust documentary evidence produced.

Keywords: Causal link, Burnout, sentence, employee.

1. Introduction

Concerns about workers' health are a vast object of study in the field of Labor Law. With the arrival of the Covid-19 pandemic, Professional Exhaustion Syndrome, known as Burnout, began to occupy a significant space in this context due to the virtualization of work and the mental overload to which many were subjected.

In Brazil, the concept of work-related accidents is broad, encompassing both occupational diseases and other accidental events. Law 8.213/91[2] provides the provisions regarding the conceptualization and situations that qualify or not as work-related accidents or are equivalent to them.

Burnout is characterized by the high level of stress in the work environment imposed on the employee. The most common symptoms are emotional exhaustion, negative self-evaluation, depression, and even emotional indifference towards the world. In this sense, VIEIRA states that it is still a concept under construction, not closed, addressing exhaustion and the possibility of depersonalization linked to its definition[3]. It is one of

[2] Art. 20 and 21 – Law 8213/91. Available at: *www.planalto.gov.br/ccivil_03/leis/l8213cons.htm* (accessed: 05/11/2023).

[3] "*O debate a respeito do conceito de burnout traduz o desejo de se compreender a sua 'verdadeira natureza', a sua 'essência'. Essa tentativa de compreensão tem sido empreendida por meio da investigação científica baseada no método empírico. Curiosamente, as questões que emergem deste debate conceitual (se burnout é só exaustão, se a Despersonalização faz parte do conceito, se se trata de um tipo de resposta de estresse não necessariamente ligada ao trabalho) são justamente as questões nas quais a subjetividade está mais presente. É possível que elas reflitam uma limitação do*

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the consequences of the precariousness and intensification of work relations, due to the state of emotional tension and chronic stress caused by exhausting working conditions, according to Alvim & Viana[4].

In other words, psychic aggressions have always been present, but not with the intensity that is known today, with the advancement of technology, especially via social networks. During the pandemic, many cases came to light, such as the obligation for employees to keep the "zoom" application on in their homes, during working hours, constantly so that they could be supervised by their managers.

The methodology used in this study will be quantitative empirical and case study, based on the critical reading of pre-selected judgments. From the occurrences of the expression (Burnout) in the system of the Regional Labor Court of the Second Region, the objective is to expose how the Brazilian Labor Judiciary currently addresses the issue, through case studies, considering whether the disease is treated as professional in nature, whether in most cases there is recognition of a causal link with the professional activity performed, whether in direct or indirect form, as well as the percentage of cases in which compensation is granted to the worker due to being affected by Burnout. The article innovates by intending to infer the main points of findings that are not cited in the decisions but can help understand the severity and think of solutions for the adequate treatment of cases.

método empírico (já que a sua ênfase está em descobrir os dados objetivos)" (Vieira, 2010). Translated to English: "*The debate about the concept of burnout reflects the desire to understand its 'true nature,' its 'essence'. This attempt at understanding has been undertaken through scientific investigation based on the empirical method. Interestingly, the questions that emerge from this conceptual debate (whether burnout is just exhaustion, whether depersonalization is part of the concept, whether it is a type of stress response not necessarily linked to work) are precisely the questions where subjectivity is most present. It is possible that they reflect a limitation of the empirical method (since its emphasis is on discovering objective data)*" (Vieira, 2010).

[4] "*Com base nesses estudos, pode-se verificar um caráter multidimensional e polissêmico da definição da síndrome, pois compreende três variáveis constitutivas que a especificam e determinam, quais sejam: a exaustão emocional, a despersonalização e a diminuição da realização pessoal. Percebe-se, assim, que se trata do profissional frustrado, descomprometido com os outros e exaurido emocionalmente*" (Alvim & Viana, 2021, p. 65). Translated to English: "*Based on these studies, it is possible to verify a multidimensional and polysemic character of the syndrome's definition, as it comprises three constitutive variables that specify and determine it, namely: emotional exhaustion, depersonalization, and reduced personal accomplishment. Thus, it is perceived that it is about the frustrated professional, disengaged from others, and emotionally exhausted*" (Alvim, Viana, 2021, p. 65).

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2. Brazilian legislation on burnout

Burnout syndrome is included in the list of occupational diseases by the Ministry of Labor and Employment in Brazil, inserted in Annex II of the Social Security Regulation. Annex II identifies the pathogenic agents causing occupational or work-related diseases, as provided for in Article 20 of Law No. 8.213/91[5]. Among the mental and behavioral disorders related to work (Group V of ICD-10), item XII includes Burnout syndrome – "Feeling of Being Finished (Burnout Syndrome, Professional Exhaustion Syndrome)", identified in ICD-10 by the number Z73.0. The syndrome is recognized by the World Health Organization through PAHO.

Brazilian employees have the right to reduce the risks inherent to work through health, hygiene, and safety standards, as provided for in Article 7, item XXII of the Federal Constitution. The same statute provides for the duty of reparation for moral and material damages in cases of recognition of occupational and work-related diseases, under the terms of Article 7, item XXVIII (guaranteeing the worker insurance against work accidents, at the employer's expense, without excluding the indemnity to which the employer is obliged when acting with intent or fault) and Articles 927, 186, 949, and 950 of the Civil Code. Article 225, caput, of the Federal Constitution ensures everyone an ecologically balanced environment, including the work environment. The Federal Supreme Court (STF) also decided through theme no. 932[6] the possibility of objective liability of the employer for damages resulting from work accidents in cases specified by law, or when the activity

[5] Art. 20 – Law 8213/91, available at: *www.planalto.gov.br/ccivil_03/leis/l8213cons.htm* (accessed: 05.11.2023).

[6] "*O artigo 927, parágrafo único, do Código Civil é compatível com o artigo 7º, XXVIII, da Constituição Federal, sendo constitucional a responsabilização objetiva do empregador por danos decorrentes de acidentes de trabalho, nos casos especificados em lei, ou quando a atividade normalmente desenvolvida, por sua natureza, apresentar exposição habitual a risco especial, com potencialidade lesiva e implicar ao trabalhador ônus maior do que aos demais membros da coletividade*". Tema 932 de Repercussão Geral no STF – relator Min. Alexandre de Moraes – Leading Case 828040 – Julgamento em 26 de junho de 2020. Disponível em: *portal.stf.jus.br/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incidente=4608798&numeroProcesso=828040&classeProcesso=RE&numeroTema=932* (acesso em: 05.09.2024). Translated to English: "*The sole paragraph of Article 927 of the Civil Code is compatible with Article 7, XXVIII, of the Federal Constitution, being constitutional the objective liability of the employer for damages resulting from work accidents, in cases specified by law, or when the activity normally developed, by its nature, presents habitual exposure to special risk, with harmful potential and imposes a greater burden on the worker than on other members of the community*". Theme 932 of General Repercussion in the STF – rapporteur Min. Alexandre de Moraes – Leading Case 828040 – Judgment on June 26, 2020.

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normally developed, by its nature, presents habitual exposure to special risk, with harmful potential and imposes a greater burden on the employee than on other members of the community. The theme, as seen, may be applicable in the case of Burnout in some situations.

The appearance of the theme in labor judicial processes has increased significantly in recent years. It is possible to empirically verify the occurrence of the search term "Burnout" in the databases of the Regional Labor Court of the Second Region (TRT-SP) for processes distributed in the period before the pandemic (January 1, 2019, to December 31, 2019), which total 118 occurrences; compared to the occurrence of the same term "Burnout" for the period after 2021 (considering the distribution date from January 1, 2022, to December 31, 2022), which total 256 occurrences. Thus, there is more than double the occurrences of the previous year compared to the period before the start of the Covid-19 pandemic (March 2020 in Brazil).

3. Empirical analysis at TRT-SP

The methodology used will be quantitative empirical through the analysis of a set of specific cases on the subject, along with the case study, based on the critical reading of the judgments.

From the occurrences found in the Labor Judiciary in the post-Covid-19 period, the year 2022, they were then segmented for the research, which tracked 39 judgments on the subject with the keyword "Burnout", with the filter "judgment", with the distribution date to the Regional Labor Court of the Second Region – São Paulo between January 1, 2022, and January 1, 2023. The Regional Labor Court of the Second Region – São Paulo has 18 judging panels, and the research universe analyzed judgments from 15 panels.

From these case studies, the study analyzes:

1) whether or not there is recognition of Burnout as a professional disease or as resulting from other factors;
2) whether there is recognition of a direct or indirect causal link between the activity performed and the onset of Burnout;
3) whether the burden of proving the causal link fell on the employee or the employer;
4) the type and amount of compensation in case of recognition of damage to the employee.

Given the established parameters, it is possible to verify that there was recognition in the grounds of the decisions of Professional Exhaustion

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Syndrome (Burnout) as a professional disease in 87.18% of cases (34 out of a universe of 39 judgments), even when in the case in question the link with work was not recognized based on the evidence produced. In 12.82% of cases, it was understood that it is a mental pathology with various causes.

In 15.38% of cases, there was recognition of a direct causal link, with the judgment stating that the causal link is recognized. In 28.21% of cases, it was responded that the link was "concausal". In 56.41%, there was no recognition of a causal link in the judgment.

The judgments recognize that it is the employee's burden in 82.05% of cases, recognizing that it was up to the claimant to provide the working conditions since the report demonstrated otherwise or was not sufficient to form the judge's understanding. In 17.9% of cases, it was understood that the burden fell on the defendant to provide evidence to the records that demonstrated that the working conditions were contrary to those that caused Burnout, as the reports pointed to it as the cause.

Of the universe of 39 judgments, there was condemnation in 35.89% of cases. In 30.76% of cases (12 judgments), compensation was determined in the form of indemnity, while in 5% (2 cases), monthly pension was granted as a form of indemnity.

4. Critical analysis

In only 7.6% of cases (3 judgments), the expert report is disregarded for the resolution of the case, with other parameters being considered. At this point, the importance of the work of judicial experts is raised, who are generally trusted and appointed by the labor judge in the first instance and who do not have a standardized model for conducting expertise in the psychiatric and psychological field (only the provisions of each Professional Council). There is also the question of the specialty of this expert, as they hold the title of "occupational physician" without the specific specialty of psychiatry or psychology in their curriculum and are appointed to judge cases of psychiatric occupational diseases.

In one of these cases, the judge found that the expertise was conducted three years after the dismissal and served only to ascertain that there was no longer any incapacity after such a long time. The judge[7], in condemning the company, took into account the fact that the defendant failed to comply with legal standards regarding safety, hygiene, health, and the work environment;

[7] Lawsuit No. 1000068-90.2020.5.02.0020, Rapporteur Ana Paula Scupino Oliveira, judgment on March 10, 2023

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as well as in a pedagogical character to prevent harassment by poorly prepared hierarchical superiors from recurring within companies.

The second data point that draws attention in the researched universe is that 38.46% of the judgments, whether favorable or unfavorable, have financial institutions (banks) as the defendant, raising the question of whether the banking work environment would also be a factor triggering the state of exhaustion (linked or not to the subsequent recognition of the illness with or without a causal link to the professional activity) that could be framed in Theme 932 of the Federal Supreme Court (STF)[8] with an objective link of liability for being an activity normally developed, by its nature, with habitual exposure to special risk, with harmful potential and imposing a greater burden on the employee than on other members of the community.

The third interesting finding of the study is the fact that Burnout is not always linked to the specific ICD Z 73.0, often being recognized as ICD F 41.0 (anxiety disorder) and F32 (depressive episodes) as Burnout. It is important to note that the ICD for Burnout (Z 73.0) is expressly cited in only 15.38% of the judgments.

It is also identified a situation where the expert who supports the judges' understanding (rapporteur's vote)[9] did not establish a causal or concausal link, but the expert lists some important factors to be considered for this finding: lack of proof of full compliance with current legislation and NTEP (Technical Epidemiological Nexus); lack of issuance of Work Accident Communication (CAT); lack of social security leave; existence of constitutional/congenital/genetic condition; non-recognition of incapacity and the absence of mention of occupational condition in the medical documentation presented.

There are judgments that also suggest that the work environment of demands and attitudes of superiors in controlling activities is one of the stressful factors for which the recognition of the link with professional activity is sought. In this sense, it is also the understanding of ALVIM, J.L.R.; VIANA, J.P. (Jul-Dec 2021), in understanding that new forms of work require individual accountability and responsibility – aversion to failure, intensification, and internalization of this work that can lead to an imbalance with the most intimate aspects of the worker's emotional life.

It is also noted the difficulty in proving by the claimants when the ICD Z 73.0 is expressly cited, and the expert links the report to testimonial evidence

[8] Available at: *portal.stf.jus.br/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incidente=4608798&numeroProcesso=828040&classeProcesso=RE&numeroTema=932* (accessed: 05.09.2024).

[9] Lawsuit n. 1000036-62.2022.5.02.0005. R Rapporteur: Ana Maria Moraes Barbosa Macedo, judgment on March 15, 2023.

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to be produced in a hearing. In this case, the report may be favorable, but the absence of witnesses to prove situations in the work environment that are the causes leads the judges to deny compensation. MELO and CALDAS (2019, p. 180) point out in their studies the difficulty of requesting and granting in the Brazilian labor judiciary that the defendant be condemned to the burden of psychotherapeutic and psychiatric treatment in case of recognition of the causal link with work. The findings of the above research go in the same direction, given the absence of convictions in this regard in the studied universe.

Finally, another point raised is the need for inspection at the workplace to comply with the provisions of Article 2 of the Federal Council of Medicine Resolution 1488/1998[10]. In this sense, there was no judgment that determined the return of the records for inspection, but it is important to note that the presence of inspection at the site is one of the points provided by the Federal Council of Medicine for this analysis and can help prove the situations of the work environment when there is difficulty in bringing witnesses to the court for testimony during the process.

5. Conclusion

The objective is to highlight the main points of attention for Professional Exhaustion Syndrome from this empirical perspective and critical analysis of the judgments on the subject. The article aimed to avoid the analysis of

[10] "*Art. 2º: Para o estabelecimento do nexo causal entre os transtornos de saúde e as atividades do trabalhador, além do exame clínico (físico e mental) e os exames complementares, quando necessários, deve o médico considerar: I) a história clínica e ocupacional, decisiva em qualquer diagnóstico e/ou investigação de nexo causal; II) o estudo do local de trabalho; III) o estudo da organização do trabalho; IV) os dados epidemiológicos; V) a literatura atualizada; VI) a ocorrência de quadro clínico ou subclínico em trabalhador exposto a condições agressivas; VII) a identificação de riscos físicos, químicos, biológicos, mecânicos, estressantes e outros; VIII) o depoimento e a experiência dos trabalhadores; IX) os conhecimentos e as práticas de outras disciplinas e de seus profissionais, sejam ou não da área da saúde (g.n.)*" (Translated to English: "*Art. 2: For the establishment of the causal link between health disorders and the worker's activities, in addition to the clinical examination (physical and mental) and complementary exams, when necessary, the doctor must consider: I) the clinical and occupational history, decisive in any diagnosis and/or investigation of causal link; II) the study of the workplace; III) the study of work organization; IV) epidemiological data; V) updated literature; VI) the occurrence of clinical or subclinical condition in a worker exposed to aggressive conditions; VII) the identification of physical, chemical, biological, mechanical, stressful, and other risks; VIII) the testimony and experience of workers; IX) the knowledge and practices of other disciplines and their professionals, whether or not in the health area*").

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Burnout prevention, which is already widely discussed among companies, and to verify the whole, with special attention to the main measures of compensation and retaliation applied against the defendants who, in their actions, favor the appearance of this type of occupational disease among employees in Brazil within the jurisdiction of the Regional Labor Court of the Second Region.

In consultation with the Occupational Safety and Health Observatory (Smartlab) in Brazil[11], notifications of Work Accidents by ICD Chapter – V – Mental and Behavioral Disorders currently occupy the fifth place of greatest occurrence. Furthermore, the maps of the same system show a significant underreporting of work accidents in all areas, which makes it difficult to prove in case of a subsequent judicial process. The concept of Burnout is a concept under construction and is still seen as discriminatory and stigmatizing, just as depression was seen in the 1980s and 1990s.

The brief case study is a form of support for the study of the subject through an analysis of cases restricted to the defined temporal cut and judgments with a universe of only 39 cases in progress at the Regional Labor Court of the Second Region – São Paulo. The idea is to overcome the underreporting of cases to verify how conflicts are treated in the Judiciary in the context of second-instance decisions.

Given the evaluated content, it is possible to conclude that most judgments establish that Professional Exhaustion Syndrome (Burnout) is a professional exhaustion disease and not a mental pathology with various causes. In the vast majority of cases (82%), it was understood that it is up to the claimant to bring the probative set to the records (burden of proof). More than 50% of cases do not result in compensation in the Judiciary, with claimants having difficulty proving the causal link. In cases where there is condemnation, most recognize the concausal link of work in the disease, with only 15% of cases recognizing the direct causal link. The forms of condemnation are mostly indemnity in nature; monthly pension was granted in only 2 cases (5%).

Probably due to the little in-depth approach on the subject, the ICDs for depression and anxiety disorders are present in the research findings and are also recognized as Burnout.

Given this scenario, it is necessary to rethink the burden of proof on the employee in Burnout cases (Z 73.0), when there is already robust prior documentation, such as: issuance of Work Accident Communication notified, social security leave with recognized benefit before the INSS, and recognition of the Technical Epidemiological Nexus (NTEP) of Burnout

[11] Available at: *smartlabbr.org/sst/localidade/0?dimensao=prioritarias* (accessed: 12.07.2023).

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with the professional occupation. The expert report trusted by the court is currently confirmed in more than 90% of cases that go to court, with questions about whether the inspection at the workplace is an essential point of this document.

Another point of attention worth highlighting is that one of the research findings identifies that financial institutions are the main defendants in the judgments studied concerning Burnout; leaving the question of whether this work environment should be considered a habitual risk environment subject to recognition of direct causal link and objective liability, as per the terms of Theme 932 of the Federal Supreme Court (STF).

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1000036-62.2022.5.02.0005
1000051-28.2022.5.02.0006
1000068-90.2020.5.02.0020
1000095-11.2022.5.02.0018
1000111-56.2019.5.02.0054
1000130-08.2022.5.02.0717
1000142-45.2021.5.02.0462
1000153-48.2022.5.02.0039
1000195-06.2022.5.02.0037
1000233-87.2022.5.02.0014
1000357-93.2020.5.02.0708
1000369.46.2021.5.02.0717
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1000500-13.2021.5.02.0461
1000525-33.2020.5.02.0082
1000743-51.2021.5.02.0462
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1000827-52.2020.5.02.0441
1000846-84.2019.5.02.0088
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The European Union approach to prevention of psychosocial risks at workplace

Martina Bassotti[1]

1. Digital transition and psychosocial risks

The European Commission has highlighted how psychosocial risks and work-related stress are among the primary challenges in the field of occupational health and safety. Within the framework of the communication on a EU Strategic Framework on Health and Safety at Work 2021-2027, the importance of addressing psychosocial risks in the workplace has been acknowledged, particularly in light of the digital transition. Indeed, various studies have highlighted the emergence of psychosocial risks linked to the digital transformation that has reshaped the world of work.

With regard to remote work, and particularly to the smart working arrangements during the pandemic period, the main risk factors stem from the uncontrolled extension of working hours, partly due to the blurring of boundaries with personal life (known as "time porosity")[2]. Additionally, the predominance of virtual interpersonal interactions may lead to a sense of alienation from the workplace environment and, more broadly, from social relationships. Remote workers are also exposed to risks associated with prolonged use of digital tools and the condition of "hyperconnectivity".

Moreover, specific criticalness have emerged concerning platform-based work (Bérastégui, 2021). First and foremost, the precariousness inherent in gig workers' contractual agreements may significantly impact on workers' stress levels. This aspect is, at least partially, exacerbated by the classification

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[2] European Agency for Safety and Health at Work, *Telework and health risks in the context of the Covid-19 pandemic: evidence from the field and policy implications*, Luxembourg, 2021.

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of these workers as self-employed (thus excluding from the protective framework of employment law), despite the forms of performance control exercised by the platform and the economic and contractual weakness of the worker, which have raised numerous concerns regarding the proper classification of the employment relationship.

Among the most critical factors, not only in relation to platform-based work, is the algorithmic management of work performance, which is generally characterized by a lack of transparency in decision-making, with risks of discriminatory practices, as well as by invasive monitoring of performance. This oversight extends to potential violations of workers' privacy in their personal lives (Todolí-Signes, 2021).

The adequacy of the European regulatory framework has, at least partially, been the subject of critical observations, highlighting the need for new provisions to be introduced.

Among the initiatives of interest at the European level is the start of the consultation phase with social partners regarding a possible EU action in the field of telework and workers' right to disconnect[3]. Perhaps, European employer organizations appear skeptical about a harmonized approach through hard law concerning the right to disconnect, considering the various organizational models that companies can adopt and, consequently, the diverse protective measures that might be envisaged. Nonetheless, it remains advisable for collective bargaining to address this issue.

A second area of intervention appears to concern, more broadly, psychosocial risks. The European Parliament has argued that it is necessary to intervene to reinforce the assessment and management of psychosocial risks compared to the current provisions of Directive 89/391/EEC, considering that the latter may not prove sufficiently effective for the 21st-century world of work. In this perspective, the Commission has been urged to "*to propose, in consultation with the social partners, a directive on psychosocial risks and well-being at work aimed at the efficient prevention of psychosocial risks in the workplace, such as anxiety, depression, burnout and stress, including risks caused by structural problems such as work organisation*"[4].

[3] Consultation follows the European Parliament's 2021 resolution calling for a proposal to address these issues. Moreover, the European intersectoral social partners, based on their 2022-2024 work program, had initiated negotiations to draft an agreement on teleworking and the right of workers to disconnect, intended to be transposed into a directive. However, the negotiations concluded without agreement on November 27, 2023. Following their inconclusive negotiations, they asked the issue to be addressed by the Commission.

[4] European Parliament resolution of 10 March 2022 on a new EU strategic framework on health and safety at work post 2020 (including better protection of workers from exposure to harmful substances, stress at work and repetitive motion injuries) (2021/2165(INI))

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While awaiting the regulatory developments in the aforementioned areas and considering the profiles more closely linked to digital transformation, the main innovations in the prevention of psychosocial risks arise from the Platform Work Directive[5] and, to some extent, from the so-called AI Act[6].

2. The prevention of risks arising from the algorithmic management of employment relationships under the Platform Work Directive

The platforms fall within the scope of the directive on the assumption that they adopt automated monitoring or decision-making systems.

Provisions indirectly related to the prevention of psychosocial risks include those aimed at ensuring transparency in the operation of automated monitoring and decision-making systems (for instance, the platform is required to inform workers and their representatives about the categories of data collected, the main parameters these systems consider, and their role in decision-making). Additionally, measures concerning the processing of personal data also fall within this scope.

Regarding obligations specifically related to the protection of workers' health and safety (article 12), it is stipulated that a risk assessment must be conducted concerning the automated monitoring or decision-making systems, "*in particular as regards possible risks of work-related accidents, psychosocial and ergonomic risks*". While it could be argued that such an assessment was already mandatory under the previous regulatory framework, this specification explicitly highlights the impact of algorithmic management on workers' health, with particular emphasis on psychosocial aspects[7].

Finally, within the prevention framework, the prohibition set forth in Article 7 against processing certain types of personal data, including "*data on the emotional or psychological state of a person performing platform*

[5] Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work.

[6] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

[7] Peruzzi M. (2012), "La prevenzione dei rischi psico-sociali nel diritto dell'Unione europea", *Lavoro e Diritto*, n. 2, pointed out how the absence of explicit references to psycho-social risks did not prevent the identification in the evolutionary passage marked by Directive 89/391/EEC of the reference to "*an 'integral" notion of health that includes both physical and psychic well-being*" (p. 211).

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work", can also be considered. However, it should be noted that artificial intelligence may also serve as a tool to mitigate certain health risks. In this regard, the directive appears to adopt a restrictive approach compared to what can be inferred, instead, from the Regulation and the AI Act (Peruzzi, 2024). Indeed, article 5 prohibits the use of AI systems to infer emotions of a natural person in the areas of workplace and education institutions "*except where the use of the AI system is intended to be put in place or into the market for medical or safety reasons*" (par. 1, lett. f).

That said, the provisions as a whole certainly constitute a positive step forward. In this sense, when implementing the directive, the Member States could consider extend the scope to all workers whose work is organised by algorithm, regardless of whether the employer is a platform. This is also in view of the fact that the measures provided by the directive enable the social dimension of the risk management system covered by the Artificial Intelligence Regulation to be integrated. With reference to the Italian legal system, it should be noted that one of the provisions anticipating the provisions of the directive, Article 1-bis of Legislative Decree No. 152 of 1997 on the transparency of the algorithm, already has a broader scope than work by means of a platform.

3. The role of trade union representatives

Of particular importance is the fact that the rights to information regarding the automated management of employment relationships are also extended to workers' representatives. Generally, it must be acknowledged that workers' participation, including health and safety representatives, can play a significant role in identifying, preventing, and mitigating psychosocial risks stemming from the use of digital technologies in general, and algorithmic management in particular.

With regard to health and safety protections, it is stipulated that digital work platforms must ensure effective information, consultation, and participation of platform workers and/or their representatives in compliance with Articles 10 and 11 of Council Directive 89/391/EEC. Moreover, under these provisions, which are now somewhat dated, it is stated that such rights are recognized "*in compliance with national laws* […] *which may take into account, inter alia, of the size of the enterprise and/or the unit*". While it seems necessary to also address smaller entities – despite the phenomenon of platforms being commonly associated with organizations employing a significant number of workers, it should be noted that the directive allows the size to be referred not to the enterprise as a whole but to the "establishment".

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This concept must necessarily adapt to modern forms of work organization. The issue is particularly pronounced for so-called "web-based" work performances but does not entirely exclude "location-based" performances, such as those of so-called riders.

It should also be considered that, specifically concerning health protection and consultation rights on health and safety matters, the directive refers to a specific figure: the workers' health and safety representative, distinct from, though potentially overlapping with, the workers' representatives entitled to receive information on the algorithm's functioning. Moreover, psychosocial risks are tied to how work is designed, organized, and managed, and prevention is closely linked to issues of privacy and algorithm transparency. In this regard, a strict division of roles among trade union representatives does not appear consistent with the nature of psychosocial risks.

4. Protections for the self-employed

The psychosocial risks associated with algorithmic management are also likely to affect the health of self-employed workers. For this reason, should be welcomed the extension of certain protective provisions, specifically rights concerning transparency in the automated monitoring or decision-making systems, as well as restrictions on processing or collecting personal data. Indeed, these provisions apply even to those performing platform work who do not fall under the definition of a worker as envisaged by the social legislation of the European Union.

It would have been desirable to intervene also with regard to rights concerning occupational health and safety, as well as the information and consultation of platform workers or their representatives. The vulnerability of these self-employed workers has, in fact, been highlighted in other contexts. Consider, in particular, the European Commission's guidelines on the application of EU competition law to collective agreements concerning the working conditions of self-employed individuals.

It's true that the directive on platform work aims at ensuring the correct classification of employment relationships (based on the premise that such relationships are often classified as self-employment despite exhibiting characteristics of subordination, solely to evade the constraints of social legislation), through presumptions that favor the worker. However, it remains the case that the absence of the criteria to frame the performance within the concept of an employment contract does not eliminate the worker's vulnerable position.

In this regard, certain critical aspects appear to arise from Article 26 of

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the Directive, which seems to limit the action of Member States in favor of self-employed workers. Specifically, the non-regression clause (para. 1) and the recognition of the Member States' prerogative to apply or introduce more favorable provisions (para. 2) are solely referenced to platform workers and not, more generally, to individuals performing work through digital platforms. For the latter, it is only specified (para. 3) that any other rights conferred by other legal acts of the Union shall remain unaffected (and not those introduced by Member States).

Nevertheless, it seems possible to exclude that normative frameworks, such as the Italian one (Title V-bis of Legislative Decree No. 81/2015), which provide protective legislation even for workers who might not fall under the definition of employees, could be challenged. In fact, in the past, the extension of safety regulations beyond subordination has been the subject of a Council Recommendation. Moreover, the aforementioned European Commission guidelines on the application of EU competition law and the admissibility of collective agreements concerning the working conditions of self-employed individuals presuppose that minimum regulatory protections for workers potentially covered by such agreements are permissible.

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Exploring the gender dimension of psychosocial risks: implications for occupational safety and health

Silvia Bertocco[1]

1. Introduction

Among the related work risks, psychosocial ones play an increasingly important role, mainly linked to inadequate methods of planning, work organisation and human resources management. They concern the way work is organised, social factors at work and aspects of the working environment, equipment and hazardous activities. Psychosocial risks can be present in all organisations, in all sectors and in all types of work activities, equipment and ways of working. But their differential impact on the two sexes plays a very important role in promoting gender equality.

The aim of this paper is to highlight how gender differences in the labour market are often associated with a different distribution, in terms of type and incidence, of occupational pathologies. And this different distribution is due both to unequal exposure to health risks and to some specificities of the two sexes.

In order to understand the specificities and gender differences in terms of psychosocial risks, we must first list the main risk factors in the workplace, broken down by content and work context, such as discrimination, sexual and economic violence and sexual harassment, isolation, burnout. It is important to emphasise that many of the risk factors are present in tasks generally performed by women, such as lack of control over one's work, position in the organisational hierarchy, salary gap, repetitive tasks, instability and insecurity at work, conflicting demands between work and private life. Moreover, after the Covid-19 pandemic, most studies highlight the relevance of gender when telework is analysed.

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After analysing the causes, the psychosocial risks and their different effects on the two sexes, the study proposes a specific assessment pathway for this type of risk, inspired by the INAIL and EU-OSHA guidelines, which encourages interdisciplinary collaboration between company personnel and external professionals, mainly psychologists and business organisation experts.

In fact, it is important that psychosocial risks are managed consistently with other OH&S risks, through an OH&S management system, and integrated into the organisation's wider business processes, because the implementation of a proper risk assessment methodology makes it possible to identify effective remedies, or rather, the best preventives measures of an organisational and relational nature capable of counteracting inadequate methods of planning, work organisation and human resources management.

2. Psychosocial risks from a gender perspective

The work environment in the majority of the established EU Member States has changed from one focused on manufacturing to one that is service driven. The advances in technology and increasing globalisation have contributed to these changes and have also introduced new risks and hazards into the workplace.

Psychosocial risks and resulting consequences for mental and physical health are among the most challenging issues in occupational safety and health (OSH). Besides their detrimental effect on individual health, psychosocial risks can also negatively impact the efficiency of organisations as well as national economies. They are mainly linked to inadequate methods of planning, work organization and human resources management. According to the International Labor Organization (ILO, 1986), "psychosocial risks" are defined as those risks that are generated by "*an unfavorable interaction between work content, management, work organisation, environmental and organisational conditions with respect to the skills and needs of the workers*".

In a few words psychosocial risks concern the way work is organised, social factors at work and aspects of the working environment, equipment and dangerous activities. And in particular "work-related stress" is a set of harmful physical and emotional reactions that manifests itself when the demands in the workplace are not commensurate with the worker's abilities, resources or needs.

Today psychosocial risks make up the second most common work-related health problem affecting European workers at a rate close to 45

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percent. Therefore if they are viewed as an organisational issue, rather than an individual fault, these risks can be tackled in the same structured and organised way, as other OSH risks.

In order to understand whether there are specificities and gender differences in terms of psychosocial risks, we must first list the main risk factors in the workplace, broken down by content and work context, for which there is ample scientific evidence that they represent a potential source of stress and damage to health. We can sketch them as follows:

1) the high workload – lack of control over one's work;
2) low autonomy – lack of role clarity; repetitive tasks;
3) low social support from colleagues and superiors – low position in the organisational hierarchy;
4) job instability and insecurity – low performance;
5) some characteristics of working hours and low remuneration – salary gap;
6) non-standard employement agreements (fixed-term contract, remote working, temporary agency work) – lack of integration in the organisation;
7) work-life balance – conflicting demands between work and private life;
8) discrimination, violence, psychological or sexual harassment (OIL Conv. 190) – Fear of asserting one's rights, fear of being hired.

Direct consequences of these risks are stress, anxiety and depression that lead to many lost working days, increase accident and injury rates and financial costs.

Gender differences are often associated in the world of work with a different distribution, in terms of type and incidence, of pathologies of professional origin. And this difference in distribution is due both to unequal exposure to health risks and to some specificities of the two sexes, related to the reproductive and hormonal system which can predispose to different biological effects, even with the same exposure. As outlined over the years, more information, and therefore research, is required to explore the links between women's reproductive health and the conditions under which they work. This is still not a priority within policy or research agendas and this needs to change. Further, women have a high rate of developing certain cancers, such as breast, colorectal and endometrial, which have been linked to environmental factors and working conditions, and more research is needed to further explore these connections.

Going back to the 8 stressors, it is important to emphasise that many of these risk factors are common to women's jobs (for sure the last three) and the World Health Organisation has showed how depression and anxiety disorders are more widespread among women than men. This greater female

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prevalence may be due to hormonal factors (just think of post-partum depression), biological and social factors.

A second critical profile relates to the difficulty of reconciling work and family life. This situation is seen as a factor that can increase the risk of psychological stress disorders such as chronic fatigue, nervousness, anxiety, sexual disorders and depression in women, as it is well known how much family and child care is still left to women. For example Eurostat data show that in couples with children 72% of women reporting daily housework activities, compared to 35% of men. The gender gaps are much more lower among lone parents.

Finally, gender differences are particularly evident in cases of occupational segregation, i.e. the unequal distribution of people by gender in different occupations, or discrimination, violence and sexual harassment.

3. Some highlights on teleworking and hybrid work

The increasing shift to telework and hybrid work since the Covid-19 pandemic has had a strong impact on women. Workers, especially women and younger generations, are demanding more autonomy over when and where they work. Hybrid work (a combination of telework and on-site work) is consolidating as the most common approach, although it is implemented in a largely decentralised, company-based way through a variety of collective and individual arrangements (Countouris *et al*., 2023). Telework has the potential to improve work-life balance and the situation of women in the labour market, especially for women with caring responsibilities.

However It is necessary to explore the gender dimension of telework and occupational safety and health (OSH) and reviews developments in related legislation, because the relevance of gender when telework is analysed is surprising. The latest available OSH data for teleworkers show that gender inequalities are marked with regard to exposure to OSH psychosocial risks, incidence of work-related health problems, and availability of OSH initiatives in the workplace to prevent or address stress and mental health problems. In all these aspects, women are at a disadvantage compared to men. In fact bias in telework and flexible time arrangements may happen through different ways: limiting wage and career progression of workers who are in these arrangements (Pabilonia, Vernon, 2022; Glass, Noonan, 2016); limiting access to such arrangements in women-dominated workplaces and occupations (Chung, 2020; Magnusson, 2021); and limiting the uptake of those arrangements due to women's fears of losing career opportunities (Lott, Abendroth, 2020). In a few words telework might have a disproportionate

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negative impact on women in terms of work-life conflict, cyberbullying, stress and health outcomes. Working from home entails crossing the physical boundaries between work and private life, risking reinforcement of traditional gender roles and increasing women's double burden of care and paid work as well as women's work-life conflict (Chung, van der Lippe, 2020; Arabadjieva, Franklin, 2023). Further, the lack of space at home for setting up a proper workstation exacerbates work-life conflict and is a significant obstacle for sustained work from home (Allen *et al*., 2021). As stated by Countouris *et al*. (2023, p. 8), "*the departure from a shared and standardised place of work into highly individualised locations with unequal potential and constraints can deepen existing inequalities as well as generate new ones. Significant and accurate research show that the most prevalent health risks associated with this work arrangement are of a psychosocial nature*" (Charalampous *et al*., 2019; Oakman *et al*., 2020).

For example EU-OSHA studies (2021a; 2021b; 2023a; 2024) confirm that the most relevant psychosocial risks associated with telework or hybrid work are located in three areas:

1) work intensity, working time and work-life balance;
2) isolation;
3) use of digital technologies for surveillance.

In this literature, the gender dimension is mainly explored in relation to opportunities and drawbacks in terms of work-life balance and stress. Moving from this study one of the main OSH concerns about telework is the risk of work intensification, working long hours and being "always on" that can cause stress, acute fatigue and chronic fatigue, isolation, which may lead to other long-term outcomes such as anxiety, depression and burnout. This idea is also shared by other researchers who confirm the impact of quality of working time on health and wellbeing and find clear evidence that this impact is stronger for women than men Franklin *et al*. (2022). To cope with this situation, it is necessary that companies place strong emphasis on the need to adopt a more equitable and gender-sensitive approach towards work-life balance in telework and hybrid work, based on workers' autonomy and trust (Arabadjieva, Franklin 2023).

Another key measure to prevent psychosocial risks and ensure a better work-life balance is the right to disconnect that aims to prevent the expansion of working hours and the intrusion of professional life into the private sphere (Eurofound, 2022). It has been argued that it has an important gender equality dimension, as it aims to protect workers' health and safety by promoting a better work-life balance (European Law Institute, 2023). Nevertheless, in

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most of the countries the right to disconnect does not make explicit references to the gender dimension. Indeed, only in France was this right to disconnect introduced with the explicit purpose of promoting gender equality. Article L.2242-17 of the Labour Code introduced the right to disconnect as one of the obligations containing measures for equality between men and women that need to be negotiated annually in companies of more than 50 workers (European Law Institute, 2023).

Finally, with regard to the use of technology for monitoring, although the EU-OSHA OSH Pulse survey shows gender differences in the exposure to increased monitoring among teleworkers (36% of women vs. 31% of men), unfortunately recent studies on employee monitoring and surveillance by Eurofound (2020) and EU-OSHA (2023) do not explore gender inequalities.

4. Key psychosocial vulnerability factors for women

Women are particularly vulnerable to psychosocial risks for several reasons. As already analysed, women traditionally play multiple roles, both at work and at home. Work-life balance has been researched consistently over the last 20 years and the evidence shows that the ability to balance work and home life remains problematic for women and impacts on their psychological well-being to an even greater extent than for men.

Women generally tend to be seen as the "carers" within the social system and so assume responsibility for the home and for children and parents. Therefore, when the demands of work and home are combined, women have more responsibilities and work longer hours than men. Seifert and Messing (2007) argue that women generally are not considered as workers who can make a valued contribution. This perception is facilitated by several factors: they are primarily responsible for childcare, they tend to work part time to a greater extent, they are highly likely to seek work in the informal sector and they remove themselves from the workplace for extended periods of time. This can lead to increased exposure to stress, with significant mental burden resulting from the need to balance work and family responsibilities.

It is important to acknowledge that women's concept of work is not restricted to one facet, but is seen as a continuum (Oakley, 1997, cited in Watts, 2009). For example, a study looking at women's dual roles found that the three domains of person, task and environment were useful in understanding how women cope with daily activities (Erlandsson, Eklund, 2003); in other words, a full understanding of what women do could not be gained by looking at just one domain. In this respect, women carry out close to two-thirds of unpaid work, including raising children, caring for

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the elderly, preparing food and keeping houses clean – essential aspects of health and well-being (Briar, 2009). Women combine paid and unpaid work throughout the day.

Another key factor is occupational segregation, or the concentration of women's activity in a few sectors, which appears to be increasing rather than decreasing over time. The shift to services particularly affects women working in the growing health, education, public administration, hotels and restaurants (HORECA), retail trade, financial and other customer services. As a result, women are over-represented in traditionally lower-paid sectors with fewer career prospects, such as health, education and social services. These sectors can be characterised by high levels of emotional and physical strain, increasing psychosocial risks. This may lead to greater emotional dissonance because their actions cannot be in accordance with their own emotions and values. Moreover, although the number of women managers has increased slightly since 2003, women remain under-represented in management positions and in the decision-making processes within companies.

Women still have difficulties in attaining senior positions within organisations because of the "glass ceiling effect". This also limits their ability to influence and shape their working conditions and to actively contribute to workplace risk prevention at the decision-making level. In addition, there is concrete evidence that women's limited career opportunities can have a direct impact on their health and safety at work, as the combination of doing the same job for a long time and the repetitive and monotonous nature of many women's jobs can contribute to health and safety risks such as stress and musculoskeletal disorders (MSDs).

No less damaging to women's mental health and safety is the risk of discrimination and violence. Women may be more exposed to discrimination and harassment at work. This includes inappropriate behavior, unwanted sexual approaches, and unequal treatment compared to male colleagues. This may relate to gender, age, ethnic background, disability and sexual orientation, while migrant women also face discrimination based on their origin or class. Some particularly vulnerable groups are identified in young women, women with care obligations, migrant women engaging in informal work, such as cleaning and home care, women in multiple jobs and very young mothers (Eurofound, Violence in the workplace: Women and frontline workers face higher risks 2023)

Violence and harassment are a particular problem in the service sector, and discrimination in the workplace is on the rise. Reporting and support mechanisms are still lacking, and female workers in personal services and those working on clients' premises are particularly vulnerable. Furthermore, third-party violence is increasing in the HORECA sectors, and in the

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education, public administration, defence and retail sectors, which have a high share of female workers. Young women under the age of 30, women in white-collar occupations, and women with fixed-term or temporary contracts are particularly at risk. Third-party violence can have physical and psychological consequences, such as fear, anxiety and post-traumatic stress disorder (PTSD). Harassment can lead to long-term sickness absence, displacement and even suicide. It also has an indirect impact on families and friends (Weber, Henke, 2023).

Additionally, new forms of harassment, such as cyber-harassment, are an emerging issue in some sectors, for example in education, or in types of work such as telework and hybrid work. To better understand the gender dimension of cyberbullying and cyber-harassment in the context of telework, further research is needed. This includes analysing online negative behaviours in a more general sense, including stalking, cyber discrimination and cyber sexual harassment. This is necessary to address and contribute to more effective responses to the multiple and gendered patterns of cyberbullying (D'Souza *et al*., 2020).

Improving women's occupational safety and health cannot be separated from wider issues of discrimination at work and in society. Employment equality policies should include OSH women's occupational safety and health cannot be separated from wider issues of discrimination at work and in society. Employment equality policies should include OSH (EU-OSHA, New risks and trends in the safety and health of women at work. European Risk Observatory. Literature review 2013).

Continue analysing the causes of vulnerability we can notice that women are more likely to work in precarious or part-time jobs, which often offer less security and stability, increasing the risk of stress and economic insecurity. Further, women are less likely to find proper fitting personal protective equipment (PPE), such as filtering face pieces (Han, 2000; Frost, 2007), which may leave them more exposed in the workplace (Quinn *et al*., 2000). Moreover, other research shows that type of jobs increase women's stress levels, as well as lead to repetitive strain injuries, migraine headaches, feelings of low self-esteem, low motivation and job dissatisfaction (Zeytinogla, 2005). They are also known to be jobs with fewer training opportunities and lower economic benefits, and the lack of job stability increases the risk of women engaging in presenteeism (going to work when ill) at work. Quinn and Woskie (1988) note that women who work are more likely to use their sick leave allowances for child or elderly care, which then results in them needing to work when they are ill themselves. Presenteeism contributes to higher sick leave rates as well as lower productivity (Hillier *et al*., 2005).

The final key factor to consider is women's mental health, as women

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tend to report higher levels of anxiety and depression than men, which can be exacerbated by a stressful or toxic work environment. Changes in work lead to a change in working demands and therefore also to a change in related stresses and strains. Work intensity has increased as a result of new technologies and the increase in service-sector work. Higher absenteeism and early retirement rates due to mental health problems are the consequences of increased work intensity. In addition, women are now achieving higher levels of education than men. These trends need to be monitored, as recent research has shown that highly educated women, particularly those aged 50-64, are more likely to have high levels of work-related fatigue (Verdonk *et al*., 2010), while high levels of work pressure have been linked to the risk of ischaemic heart disease in women.

5. Potential remedies

Taking a gender-neutral approach in policy and legislation has contributed to less attention and fewer resources being directed towards work-related risks to women and their prevention. It is important that OSH risks are analysed by gender and sector, as well as by occupation. Gender impact assessments should be carried out on existing and future OSH directives, standard setting and compensation arrangements. Based on current knowledge of prevention and mainstreaming gender into OSH, existing directives could be implemented in a more gender-sensitive way, despite the need for gender impact assessments and attention to gaps in knowledge. Gender-sensitive interventions should take a participatory approach, involving the workers concerned, and based on an examination of actual work situations. European safety and health directives do not cover (predominantly female) domestic workers. Women working informally, for example wives or partners of men in family farming businesses, may not always be covered by legislation. Recognizing and addressing psychosocial risks with a gender perspective is essential to promoting the health and well-being of all female workers. It is necessary to ensure that in the causal relationship between risk factors, exposure factors and health effects, no organizational aspects or choices may produce undesirable health effects on a group of workers on which vulnerability factors are going to be thickened.

The implementation of a proper risk assessment methodology, including the gender dimension, makes it possible to identify effective remedies, or rather the best preventive measures, capable of counteracting inadequate methods of planning, work organisation and human resources management.

To achieve these goals, it is crucial to improve a specific assessment

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pathway that, inspired by the OIL Conv. 190, EU-OSHA guidelines, INAIL Guidelines for women safety (2023), ISO standard 45003:2021 "Guidelines for managing psychosocial risks", enhances the interdisciplinary collaboration between company figures (employer, safety manager, trade union representatives, company doctor) and external professionals, primarily psychologists and business organization experts.

An efficient, systematic approach to making changes in the workplace can be based on the following five steps:

1) preparation. There are several important decisions to be made at this first stage, but it is good to start by reflecting on what everyone wants to achieve in terms of the psychosocial work environment;
2) assessing risks. The risk assessment phase – carrying out a review of the psychosocial work environment – is crucial, because it is at this stage that the company identifies what needs to change. By carrying out this assessment, management also fulfils the legal requirement to assess the risks to which workers are exposed at work;
3) action planning. The company agrees what measures will be taken to eliminate or reduce the risks and sets up an action plan;
4) taking action. At this stage, the company will implement and monitor the agreed actions. It is important that the implementation of the agreed improvement actions is seen as part of the day-to-day business. Supervise and support the people responsible for implementing the solutions as required;
5) evaluation.

The aim now is to take stock of what has been achieved and how companies can use what they have learned in the future. The company needs to review the full cycle of risk assessment, planning and implementation of measures (EU-OSHA Guidelines 2017).

In this perspective, to reduce the incidence of psychosocial risks among women, companies can take several measures, including promoting an inclusive and respectful working environment; ensuring equal opportunities for advancement and pay equity; establishing clear policies against discrimination and harassment; providing psychological support and specific wellness programmes for women; and offering flexible working hours to facilitate work-life balance. At this regard, for example the paper has highlighted that gender-sensitive provisions in the area of telework and hybrid work is essential to improving women's work-life balance and labor market integration, but it is also necessary to ensure that the right to disconnect and the right to request telework are respected.

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A good work environment doesn't just prevent workers from getting stressed or ill, it actually improves their wellbeing. Wellbeing is linked to job satisfaction, commitment, engagement, sense of purpose and intention to stay in the company and contribute to its success.

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The psychosocial impact of racism on workers: policies to mitigate its effects

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1. Introduction

This paper aims to analyze the impact of racism on the mental health of black workers, by pointing out possible policies that can reduce these effects.

To this end, we first intend to address the particularities of democratic states, in order to analyze whether or not countries that identify themselves as such have to combat racial inequalities in the labor market.

Then, through a critical-dialectical approach that uses bibliographical research as a methodological resource, we aim to highlight the working conditions of black people around the world, by addressing the psychosocial repercussions of racial discrimination on black workers.

Finally, we intend to point out and analyze public policies that can be adopted to reduce the effects of racism on the mental health of these workers. These are: affirmative measures that favor the inclusion of black people in management positions in public and private companies; worker awareness programs; and psychological support for black workers.

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2. The consolidation of Democratic States and its implications in the fight against racism

Jürgen Habermas (1997) establishes the existence of three major paradigms of State: the liberal State, the welfare State and the Democratic State.

The paradigm of the liberal State derives from the bourgeois societies of the 19th century, which sought to restrict the action of the State in such a way as to guarantee the individual freedom of citizens and, in particular, of those who owned property. This form of state also represented the consolidation of first-generation rights, relating to life, equality before the law, freedom of expression, freedom of religion, freedom of movement, property, fair trial and voting (Ruiz, 2006).

However, as long as the right to equality was only granted in its formal aspect, the liberal State became indifferent and insensitive to the social inequalities existing between capitalist owners and workers, a fact that marked, from the second half of the 19th century, the beginning of a series of social conflicts, among which the episode of the Paris Commune in 1871 stands out, when workers revolted and took power in the French capital (Marx, 1983).

These conflicts contributed to the emergence of the paradigm of the welfare state, in which the so-called social question, considered as the set of expressions that define inequalities in society, became an issue inseparable from capitalism.

The welfare state, therefore, resulted from a process of disillusionment and disenchantment with the liberal state, which, despite having contained the absolutist powers of monarchs around the world, inaugurated a new type of exploitation, this time between the bourgeoisie and the workers, culminating later in the reckless and unbridled growth of imperialist powers in the First and Second World Wars (Martins, 2022).

The welfare state predominated in the post-war period, already in the 20th century, through the regulation of the market and the consolidation of second-generation social and collective rights, which sought to ensure minimum conditions of equality and life in three different areas: in the social area, through public policies aimed at education, health, social security, housing, etc.; in the economic area, with the valorization of work and the consequent fair remuneration, the right of association, the right to strike, the social function of property and consumer protection; and, finally, in the cultural area, through the protection of culture and the material and immaterial cultural heritage of the community, in addition to the adoption of policies that allow access to culture by the entire society.

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With this, in addition to formal equality, with the welfare state, the realization of material equality was sought, in the face of which, through the so-called social constitutionalism, the right to property and freedom of contract gave way to the principles of the social function of property and the supremacy of the public interest. Examples of this social constitutionalism include the constitutions of Mexico in 1917 and Weimar Germany in 1919.

Thus, while in liberal constitutionalism rights represented guarantees of the individual against the State, in social constitutionalism rights came to be seen as instruments used to demand positive benefits, which should effectively comply with the principle of equality, so that social groups, and not only human beings in their individual and abstract perspective, were the real beneficiaries of rights (Moreira, 2023, p. 248).

The fact is that the tasks assumed by the welfare State, given their originality, proved to be costly due to the high cost of the technical-bureaucratic apparatus, especially from the beginning of the 1970s onwards, and evidenced the practice of clientelism, in which citizens became mere clients of an administration that provided goods, as a reflection of the evident autonomy of the state administration in relation to its citizens (Habermas, 2000).

In effect, the crisis of the welfare State paradigm resulted, in short, from the overload of tasks and social burdens that were imposed on it. Furthermore, with the expansion of powers attributed to the Executive and the provision of jurisdiction, the welfare state undermined the concept of separation of powers and, through the adoption of comprehensive and subjective constitutional rules, weakened the notion of legal certainty existing in society (Habermas, 1997).

In the liberal state, the common individual was hostage of market imperatives. In the so-called welfare state, this citizen found himself submissive to a superior political will, materialized by the state, which began to regulate economic and social actions. In other words, in the palm of the hand of the welfare state was the function of providing freedom; on its back, however, was the withdrawal of individual freedom, through excessive social regulation.

The need then arose to reformulate the welfare state project, in an attempt to meet the diverse desires of society and value individual freedoms, ending the clientelist relationship that exists between the state and society. This is precisely what the paradigm of the Democratic State proposes, in which individual, collective, social and political rights are guaranteed by social constitutionalism.

Thus, in a trivial way, the Democratic State is nothing more than the concretization of the formula defended by Abraham Lincoln regarding the

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essence of democracy: "*government of the people, by the people and for the people*" (Lincoln, 1863).

According to this conception, the government would be "of the people", because it is they – the people – who are the subject of democracy. Government "by the people", in turn, demonstrates the exercise of democratized power. And, finally, government "for the people" exposes the purpose of democratic power, which is to achieve the common good (Da Silva, 2005).

The Democratic State is, therefore, the combination of precepts of the liberal State and the social State, with the incorporation of a component that seeks precisely to overcome the contradictions of the models that preceded it – the rule of law. This law, however, in a Democratic State, must always preserve democracy and ensure the principle of equality, paying attention, on one side, to limiting the possibilities of abuse of power by state agents and, on the other, to overcoming existing social inequalities (De Moraes, 2014).

Based on this State paradigm, third-generation rights were consolidated, focused on the need to achieve fraternity or solidarity among human beings, among which are the right to development or progress, to the environment, to self-determination of peoples, to communication, to ownership of the common heritage of humanity and the right to peace. These are, in effect, transindividual rights, which are not conceived to protect individual interests, but rather those of present and future generations, groups and collectives.

The fact is that the Democratic State has the duty to seek, for example, the eradication of poverty and the reduction of social inequalities. Likewise, it is a legal obligation of state agents to promote public policies that combat racial prejudice and that seek the social inclusion of minorities of all kinds.

In this regard, according to the Drs. Maurício Godinho Delgado and Gabriela Neves Delgado (2012, p. 42), the Democratic State of Law is based on a three-pronged structure, formed by the human person, with his or her dignity; by the political society, democratic and inclusive; and by the civil society, equally democratic and inclusive. This means that the preservation of democracy, the eradication of poverty and the reduction of social inequalities are the duties of all people and of the entire political and civil society.

In other words, Democratic States have a duty to implement policies that combat racial inequality in all sectors of society, including the labor market. To achieve this, the participation of the entire society is essential, which includes the collaboration of companies and citizens as individuals.

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3. The psychosocial effects of racism on workers

Racism can manifest itself in two ways: through assimilation and through segregation.

Assimilation racism, which is characterized by the expectation of whitening the black population through skin lightening or achieving the social status attributed to white people, can be observed in countries such as Brazil, Peru and Mexico. On the other hand, racism due to segregation, which results from the isolation and marginalization of black people, is seen in countries such as the United States and South Africa, among others (Ribeiro, 2015, p. 170).

While racism by assimilation, by allegedly carrying an image of sociability, turns black people into villains of themselves, awakening feelings of non-belonging and personal sabotage, segregation racism, despite the cruelty that is peculiar to it, allows, at least, the conservation of a cultural identity by black people, in addition to the creation of solidarity networks within the black community itself (Ribeiro, 2015, p. 170).

Despite these differences, both types of racism disarm black people in the fight against racial inequality and, by creating a false idea of social order, prevent the State from paying attention to the need to adopt policies that effectively promote racial equality. The consequence is the perpetuation of racial inequality and, with it, the worsening of illnesses related to the mental health of black people, such as, for example, anxiety, depression, low self-esteem, stress, phobia, inferiority complex, impostor syndrome and others mental disorders.

This is because, according to the World Health Organization, mental health is determined by a series of socioeconomic, biological and environmental factors, in such a way that social exclusion, racial discrimination and violation of human rights are factors that can put risk to the mental health of individuals (OMS, 2022).

In workplaces, for example, an employee's mental health results from others' and their own perception of themselves, which means that workers exposed to racial discrimination are subject to the loss of their subjective mobilization and, with it, their ability to resist the constraints of work (Alencar, Silva, 2021).

This means that black workers are deeply susceptible to the internalization of negative stereotypes about their own race, which arouses feelings of inadequacy and self-contempt that, not infrequently, culminate in the development of symptoms related to depression, anxiety and personal sabotage (Moreira, 2023, p. 745). When, for example, black people do not recognize other black people occupying leadership positions, which is a

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reflection of structural racism, is awakened in these individuals the belief that the social status of those who occupy positions of this nature do not belong to them.

Members of so-called double minorities, such as, for example, black women, black immigrants and black homosexual men, are even more likely to experience the aforementioned symptoms in the workplace, because they are subjected to two or more systems of oppression that end up making it difficult to create solidarity networks within the different communities to which they belong (Moreira, 2023, p. 744).

It happens because the obstacles encountered by black women are different, if not greater, than those encountered by black men. Likewise, the social reality and challenges imposed on brown people, whose skin tone is a little lighter, are different from those experienced by black people. The same can be said of the adversities encountered by LGBTQIAPN+ black people, when compared to those suffered by heterosexual black people, and by black immigrants when compared to those of local black people.

The fact is that the racial inequality present in the job market, in all its variations of gender, nationality, color and sexual orientation, strengthens stereotypes and false consensuses about black people, in order to encourage discriminatory practices in the workplace and developing problems associated with the mental health of black workers.

4. Policies that can reduce the effects of racism on the mental health of black workers

As previously demonstrated, democratic states, with the participation of all civil society, have the duty to implement public policies that combat racial inequality in the labor market. These measures, among other things, should focus efforts on reducing the impacts of racism on the mental health of black workers, since they are more susceptible to developing mental illnesses.

Cida Bento (2022, pp. 69-78) establishes that equity policies that seek to increase the proportion of black people in management positions in public and private companies can result in a reduction of the impacts of racism and its psychosocial effects on black workers.

For this purpose, in our view, some measures can be adopted. Racial quotas, for example, are instruments that can be used to reduce racial inequality in the labor market. These quotas, however, must be restricted to large companies, with more than one hundred employees, so that, based on them, there is a gradual change in social perception regarding the possibility of black people occupying prominent roles and social prestige.

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It is also suggested that tax incentives be granted to companies that, spontaneously, increase the participation of black people in their management positions, a measure that meets the constitutional duty of Democratic States to plan and allocate resources towards achieving material equality and the consequent reduction of social inequalities.

Finally, as an alternative to provide greater participation of black people in management positions, an international quality and/or diversity seal could be implemented for companies that increase the proportion of black people in prominent positions. This would be a certification whose scope for participating companies would consist of a good corporate governance practice, which, in addition to improving the external and internal perceptions of participating companies, would enable better financial and operational results, causing positive impacts from the macroeconomic point of view.

These same companies can also implement training and mentoring programs exclusively for black people or even establish programs to support Afro-entrepreneurship.

Training and mentoring programs exclusively for black people would aim to facilitate the transition of black people from regular positions to eventually occupying management positions. Programs aimed at Afro-entrepreneurship, by encouraging the development of entrepreneurial, creative and innovative activities by the black population, are fundamental instruments for the inclusion of black people in the big wheel of the economy, notably because black entrepreneurs are the ones who face the greatest difficulties in opening and maintaining their businesses. In the specific case of black women, who often combine their jobs with being the family breadwinner, these programs would be essential to reduce the informality of their work relationships and also reduce the social barriers imposed on them.

In reality, all of these policies are supported by international legislation, more specifically by ILO Convention No. 111 (1958), which establishes the need for signatory countries to formulate and implement public policies that favor the insertion of black people into the labor market.

In the same vein, awareness programs for workers in general can also be used as instruments to reduce the impacts of racism on the mental health of black workers. This is important because racial discrimination manifests itself in many ways in the workplace, and in most of them, white people are actively involved (Bento, 2022, pp. 69-78).

Racial discrimination can occur, for example, in the form of discrediting black workers, so that questions about the work they perform are not expressed in relation to the activity performed, but rather in relation to the person. In other words, the attack is personal, not professional (Dias, 2022).

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Tone policing is another form of racial discrimination in the workplace, as the content of the black person's speech, even if correct, is left aside in favor of the way it is expressed (Dias, 2022).

The erasure of speech, which occurs when black people, despite having the space to speak, are completely ignored by those who listen to them, is also a form of racial discrimination in the workplace (Dias, 2022).

White salvationism is also mentioned, which occurs when the skills of black people and possible promotions are attributed to the generosity of white people, and not to the ability of black people (Dias, 2022).

Finally, there is mention of the low tolerance towards black workers and the empty recognition that is given to them, such that their qualities and skills, although high, are not recognized through salary increases or career promotions (Dias, 2022).

In fact, these are behaviors that increase the emergence of diseases and syndromes that harm the psychological health of black workers, so that awareness programs that seek to avoid such harmful practices in the workplace consist of fundamental policies for reducing these psychosocial effects. These programs, it is worth mentioning, can be implemented directly, through advertising materials, lectures and courses, and indirectly, through the inclusion of themes related to racial discrimination in the workplace in the curriculum of training courses in general and, especially, in human resources management. After all, as Foucault rightly pointed out, education is a political instrument for shaping individuals' personalities, through which political discourses can be maintained or modified (Foucault, 2002, p. 45). In effect, it is education that can dismantle the structural bases of racism, forming individuals committed to ending racial inequality.

Finally, also as an example of public policy that can be used to reduce the effects of racism on the mental health of black workers, the need to build psychological support networks for black workers should be mentioned. Once again, this would be a measure that goes against the positive duty of public agents and society as a whole to establish policies that seek to eradicate racial inequality in the world, in the sense of not only implementing public policies that act in prevention, but also in reducing the effects of racism on the mental health of black workers.

5. Conclusion

The shamelessness with which racism is practiced in much of the world causes the entire society, including black people, to participate in a grand theater in which racial discrimination is denied both by those who practice it

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and by those who suffer from its ills. The result is the naturalization of racial inequality and the dissemination of stereotypes and false consensus, as a kind of social idiosyncrasy.

As a consequence of this social reality, black workers are more likely to develop psychosocial illnesses, such as anxiety, depression, low self-esteem, stress, phobias, inferiority complexes, impostor syndrome and other mental disorders. This is because mental health is determined by a series of socioeconomic, biological and environmental factors, so that racial discrimination is a factor that can put the mental health of those who are victims of racism at risk. Furthermore, an employee's psychosocial condition results from the perception of others and their own perception of themselves, which means that workers exposed to racial discrimination are subject to a decrease in their subjective mobilization and, with it, their ability to resist the constraints of work.

In this scenario, the proposal is, on the one hand, to adopt affirmative policies that encourage the hiring of black people to occupy management positions in private and public companies, through racial quotas, tax incentives and/or the institution of quality/diversity seals; and, on the other hand, to establish general awareness-raising and psychological support programs for workers affected by racial discrimination.

In this way, the state and society would focus their efforts not only on prevention, but also on mitigating the effects of racism on the mental health of black workers. This is what is expected, after all, from countries that claim to be democratic states.

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Acceso al mercado laboral. Algunas herramientas para la integración laboral de las personas con discapacidades entre Italia y España

Francesca Pacifico[1]

1. Introducción

La inclusión laboral de las personas con discapacidad representa un reto central en la formulación de políticas públicas a nivel global. Garantizar su acceso al empleo no solo responde al cumplimiento de derechos fundamentales, como la igualdad y la no discriminación, sino que también promueve una sociedad más justa y cohesionada. En este marco, resulta pertinente examinar y comparar las estrategias empleadas en distintos contextos normativos para identificar prácticas que impulsen la integración efectiva y sostenida de este colectivo en el mercado laboral.

Italia y España, ambos miembros de la Unión Europea, comparten un compromiso normativo con la inclusión laboral de las personas con discapacidad, influido por los estándares europeos y las convenciones internacionales. Sin embargo, sus aproximaciones presentan diferencias significativas en cuanto a la implementación de sistemas de cuotas, el papel de los empleadores en el mercado laboral ordinario y la utilización de estructuras especializadas como el tercer sector en Italia y los Centros Especiales de Empleo en España.

En este análisis, se presta especial atención a las herramientas diseñadas para facilitar la integración en el mercado laboral ordinario y las estructuras de empleo protegido, explorando sus principales características y la interacción entre ambos sistemas.

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2. Vías de empleo selectivo en el ordenamiento jurídico italiano

La Ley n. 68 del 12 de marzo de 1999, titulada "Normas para el derecho al trabajo de las personas con discapacidad", representó una transformación significativa en la perspectiva del empleo para personas con discapacidad dentro del sistema jurídico italiano (Tullini, 1999; Lambertucci, 2004; Di Stasi, 2013).

Sustituyendo el marco legal establecido por la Ley n. 482/1968 (Riverso, 2008; Garofalo, 1985; Pera, 1988), impulsó un cambio cultural que dejó atrás la visión asistencialista predominante, posicionando a las personas con discapacidad como recursos productivos en el mercado laboral.

La "colocación selectiva" (en italiano, *collocamento mirato*), piedra angular de la nueva Ley, tiene como objetivo asegurar que las personas con discapacidad se inserten en roles laborales compatibles con sus capacidades. Según el artículo 2, este concepto se define como "*un conjunto de herramientas técnicas y de apoyo que permiten evaluar adecuadamente la capacidad laboral de las personas con discapacidad y ubicarlas en roles apropiados, a través del análisis de puestos de trabajo, medidas de apoyo, acciones positivas y soluciones a los problemas relacionados con los entornos, equipos y relaciones interpersonales en los lugares cotidianos de trabajo*"; es decir, un conjunto de herramientas técnicas y de apoyo diseñadas para valorar las capacidades laborales residuales y garantizar su correcta integración en el ámbito laboral.

Este enfoque, centrado en la correspondencia entre las capacidades individuales y las exigencias de los puestos de trabajo, introduce una perspectiva novedosa para la inclusión laboral, al priorizar soluciones adaptadas a cada caso.

No obstante, pese a la innovación conceptual, la Ley n. 68/99 conserva elementos del sistema previo, como la obligatoriedad de cuotas de contratación para los empleadores, con sanciones por su incumplimiento.

En particular, el artículo 3 establece que las empresas públicas y privadas con más de 50 trabajadores deben cumplir una cuota del 7%; aquellas con entre 36 y 50 empleados deben contratar a dos trabajadores, y las que tienen entre 15 y 35, a uno. Sin embargo, en muchos casos, el cumplimiento formal de estas cuotas no refleja un verdadero compromiso con la inclusión, lo que deja a las personas con discapacidad en situaciones de empleo marginal o precario.

La efectividad de este sistema ha dependido en gran medida de la capacidad de los empleadores para implementar medidas flexibles, como los convenios previstos en los artículos 11, 12 y 12 *bis* de la Ley n. 68/1999, así como en el artículo 14 del Decreto Legislativo n. 276/2003. Estas disposiciones permiten

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colaborar con organizaciones del tercer sector, reconociendo su papel clave en una inclusión más efectiva y adaptada a cada individuo (Santucci, De Petris, Pacifico, 2023; Gheido, Casotti, 2015; Corbo, 2009).

Este enfoque refuerza la idea de una integración sociolaboral sostenible y ajustada a las capacidades y necesidades particulares, promoviendo un modelo que equilibra rigor normativo con flexibilidad operativa, como se observa en las recientes reformas, cuyas novedades se exponen a continuación, con especial énfasis en el papel del tercer sector.

2.1. El papel del tercer sector a la luz del decreto legislativo n.62/2024

El marco normativo establecido por la Ley Delegada n. 227/2021 y el Decreto Legislativo n. 62/2024 marca una transformación significativa en la gestión de las políticas de discapacidad en Italia, redefiniendo al tercer sector como un protagonista esencial en la promoción de la inclusión social y laboral (Bombardelli, 2022; Petrachi, 2023).

Estas reformas no solo fortalecen la cooperación entre las entidades del tercer sector (ETS) y las administraciones públicas, sino que también buscan superar las limitaciones de modelos previos a través de enfoques más participativos y personalizados (Gualdani, 2021; Bombardelli, 2022).

La Ley Delegada n. 227/2021 introduce criterios innovadores al fomentar un modelo de *administración compartida* (art. 2) que legitima la participación activa de las ETS en la planificación y diseño de proyectos de vida individuales, personalizados y participativos para personas con discapacidad y también una "red integrada" que pretende garantizar la eficacia y la personalización en la prestación de servicios, evitando solapamientos o lagunas y valorando su proximidad a las necesidades de los beneficiarios y su capacidad organizativa (Lambertucci, 2024; Pacifico, 2024).

A su vez, el Decreto Legislativo n. 62/2024 refuerza esta colaboración, subrayando la participación de las ETS en los procesos de evaluación y planificación de servicios para personas con discapacidad. El artículo 9 establece que las comisiones del INPS, encargadas de evaluar discapacidades, incluirán a representantes de asociaciones del tercer sector. Por su parte, el artículo 17 dispone que las ETS puedan denunciar casos de discriminación y proponer ajustes razonables ante el Garante Nacional de los Derechos de las Personas con Discapacidad.

Este modelo se complementa con la reorganización de las Unidades de Evaluación Multidimensional (UEM), regulada en el artículo 24, que adopta principios de co-programación y eficiencia. Las UEM, con la implicación activa de las ETS, se convierten en herramientas fundamentales para adaptar

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las políticas a las necesidades específicas, superando barreras tradicionales como la estandarización de las respuestas o la falta de información.

La reconfiguración de las UEM mediante la participación activa de las ETS refuerza su papel como interlocutores esenciales en la identificación de necesidades y en la prestación de soluciones adaptadas. Tal como señaló el Tribunal Constitucional en su sentencia n. 131/2020 (Arena, 2020; Rossi, 2020), las ETS constituyen una red de proximidad y solidaridad capaz de ofrecer información relevante y capacidades operativas complementarias al trabajo de las administraciones públicas. Este modelo fomenta un enfoque participativo que busca superar las barreras tradicionales en las políticas de discapacidad, incluyendo carencias informativas y respuestas a necesidades específicas.

En conclusión, tanto la Ley Delegada n. 227/2021 como el Decreto Legislativo n. 62/2024 redefinen el papel del tercer sector en Italia, otorgándole un rol protagónico en la promoción de derechos, equidad y eficiencia en las políticas de discapacidad. Este planteamiento refuerza el vínculo entre el Estado y la sociedad civil, ofreciendo mayor flexibilidad y capacidad de adaptación en la prestación de servicios, y posiciona al tercer sector como un actor fundamental en la construcción de trayectorias inclusivas y orientadas a la desinstitucionalización para las personas con discapacidad.

3. Normativa española sobre la integración laboral de las personas con discapacidad

La normativa española ha implementado diversas estrategias para fomentar la inclusión laboral de las personas con discapacidad, organizándose fundamentalmente en dos enfoques: la integración en el mercado laboral ordinario, que abarca tanto entidades públicas como privadas, y la inserción en el mercado protegido, que incluye a los Centros Especiales de Empleo (CEE). Dentro de las medidas de acción positiva destinadas a garantizar la participación en el empleo ordinario, sobresale, en primer lugar, la regulación de las cuotas de reserva de puestos de trabajo.

3.1. Integración laboral ordinaria. Las cuotas de reserva

La normativa española, recogida en el artículo 42.1 del Real Decreto Legislativo 1/2013, establece que las empresas, tanto públicas como privadas, con plantillas de 50 o más trabajadores deben destinar al menos el 2% de sus puestos a personas con discapacidad. Este requisito se alinea

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con los principios de igualdad de trato y no discriminación establecidos en el artículo 14 de la Constitución Española, con el objetivo de equiparar las oportunidades laborales de este colectivo con las del resto de la población trabajadora (Cordero Gordillo, 2011).

El procedimiento para calcular el tamaño de la plantilla a efectos de esta obligación se detalla en el Real Decreto n. 364/2005. Según esta norma, el cálculo se realiza tomando como referencia los doce meses previos, utilizando el promedio de empleados durante ese periodo, incluidos los que trabajan a tiempo parcial. Los contratos temporales de más de un año se consideran parte de la plantilla fija, mientras que los de menor duración se computan con base en los días trabajados, atribuyendo un trabajador por cada doscientos días, incorporando no sólo los días laborales, sino también los de descanso, vacaciones y festivos (Lahera Forteza, 2005).

Aunque la obligación de reserva es de carácter obligatorio, la normativa prevé excepciones que permiten a las empresas quedar parcial o totalmente exentas en determinadas circunstancias. Una de estas excepciones ocurre cuando los servicios públicos de empleo o las agencias de colocación no logran cubrir las vacantes por la falta de candidatos o la ausencia de interés en las ofertas. Sin embargo, la normativa no especifica con claridad los requisitos que deben cumplir estas ofertas laborales, lo que puede abrir la puerta a interpretaciones flexibles y posibles abusos.

Otra exención se refiere a razones de tipo técnico, organizativo, productivo o económico que dificulten la contratación de trabajadores con discapacidad. Sin embargo, estas justificaciones tampoco están definidas con precisión en la legislación, dejando margen para una aplicación subjetiva.

En casos donde se autorice la exención, las empresas están obligadas a implementar medidas alternativas establecidas en el Real Decreto Legislativo 1/2013, el RD 364/2005 y el RD 27/2000. Estas medidas incluyen, entre otras: establecer contratos comerciales con CEE o autónomos con discapacidad para adquirir bienes o servicios; realizar donaciones o patrocinios a fundaciones o asociaciones que promuevan la inclusión laboral y la formación de personas con discapacidad; y crear enclaves laborales en colaboración con CEE (Llano Sánchez, 2005).

Si bien estas disposiciones buscan conciliar las necesidades de las empresas con la inclusión laboral, las excepciones permitidas generan dudas sobre su efectividad para superar las barreras estructurales que persisten en el acceso al empleo por parte de las personas con discapacidad.

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3.2. Las estructuras de empleo protegido. Los Centros Especiales de Empleo

La Ley n. 13/1982, conocida como Ley de Integración Social de los Minusválidos (LISMI), supuso un avance significativo en la normativa española relacionada con el empleo protegido, al establecer una estructura legal orientada a facilitar la inclusión laboral de personas con discapacidad (Legarreta, Pérez, 2009). Esta normativa otorgaba un reconocimiento formal a los CEE como una alternativa válida para quienes encontraban mayores barreras de acceso al al empleo ordinario.

En este marco, el artículo 41.1 definía a los CEE como espacios diseñados para emplear a personas con discapacidad cuyas limitaciones les impedían participar en el empleo ordinario. Aquellas con discapacidades más severas que no lograban alcanzar una capacidad laboral mínima podían incorporarse a Centros Ocupacionales, cuya misión era principalmente terapéutica y ocupacional, más que laboral.

Actualmente, los CEE están regulados principalmente por el artículo 43.1 del Real Decreto Legislativo n. 1/2013, según el cual

> son aquellos cuyo objetivo principal es el de realizar una actividad productiva de bienes o de servicios, participando regularmente en las operaciones del mercado, y tienen como finalidad el asegurar un empleo remunerado para las personas con discapacidad; a la vez que son un medio de inclusión del mayor número de estas personas en el régimen de empleo ordinario. Igualmente, los centros especiales de empleo deberán prestar, a través de las unidades de apoyo, los servicios de ajuste personal y social que requieran las personas trabajadoras con discapacidad, según sus circunstancias y conforme a lo que se determine reglamentariamente.

Este planteamiento confiere a los CEE un carácter dual: funcionan tanto como espacios de empleo adaptado como herramientas de transición hacia el mercado ordinario. Esto los diferencia de los Centros Ocupacionales, que no establecen una relación laboral entre el centro y sus usuarios.

La normativa considera la relación laboral en los CEE como una modalidad especial, regulada por el artículo 2.1.g del Estatuto de los Trabajadores y el artículo 43.3 del Real Decreto Legislativo n. 1/2013. Esta calificación responde a tres razones clave: el perfil particular de los empleados (personas con discapacidad), la naturaleza singular de las empresas (CEE) y el objetivo social específico de estas entidades, que no solo buscan ofrecer empleo remunerado, sino también servicios integrales de ajuste personal y social. El fin último de este modelo es lograr la inclusión sociolaboral de las personas con discapacidad y evitar su exclusión del mercado laboral.

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Una característica distintiva de este régimen laboral es el alto nivel de supervisión establecido por el Real Decreto n. 1368/1985. Esta normativa requiere la intervención de equipos multiprofesionales, encargados de evaluar la adecuación de los trabajadores al entorno laboral, supervisar su progreso y garantizar que las adaptaciones necesarias sean eficaces.

Entre las particularidades de esta relación laboral destaca la obligatoriedad de que los trabajadores estén inscritos en las oficinas de empleo correspondientes, mientras que los CEE deben recurrir a estas mismas oficinas para la contratación.

El éxito de esta intermediación laboral depende, en gran medida, de la capacidad de los servicios públicos de empleo para gestionar eficazmente los recursos disponibles y proporcionar el apoyo especializado que requieren tanto los trabajadores con discapacidad como los CEE (Lahera Forteza, 2005).

En conclusión, los CEE representan una herramienta crucial dentro del sistema de empleo protegido en España. Su regulación específica, basada en una relación laboral especial, combina la generación de empleo remunerado con un enfoque integral de servicios de ajuste personal y social. Sin embargo, su impacto efectivo radica en la calidad de los mecanismos de intermediación y supervisión, que deben asegurar no sólo la integración laboral, sino también la mejora continua de las condiciones laborales y una transición efectiva hacia el mercado laboral ordinario.

4. Conclusiones

Debido al espacio limitado de este artículo, no ha sido posible abordar en profundidad todas las complejidades y matices que el tema de la inclusión laboral de personas con discapacidad merece (Riccardi, 2018; Tardivo, 2024). Sin embargo, el análisis comparativo entre los sistemas de Italia y España ha permitido identificar aspectos clave en sus estrategias normativas y prácticas para la integración laboral, destacando tanto similitudes como diferencias significativas en sus enfoques normativos y operativos.

En Italia, el sistema de cuotas obligatorio, aplicable a partir de empresas con más de 15 empleados y con porcentajes variables según el tamaño de la organización, busca fomentar la inclusión mediante la imposición de obligaciones específicas al empleador. Este sistema se complementa con el papel cada vez más relevante del tercer sector, que, tras las reformas recientes, se erige como un pilar en la generación de oportunidades laborales inclusivas, demostrando flexibilidad y capacidad para abordar necesidades específicas del colectivo de personas con discapacidad.

Por su parte, España presenta un sistema de cuotas con un umbral más elevado, aplicable a empresas de 50 o más empleados y con un porcentaje

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fijo del 2%. Aunque este sistema simplifica la implementación para los empleadores, plantea desafíos en su fiscalización y efectividad en términos de alcance. Además, los CEE representan una herramienta central en el sistema español, consolidando espacios de empleo protegido que, si bien promueven la ocupación, enfrentan cuestionamientos sobre su capacidad para facilitar una transición al mercado laboral ordinario y abierto.

Ambos sistemas, si bien reflejan compromisos sólidos con la inclusión laboral, aún no se alinean plenamente con el artículo 27 de la Convención de las Naciones Unidas sobre los Derechos de las Personas con Discapacidad (CDPD) que subraya la necesidad de garantizar empleos en mercados abiertos, accesibles y verdaderamente inclusivos, objetivo que las cuotas y las estructuras especializadas no logran alcanzar por sí solas.

La comparación realizada pone de manifiesto la importancia de combinar medidas normativas con iniciativas que promuevan la accesibilidad y la sensibilización empresarial.

Aunque las particularidades del tercer sector italiano y los CEE españoles ofrecen valiosas lecciones, es necesario adoptar enfoques más integrales para avanzar hacia una inclusión laboral que no solo cumpla con obligaciones legales, sino que también respete y potencie los derechos y capacidades individuales.

En conclusión, tanto Italia como España han logrado avances destacables en sus respectivos sistemas, pero deben seguir trabajando en la construcción de un entorno laboral plenamente inclusivo, que permita a las personas con discapacidad desarrollar su potencial en condiciones de igualdad y dignidad.

Este estudio invita a continuar explorando soluciones innovadoras y colaborativas que respondan tanto a las exigencias de la CDPD como a las realidades económicas y sociales de cada contexto.

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Use of the ICF as a tool for prevention, rehabilitation and inclusion in the workplace in cases of occupational accidents involving people with disabilities

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Abstract

The International Classification of Functioning, Disability and Health (ICF) is an essential tool for broadening the understanding of functionality and disabilities resulting from workplace accidents in people with disabilities. This article argues that the ICF offers a more detailed and comprehensive approach compared to the International Classification of Diseases (ICD-10) by integrating biopsychosocial factors that impact health and labor reintegration. The results highlight that the ICF improves prevention, rehabilitation, and inclusion in the work environment, ensuring a more just and efficient process for workers with disabilities.

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1. Introduction

Occupational accidents represent a critical issue in occupational health, particularly for people with disabilities. The traditional approach, centered on the ICD-10, is limited to describing diseases and sequelae, neglecting functional, environmental, and social aspects (WHO, 2001). The ICF emerges as an innovative and more comprehensive alternative for evaluating and classifying disabilities, providing the basis for a more inclusive and effective process of rehabilitation and prevention (Melo, 2019). This article discusses the role of the ICF as a central tool in occupational health, addressing its advantages in risk prevention, personalized rehabilitation, and promoting inclusive work environments.

2. Theoretical framework

2.1. The International Classification of Functioning (ICF)

Developed by the World Health Organization, the ICF classifies functionality and disabilities, considering not only clinical aspects but also environmental and personal factors (Who, 2001).

2.2. Occupational health and people with disabilities

Occupational health faces challenges in addressing the needs of workers with disabilities. The ICF fills gaps by assessing the impacts of work conditions and proposing personalized solutions to improve inclusion (Santos *et al*., 2020).

2.3. Inclusion in the workplace

Physical and social barriers limit the engagement of people with disabilities in the labor market. The ICF identifies and helps overcome these barriers, promoting an accessible and safe environment (Febraban, 2006).

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3. Methodology

This study employed a qualitative approach, based on a systematic literature review. Academic databases such as PubMed, Scielo, and Google Scholar were consulted using the descriptors: International Classification of Functioning, occupational health, workplace accidents, and inclusion in the labor market. The search period covered publications from 2000 to 2023, focusing on peer-reviewed articles, institutional guidelines, and case studies.

A comparative analysis between the International Classification of Functioning, Disability, and Health (ICF) and the International Classification of Diseases (ICD-10) was conducted based on criteria such as evaluation comprehensiveness, practical applicability, and outcomes in occupational contexts (Who, 2001; Santos *et al*., 2020). In addition, case studies illustrating the practical use of the ICF in rehabilitation, prevention, and workplace inclusion contexts were included.

To ensure an interdisciplinary perspective, publications from fields such as occupational health, ergonomics, and public policies for inclusion were incorporated, along with national guidelines such as the National Health Policy for People with Disabilities (Ministry of Health, 2009) and the regulation of the Quotas Law (Ministry of Labor and Employment, 2007). The review also included qualitative analyses of studies highlighting the challenges and solutions in using the ICF for workers with disabilities, reinforcing the relevance of the biopsychosocial model in labor contexts.

This approach allowed for an understanding not only of the theoretical aspects of the ICF but also its practical applications and challenges in both the Brazilian and international occupational scenarios.

4. Results and discussion

4.1. Use of the ICF in prevention

The ICF enables the early identification of risk factors in the work environment (Who, 2001). Its multidimensional approach allows for the analysis of not only the worker's physical conditions but also environmental, social, and personal factors that may negatively influence occupational safety. This detailed assessment allows for the development of preventive strategies tailored to the specific needs of workers, especially those with disabilities.

Through tools such as the ICF Checklist, it is possible to record and

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interpret information about risks present in the workplace. This includes architectural barriers, inadequate ergonomic conditions, and social attitudes that may increase the risk of accidents (Santos *et al*., 2020).

4.2. Use of the ICF in rehabilitation

After a workplace accident, the ICF plays a central role in occupational rehabilitation by structuring the assessment of labor capacity into two main parts: 1) functionality and disability, and 2) contextual factors. This organization allows for a comprehensive analysis of the worker's health conditions, limitations, and the barriers faced in the work environment (Pereira, Silva, 2023).

Regarding functionality and disability, the ICF provides a detailed framework for identifying the physiological and anatomical conditions affected by the accident, evaluating how these changes influence daily activities and engagement at work. The approach goes beyond traditional medical assessment by also considering the impact of injuries on social interaction and worker productivity (Who, 2001).

Contextual factors, such as physical, social, and organizational barriers, are equally crucial in rehabilitation. For instance, elements of the physical environment, such as inappropriate furniture and lack of accessibility, may exacerbate the difficulties faced by workers with disabilities. Similarly, attitudinal barriers, such as prejudice or lack of awareness among colleagues and managers, can hinder reintegration into the work environment (Febraban, 2006).

Studies show that many workers with disabilities use facilitators, such as prosthetics, wheelchairs, or other assistive devices, to perform their roles. However, the lack of appropriate adaptations in the workplace, such as ergonomic stations or accessible routes, limits the effectiveness of these facilitators, resulting in greater challenges in labor reintegration (Pereira, Silva, 2023). In this context, the ICF serves as a guide to identify necessary adaptations and prioritize interventions that promote a safe and efficient return to work.

Additionally, the ICF allows for continuous monitoring of the worker's progress during the rehabilitation process. This tool enables personalized adjustments to the rehabilitation plan, such as physical therapy sessions, occupational training, or changes in the work environment, to meet the specific needs of the worker at each stage of the process (Melo, 2019). This dynamic approach ensures not only functional recovery but also psychological well-being and dignity.

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Another important aspect is the role of the ICF in facilitating coordination between health services, employers, and workers. By providing a common language to describe functionality and disability, the ICF enhances communication between health professionals, human resources teams, and other stakeholders, ensuring that decisions are based on a comprehensive understanding of the worker's condition (Santos *et al*., 2020).

Ultimately, the application of the ICF in occupational rehabilitation underscores the importance of an interdisciplinary approach, combining the efforts of doctors, physiotherapists, ergonomists, and managers to effectively reintegrate workers with disabilities into the labor market. This integration not only benefits the worker but also contributes to increased productivity and the creation of an inclusive and diverse work environment.

4.3. Use of the ICF in inclusion

The inclusion of workers with disabilities in the labor market requires a detailed analysis of the barriers that limit their full engagement (Febraban, 2006). The ICF promotes this analysis through its holistic approach, which identifies environmental factors, such as physical and attitudinal barriers, as well as personal and contextual conditions (Melo, 2019). These barriers, if not effectively addressed, can result in exclusion and discrimination, impairing the quality of life and the potential contribution of workers with disabilities in the workplace.

In the Brazilian context, the Quota Law (Law n. 8.213/91, art. 93) was established to promote the inclusion of people with disabilities (PwD) in the labor market, requiring private companies with more than 100 employees to reserve 2% to 5% of their vacancies for workers with disabilities. However, the effective regulation of this law only occurred in 1999, when it began to have a significant impact (Ministry of Labor and Employment, 2007). Although the legislation established an important milestone for inclusion, substantial challenges remain for the full implementation of quotas. Companies often face difficulties in integrating workers with disabilities due to attitudinal barriers, such as prejudice and insecurity about how to address the special needs of this population (Vieira, 2008). This scenario is exacerbated by the lack of adequate training for managers and human resources teams, who often don't know how to adapt work environments or provide adequate support for disabled workers.

The ICF, with its multidimensional approach, enables the identification and analysis of these barriers, not only in the physical conditions of the environment but also in the social and organizational aspects that influence

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worker engagement. From this detailed assessment, it becomes possible to implement measures that remove these barriers, such as ergonomic adaptations, assistive technologies, and modifications in organizational processes. Additionally, the ICF emphasizes the importance of considering personal factors, such as the worker's abilities and limitations, and contextual factors, such as social support and accessibility conditions at the workplace (Pereira, Silva, 2023).

Studies show that, while compliance with quotas has increased the presence of workers with disabilities in the formal labor market, there is still a significant gap in terms of the quality and sustainability of this inclusion. Often, workers with disabilities are hired simply to fulfill the quota, without the proper support or adaptation, which can lead to frustration for both the worker and the organization (Febraban, 2006). The ICF provides a solid foundation for a more detailed analysis of these conditions, allowing companies to develop more effective inclusion practices that contribute to a more diverse and productive work environment.

In addition, the ICF can also be used as a tool to make companies aware of the importance of fully promoting inclusion. By highlighting the specific needs of each worker, the ICF enables the customization of the work environment and the creation of specific rehabilitation and adaptation plans. This includes both the modification of physical spaces, such as adapting furniture and equipment, and the review of internal policies and awareness training to reduce prejudice and increase social and professional inclusion.

Finally, the ICF not only contributes to inclusion in the labor market but also ensures that workers with disabilities can develop their full potential in a work environment that respects their needs and promotes their active and productive engagement. Ultimately, it guides the creation of inclusive environments, guaranteeing equal opportunities and contributing to the construction of a fairer and more accessible society for all.

5. Conclusion

The application of the ICF in the context of workplace accidents represents a significant advancement for occupational health. By integrating biopsychosocial factors, the ICF offers a more complete evaluation of disabilities, contributing to accident prevention, effective rehabilitation, and the inclusion of people with disabilities. This article reinforces the need for public policies and business practices that incorporate the ICF as an essential tool for ensuring a fair and accessible work environment.

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Fostering a gender perspective in health and safety at work. The Italian case

Giovanna Pistore[1]

1. Gender and safety at work in the Italian legislation

As it is often stated, equality between men and women in the workplace must be ensured also through a gender-sensitive approach to risk assessment. However, in the Italian legal system this attitude was largely overlooked for a long time: legislative decree no. 626 of 19 September 1994, on health and safety at work, adopted a neutral concept of worker, failing to consider gender differences.

Yet, the pursuit of equality was enshrined in the Constitution, particularly in articles 3 and 37. Article 3 promotes both formal and substantive equality. Article 37 stipulates that female workers must enjoy the same rights and receive the same pay as men for equal work, and working conditions must accommodate women's family responsibilities also through the protection of mothers and children[2]. Consequently, female workers were historically viewed primarily in their role as mothers, as reflected in legislative decree no. 151 of 26 March 2001, the Consolidated Law regarding the protection and support of maternity and paternity.

In 2008, the implementation of the Consolidated Law on safety at work (legislative decree no. 81 of 9 April 2008) marked a shift towards an occupational safety and health framework that acknowledges gender differences, moving beyond the previous, neutral approach. This is pointed up in the very beginning of the decree, which aims at fostering a consistent protection of workers on the national territory through compliance with the essential levels of services concerning civil and social rights, also with regard to differences in gender (art. 1, par. 1).

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[2] Perlingieri P. (2001), *Commento alla Costituzione italiana*, Napoli.

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In the same vein, article 28 of the decree requires employers, when assessing risks, to take gender differences into account. So, "*the 'gender issue' cannot be considered in a specific phase of the* [OSH evaluation] *process,* […] [since it] *is a cross element in OSH, lowering the hazard aggregation degree by doubling the 'homogeneous group of hazard situations' that an enterprise has to take into account*"[3].

Additionally, art. 8 of the decree establishes the National Information System for Prevention, which also considers risks from a gender perspective[4]. Article 40 further requires the appointed physician to report health information and workplace hazards to public authorities, highlighting any gender differences.

2. Hazards, harms and risks in a gender perspective

That being said, it is important to clarify what is meant by gender differences in the OSH. These differences go beyond biological sex – defined as the physical aspects of a person – and encompass a variety of other factors, such as behaviour, lifestyle, and the roles traditionally assigned to men and women. A comprehensive understanding of risk exposure must pay heed to all these factors, along with the complexity of individuals' lives outside of work and at different stages of life.

Indeed, the law does not provide a precise definition of a "gender hazard factor". Rather, gender serves as a lens through which examining the interaction between hazards and risks. To recall some established definitions, a hazard refers to an inherent characteristic of a factor – such as a substance, tool, or work method – that has the potential to cause harm (e.g., electricity, chemicals, working at height, noise, repetitive tasks, workplace

[3] Sorrentino E., Vona R., Monterosso D., Giammarioli A.M. (2016), "Gender issues on occupational safety and health", *Annali dell'Istituto Superiore di Sanità*, 2, p. 190. See also Nunin R. (2011), "Lavoro femminile e tutela della salute e della sicurezza: nuovi scenari per una prospettiva di genere dopo il d.lgs. n. 81/2008", *Rivista del diritto della sicurezza sociale*, 2, p. 383; Ninci A. (2009), "Le differenze di genere e l'impatto su salute e sicurezza in ambito lavorativo", *Diritto delle relazioni industriali*, 3, p. 800.

[4] The *Sistema informativo nazionale per la prevenzione* (SINP) provides useful data to orient, program, plan and evaluate the effectiveness of the prevention of accidents and occupational diseases, in relation to workers registered and not registered with public insurance bodies, and to plan and evaluate supervisory activities, through the integrated use of the information available in the information systems, of specific archives and the creation of unified databases. The system is managed by INAIL (Italian National Institute for the Insurance against Injuries at Work).

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bullying, stress). Risk, on the other hand, is the likelihood that a hazard will actually result in harm (see article 2, par. 1, letters *r* and *s* of legislative decree no. 81/2008). Although the terms "hazard" and "risk" are often used interchangeably, they have distinct meanings. A hazard may exist in the workplace, but its potential for harm depends on the specific conditions in which it occurs. The interaction between risk and hazard can ultimately result in harm, manifesting as an adverse health outcome.

In the triptych of hazard, risk, and harm that defines risk assessment, gender serves as an important criterion for evaluation. It is undeniable that: a) certain hazards disproportionately affect women compared to men; and b) the outcomes of exposure to hazards may vary by gender, particularly in terms of physical effects, such as reproductive damage.

Data from INAIL – the Italian National Institute for the Insurance against Injuries at Work-in its 2024 Women's Dossier[5] reveals that in the period between 2018 and 2022 for women almost a third (32.9%) of accidents were due to "*overflow, spillage, vaporization*" (including Covid-19); the second cause was "*body movements under physical effort*" (19.2%) – which on the contrary is the first for men; the third one is "*slipping or tripping with fall*" (17.3%).

In 2022 mental health issues among female workers (amounting to the 1.2% of total illnesses) were more than triple than those of men (0.4%) – 2022. Traffic accidents involving female workers outnumbered those involving men, both in absolute and relative terms (17% for women – 15% for men); fatal outcomes represent the 61,7% of the cases for women while are the 44,2% for men.

In the Institute's view, this discrepancy is largely due to traditional family and social roles, which burden women with the challenge of balancing work and family responsibilities, potentially leading to more frequent travel and insufficient recovery time. These differing social roles and the associated workload contribute to variations in risk exposure.

Moreover, some employment trends, while not inherently hazardous, can have occupational safety and health implications when combined with other factors. For example, different types of employment contracts (such as part-time, informal, or casual jobs), occupational segregation, work organization, and working hours can lead to both physical and psychological harm[6].

[5] INAIL, *Dossier donne 2024*, in *inail.it*.

[6] Sjöberg Forssberg K., Vänje A., Parding K. (2022), "Bringing in gender perspectives on systematic occupational safety and health management", *Safety Science*, p. 152; see also EU-OSHA (2013), *New risks and trends in the safety and health of women at work*, *osha.europa.eu*: "*Occupational segregation, overall, the concentration of female activity in a few*

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3. How to make effective the OSH gender-oriented approach

The introduction of a gender-sensitive approach to risk assessment has not been accompanied by specific regulations on how to implement this innovation. As mentioned above, the only provisions in this area apply to working mothers and encompass both physical and organizational protective measures, but only for a limited period.

Namely, legislative decree no. 151/2001 outlines the following provisions:

- article 7: specifies the activities and jobs that are prohibited from the start of the pregnancy until the end of the work restriction period, with particular focus on Annex A (hazardous, strenuous, and unhealthy work) and Annex B (special agents and working conditions);
- article 11: requires that risk assessments consider specific conditions that might end into risks to pregnancy and breastfeeding, with reference to agents, processes, and working conditions listed in Annex C (agents, processes, and working conditions to be evaluated in relation to pregnancy) and in accordance with European directives;
- article 12: details the preventive measures and the outcomes of these evaluations, including potential reassignment to a non-hazardous role or the possibility of requesting early work leave;
- article 53: imposes restrictions on night work.

Apart from this, there is a lack of specific protective measures from a gender perspective.

Nor hints in this regard are offered by collective agreements.

In 2014, CGIL, CISL and UIL unions put forward *Proposals for Negotiation on the topic of Health and Safety at Work*[7]. The document underlines that work organization is a critical aspect of collective bargaining, directly affecting workers' health and safety. Work organization should be drafted with the purpose to create a system that is reliable and safe, through parameters that reconcile efficiency, protection and workers' satisfaction. It is a fact that too often, however, management systems for health and safety at work are unable to integrate with the actual organization of work, whereas they formally comply

sectors seems to be increasing rather than falling over time. The move to service sectors particularly affects women, who work in the growing sectors health care, education and retail. Consequently, if it should be effective, OSH policy should continue to address and enhance its activities for these sectors"; Masike R., Mwanza B., Masiyazi L. (2014), "A gender sensitive framework to safety and health at work", *European Scientific Journal*, 11, p. 155.

[7] CGIL, CISL, UIL (2014), *Proposte per la Contrattazione in tema di Salute e Sicurezza sul Lavoro*, in: *olympus.uniurb.it*.

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with regulatory obligations. On this side, the paper raised concerns that many employers fail to recognize the direct link between these two issues, treating them as independent variables. As a result, the responsibility for implementing necessary measures is left to second-level collective bargaining.

Collective agreements that explicitly draw a connection between work organization issues and gender-related matters are rare. Such connections are mainly made in relation to the monitoring, research, and consultation activities carried out by commissions or other bodies established with the aim of promoting gender equality and preventing discrimination[8]. Instead, it is unions who should be at the forefront of the campaign to ensure that women's health and safety at work is taken seriously[9].

Some suggestions have emerged from non-binding documents. In 2017, the Autonomous Province of Trento issued guidelines for drafting a risk assessment document with a gender perspective[10]. These guidelines emphasized the need to consider gender-specific indicators, particularly in evaluating work-related stress, taking into account household responsibilities, working hours, career development, harassment, and emotional stress factors. They also highlighted the importance of addressing reproductive risks for both men and women.

In 2013, the Milan Women's Health Work Group of the CGIL, CISL and UIL unions released a paper titled *Risk Assessment with Gender in Mind*[11], identifying several quantitative and qualitative indicators for assessing risks. Their analysis was based on the following observations:

[8] Ferrara M.D. (2019), "Il ruolo della contrattazione collettiva e la tutela della salute nei luoghi di lavoro: la prospettiva di genere", in Sclip G. (ed.), *Sicurezza accessibile. La sicurezza sul lavoro in una prospettiva di genere*, Trieste, p. 59.

[9] Trades Union Congress (2017), *Gender in occupational safety and health*, in: *tuc.org.uk*. But also, in its Guidelines, CGIL (2023), *Una prospettiva di genere su salute e sicurezza*, in: *nidil.cigil.it*, stresses that: unions should work to ensure that adequate health programs are provided in the workplace and that respond to the specific needs of female workers; campaign against any gender discrimination and any harmful practices that may result from it; pressure national, regional and local governments to adopt international laws and conventions; incorporate collective bargaining clauses that require the inclusion of occupational health as an essential tool for the elimination of workplace violence and that take into account the needs of a diverse workplace; create independent occupational health and safety committees, essential for safe work and fully inclusive of women, to monitor the conditions, organization and working methods of workers, ensuring that they take into account biological and social needs and differences among workers.

[10] Provincia Autonoma di Trento (2017), *Indicazioni per la redazione di un documento di valutazione dei rischi in un'ottica di genere*, in: *trentinosalute.net*.

[11] Gruppo Donne Salute Lavoro CGIL CISL UIL Milano (2013), *La valutazione dei rischi tenendo conto del genere*, in *lombardia.cisl.it*.

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1) women and men often perform different tasks;
2) they follow different career paths both in the labour market and within companies;
3) women and men are frequently exposed to different risks, including those that are less visible, such as violence and harassment;
4) outside of work, women and men face different constraints related to time and family care.

Most recently in 2024, INAIL issued recommendations on gender-sensitive risk assessment[12], which included risk assessment sheets tailored to a gender-oriented approach. These sheets analyze risk exposure, harm, and necessary protective measures, distinguishing between neutral, female, and male-related risks.

4. The search for gender-oriented safety measures in the Italian OSH legislation

In the absence of clear regulatory directives, how can we determine which measures are compulsory for employers in a gender-sensitive OSH approach?

Article 2087 of the Italian Civil Code, which is fundamental to safety obligations, requires employers to adopt measures that, considering the specific nature of the work, experience, and current techniques, are necessary to safeguard both the physical and moral well-being of workers.

This is a "closing rule" within the occupational safety and health system[13], open to broad interpretation in light of the right to health (article 32 of the Constitution) and the principles of fairness and good faith (articles 1175 and 1375 of the Italian civil code), which also steer the employment relationship. The employer's obligation to "*protect the physical integrity and moral personality of workers*" entails both typical and atypical measures. Typical measures are those established by law, collective agreements, or other binding provisions. Atypical measures, on the other hand, are those aimed at protecting workers' health and safety, such as safety precautions to

[12] INAIL (2024), *La valutazione dei rischi in un'ottica di genere*, in *inail.it*.

[13] Court of Cassation, Fourth criminal chamber, 30 November 2007, no. 44791; Id., Third criminal chamber, 26 January 2005, no. 6360. See S. Aprile, *Art. 2087 c.c.*, in Amoroso G., Di Cerbo V., Maresca A. (eds.), *Diritto del lavoro*, I, Milan, 2017, p. 752; Albi P. (2008), "Adempimento dell'obbligo di sicurezza e tutela della persona – art. 2087 cod. civ.", in *Commentario Schlesinger*, 2008; Albi P. (2016), "La sicurezza sul lavoro e la cultura giuridica italiana fra vecchio e nuovo diritto", *Diritto della Sicurezza sul Lavoro*, 1, p. 83.

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be implemented within the technical and operational organization of work to prevent potential harmful events.

However, in this context, the rule outlined in article 2087 of the civil code does not imply an obligation to adopt every conceivable or unspecified precaution, but rather the duty to exercise due diligence, which must be concretely identified. For protective devices, jurisprudence has cleared up that the yardstick is that of the "*highest technologically possible level of safety*"[14]. On the contrary, to date the benchmark for organizational measures has not been cleared up but, in any case, it has been traced to behavioural obligations imposed by legal sources. So, we should conclude that the obligations involved could stem from contractual good faith[15], as explained by law and collective bargaining in fields not involving security at first glance.

In addition, we must keep in mind that the Consolidated Law adopts a holistic notion of health, as the "*state of complete physical, mental and social well-being, not consisting only in the absence of disease or infirmity*" (art. 2, par. 1, lett. *o*). The rule shows an overall vision of the worker, whose risks are tackled in whole to ensure full health. Alongside the more "traditional" physical risks, the employer has also to evaluate those that we could summarily ascribe to the category of psycho-social ones connected to the interaction between the subjective characteristics of the worker (gender, age, geographical origin), the objective ones (type of contract) and the organization of work[16].

Applying these conclusions to our analysis, with regards to the exposure to physical hazard, workplace health and safety legislation traditionally made no distinction between genders. As a result, workplaces, machinery, equipment, workstations, and even personal protective equipment have been designed primarily for men of average, standardized body size and age. This same male-centric approach has been applied to the calculation of exposure limits for hazardous substances.

Exposures to dangerous substances in service occupations are frequent, but remain underassessed. Women's exposure in health care, hospitality, dry cleaning, hairdressing and waste management may also involve carcinogens. Exposures in

[14] Constitutional Court, 25 July 1996, no. 312; Court of Cassation, Labour chamber, 21 June 2019, no. 16749.

[15] Court of Cassation, Labour chamber, 11 November 2022, no. 33428; Id., 26 November 2021, no. 37035; Court of Appeal of Rome, Labour chamber, 2 March 2020, no. 75.

[16] Laforgia S. (2016), "Tutela della salute e sicurezza, benessere dei lavoratori e legalità: interconnessioni organizzative e giuridiche", *Diritto della Sicurezza sul Lavoro*, 1, p. 126. See also Monaco M.P. (2023), *Benessere, organizzazione e contratto di lavoro: una ricomposizione*, Bergamo.

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these occupations, but also in other tasks such as cleaning may be varied and are often unpredictable. This is why it is crucial to avoid assumptions about what women are exposed to and to apply the same principles of risk assessment, substitution and elimination, and the hierarchy of prevention measures as defined in EU prevention approach as for other workers. Gender differences in uptake and metabolisation of dangerous substances should also be further explored[17].

Only in recent years work clothing, safety footwear, and some types of PPE have been made available in sizes suitable for different body types. There are still relatively few studies that analyze gender-specific susceptibility to hazardous substances and biological agents. This highlights the need for new scientific research on gender differences in the workplace, which could help develop targeted strategies for the prevention of chemical and biological work-related risks. In 2018, the adoption of law no. 3 of 11 January, namely its article 3, promoted the application and dissemination of gender medicine, aimed at ensuring the quality of services provided by the National Health Service[18].

The issue becomes more complex when considering "organizational hazards". In this regard, it is difficult to assert an absolute right of the worker to obtain some benefits/changes, since it involves a legal situation that requires balancing the interests of different workers. The criterion to follow could arise from the tie-up between safety obligations and contractual good faith explained by jurisprudence. From this perspective, many regulations that may initially appear unrelated to preventive aspects can serve to define the organizational scope of the safety obligation. On the flip side, we must not lose sight on the fact that there is also a need for legal certainty on the part of the employer.

One example might be the use of anti-discrimination regulations, whereas the worker demonstrates sex-based discrimination which, despite some headlong rushes of jurisprudence and doctrine, requires proof of a relational element. Specifically, it must be shown that the treatment received is less favourable compared to what other individuals, who are not subject to the protected characteristic and are in a similar situation, have received or would receive[19].

[17] EU-OSHA (2014), *New Risks and Trends in the Safety and Health of Women at Work*, in: *osha.europa.eu*; Id. (2014), *Mainstreaming gender into occupational safety and health practice*, in: *osha.europa.eu*.

[18] See the monographic issue of *The Italian Journal of Gender-Specific Medicine*, *La normativa sulla medicina di genere in Italia*, Supplement to Volume 5, Issue 3, 2019.

[19] Consiglio E. (2020), *Che cosa è la discriminazione? Un'introduzione teorica al diritto antidiscriminatorio*, Torino; Barbera M., Guariso A. (ed.) (2020), *La tutela antidiscriminatoria*, Torino.

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Another case is the refuse to apply means of reasonable accommodation to the worker who gives assistance to a disabled person. Already in 2008, the Court of Justice, in its judgment of 17 July 2008, Case C-303/06, *Coleman*, stated that if an employer treats a worker less favourably than another in a similar situation, and it is proven that the treatment is due to the disability of their child, for whom they provide essential care, such treatment constitutes a direct discrimination set out in article 2(2)(a) of the Directive 2000/78/EC. Consequently, the caregiver worker is entitled to "reasonable accommodations", including organizational adjustments, as provided for by the Directive. Besides, with a recent order dated 17 January 2024, the Court of Cassation referred to the Court of Justice the question of whether EU law entitles the caregiver of a severely disabled child to invoke the anti-discrimination protections granted to disabled individuals under Council Directive 2000/78/EC also in the case of indirect discrimination[20].

The provisions of collective bargaining that settle work-life balance measures may also come into play: leaves and scheduling flexibility measures, such as remote work, flexible daily working hours, solidarity time bank, and provisions for reducing working hours to support employees' needs that may arise during specific periods of their lives. Viewing these clauses from a prevention perspective would help define the obligation of organizational safety and also carries many implications[21]. In fact, in the event of an injury, if a causal link is proven between the injury and the failure to implement the measure, the employer can be held liable.

Yet, it is undeniable that, in this way, the employer is burdened with a significant safety obligation, without necessary guidance. The sensitivity of the issue would require, for reasons of legal certainty, the intervention of the sources capable of managing employer's powers, i.e. the law and collective bargaining. Nonetheless, the silence on the matter still makes the gender approach an unsolved problem, still lacking a defined image.

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[21] See the analysis of Tiraboschi M. (ed.) (2024), *Welfare for People. Settimo rapporto su welfare occupazionale e aziendale in Italia*, Bergamo.

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The intersectionality of discrimination: exploring the complexities of workplace inequity for individuals with disabilities

Maria Rosaria Barbato[1], Stefano Morici[2]

1. Introduction

Workers with disabilities face multifaceted challenges in contemporary professional environments, exacerbated by intersecting forms of discrimination such as racism, sexism, and homophobia (Fuentes, 2024; Pieper, Mohammadi, 2014). This research critically examines how these overlapping oppressions hinder job equity. Ethnic minorities with disabilities encounter compounded biases in employment practices influenced by both ableism and racism, significantly limiting their career prospects (Balcazar, 2016). Similarly, women with disabilities confront dual forms of discrimination based on gender and disability, particularly evident in male-dominated sectors, which obstruct their professional advancement (Lindsay, 2023). Additionally, LGBTQ+ individuals with disabilities navigate complex layers of stigma and bias that affect their employment experiences and opportunities for progression (Shakespeare, 2006).

The concept of "infra-discrimination" is introduced to underscore disparities in the treatment of different disabilities during recruitment, exacerbating employment barriers. For example, physical impairments often receive preferential treatment over mental disabilities in intellectual roles, despite evidence demonstrating that mental disabilities, with appropriate support, do not impair job performance. Drawing on a comprehensive review

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of the literature and case law, this study identifies and analyzes the elements of intersectional discrimination experienced by workers with disabilities. The findings highlight the importance of innovative approaches to promote intersectional equity, such as targeted recruitment initiatives, tailored support services, and inclusive workplace practices designed to challenge entrenched biases (Barbato, Pereira, 2015).

Structured to begin with an evaluation of the legal foundation for disability rights at international and European levels, this article also delves into the theoretical frameworks underpinning disability laws. It proceeds with a detailed analysis of the multiple forms of discrimination and wage discrepancies experienced by workers with disabilities, adopting an intersectional perspective. The study then explores how ableism – defined as the social prejudice against individuals with disabilities – amplifies intersectional discrimination, complicating the professional experiences of disabled workers (Crispino, 2021). The final section discusses strategies for restructuring workplaces to foster a more inclusive culture that values diversity (Goodley, 2014). By shedding light on these critical issues, this study not only encourages introspection into societal norms but also aims to stimulate broader discussions and deepen understanding of this essential yet often marginalized topic in disability studies.

2. Legal framework of disability rights at the international and European level

The protection of the rights of persons with disabilities constitutes a complex and significant challenge within the framework of international and European law[3]. This paper, to give some context to the specific theme of ableism's influence on employment rights for workers with disability, will first explore the legal framework provided by the European Social Charter, the European Convention on Human Rights, as well as the strategies adopted by the Council of Europe to promote equality and combat discrimination, and other relevant international conventions. The European Social Charter[4] represents a fundamental pillar in safeguarding the rights of persons with disabilities. It establishes the principle of non-discrimination and emphasizes

[3] The main focus of this paper will be on Western experiences of liberal democracies, specifically examining the European Union, the United States, and the United Kingdom.

[4] The Charter became effective on 26 February 1965 and was established to support the European Convention on Human Rights and broaden the scope of protected fundamental rights, including social and economic ones.

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the importance of fully exercising their social, economic, and cultural rights (Harris, Darcy, 2001). This includes access to employment, education, participation in social life, and concrete measures to promote inclusion and equal treatment in the workplace. Furthermore, the Charter provides for a monitoring system entrusted to the European Committee of Social Rights to monitor the implementation of these provisions and assess the progress made by member states. The European Convention on Human Rights, while not containing specific references to disability in its original text, prohibits any form of discrimination in Article 14 of the ECHR. This article establishes the principle of non-discrimination and prohibits any form of discrimination based on disability. The European Court of Human Rights has extended its interpretation of this provision to ensure the protection of the rights of persons with disabilities, recognizing the need for specific measures to ensure equality of treatment (Lawson, Gooding, 2005).

The Council of Europe has adopted a Strategy for the Protection of the Rights of Persons with Disabilities to combat discrimination through targeted actions. This strategy focuses on eliminating discrimination through monitoring and controlling discriminatory practices, promoting equality in education and employment, and disseminating best practices.

In addition to the European Social Charter and the European Convention on Human Rights, other international conventions provide a legal framework for protecting the rights of persons with disabilities. For example, the United Nations Convention on the Rights of Persons with Disabilities of 2006 emphasizes the principles of equality and non-discrimination. It recognizes the need for specific measures to ensure access to justice, education, and employment for persons with disabilities (Quinn, Degener, 2002).

It is evident that the legal framework provided by the European Social Charter, the European Convention on Human Rights, and the international conventions, together with the strategies implemented by the Council of Europe, constitute a solid basis for safeguarding the rights of persons with disabilities.

The protection and promotion of disability rights have also garnered significant attention on the international stage. Several pivotal conventions have been established to uphold the rights and dignity of individuals with disabilities worldwide. Among these, the United Nations Convention on the Rights of Persons with Disabilities (CRPD) is a landmark treaty. Adopted in 2006, the CRPD affirms the inherent dignity and autonomy of individuals with disabilities. It outlines comprehensive measures to ensure their full inclusion and participation in society. Key provisions include non-discrimination, accessibility, equal recognition before the law, and access to justice and education (Bruce, 2002). Moreover, the CRPD emphasizes the

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importance of reasonable accommodation and the participation of persons with disabilities in decision-making processes. In fact, in an environment where accommodations for everyone are normalized, many of the micro or macro-aggressions can be eliminated from the workplace, together with the stigma surrounding disability.

Another significant convention is the International Labor Organization (ILO) Convention on Vocational Rehabilitation and Employment (No. 159), enacted in 1983. This convention addresses the employment rights of persons with disabilities. It underscores the importance of vocational rehabilitation services, job training, and employment opportunities tailored to the needs of individuals with disabilities (Thornton, Lunt, 1999). The convention advocates inclusive workplaces accommodating diverse abilities and promoting equal access to gainful employment. Besides, the World Health Organization's (WHO) International Classification of Functioning, Disability, and Health (ICF) offers a standardized framework for understanding disability. The ICF provides a holistic view of disability, encompassing not only impairments but also activity limitations and participation restrictions4. The ICF acknowledges the interaction between an individual's health condition and environmental factors, guiding policy development and service provision to enhance the lives of people with disabilities (Bickenbach, Chatterji, Badley, Üstün, 1999).

Additionally, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, adopted by the Organization of American States (OAS) in 1999, aims to combat discrimination and promote the full inclusion of persons with disabilities in the Americas. It emphasizes the rights to equality, accessibility, and non-discrimination across various spheres, including education, employment, and healthcare. The convention underscores the importance of affirmative action measures to address historical inequalities and ensure the meaningful participation of persons with disabilities in society.

International conventions play a vital role in advancing disability rights on a global scale. From the comprehensive protections outlined in the CRPD to the focus on inclusive employment in ILO Convention No. 159, these treaties serve as critical instruments for promoting equality, dignity, and social inclusion for persons with disabilities (Thornton, Lunt, 1999). By adhering to the principles and obligations outlined in these conventions, nations can work towards creating a more inclusive and accessible world for all. However, member states of these conventions or organizations must translate these principles into concrete actions by adopting effective policies and measures to promote equality and combat discrimination. Only through concrete and collective commitment will it be possible to fully realize the

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rights of persons with disabilities and ensure fair and dignified treatment for them.

The issue concerning the rights of individuals with disabilities lies indeed in the frequent disparity between legislative affirmation and practical implementation. While these laws may assert principles in theory, they often fall short of effective execution in practice (Pieper, Mohammadi, 2014). And this reflects the reality: workers with disabilities are frequently under-represented and have limited access to employment5.

3. Multiple discriminations in the workplace

Given the intersectional nature of discrimination, exploring how ableism interacts with other forms of oppression, such as racism, sexism, or homophobia, can enrich this analysis. Discussing how individuals with disabilities who belong to marginalized communities experience unique challenges can deepen understanding and inform strategies for promoting equity. Intersectionality is a critical lens to examine the complex interplay of various forms of discrimination and marginalization that individuals may experience simultaneously (Erevelles, 2011).

When considering ableism in the context of other systemic biases it becomes evident that individuals with disabilities who belong to marginalized communities face compounded challenges and barriers in the workplace.

For example, disabled individuals who are also racial or ethnic minorities may encounter discriminatory hiring practices rooted in both ableism and racism (Campbell, 2008). They may face stereotypes and biases that portray them as less competent than their non-disabled counterparts, while also contending with systemic racism that limits their access to employment opportunities or subjects them to workplace harassment and discrimination (Dolmage, 2017). Similarly, disabled women may face intersecting forms of oppression based on both their gender and disability. They may encounter barriers to advancement in male-dominated industries due to sexism and gender bias, while also facing ableism that undermines their perceived competence or suitability for leadership roles. In addition, disabled LGBTQ+ individuals may experience additional stigma and discrimination based on their sexual orientation or gender identity, further complicating their experiences in the workplace (Shildrick, 2019). Moreover, individuals with disabilities who belong to marginalized communities often have limited access to resources and support networks that can help mitigate the effects of discrimination. They may face socioeconomic barriers, inadequate healthcare access, or environmental factors exacerbating their vulnerability

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to workplace exclusion and marginalization. Also, young people with disabilities are persistently under-employed and experience concerning rates of discrimination and ableism in looking for work within the workplace. Focusing on youth is salient because rates of ableism are often higher among younger ages compared to older (Lindsay, Fuentes, Tomas, 2023).

Understanding the intersectional dimensions of ableism is crucial for developing effective strategies to promote equity and inclusion in the workforce. By recognizing and addressing the unique challenges faced by individuals with disabilities who belong to marginalized communities, organizations can create more inclusive environments that value diversity and prioritize the needs of all employees.

Strategies for promoting intersectional equity may include implementing targeted recruitment and retention initiatives and social insurance programs (Bagenstos, 2009) to increase the representation of marginalized groups, providing culturally competent support services and accommodations, and fostering a workplace culture that actively challenges stereotypes and biases. Additionally, collaborating with community organizations and advocacy groups representing intersecting identities can help ensure that the experiences and perspectives inform the diversity and inclusion efforts of those most affected by multiple forms of oppression.

To conclude, intersectionality provides a nuanced framework for understanding the complex ways ableism interacts with other forms of discrimination to shape the experiences of these individuals in the workforce. By acknowledging and addressing intersecting inequalities, governments, employers and syndicates can work towards creating more equitable and inclusive environments for all employees.

4. Redesigning workplaces for a more inclusive culture

In the modern employment landscape, workplaces stand as the place where individuals converge to contribute their skills, ideas, and expertise. However, within this realm, a sad reality persists: many workplaces are not designed to accommodate the diverse ways in which individuals think, learn, or navigate society. They lack accessibility, and inclusivity, and often fail to foster a sense of belonging among their employees. This deficiency in an organizational culture not only inhibits the potential of individuals but also handicaps the collective strength of the company itself.

To begin, it is crucial to acknowledge the myriad ways in which individuals perceive, process, and interact with the world. Neurodiversity, for instance, encompasses a broad spectrum of cognitive variations, including autism,

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dyslexia, ADHD[5], and others. These differences in cognitive functioning can profoundly influence how individuals approach tasks, problem-solving, and communication. Yet, traditional workplace structures often favor a narrow range of cognitive styles, inadvertently excluding those who think differently. Moreover, workplaces frequently overlook the importance of inclusive design in physical and digital spaces. From inaccessible buildings, lacking ramps or elevators, to social accessibility factors damaging individuals with disabilities, many environments pose barriers to full participation (Prescott, 2020). This lack of accessibility not only alienates employees with disabilities but also deprives organizations of the unique perspectives and talents they can express. Furthermore, the absence of representation in company cultures exacerbates feelings of isolation and marginalization among underrepresented groups. Whether it is the absence of diverse voices in decision-making processes, the perpetuation of discriminatory practices, or the failure to address microaggressions, these factors contribute to a toxic work environment where certain individuals feel invisible or undervalued. Employers may hire people with disabilities for jobs, but many individuals with disabilities are, in fact, still not treated equally once they begin working in these positions: this is especially true for people who have disabilities that may be considered invisible (Crispino, 2021).

All this represents nothing more than another reflection of ableism in employment. In light of these challenges, organizations must undertake a comprehensive reassessment of their company cultures and practices.

Firstly, fostering an inclusive culture requires understanding and accommodating diverse perspectives and cognitive styles. This involves implementing flexible work arrangements, providing neurodiversity training for managers and employees, and creating support networks for individuals with disabilities.

Secondly, organizations must prioritize accessibility in all operations, from physical infrastructure to digital platforms. Investing in inclusive design not only ensures compliance with legal regulations but also demonstrates a genuine commitment to equity and inclusion. By consulting with individuals with disabilities and incorporating their feedback into the design process, companies can create environments that are welcoming and empowering for all.

Lastly, promoting representation and belonging necessitates proactive efforts to diversify leadership, elevate underrepresented voices, and cultivate a culture of respect and empathy. This may involve establishing affinity groups

[5] ADHD, or Attention-Deficit/Hyperactivity Disorder, is a neurodevelopmental condition causing persistent inattention, hyperactivity, and impulsivity that affect daily life.

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or conducting regular diversity and inclusion assessments to identify areas for improvement. Anyway, while policies and cultural shifts play a vital role in fostering inclusion, some argue that true progress hinges on individual action. This viewpoint emphasizes the importance of personal responsibility in dismantling bias and creating a more equitable work environment. Proponents of this perspective acknowledge the limitations of external structures. Policies, they argue, can be circumvented, and cultural change is often slow and uneven. Instead, they advocate for a focus on individual mindset and behavior (Banaji, Greenwald, 2013). This involves challenging our own unconscious biases and actively working to overcome them. By becoming aware of how our personal experiences and societal norms can influence our perceptions, we can make conscious choices to be more inclusive. This approach emphasizes the power of everyday interactions. It encourages us to question our assumptions, listen actively to diverse perspectives, and intervene when we witness microaggressions. By holding ourselves and others accountable for generating a respectful and inclusive environment, we can create a ripple effect of positive change. This is not to say that individual action negates the need for systemic change. Rather, it highlights the importance of a two-pronged approach. Effective policies provide a framework for inclusion, while individual commitment ensures its implementation in the day-to-day interactions that shape workplace culture. Ultimately, creating a truly inclusive workplace requires a combination of top-down and bottom-up efforts. By working both individually and collectively, we can dismantle the barriers that perpetuate discrimination and build a more equitable work environment for everyone. Ableism reflects a way of thinking that represses openness to understanding what is different. These modalities should be combated first and foremost with the aforementioned personal awareness of what cognitive biases and mental closures of others prevent workers with disabilities from fully entering the world of work (and even more in general, society).

Ableism acts as a barrier to inclusion by shutting down our willingness to learn about different abilities. To dismantle these obstacles, we must first recognize our preconceptions and how they unconsciously limit opportunities for disabled people. Shifting our mindsets is crucial for creating truly effective policies. Without this change, inclusion efforts become performative exercises in meeting quotas, failing to achieve genuine integration. By changing the language and thinking of each of us regarding this issue, we can subsequently develop real policies for employment inclusion in a more effective way. Otherwise, it becomes mere legal compliance with certain norms, which can hardly achieve full inclusion.

In conclusion, the current state of many workplaces, unfortunately, still reflects a systemic failure to accommodate the diverse needs and experiences

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of individuals. However, by embracing the principles of inclusivity, accessibility, and representation, employers have the opportunity to unlock the full potential of their employees and create environments where everyone can thrive. Only through collective action and a genuine commitment to change is possible to dismantle the barriers and flourish in a new era of inclusivity and belonging.

5. Conclusions

Within the multifaceted discussions surrounding the intersectionality of discrimination and its impact on workers with disabilities, it becomes evident that it intersects with various forms of oppression, including racism, sexism, and homophobia, creating compounded challenges in the workplace. The exploration of how individuals with disabilities navigate these intersecting biases reveals the complexities of systemic discrimination and marginalization they face.

From discriminatory hiring practices to wage disparities and societal stereotypes, disabled individuals from marginalized communities encounter compounded barriers that limit their access to opportunities and hinder their professional advancement. Moreover, the pervasive influence of ableism perpetuates a narrative of deficiency rather than ability, undermining the contributions and worth of disabled workers.

However, amidst these challenges lies an opportunity for meaningful change. By recognizing and addressing the unique experiences of individuals with disabilities who belong to underrepresented communities, organizations can foster more inclusive environments that prioritize equity and diversity. Strategies such as targeted recruitment initiatives, culturally competent support services, and real inclusive workplace policies can help dismantle entrenched biases and create pathways for equal participation and advancement. This research serves as an effort to prioritize the voices and experiences of disabled workers from marginalized communities and to work collaboratively toward building more inclusive and equitable workplaces.

This study does not just provide an academic analysis it also strives to stimulate personal reflection around the theme of disability rights and encourages broader societal discussion. By shedding light on the often overlooked intersectional discrimination faced by workers with disabilities, it aims to spark change in attitudes and policies. Through concerted efforts and a commitment to intersectional understanding, it is possible to create a future where every individual, regardless of their abilities or identities, is valued, respected, and empowered to thrive in the workforce.

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Part V
Digitalization, AI and employment

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Digital Platforms and Labor Law in Switzerland: a subordination to the algorithm

Jean-Philippe Dunand[1]

1. Introduction

By promoting self-employment and pluriactivity, digital platforms are changing the employment relationship. It is true that platform service providers currently constitute a small proportion of the working population. The service provided by a platform is often a secondary activity that is carried out in addition to another dependent or independent activity. However, it is likely that the platformisation of social and economic relations will progress in such a way that it may one day become the dominant mode of labour relations!

Platform owners require service providers, at the time of hiring, to accept non-negotiable general terms and conditions (membership contracts) containing, inter alia, a clause on applicable law (e.g. Dutch law) and arbitration (e.g. exclusive jurisdiction of an arbitrator in Amsterdam), and according to which they acknowledge that they are self-employed "partners" or self-employed entrepreneurs (or micro-contractors). Platforms thus intend to free themselves from the obligations of an employer (working hours, minimum wages, health protection, etc.) and from the payment of social security contributions. They also constitute a form of unfair competition to established trades and regulated professions (e.g. taxi drivers). They also aim to avoid the application of the rules of the state where the service is provided and to deprive providers of their natural forum.

In recent years, digital meal delivery and private transport platforms (most often Uber) have been in the news. In many countries there are disputes about the legal contours of the platform. Are service providers

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acting as independent self-employed entrepreneurs (or partner-entrepreneurs who would be "*their own employers*"), as the platform owners claim, or as dependent workers?

In two rulings issued on May 30, 2022, concerning meal delivery couriers and drivers operating through a digital platform managed by Uber, the Swiss Federal Court (FC, the highest judicial authority in the country) addressed this question. To legally characterize the contracts concluded between the parties, the Swiss Supreme Court examined the criteria of legal subordination and dependency, which are essential to determining the existence of an employment contract. The Court found that the couriers and drivers were subordinate to the algorithms used in the management of the platforms.

Before presenting the reasoning of the Federal Court (FC) and the key considerations in these landmark rulings (Section 3), we aim in this brief contribution to describe the concept of subordination in Swiss labor law (Section 2). We will then conclude with some historical reflections on the evolution of subordination and dependency in labor relations from antiquity to the present day (Section 4).

2. The concept of subordination in Swiss Labor Law

According to Article 319(1) of the Swiss Code of Obligations of March 30, 1911, "*an employment contract is a contract under which the employee undertakes to work for the employer for a fixed or indefinite period, and the employer undertakes to pay a salary determined by time worked or the work performed*". While the concept of subordination is implied in the phrase "to work for", it is not explicitly defined in the law. Over time, case law has expanded the scope of subordination from functional subordination to organizational subordination, and later to economic subordination.

Thus, in the standard reasoning of its case law, the Federal Court emphasizes that the

> essential characteristic of an employment contract lies in the existence of a relationship of subordination, which places the employee in a position of dependence on their employer from personal, organizational, and temporal perspectives, as well as, to a certain extent, an economic one[2].

[2] FC 121 I 259, c. 3a; FC 4A_53/2021, c. 5.1.3.1. For a detailed analysis of the constituent elements of the subordination relationship, see Billarant (2020), *Pour une approche nouvelle du rapport de subordination en droit privé Suisse du travail*, Geneva/Zurich/Basle, pp. 31 ff; Dunand (2022), "ad art. 319 CO", in *Commentaire du contrat de travail*, Bern.

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The employee is subject to the supervision, orders, and instructions of the employer; they are integrated into the work organization of another party and assigned a specific role within it. In principle, instructions that go beyond mere general guidelines on how to perform the task, influencing the subject and organization of the work and establishing a right of control by the beneficiary, indicate the existence of an employment contract[3].

However, this does not mean that the employer must necessarily provide technical instructions to the employee. Indeed, when the employee's activity requires specific technical expertise, it is possible that only the employee, and not the employer, possesses such knowledge[4]. The criterion of subordination must be relativized with regard to workers who hold managerial positions or practice liberal professions (lawyers, doctors, veterinarians, etc.). Indeed, in these cases, since the employee's independence is much greater, subordination is essentially organizational in nature[5]. To assess the existence of a relationship of subordination, one must then rely on the overall picture of how the service provider is integrated into the company[6]. Arguments in favor of an employment contract will include: a fixed and periodic salary; the provision of a workplace and tools; as well as the employer assuming the business risk. The employee renounces participating in the market as an entrepreneur assuming economic risk and entrusts a third party (the employer) with the exploitation of their services, in exchange for a guaranteed income[7].

Finally, economic dependency is also a typical aspect of an employment contract[8]. What is decisive is the fact that, in the context of the work the employee is required to perform, other sources of income are excluded, and they cannot influence their income through their own entrepreneurial decisions. A sign of such dependency is the fact that a person works exclusively for a single employer, or that they lack independence in managing their labor force. These signs are strengthened when the parties agree to a prohibition on engaging in any similar economic activity. However, the criterion of economic dependency must sometimes be relativized, as such dependency can exist in other types of contracts besides the employment contract, on the one hand, and it does not necessarily exist in all employment contracts, on the other hand[9].

[3] FC 4A_53/2021, c. 5.1.3.1.
[4] FC 4A_64/2020, c. 6.3.1.
[5] FC 4A_592/2016, c. 2.1.
[6] FC 4P.83/2003, c. 3.2.
[7] FC 4A_592/2016, c. 2.1.
[8] FC 4A_53/2021, c. 5.1.3.2.
[9] FC 4A_592/2016, c. 2.1.

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3. Subordination to the algorithm of meal delivery couriers and drivers active on platforms controlled by Uber

In two rulings of 30 May 2022, the Federal Tribunal ruled that drivers active with the "Uber" transport service[10], as well as delivery personnel active with the "Uber Eats" meal delivery service[11], were bound by an employment contract with "Uber Switzerland GmbH"[12]. We will cite the relevant consideration here:

> In view of the facts, it is not arbitrary to consider that the drivers heard by the Cantonal Labour Office performed a paid service for [the Uber company] over a period of time, since they carried out hundreds of journeys in return for a price fixed unilaterally by it.
>
> In addition to the fact that [the company] has complete control over the prices of the journeys, it follows from the judgment under appeal that it regulates precisely the way in which the transport service is to be provided, in particular by giving instructions as to the vehicle and the behaviour to be followed by the drivers, and by fixing the route to be followed.
>
> Drivers are not free to organise their work once they are connected to the platform, and repeated refusals to give rides are punished by deactivation of the account for a fixed period. Geolocation also makes it possible to monitor the activity of drivers. In particular, a route deemed inefficient may be sanctioned by a reduction in the price of the journey.
>
> Drivers are also controlled and monitored via the rating and complaint system, although they do not have the possibility of knowing who has made a rating or complaint and an account can be deactivated while the complaint is being processed, at the sole discretion of [Uber].

As these high courts have noted, Uber exercises, through the intermediary of algorithms, a power of direction, control, evaluation and sanction which are characteristic of the subordination link specific to the employment contract. Numerous direct constraints weigh on the service providers (tasks to be carried out according to a rhythm and order established by the algorithm, time and place constraints, imposition of the price of the rides, obligation to report, etc.), who are also constantly monitored in real time.

Algorithmic (or technical) subordination is more generally characterised by the fact that it is not the employee or the employer who defines how the work is to be performed, but the algorithm.

[10] FC 2C_34/2021.

[11] FC ATF 148 II 426, c. 6.

[12] For a commentary on these two judicial decisions, see Wyler/Heinzer/Witzig (2024), *Droit du travail*, Bern, pp. 28 ff.

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The issue inevitably caught the interest of political authorities. Thus, Swiss parliamentarians tasked the Government with studying the creation of a new status for "platform workers", granting them reduced social coverage, which would be halfway between employment and self-employment. In a report dated October 27, 2021, the Government concluded that it was not necessary to create such a status, as the Swiss social security system is flexible enough to adapt to new forms of work, not only at the level of social insurance but also in terms of social protection related to labor law.

4. Conclusion

In a previous contribution, we aimed to provide a historical overview of the evolution of labour relations from Roman antiquity to the present day[13].

More specifically, we have identified six typical workers whose activity was part of a labour relationship characteristic of a particular period:

- the slave of Roman antiquity;
- the serf of the Middle Ages;
- the companion craftsman (journeyman) of the modern period;
- the factory worker at the time of the second industrial revolution;
- the office worker of the 2000s, as well as
- the provider of a digital platform (such as the Uber driver) in our 4.0 economy.

We focused on the modalities of nature of the worker's dependence on the person in whose service and for whose benefit he or she performs the work.

For each period there is a common and a specific element.

The common element is a relationship of dependence and personal subordination. This link is reinforced by a specific link of dependence or servitude:

- the slave is subordinate to his master and to his condition as a chattel;
- the serf is subordinate to his lord and to the land which he cannot leave;
- the journeyman is subordinate to his master craftsman and to the corporation that governs the trade practiced in the town concerned;
- the worker is subordinate to his boss and to the factory machine;

[13] See Dunand (2022-2023), "From Stichus the Slave to the Uber Driver, Six Forms of Subordination in the Employment Relationship", in Sartoniana, *Sarton Chair of the History of Sciences Ghent University*, Belgium, vol. 36, pp. 55 ff.

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– the office worker is subordinate to the employer and to the company's computer program;
– finally, the provider of a digital platform is subordinate to the owner of the platform and the algorithm by which it operates.

Thus, labour relations are characterised by a strong bond of legal dependence (subordination) and economic dependence (means of subsistence) of one person, the worker, on another.

Is there a way out of this model, which we have known at least since antiquity? Some note that an important transformation is underway in which co-production within value-creating platforms is tending to become an important modality for the exercise of work[14]. In such a context, where each person is his or her own employer, we can envisage a society in which there would no longer be any hierarchy or subordination, nor any wage-earning system. The work of the future would then hardly differ from leisure…

[14] See Méda (2022), *Le travail*, Paris, pp. 84 f.

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Hiring procedures and the use of Artificial Intelligence: challenges and perspectives

Alessandro Bellavista, Alessandro Riccobono[1]

1. Introduction

This paper aims to explore the key challenges posed by artificial intelligence (AI) in the pre-hiring context. As evidenced by several research studies, the use of AI technologies along recruitment procedures has become widespread in recent years.

It is widely believed that AI tools can improve the functioning of labor market, for example by increasing job matching opportunities or improving the functioning of active policies, especially during job-to-job transitions.

It is also known that big companies all over the world are increasingly adopting advanced AI systems to select the most suitable candidates for open positions: CV are filtered by applicant tracking systems, interviews are conducted by chatbots or robot-avatar, soft skills are assessed by multimedia platforms and many other hiring tools are going to be developed by tech industries which have "smelled" the importance of the e-recruitment business.

Just think about Vera, Ikea's hiring robot which can recognize emotions and non-verbal aspects of communication, even analyzing the speed, the confidence, or the hesitation with which the candidate responds to its questions.

Another cutting-edge practice in Human Resource Management (HRM) is the screening of candidates' social media. Human resource managers are now used to search into virtual communities to gather information about job applicants or to scout out candidates who are not even job seekers: peeking into the Facebook walls allows not only to uncover their skills, education and early careers experiences, but also to learn as much as possible about their

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personality. DeepSense, for example, is a software that evaluates people's social behaviors based on everything they post on their social profiles. On the other hand, Mc Donal's tested a recruitment campaign through Snapchat, to assess soft skills and creativity of a very large number of applicants attracted by this way of submitting their application.

In recent times, Artificial Intelligence is already being used in Italy's labor market. A recent provision (art. 26, d.l. 7 May 2024, n. 60, as known as "Cohesion Decree") allows the use of AI to increase the employability chances of individuals in transition or receiving public subsidies. This means that, in the near future, the consistency between job offers and the candidates' skills, abilities and experience will be assessed through the use of automated systems and no longer by employment office agents.

2. The workforce analytics in hiring decisions: opportunities and risks

Actually, the success of the "workforce analytics" is having an unstoppable expansion because of the widespread opinion that algorithms can help (and perhaps even replace) human decisions. Many developers, and also some scholars, believe that intelligent machines can perform better than human intelligence and could lead to neutral and efficient decisions: the idea is that profiling candidates by algorithmic matching models would allow for automated assessments of their potential talent and prevent counterproductive behaviors. Most importantly, it handles large selection processes in a short time with huge cost savings.

While the potential of these AI tools is remarkable, it is important to recognize their limitations and potential pitfalls. As everybody knows, human intervention is always needed to select the input dataset through which artificial intelligence systems are trained. This is why social biases or discriminations can occur at various stages of the process of machine learning, as the famous Amazon case revealed.

Additionally, the algorithmic management is generally affected by lack of transparency and raises privacy concerns due to the informational asymmetries that surrounds the employment relationship. Employers are not obligated to disclose their selection criteria, so the use of automated decision-making remains opaque, especially when based on profiling conducted on social media, which the job seekers may be unaware of.

For these reasons it would be essential that algorithmic management to be driven by the principles of transparency, accessibility, and understandability of automated decisions. Moreover, it should be ensured that these principles

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can be enforced by workers or their collective representatives. Indeed, the "black box" effect can be effectively countervailed if a serious right of participation (or even better a right of negotiation) is granted to workers' unions during the phase along which the algorithm is being built and before it is put into operation.

3. The AI Act and its implications for workers' rights in the hiring process

In the above scenario, the regulatory framework is evolving to address the risks of uncontrolled use of artificial intelligence. First of all, the European Regulation on Artificial Intelligence 2024/1689 (AI ACT) – the world's first comprehensive binding AI regulation recently approved by the Council of the EU – aims to regulate AI systems by focusing on risk management to safeguard individuals' security and fundamental rights.

Recruitment tools are classified by Article 6 of the Regulation as high-risk AI systems and must comply with narrow requirements either for providers and deployers who are employers. These rules apply to AI systems intended to be used in the hiring context, e.g. to place targeted job advertisements, to analyse and filter job applications, and to evaluate candidates.

In particular, AI systems intended to be used for recruitment purposes will have to meet the compliance requirements of Section II of the Regulation, while providers and deployers will have to meet the obligations of Section III, which set the guiding principles of transparency, human oversight and governance of data input during machine training, in order to prevent the risk of statistical or cognitive biases and their discriminatory effects.

Moreover, the AI Act mandates human control and supervision throughout the AI system's lifecycle, to ensure that there is a "human in the loop" and give individuals a right to contest automated decisions. This means that candidates assessed by automated systems have the right to understand how decisions are made and eventually challenge the outcome.

In addition, deployers who are employers shall inform workers' representatives and the affected workers that they will be subject to the use of an high-risk AI system: as we have said, this can be seen as a missed opportunity, since the effectiveness of the principle of transparency can only be truly guaranteed if trade unions are involved in the design of the algorithm, giving them the opportunity to negotiate the data on which the software source code is based.

On the other hand, it is important to underline that many systems that could be used in personnel selection may fall among those prohibited by the

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AI Act, as they pose unacceptable risks to human safety and dignity: article 5 of the Regulation considers as a forbidden practice the use of AI systems for social scoring purposes, or to infer emotions of a natural person in the workplace, or even the use of biometric categorization to deduce or infer sensitive data like political opinions, trade union membership, religious or philosophical beliefs, sex life or sexual orientation.

It should be noted that this kind of tools is not directly related to labor and employment; however, their potential utility in human resource management, particularly in large-scale recruitment processes, cannot be ignored.

The ban of their use is therefore very significant to protect fundamental rights.

Consider, for example, a system that evaluates candidates' behavior through social media analysis and assigns disproportionate scores that could affect their chances of getting a job: a Facebook post showing a young student consuming an alcoholic beverage at a graduation party could be enough to label a person as a potential alcohol addicted?

Again, let's think about the tools for the emotional recognition. Their use is forbidden when they are draw on the areas of workplace, while they seem to be allowed to assess those who have not yet been hired. While there are serious concerns about the discriminatory effect led by emotional recognition tools, it is worth asking why the ban on the monitoring of this intimate aspects can only affect those who have already found the job and not even those who are searching for it.

As we know, many types of these applications are already traded in non-European markets. For this reason, it is essential that future guidelines be implemented to distinguish between permitted high-risk systems and those that are prohibited because they pose an unacceptable risk to personal freedom and fundamental rights.

4. The "golden triangle" in the Age of AI: privacy, anti-discrimination and transparency

While we wait for the rules of the AI Act to completely entry into force, the fundamental rights of workers remain entrusted to the protections which run along the "golden triangle" consisting of privacy, anti-discrimination law and transparency.

Additional protection can be provided by Member State legislation, which always operates as a best-favored discipline over the rules of the AI Act and other relevant European sources.

In Italy, the most significant protection is provided by Article 8 of the

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Workers' Statute (L. n. 300/1970), which imposes restrictive conditions on the control over workers' private lives since from the pre-employment stage.

This provision prohibits employers from inquiring into workers' political, religious, or union opinions, and prevents inquiries into facts that are not relevant to the evaluation of the employee's job performance. To the opposite, it implicitly allows the evaluation of aspects of private life that appear to be closely related to the duties to be performed. It is agreed that Article 8 of the Statute plays a fundamental anti-dominance function in the workplace and can be considered insensitive to the progress of technology: it doesn't matter whether the monitoring is done by investigative agencies or by artificial intelligence systems, what count is that any kind of information that is not strictly relevant to the working relationship cannot be assessed, even when it is widely shared on social networks.

On the second hand, the General Data Protection Regulation (GDPR) (Regulation n. 2016/679/EU) provides key protections for the dignity and privacy of working people, especially when their personal data is processed for profiling purposes in automated hiring decisions.

Article 22 of the GDPR establishes that automated individual decision-making, including profiling, is not allowed, except when it is necessary for enter into a contract, as the employment contract could be.

In this case employers must implement safeguards to protect the worker's rights and freedoms. In particular, they are required to provide workers with clear and understandable information about how any automated decision will be taken, while workers have the right to obtain human intervention, to express their viewpoint and to contest the outcome. This means that the employer must reveal how profiling works and what kind of decision can be taken on the basis of the profile generated, so that a job seeker can check the legality of the procedure of recruitment along all its stages.

Moreover, case law has already shown that algorithms are not neutral. The judicial enforcement of anti-discrimination law have already dispelled the myth of the impartiality of algorithmic management in many European countries, specifically in the context of the access to employment opportunities: in Italy, "Glovo" and "Deliveroo" cases showed that the reputational ranking systems used by the food delivery platforms can lead to indirect discrimination during shift assignments and penalize workers engaged in trade union activities, family caring or religious activities.

Last but not least, the Directive 2019/1152/EU on transparent and predictable working conditions imposes additional information requirements to be fulfilled by the entrepreneur, and its implementation into Italian law has further strengthened workers' rights: employers must provide detailed information to workers on the terms and conditions of their job, including

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how any automated decision-making or monitoring systems may impact their work.

Workers can also request additional details, either directly or through collective representatives.

These provisions aim to enhance the right of explanation – now formally enshrined in Article 86 of the AI ACT – so that workers can eventually assert their rights in court.

5. Concluding remarks

As AI technology continues to evolve, the future of recruitment will likely see a balance between automated systems and human expertise. While AI can enhance efficiency and provide valuable insights, human oversight remains crucial to ensure ethical and fair hiring practices. The evolution of legal frameworks and best practices is essential to protect workers' rights and dignity in the evolving work environment.

In this light, it can be said that European legal system is already well equipped to face the challenges of Artificial Intelligence applied to labor relations, and this allow us to look at the future with a certain optimism: despite some people think otherwise, we can argue that artificial intelligence will not steal work from humans but will continue to be human-led.

As we know, technology runs faster than the legal basis, but history teaches us that the law always succeeds in pursuing and achieving the technological development. Once again, we can bet that the quest for social justice for those who work in a changing world will not be lost.

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The effects of the teleworkability divide on the labour market

Matteo Turrin[1]

1. Introduction

As a result of its spread during the Covid-19 pandemic, telework has become a long-standing subject of study by labour law scholars, who have pointed out its potential and limitations. On the one hand, the flexibility inherent in telework is likely to favour the achievement of a better work-life balance and the inclusion of workers with disabilities, representing a reasonable accommodation; on the other hand, the same flexibility that makes it possible to work "anytime, anywhere" may conversely be the cause of the phenomenon known as work-life blending, generate work-related stress and expose workers to psychosocial risks to their health and safety (Eurofound, International Labour Office, 2017).

However, the study of telework as a source of inequalities in the labour market is still under-researched, at least by labour law scholars. This is probably because when it comes to telework, there is a tendency to focus on teleworkers, ignoring workers who do not perform it.

Yet, telework has exacerbated social and economic inequalities among workers (Seghezzi, 2022), since, for a wide number of reasons, not everyone can perform it and enjoy the related benefits. In other words, as we are about to see in the following paragraphs, telework is not for everyone (Brollo, 2021). Thus, from being a means of work-life balance and inclusion, telework has often turned into a means of exclusion for certain categories of workers (Brollo, 2021; Zwysen, 2023). In this respect, we can talk about a "teleworkability divide" (Bérastégui, 2021, p. 7).

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At a time of increasing digitalisation of work, this divide risks undermining social justice and equality among workers, fostering an unfair distribution of wealth, rights and opportunities. In other words, social justice appears to be at stake, as both telework and the teleworkability divide are not likely to disappear in the foreseeable future. For this reason, the teleworkability divide must be considered a matter of interest not only for sociologists and economists, but also for labour law scholars.

In the following paragraphs, we will outline the reasons for the teleworkability divide and the associated risks while proposing some possible solutions. The analysis will focus mainly on the Italian situation, but the baseline data on which the research is based are at least partially common to most European countries. So, the main findings that will be presented here could be validly extended to many other countries.

Finally, it seems appropriate to point out that by using the term telework, in this context, we are referring to situations where the work activity is wholly or partly performed outside the company premises on a continuous basis using electronic devices (ILO, 2020). So, referring to the Italian legal system, both teleworking (*European Framework Agreement on Telework*, 2002) and agile working (Law No. 81/2017) are to be considered included.

2. The teleworkability divide: causes, consequences, and solutions

2.1. Causes and consequences

As stated above, telework is not for everyone, while its spread is becoming more and more consolidated. This circumstance, unfortunately, risks heightening disparities between those who can and those who cannot work remotely.

Although it may seem obvious, it is worth remembering that not all tasks can be performed remotely, since the work performance characteristics may not be compatible with telework. Teleworkability, which is to be understood as the technical possibility of providing labour input remotely into a given economic process, basically depends on three variables: task contents of work, methods of work, and tools of work (Sostero *et al*., 2020). Other relevant factors are workers' position in the internal organisational hierarchy, availability of ICT devices and digital infrastructures enabling remote working, workers' and companies' affinities with digital technologies, organisation and management cultures (Cetrulo *et al*., 2020; Sostero *et al*., 2020). Moreover, telework seems to be more common in big companies than in small and medium-sized enterprises (Depalo, Giorgi, 2021; Cetrulo *et al*.,

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2022). However, "*the ultimate determinant of occupational teleworkability is the lack of physical handling tasks*" (Sostero *et al*., 2020, p. 6). Jobs involving similar tasks cannot be performed remotely, while all other jobs, in principle, may be performed remotely (Duranti *et al*., 2020; Rani, 2023). Thus, not surprisingly, "*a first striking difference in teleworkability relates to the white-collar/blue-collar occupational divide. White-collar work is much more teleworkable than blue-collar work, where the physical requirements of the jobs and associated place-dependence render most occupational categories non-teleworkable*" (Sostero *et al*., 2020, p. 46). So, the teleworkability divide is not neutral, since the largest share of those who can work remotely are concentrated in specific sectors and specific occupational categories (Duranti *et al*., 2020; Sostero *et al*., 2020; Bergamanti *et al*., 2022; Cetrulo *et al*., 2022). Indeed, telework is more common among professionals, workers with higher educational qualifications or occupying managerial positions (Sostero *et al*., 2020; Depalo, Giorgi, 2021; Bergamanti *et al*., 2022; Cetrulo *et al*., 2022). The fact that the occurrence of telework increases with increasing educational qualifications reveals a gap between skilled occupations associated with high human and technological capital and generic or low-tech jobs (Sostero *et al*., 2020; Bergamanti *et al*., 2022; Cetrulo *et al*., 2022). Moreover, workers in jobs that can be performed remotely usually have higher remunerations (Dingel, Neiman, 2020). From this point of view, it seems correct to state that telework is more a privilege for a few occupations rather than a generalised possibility (Cetrulo *et al*., 2020). In fact, according to a variety of empirical studies, many workers who can work remotely "*tend to belong to the upper echelon of the occupational distribution, are better remunerated and employed with permanent contracts*" (Cetrulo *et al*., 2022, p. 8), while "*most low-skilled and low-income occupations are not teleworkable*" (Bérastégui, 2021, p. 8).

As mentioned above, this teleworkability divide is not neutral. On the contrary, it risks further aggravating inequalities in the labour market. Indeed, the Covid-19 pandemic has shown that, due to the teleworkability divide, some workers are more likely than others to experience job insecurity and financial uncertainties (Adams-Prassl *et al*., 2020; Bérastégui, 2021; Cetrulo *et al*., 2022). On the one hand, "*workers who have not the opportunity to telework are at increased risk of temporary layoff or furlough, and even permanent termination on economic grounds*" (Bérastégui, 2021, p. 7). On the other hand, "*workers who can telework are those that during the Covid-19 crisis were more likely to be still in employment, more likely to have worked the same or similar working hours as pre-outbreak and less likely to have suffered declines in income than those who were not telework-capable*" (Sostero *et al*., 2020, p. 59). So, it is not wrong to state that, during

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the Covid-19 pandemic, telework has led to an increase in the average wages of those who have been able to perform it, thus increasing economic inequalities and, in particular, the already existing gender pay gap (Cetrulo *et al*., 2020; Bonacini *et al*., 2021; Carchio, 2022). Indeed, since the possibility to work remotely increases with income level, the increase in average labour income associated with a boost in the technical feasibility of telework would not be equally distributed among employees, favouring male, older, high-educated and high-paid workers (Bonacini *et al*., 2021).

Besides the economic inequalities between workers who can work remotely and those who cannot, it is worth stressing that the employability of the latter seems at risk in a context of increasing digitalisation of work. Indeed, digital skills and the ability to work remotely are two increasingly important requirements within the modern labour market. So, workers unable to work remotely and handle digital technologies – such as, for instance, older workers – are more liable to experience poor socio-economic conditions associated with generic or low-tech jobs and even to be excluded from the labour market. From this point of view, it seems correct to state that the teleworkability divide is just another side of the digital divide, as the former worsens the very same disparities deriving from the latter.

Moreover, it is worth remembering that workers who cannot work from home are excluded from the possibility of enjoying an important and well-appreciated work-life balance arrangement.

Finally, on a broader scale, the teleworkability divide risks exacerbating existing regional inequalities. Indeed, as a direct consequence of the cleavage between white-collar and blue-collar workers, "*the teleworkable employment shares are predictably higher among service sectors with high shares of white-collar employees*", while "*the primary sector, manufacturing and construction sector all have low shares of teleworkable employment*" (Sostero *et al*., 2020, 47). In turn, "*differences in industrial structures is one of the main factors explaining varying prevalence of telework across EU countries*" (Sostero *et al*., 2020, 14), as well as across regions of the same country (Duranti *et al*., 2020). One more time, these differences are not neutral, since, given the current trend of digitalisation of work, they will probably emphasise disparities between more and less developed regions across the European Union. In other words, considering the above-mentioned characteristics of remote workers, "*a continuing expansion of telework may become a factor in further differentiation between the most economically developed regions (capital and urban) and the least economically developed regions (rural) in Europe*" (Eurofound, European Commission Joint Research Centre, 2024, p. 27). Indeed, the regional distribution of teleworkable jobs and internet connectivity, which are the main drivers of telework, is higher in the most

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urbanised and developed regions (Eurofound, European Commission Joint Research Centre, 2024). So, a shift towards widespread telework, which seems very likely in the future, risks favouring only the most economically developed regions of the European Union.

2.2. Possible solutions

In order to counteract the effects of the teleworkability divide, action is required on several levels.

First and foremost, "*workers in jobs that are not teleworkable should be provided with additional social safety nets in order to protect them from the financial uncertainties associated with pandemics and large-scale disasters*" (Bérastégui, 2021, p. 8). This is a key measure (Pelham *et al*., 2011), since, given the current productive structure, a massive and immediate transition to telework seems unfeasible, while it looks like pandemics and large-scale disasters affecting the world of work will become the "new normal" in the next future (JILPT, 2014; Tiraboschi, 2014, Tomassetti, 2018). Indeed, natural disasters related to climate change are becoming increasingly common. So, a kind of permanent relief fund should be implemented to supplement the payment of wages lost due to these unpredictable but not rare events. In other words, it would be appropriate to institutionalise the wage supplement scheme already experienced by many countries, including Italy, during the Covid-19 pandemic (Canavesi, 2022).

However, in addition to measures of this kind, there is also a need for long-term ones and, in particular, for policies aimed at developing the digital skills required to work remotely and enabling broad categories of workers to take an active part in the ongoing labour transformation process (Bianco, 2018; Bonacini *et al*., 2021; Garbuio, 2023). The boost given by the Covid-19 pandemic and digitalisation will probably make telework a lasting feature in work organisation. From this point of view, digital skills are an enabling factor, if not an actual requirement, for access to telework and many kinds of jobs (De Falco, 2022b; Nardelli, 2022; Occhiocupo, Pedone, 2023). Therefore, the fact that many workers do not have these skills risks sharpening existing inequalities in the labour market, excluding these groups of workers from well-paid and secure jobs. On the contrary, appropriate training initiatives might narrow the disparities resulting from both the digital divide and the teleworkability divide, improving the employability of those at a particular disadvantage in the labour market. The same applies to access to technological infrastructures and possession of the necessary working tools to work remotely. If the tools under discussion

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are essential for the purpose of working remotely, but are not granted by the employer, a kind of access requirement to telework is established (Cairoli, 2018; Bérastégui, 2021). This requirement is precisely the possession of the necessary technological work equipment at a cost borne by the employee. Given the differences in access to ICT, this circumstance risks widening the already existing social and economic gap between well-paid workers and those who do not have the same financial means (Fiorenza, 2021; Seghezzi, 2022; Zwysen, 2023). In short, "*ensuring equal access to ICT and that workers possess the education and skills they need to use them are fundamental challenges that policymakers need to address*" (Bérastégui, 2021, p. 8).

In addition, compensatory measures should be taken for those who cannot work remotely. As repeatedly stated, remote working is not for everyone. So, many workers will continue to be excluded from the benefits of telework in terms of work-life balance for the foreseeable future. In this perspective, the lack of telework should be compensated by other work-life balance arrangements such as, among others, additional hours of paid leave and – where feasible – flexible working times or by facilitating access to welfare measures, like childcare services. Collective agreements seem to be the most appropriate instrument to implement such measures, but there should be no lack of public support measures, such as tax incentives for companies adopting this kind of work-life balance arrangements.

Finally, the digital and teleworkability divide between regions must be addressed. Two types of action are required. On the one hand, industrial policies aimed at reconverting current production structures and fostering the digital transition should be implemented in the less developed regions of the European Union. On the other hand, it would be proper to put in place or strengthen policies aimed at stimulating peripheral, rural and marginalised areas precisely through telework. Indeed, although more common in the most populated areas, telework may encourage knowledge workers to migrate away from traditional urban settings to more peripheral and rural regions (Eurofound, European Commission Joint Research Centre, 2024). These areas offer many advantages for workers who can move there, such as – among others – lower living costs, shorter commuting times, less pollution and more natural amenities. At the same time, the migration of these workers may represent an opportunity for local development. So, it is not surprising that, since the Covid-19 pandemic, several European countries, including Italy (De Falco, 2022a; Zilli, 2022), have put in place or strengthened policies to support telework in the most marginalised areas of their national territory or those suffering from brain drain and depopulation (Eurofound, European Commission Joint Research Centre, 2024). Clearly, "*all these*

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initiatives have, more or less explicitly, an ambition to help reduce territorial inequalities and/or support (rural) local development" (Eurofound, European Commission Joint Research Centre, 2024, p. 52).

3. Final remarks

Clearly, it is not sufficient to identify the main inequalities fostered by telework. Indeed, it is then necessary to find an "antidote" to these social and economic disparities, an "antidote" that – as seen in the previous paragraphs – can be realised in different ways depending on the specific disparity: by adopting additional social safety nets in favour of those who cannot work remotely; by enhancing training measures aimed at enabling broad categories of workers to acquire the digital skills required to take an active part in the ongoing labour transformation process; by providing easier access to digital technologies to every worker; by providing compensatory measures for those workers who cannot work remotely; by promoting telework in the less developed areas of a country.

However, there is still little awareness of these inequalities, which policymakers and social partners often ignore or underestimate. Nevertheless, collective bargaining may be the preferable solution to many social and economic disparities resulting from the teleworkability divide (Zwysen, 2023). Unfortunately, many of the most recent collective agreements seem to ignore the risks deriving from the teleworkability divide. At least, for data security reasons, nearly all company collective agreements on agile working provide that the necessary working tools to be able to work remotely are to be supplied by the employer (Porcheddu, 2021; Dagnino *et al*., 2023). On the other hand, with the exception of digital skills (Garbuio, 2023; Impellizzieri, 2023; Prosdocimi, 2023), almost all other issues related to the teleworkability divide are rarely and, in any case, only partially addressed by collective bargaining. The lack of compensatory measures and alternative work-life balance arrangements for those workers who cannot work remotely is particularly significant.

Considering the findings of this brief research, only one conclusion seems possible: when dealing with telework, attention must be paid not only to teleworkers, but also to those who cannot work remotely. So, while labour law scholars are expected to deepen the topic first, policymakers and, in particular, social partners are then called upon to address the problems deriving from the teleworkability divide in such a way as to ensure equal opportunities for all workers and prevent telework from remaining a source of inequalities in the labour market.

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Employment challenges for the new generations: new technologies, education, and skills

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1. Introduction

This contribution endeavors to disseminate the preliminary findings from two PRIN PNRR 2022 research projects, namely the "Youth Employment Strategy" (acronym YES) and "Sustainable Solutions for Social and Professional Integration in the Case of Chronic Illness and Transplantation" (acronym SUNRISE)[3].

The YES project falls within the purview of studies examining the position of young individuals in the Italian labour market. It aims to scrutinize the instruments provided by national and regional legislators (with particular emphasis on the regional legislation of Sicily and Apulia, to which the four local research units belong) and to evaluate them in the context of the employment policies adopted by the European Union to promote the retraining of youth and their effective integration into the labour market.

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[3] This contribution is partly attributable (paragraphs 1-4: Carmela Garofalo) to the activity carried out by the local research unit of the University of Bari "Aldo Moro" (CUP H53D23010850001), as part of the PRIN PNRR 2022 "YES – Youth Employment Strategy" (P.I. Prof. Carmela Garofalo, Code: P2022H89ZS), and in part (paragraphs 5-7 – Claudia Carchio) to the activity carried out by the local research unit of the University of Udine (CUP G53D23007840001), as part of the PRIN PNRR 2022 "SUNRISE – Sustainable Solutions for Social and Professional Integration in the Case project of Chronic Illness and Transplantation" (P.I. Prof. Valeria Filì, Code: P20229FEWC); both funded as part of Mission 4 "Education and Research" of the PNRR (component C2 – investment 1.1, Fund for the National Research Program and Projects of Significant National Interest – PRIN), making use of the European funds of the NextGeneration EU Programme.

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The SUNRISE project seeks to study and propose strategies and measures to enhance existing regulatory instruments, thereby creating new avenues for social inclusion and reintegration into work for individuals who have undergone transplants or suffer from chronic illnesses.

This research specifically analyzes a common and intersecting theme between the two research projects: the role of technological and digital transformation in both the content of training (at all levels), as it broadens the range of skills that young individuals must acquire to enter and remain in the labor market, and the methods of delivering training, wherein it becomes a powerful tool and thus an opportunity to make the rights and interests of the most vulnerable in labour relations and the labour market concrete and enforceable.

2. Technological revolution and skills: what prospects for the new generations?

Young individuals constitute a vulnerable segment of the population due to the inherent challenges in transitioning from education and vocational training to the workforce.

Despite the undeniable benefits of education and training throughout one's career – offering enhanced employment prospects and some protection against unemployment – young graduates often encounter a significant disparity between the skills acquired in the educational system and those demanded by the labour market. This gap frequently relegates them to precarious, intermittent employment or lower-tier positions, further exacerbating skill erosion and potentially jeopardizing their career trajectory (Garofalo, 2023, pp. 365-387).

In this context, the emergence of new technologies necessitates a continuous augmentation of applicable knowledge in the labour market and the constant updating of previously acquired skills, known as re-skilling and up-skilling. The rapid pace of these changes surpasses the capacity for both quantitative and qualitative adaptation of necessary skills, resulting in significant skill gaps and shortages within the labour market, not only in Italy (Treu, 2024, pp. 1-19). Furthermore, regarding the accessibility of digital competencies and the broader spectrum of skills driving technological advancement, a digital divide is gradually manifesting within the world of work (Ciucciovino, 2022, pp. 129-148).

A disparity, partially already existing and poised to expand exponentially in the absence of suitable countermeasures, threatens to marginalize workers unable to acquire the necessary skills and professionalism to keep pace with

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technological advancements and the innovation needs of companies (Cirillo, Evangelista, Guarascio, Sostero, 2020, pp. 1-37).

Consequently, new polarizations are emerging, particularly concerning professional skills and the training that renders them accessible, leading to the creation of restricted and privileged markets for the most sought-after and hard-to-find professions (Maresca, 2022, pp. 176-179). These professions are predominantly linked to STEM (Science, Technology, Engineering, and Mathematics) disciplines, with all the associated discriminatory implications. These include the gender gap, due to the well-documented underrepresentation of women in these fields, and the generational gap, due to the greater difficulty older workers face in adapting their skillsets[4].

The new generations, navigating an increasingly polarized and dynamic labour market, must be supported in their positioning to ensure their integration into quality employment pathways or, at the very least, that they remain in less advantageous positions only temporarily. Within this framework, a strategic role must be attributed to education and training as enabling factors to seize the opportunities of the technological and digital revolution and to support young people in the development and conception phase of their professional proposal, while fostering concrete work experience and the enhancement of their skills (Perulli, 2011, pp. 406-436).

3. Recent national measures to strengthen young people's skills

Transposing these objectives to the national context reveals the formidable challenges Italy must overcome to address the structural deficiencies of the training system and mitigate the skill shortage, which arises from various factors. Chief among them is the inability to establish a robust system of active policies, coupled with the misalignment between the enterprise and labour system and the education and training system, particularly amid technological advancements that necessitate the integration of new skills into production processes (Varesi, 2022a, pp. 607 ff.).

This underscores why training aimed at enhancing the skills of both employed workers (through continuous training) and those excluded from the workforce – unemployed individuals or first-time job seekers – is a strategic pillar of the National Recovery and Resilience Plan (NRRP) for the country's post-pandemic economic and social growth (Mammone, 2021, pp. 261-262).

[4] V. XXVI Almalaurea Report on the profile and employment status of graduates, 13 June 2024, available at: *www.almalaurea.it/i-dati/le-nostre-indagini/condizione-occupazionale-laureati*.

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Stimulated by the reforms and investment programs of the NRRP regarding active labour and vocational training policies (M5C1) and secondary and tertiary education policies (M4C1), Italy has initiated several measures to modernize the education and training system, aligning it more closely with the European model. This effort aims to increase the appeal of vocational pathways and ensure that young people's skills meet the needs of businesses and territories (Casano, 2022, pp. 659-686).

Specifically, in the technical-professional training sector, Law No. 99 of 15 July 2022, launched the reform of the Higher Technical Institutes (ITS Academies)[5]. This reform seeks to strengthen the connection between professional tertiary education and the labour market, ensuring the availability of technicians with advanced technological and professional skills in areas deemed strategic for economic development and the resurgence of national competitiveness (Zuccaro, 2023, pp. 1-314).

The mission of the ITS Academies encompasses the dissemination and promotion of technological and scientific culture, offering lifelong guidance for youth, and the training and provision of highly specialized technicians. The role of the ITS Academy extends beyond this, also encompassing: the updating and in-service training of educators in scientific, technological, and technical-professional fields within schools and vocational institutions; the active employment policies focused on youth transitions into the workforce; the continuous training for specialized technical workers as part of lifelong learning; the technology transfer, particularly to small and medium-sized enterprises.

Intertwined with the ITS Academy reform is Law No. 121 of 8 August 2024 (the so-called Valditara Reform), which revamps the current model of technological-professional training to enhance youth employability and innovate the production system.

Commencing in the 2024-2025 academic year[6], an experimental phase

[5] The PNRR (Reform 1.2, M4C1) has earmarked EUR 1.5 billion in funding for ITS, aimed at enhancing the educational offer of these institutes. The stated goal is to double the number of students enrolled, investing in high-tech labs, ITS campuses and locations, and improving relations with companies.

[6] To speed up the start-up of the reform as early as the 2024/2025 school and training year, the Ministry of Education and Merit (MIM) has activated, with Decree no. 240 of 7 December 2023 and the related Notice (MIM Decree No. 2608 of 7 December 2023), a National Experimentation Plan for the establishment of the integrated training supply chain, to concretely test the ability to activate an integrated system of training supply, organised and delivered by special networks of purpose, called "campuses", set up within the framework of an agreement stipulated between the Region and the Regional School Office, in the logic already experimented with the Technical and Professional Poles.

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will begin, involving voluntary participation in four-year state vocational education and training pathways or four-year IeFP pathways, supplemented by an additional two years at ITS Academies, following the "4+2" model (four years of technical or vocational secondary education followed by two years of tertiary vocational education and training at ITS).

Technological-professional training chains may span sectors such as information technology, electronics, mechanics, energy, construction, or other ITS technological areas delineated in the Prime Minister's Decree of 25 January 2008, updated by the implementing decrees of Law No. 99/2022, or other economically and professionally strategic sectors for specific regions or territories.

In addition to streamlining the supply chain, the reform has provided a comprehensive overview of state and regional vocational-technological education. The Valditara reform advocates for a "single" supply chain model, integrating regional (IeFP, IFTS, ITS) and state (IT, IP) programs within the same economic-professional sector or technological area. This supply chain model can also include local stakeholders such as companies, trade union representatives, and vocational experts, contributing to the model's success.

The reform's clear intent to involve enterprises in both defining training curricula and delivering training marks a significant innovation. Vocational training, designed in collaboration with enterprises, can better facilitate young people's employment by aligning their skills with labour market needs (Colombo, 2023).

These measures align with efforts to promote dual transitions, particularly the dual apprenticeship to which the NRRP attributes significant importance (Impellizzieri, 2024), in fostering the development of professionalism with skills attuned to the demands of a rapidly evolving economic landscape.

These initiatives aim to fortify the dual transition within vocational education and training as well as higher technical education, involving businesses directly in the planning phase of training interventions and expanding experiential learning models within work contexts. This approach seeks to enhance the technical and core competencies of young individuals aged 15 to 25 and, on an experimental basis, of adults lacking secondary education qualifications (Garofalo, 2024, pp. 470-494)[7].

[7] V. XXI INAPP Monitoring Report on the Vocational Education and Training System and Dual Apprenticeship Pathways in Vocational Education and Training (a.f. 2021-22), December 2023 (*oa.inapp.gov.it/items/96d4c1e7-7381-4292-aa4a-f977ecbeaf2e*) as well as the Inapp-Inps Monitoring Report of October 2024 "Signs of strengthening dual apprenticeship" (*www.inapp.gov.it/eventi/lapprendistato-per-il-lavoro-che-cambia-presentazione-del-xxii-rapporto-di-apprendistato*).

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Moreover, the measures adopted under the NRRP (M5C1) encompass the reform of active labour policies and vocational training, including the Guaranteed Employability of Workers (GOL) Programme[8] and the National New Skills Plan (PNC)[9] (Garofalo, 2022, pp. 114-160; Sartori, 2021, pp. 967-996; Casano, 2021, pp. 14-47)[10].

The PNC and the GOL Programme, since their inception, have been intrinsically linked, addressing in an integrated manner the training and retraining needs of unemployed youth and workers impacted by changes in the labour market (Valente, 2022, pp. 633-657). This is achieved through collaboration between public and private services and the promotion of territorial networks that, when necessary, support the most vulnerable individuals (Deleonardis, 2024, pp. 240-256), thereby customizing active policy interventions (Varesi, 2022b, pp. 75-113; Bozzao, 2023, pp. 259-278).

Recently, with the inclusion of the new REPowerEU chapter – Mission 7 in the NRRP[11], the New Skills-Transition Plan was adopted, updating the "New Skills Plan"[12]. This new plan aims to provide the country with an effective and stable mechanism to address skills mismatches, emphasizing the importance of new skills in an increasingly digital and green labor market. It expands the scope of training policies, aligning them more closely with active labour policies, integrating provisions from the GOL Programme, and ensuring greater emphasis on essential performance levels for refresher and retraining measures in terms of standard content, accessibility, customization, and applicability.

[8] See Art. 1, para. 324, Law No. 178/2020 (so-called Budget Law 2021) and Interministerial Decree of 5 November 2021.

[9] The PNNC was adopted by decree on 14 December 2021, published in the OJ on 28 December 2021,

[10] For employed workers, moreover, the strengthening of the New Skills Fund (FNC), originally introduced, during the Covid-19 pandemic emergency, by Art. 88, co. 1, d. l. n. 34/2020, conv. in l. n. 77/2020, to allow companies to reshape working hours and favour training activities based on specific collective agreements with trade unions.

[11] Following the international events of recent years and to accelerate the transition of the energy system, the European Commission presented the REPowerEU Plan on 18 May 2022. With Regulation (EU) 2023/435 of 27 February 2023, which came into force on 1 March 2023, Member States can include REPowerEU chapters in their National Recovery and Resilience Plans, and remodel already planned measures, to achieve the REPowerEU Plan's macro-objectives. The ECOFIN Council, on 8 December 2023, approved the Repower chapter of the Italian National Recovery and Resilience Plan and the reformed Council Implementing Decision (CID) according to the additions and changes agreed in Europe.

[12] With the Ministerial Decree MLPS of 30 March 2024, after agreement in the State-Regions Conference, the PNC-Transitions were adopted with the Decree of 14 December 2021 and the related *Roadmap* that outlines the procedural *steps* of the activities to be implemented and defines some general principles to be developed and declined in regulations at the regional level.

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4. Lines of continuity and critical issues in recent reforms

In analysis of the recent legislative measures aimed at strengthening the re-skilling and up-skilling processes for workers reveals several key aspects: internal coherence, continuity and mutual reinforcement of interventions, a focus on clearly defined and quantified challenges and objectives, and the use of data and evidence to support strategic choices. There is a marked preference for experiential learning methods and teaching methodologies that introduce new actors and skills, enhancing network strategies to more precisely meet labour market needs. The measures move away from rigid planning towards adaptive, flexible, and sustainably customized educational programming.

However, the question arises whether the new regulatory framework is sufficient to bridge the gap between the skills demanded by the labour market and those offered by workers, particularly young individuals. Additionally, it remains to be seen if it can effectively increase participation rates in training courses, which have historically suffered from poor attractiveness and visibility, inadequate accessibility, uneven regional distribution, and perceived insufficient return on investment by potential users of education and training services.

Accompanying the digital and technological transition necessitates more than just regulatory adjustments to support the sectors and production chains involved. It also involves reorienting the content of upskilling and reskilling pathways for workers, rethinking and restructuring the educational offerings from basic to advanced and specialized levels, and adapting the logistics, contexts, and environments where learning takes place.

This implies not only a better and more efficient distribution of these services throughout the territory, including the valorization of skills acquired through short learning options but, above all, relies on competent operators (not just formally qualified or appointed) in managing complex relationships, functional and up-to-date information infrastructures, and territorial networks capable of effectively supporting users.

All these reforms require significant investments in human and financial resources. Their success will hinge on the ability to secure the necessary resources for their implementation, including qualified teaching and technical staff and innovative technologies. Moreover, it will depend on the adherence and participation of individuals and institutions in the project, which will also be influenced by effective promotion and their ability to establish strong connections with the territory.

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5. The disability employment gap: facts and figures

Having delineated the primary challenges that young individuals may encounter while transitioning from the realm of education and vocational training to the professional sphere, and having outlined the significant opportunities that modern technologies can provide to ease these transitional phases – such as the critical role of digital skills training – this paper now seeks to re-examine the same topic from a different perspective: that of individuals with disabilities.

These individuals are particularly disadvantaged from their school years onward, extending into their professional lives and throughout their careers, ultimately facing a greater risk of poverty and social exclusion compared to those without disabilities.

Illustrative on this point are the data pertaining to the employment and working conditions of such individuals.

Employment remains a challenging frontier for most European citizens with disabilities as they not only have significantly lower employment rates, but also earn lower wages compared to their non-disabled peers.

According to the Seventh Edition of the European Disability Forum's Human Rights Report (European Disability Forum, 2023), published in 2023, the employment situation of citizens with disabilities in the EU is illuminated by overall employment statistics: in 2022, only 51.3% of working-age individuals with disabilities in the EU were employed, compared to 75.6% of individuals without disabilities, resulting in an average employment gap of 24.4 percentage points. This figure varies considerably across member states, ranging from 18.2 percentage points in Portugal to nearly 40 percentage points in Ireland. However, a crucial point is that even in countries with high overall employment rates, the employment situation for individuals with disabilities does not improve; for instance, in Sweden, where the employment rate is 80.8%, the disability employment gap is 28.9%.

Moreover, women and young individuals with disabilities are the most disadvantaged groups. Only 49% of women with disabilities are in paid employment, despite being, on average, better educated than men with disabilities. Young people with disabilities are similarly disadvantaged as 47.4% of individuals with disabilities aged 20 to 29 were employed in 2019, compared to 57.8% of their non-disabled counterparts in the same age group.

Additionally, there is the issue of the pay gap, as individuals with disabilities in the EU earn, on average, less than those without disabilities. This situation is exacerbated for women with disabilities due to the intersection of the disability pay gap and the gender pay gap.

When analyzing the current situation of individuals with disabilities,

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several additional factors must be considered (ILO, 2021). In fact, the real employment situation of individuals with disabilities is often underrepresented, as many may not be registered as unemployed due to the barriers they face in entering the labour market (World Health Organization, & The World Bank, 2011). In addition, in most countries, employed individuals with disabilities are more likely to be in vulnerable employment, characterized by inadequate earnings, low productivity, and poor working conditions, which undermine workers' fundamental rights (United Nations, 2018).

Key factors contributing to the employment gap experienced by individuals with disabilities include lack of reasonable accommodations, structural discrimination and prejudice, and insufficient access to inclusive and high-quality education.

Focusing on the latter, it must be noted that individuals with disabilities often attain significantly lower levels of education compared to their non-disabled counterparts. Limited access to inclusive and quality education severely impacts their ability to enter the labour market and secure more stable and better-paying jobs.

Access to mainstream education remains a challenge particularly for those with high support needs. Statistics from 2019 show that more than twice as many learners with disabilities leave school early compared to those without disabilities (21.8% versus 9.6%) (Grammenos, 2022). This early exit from education significantly limits their future employment prospects.

Eurofound reports that the education and vocational training available often fail to meet the needs of individuals with disabilities and are not always relevant or aligned with labour market demands (Eurofound, 2021).

Furthermore, a high proportion of young people with disabilities receive education in segregated settings, resulting in a lack of formal qualifications required for many jobs (UNESCO, 2020).

Consequently, many end up in sheltered workshops or face unemployment.

6. New technologies as a support for the training delivery of the most fragile workers

The data underscores the urgent need for action to improve the training system for people with disabilities, ensuring they receive quality education and have good employment prospects. In this context, new technologies can play a pivotal role. The digital revolution is reshaping the world of work by creating new jobs, making some occupations obsolete, and altering recruitment processes. Thus, engaging people with disabilities in the digital sphere is imperative.

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To enable the inclusion of people with disabilities, several measures must be taken: first, ensuring accessibility to technology for people with disabilities; second, promoting digital skills among people with disabilities; third, encouraging the digital employment of people with disabilities.

Accessibility, as defined in Article 9 of the UN Convention on the Rights of Persons with Disabilities (CRPD), entails ensuring that individuals with disabilities can access and use the physical environment, transportation, information and communications technologies, and other public services on an equal basis with others. Specifically, digital accessibility involves making digital products accessible to everyone. For example, digital content may need accessible formatting or assistive software for individuals with visual impairments, while those with physical disabilities might face challenges in using standard devices for navigating the internet.

Despite the pressing need for digital skills in the labour force, technology remains largely inaccessible to persons with disabilities. According to the ILO, individuals with disabilities frequently experience digital exclusion due to various barriers, including affordability and access to Information and Communications Technologies (ICTs) and the internet. For instance, the EU Strategy on the Rights of Persons with Disabilities 2021-2030[13] notes that only 64.3% of persons with disabilities over the age of 16 have internet access at home, compared to 87.9% of those without disabilities. The inaccessibility of many websites, software, and applications used by employers in recruitment and daily operations remains a significant concern. As such, ensuring digital accessibility and promoting digital skills among people with disabilities are crucial steps toward enhancing their employment prospects in the evolving job market.

The second pivotal aspect necessitating focus for the inclusion of individuals with disabilities in the labour market is the advancement of digital competencies. Amidst a technological revolution that incessantly remodels and generates employment opportunities, the requisite skill sets are likewise undergoing transformation. The demand for digital skills, both within traditional roles and in emerging digital vocations, is ascending. Consequently, there is a growing disparity between the skills presently available within the workforce and those sought by employers.

Notably, 71% of employees within the EU require basic or moderate digital skills for their job roles. Furthermore, projections indicate that more advanced digital skills will increasingly be necessary to meet market demands (CEDEFOP, 2018). However, as of 2019, only 58% of EU citizens possessed

[13] See it in *eur-lex.europa.eu/EN/legal-content/summary/strategy-for-the-rights-of-persons-with-disabilities.html*.

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basic or above-basic digital competencies[14]. Specific data regarding the digital skills of individuals with disabilities is scarce; nevertheless, as said, they generally experience lower levels of education and training.

Additionally, their ability to acquire digital skills is often hindered by barriers in accessing ICTs.

The acceleration of the digital transformation, spurred by the Covid-19 pandemic, has significantly amplified the need for digital skills. Digital upskilling has proven to be a universally reliable solution across countries and sectors during the pandemic. Furthermore, the ongoing climate crisis necessitates enhanced efforts in digital reskilling and upskilling.

The third paramount factor to address in ensuring individuals with disabilities are not left behind in the evolving digital labour market is the enhancement and promotion of digital employment opportunities tailored specifically for them.

Digital tools and platforms serve as powerful enablers, dismantling disability-related obstacles. Consequently, initiatives aimed at promoting digital employment must prioritize the inclusion of people with disabilities, connecting them to new job opportunities, with a particular focus on young individuals and women with disabilities.

One notable example is the use of digital tools to enhance reasonable accommodations in education, training, and employment. Assistive technologies, powered by AI, cater to individuals with visual, hearing, mobility, and learning disabilities. Over recent years, significant advancements have been made in predictive text, visual recognition, speech-to-text transcription, and captioning. Video conferencing software, often equipped with captioning, has increased the accessibility of meetings, particularly for participants in different locations.

Remote training, learning and teleworking also hold immense potential. When equipped with the proper technology, remote education and employment can significantly broaden access to learning and job opportunities for individuals with disabilities, effectively surmounting obstacles related to infrastructure, workplace settings, and transportation.

The pandemic has highlighted the complexities of remote learning for students with disabilities, including technical and organizational challenges, the necessity for adequate online support, and difficulties in interacting through a monitor. Similarly, while teleworking offers flexibility in work time and location, it has predominantly benefited high-paid, white-collar

[14] Eurostat 2019 data for the Community survey on ICT usage in European households and enterprises; the full data set from the survey is available at: *ec.europa.eu/eurostat/web/digital-economy-and-society/database*.

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roles since the Covid-19 outbreak. Many employees in other sectors face significant limitations in working from home due to a lack of necessary equipment. Additionally, remote learning and working carry risks of isolation, loneliness, and social exclusion.

7. Leveraging technology and digital skills for inclusive employment of people with disabilities

In conclusion, it is evident from the foregoing discussion that the integration of technology and the enhancement of digital skills are crucial focal points for future policy development aimed at improving the training and employability of individuals with disabilities. The impact of technological advancement must be considered across a multitude of areas to maximize benefits for people with disabilities. This approach should be comprehensive and intersectional, encompassing educational pathways, school-to-work transition programs, vocational training, and the assessment of developmental disabilities for school inclusion.

With specific reference to the Italian legal framework, it is crucial to consider an additional institution, namely the so-called personalized and participatory individual life project, recently introduced by Legislative Decree No. 62/2024. This decree forms part of the broader reform initiated by Law No. 227/2021, which empowered the government to reform the disability sector as envisioned in the National Recovery and Resilience Plan (NRRP) agreed upon by Italy and the European Union. Introduced in 2024 and currently in its experimental phase for 2025, the life project represents an innovative approach to assessing and promoting the social inclusion of people with disabilities. It aims to ensure their effective participation in all life contexts. This new approach underscores that it is not solely the responsibility of institutions (such as legislators, regions, schools, and training institutions) to identify suitable training pathways. Rather, from the design stage of the personalized and participatory life project, a clear path for labour and professional inclusion should be established, involving a multitude of actors.

Legislative Decree No. 62/2024 mandates a multidimensional assessment, resulting in the creation of a personalized and participatory individual life project. This document contains comprehensive information about the individual with disabilities and must be consistently aligned with educational projects, rehabilitation programs, school inclusion initiatives, and social and labour insertion efforts to ensure equal opportunities in every life sphere.

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The primary objective of this regulation is to integrate various health and social care profiles within the life project, avoiding the implementation of multiple, potentially conflicting interventions, which can result in overlapping efforts and reduced service efficacy.

One of the commendable aspects of the life project regulation is the establishment of a participatory process and an intricate network encompassing various professional entities, including territorial authorities, guardians (in the case of minors), social workers, educators, health professionals, representatives of educational institutions, and, where necessary, representatives of public employment services for individuals with disabilities.

Furthermore, the life project must ensure its long-term sustainability, guaranteeing the continuity of tools, resources, interventions, benefits, services, and reasonable accommodations to safeguard the beneficiary. To this end, a designated professional is tasked with overseeing the project's implementation and coordinating the involved professionals.

Finally, Legislative Decree No. 62/2024 establishes a fund for implementing life projects, providing 25 million euros annually to foster the initiation of additional interventions, services, and supports not currently included in the ordinary territorial offer schemes.

In summary, the personalized and participatory individual life project, if meticulously designed based on the real potential of the context and the uniqueness of the person with a disability, can be a significant tool to make inclusion effective across all life domains. Most importantly, it can help overcome the challenges that people with disabilities face when approaching the labour market, finding suitable employment, and performing dignified, well-paid jobs, thereby mitigating the risk of social and labour exclusion.

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Digital platform work and youth employment: between new opportunities and persistent pitfalls[1]

Gianni Toscano[2]

Firstly I want to express a heartfelted thanks for the prestigious opportunity that organizing commitee offered me. I hope, in my own small way, to be able to honor it. I extend a warm greeting to the president of this session, professor Valeria Filì, and to all the speakers present, especially to professor Carmela Garofalo, that's coordinating our research team as principal investigator. Last but not least, a proper greeting to all the colleagues present in the room from all over the world.

My intervention aims to provide a contribution about working through digital platform and its effects on youth employment[3].

The importance of the subject chosen and the hugeness of labor law implications would require a much more complex analysis than this speech allows me to develop.

However in this short time I have, I would try to focus and share with

[1] This contribution reproduces, with the addition of notes, the text of the reported presented at the ISLSSL Workd Congress, dedicated to the theme "*Work in a changing world. The quest for labour rights and social justice*", held in Rome from September 17 to 20, 2024.

[2] University of Messina, Italy.

[3] There are numerous scholarly contributions on work through digital platforms. Among the volumes dedicated to the topic, by way of example, the following can be mentioned: Pisani G. (2023), *Piattaforme digitali e autodeterminazione. Relazioni sociali, lavoro e diritti al tempo della "governabilità algoritmica"*, Modena: Mucchi Editore; Novella M., Tullini P. (eds.) (2022), *Lavoro digitale*, Torino: Giappichelli; Restelli R.E. (2022), *Le piattaforme digitali. Dall'intermediazione all'impresa*, Milano: Giuffrè; Loi P. (ed.) (2021), *Il lavoro attraverso piattaforme digitali tra rischi e opportunità*, Napoli: Edizioni Scientifiche Italiane; Donini A. (2019), *Il lavoro attraverso le piattaforme digitali*, Bologna: Bologna University Press. Furthermore, reference can be made to Toscano G. (2021), *Il lavoro digitale. Prime riflessioni*, Messina: Edas.

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you the aspects, from my own point of view, seem to be more relevant in the combination of working on digital-platform/youth employment.

Working on digital platforms represents not only a new frontier for work scheduling, but also an opportunity for youngsters looking for an employment.

Platforms, in fact, offer condition of employment that, due to the flexibility, appeal mainly the youngest workers.

The new shape assumed by supplying of good and services process, in the meanwhile, raises several issues with regard to working conditions and the safeguards for the wide audience involved[4].

It's right in this setting we can find not negligible issues dwelling.

This job vacancies are often characterized by desultoriness and marginality, determining a growth of the so defined "working poors", also between new generations, bound to operate in sub optimal conditions and without the forms of protection of the case[5].

The usage of informatic systems, algorithms, decision-making mechanisms automatized in work field, over modifying the organisation of work relationships, has definitely increased the risk of misconduct, fostering more and more sophisticated means of worker exploitation[6].

The latest law case events have highlighted some occurrences the teaching defined "digital gangmasters" in which the abuse through mechanisms and tools archetypal of the gig economy[7].

Although this definition could sound forced or evocative, is actually quite right, inasmuch as gang masters stands out for some typicall elements of Circumstances involved in penal code, article 603 bis, about "illicit brokering and work exploitation"[8].

Digital platform, transformed work relationships trends, and contributes to get over the stereotyped role of the exploitation as a fact related to rural

[4] See, in particular, the reflections of Santoro-Passarelli G. (2019), "Civiltà giuridica e trasformazioni sociali nel diritto del lavoro", *Dir. Rel. Ind.*, 2, p. 421; Ichino P. (2017), "Le conseguenze dell'innovazione tecnologica sul diritto del lavoro", *Riv. it. dir. lav.*, 4, p. 525 ff.

[5] On this topic, see Caruso B. (2018), "I diritti dei lavoratori digitali nella prospettiva del Pilastro sociale", in *WP CSDLE "Massimo D'Antona".IT*, 146, spec. p. 18 ff.

[6] On this point, reference is made to the detailed reflections of Bellavista A. (2017), "Intervento alla tavola rotonda 'Innovazioni tecnologiche e nuovi lavori: quali tutele per i lavoratori?'", *Riv. giur. lav. prev. soc.*, 2, p. 165.

[7] See: Ichino P. (2018), "Il nuovo 'caporalato digitale'. La faccia scura della *Gig economy*", *L'avvenire*, 29 aprile 2018.

[8] On this topic, reference can be made to, among others, Andronio A. (2019), "Il reato di intermediazione illecita e sfruttamento del lavoro: evoluzione normativa e giurisprudenziale", *Dir. lav. merc.*, 3, p. 431 ff.; Miscione M. (2017), "Caporalato e sfruttamento del lavoro", *Lav. giur.*, 2, p. 113 ff.

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contexts, spreading the door to new way of reification of the worker, that is reduced to a mere object on others acting[9].

Indeed, digital gangmasters, is not only less detrimental of the legal asset protected by conventional criminal offences,but it develops through more tricky ways, disguised by the same platforms.

Facing this pathological drifts in labor relations, the legislator will have to step a proper protection scheme for this category of workers, risking to facilitate, or anyway not successfully tackling, the proliferation of these facts.

In this scenario, the first and maybe the more complex problem to be solved, regards the legal classification in digital relationships.

The hermeneutic effort to classificates in the correct way such relationships is strongly connected to the protection scheme, that it wants to admit to the involved workers.

For this purpose by reducing, for time issues, to the riders job performances. We still assist to opposite positions between jurisprudence and doctrine, characterized by an almost paroxysmal dilemma of the legal classification[10].

[9] See: Brambilla P. (2017), "'Caporalato tradizionale' e 'nuovo caporalato': recenti riforme a contrasto del fenomeno", *Riv. trim. dir. pen. ec.*, 1-2, p. 191 ff.

[10] The first ruling on the legal classification of the employment relationship of riders and the protections to which they are entitled was issued by the Turin Court (Trib. Torino, May 7, 2018, in *Lav. Dir. Eur*., 2018, p. 1, with a commentary by P. Tullini), which classified the relationship as self-employment. On appeal, the Turin Court of Appeals opted instead for a classification in terms of collaborations organized by the client, *ex* art. 2 of Legislative Decree no. 81/2015 (App. Torino, 4 febbraio 2019, n. 26, in *Dir. rel. ind.*, 3, 2019, p. 936). Finally, the Supreme Court, with judgment no. 1663 of January 24, 2020, albeit through a different argumentative path, confirmed the classification recognized by the Turin Court of Appeal (Cass. Civ., January 24, 2020, no. 1663, in *Lav. Dir. Eur.*, 1, 2020, pp. 2 ff.). This ruling has sparked great interest in the academic community, as evidenced by the large number of contributions dedicated to it: among others, by way of example, Maio V. (2020), "I riders nella 'terra di mezzo', tra crisi dei rimedi e necessità logica della fattispecie", *Giur. it.*, 7, p. 1797 ff.; Persiani M. (2020), "Osservazioni sulla vicenda giudiziaria dei 'riders'", ivi, p. 1801 ff.; Persiani M. (2020), "Note sulla vicenda giudiziaria dei riders", *Lav. Dir. Eur.*, 1, p. 2 ff.; Biasi M. (2020), "Le (in)attese ricadute di un approccio rimediale al lavoro tramite piattaforma digitale", *Giur. it.*, p. 1806 ff.; Ichino P. (2020), "La stretta giurisprudenziale e legislativa sulle collaborazioni continuative", *Riv. it. dir. lav.*, p. 90 ff.; Maresca A. (2020), "La disciplina del lavoro subordinato applicabile alle collaborazioni etero-organizzate", *Dir. Rel. Ind.*, 1, p. 146 ff.; Mazzotta O. (2020), "L'inafferrabile etero-direzione a proposito di ciclofattorini e modelli contrattuali", *Labor*, 1, p. 5 ff.; Perulli A. (2020), "Collaborazioni etero-organizzate, coordinate e continuative e subordinazione: come 'orientarsi nel pensiero'", *Dir. Rel. Ind.*, 2, p. 267 ff. It should also be noted the *Focus* titled "La sentenza di Cassazione n. 1663 sui riders. Un approdo e un punto di partenza", in *Lav. Dir. Eur.* n. 1/2020, and monographic issue no. 2/2020 of the journal *Mass. Giur. lav*., entirely dedicated to this ruling. Indeed, in the aftermath of the Supreme Court's ruling, several first-instance decisions have also been issued that have established the existence of an employment relationship: the first, in chronological order, is

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This incertitide lingers after the introduction of a specific regulation intended to protect the job through digital platforms[11].

For the occasion, has come to light the new trend of the right to work, that seeks to reduce the borders between autonomy and subordination[12], through the deployment of a minimal protection system introduction, also for the workers on this platforms[13], though formally qualified as self-employeds[14].

It's clear though, that this intervention cannot be considered as an end point.

Even marking a step forward in terms of protection, it leaves a massive quantity of questions and calls for further considerations about the necessity of solutions acted to a more functional regulation of the platforms workers, an ongoing expansion category that goes further to the riders role.

In this occasion, will also be fundamental evaluate the impact of the recent directive about the improvement of work conditions on the digital platforms situation[15], that imposes to the member states the obligation to

Palermo Court, November 24, 2020, no. 3570, in *Guida dir*., 49, 2020, p. 54, regarding which reference is made to Fava G. (2021), "Nota alla sentenza del Tribunale di Palermo n. 3570/2020 pubbl. il 24/11/2020", *Lav. Dir. Eur.*, 1, p. 2 ff.; Puccetti E. (2021), "La subordinazione dei Riders. Il canto del cigno del tribunale di Palermo", *Lav. Dir. Eur.*, 1, p. 2 ff.

[11] Reference is made to Legislative Decree no. 101 of 2019 (the so-called "Decreto imprese"), converted into Law no. 128 of 2019, which added a new Chapter V-bis, entitled "*Tutela del lavoro tramite piattaforme digitali*".

[12] On this point, see the authoritative reflections of Carinci F. (2018), "La subordinazione rivisitata alla luce dell'ultima legislazione: dalla 'subordinazione' alle 'subordinazioni'?", *ADL*, 4-5, p. 961 ff.

[13] In this regard, the provision seems to align with Directive 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, which establishes "*minimum rights that apply to all workers in the Union who have an employment contract or an employment relationship as defined by the law, collective agreements or practices in force in each Member State, taking into account the case-law of the Court of Justice*". For an in-depth analysis of these provisions, see, among others, Garofalo D. (2020), "La prima disciplina del lavoro su piattaforma digitale", *Lav. giur.*, 1, p. 5 ff.

[14] Regardless of the legislator's intentions, it does not seem that the doubts raised in the academic literature and in practice regarding the classification of these relationships have been fully dispelled. Consequently, it cannot be said that the protections provided are certain and effective. As evidence of the foregoing, the various positions taken by the first commentators should be noted: see., among others, Carinci M.T. (2020), "Il lavoro etero-organizzato secondo Cass. n. 1663/2020: verso un nuovo sistema dei contratti in cui è dedotta un'attività di lavoro", *Dir. Rel. Ind.,* 2, p. 488 ff.; Perulli A. (2019), "La nuova definizione di collaborazione organizzata dal committente e le tutele del lavoro autonomo tramite piattaforme digitali. Note al d.lgs. 81/2015", *Riv. it. dir. lav.*, 4, p. 163 ff.; Tosi P. (2019), "Le collaborazioni organizzate dal committente nel decreto crisi", *Guida Lav.*, n. 47, p. 10 ff.

[15] At the time of the report, the text of the directive had not yet been definitively approved. Only recently has Directive (EU) 2024/2831 of the European Parliament and of the Council

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introduce a presumption of subordination, when there are elements that show a supervisory power of the platform, in line with national right collective contracts and the EU case law[16].

The introduction of a presumption of subordination represents in fact, a test bench, for both legal qualification of working relationships and the definition of protection to tribute to the digital platforms workers.

The real problem to solve will be to understand how the ruler will transpose the directives, and above all how he will balance new dispositions with the pre existent article 47 bis of legislative decree number 81/2015 where working relationships are defined autonomy.

The matter is understandably urgent because it involves the safeguard and the dignity of the rider himself[17].

If in fact, working through digital platforms sounds like a forerunner for the youngsters beginners to the job market, on the other side the missing legal qualification and the lack of a solid protection, risks to confine these new kinds of job, in a legal limbo, exposing the young pepole to precariousness and sweatshop, hard to fight.

It's obvious that, under a de iure condendo point of view, the problems to deal with are multiple and not easy to solve.the task of the legislator turns out very difficult.

Not only for the inner thickness of the matter, but also for the rapid tech innovation that let every legal regulation be vastly obsolescence.

Waiting for legal developing, we can say that the different solutions found out till now, witness the incertitude that features the job with digital platforms[18], offers a kind of compromise.

of 23 October 2024 on improving working conditions in platform work been definitively adopted. The Directive, published in the Official Journal of the European Union on 11 November 2024, will enter into force on 1° December 2024 and must be transposed into national law by 2 December 2026.

[16] Article 5 of the Directive begins by stating: "*There shall be a presumption that a contractual relationship between a digital labour platform and a person performing work through such a platform constitutes an employment relationship where there are facts that indicate direction and control, in accordance with national law, collective agreements or practices in force in the Member States, taking into account the case-law of the Court of Justice*".

[17] On the topic, see Santoro Passarelli G. (2023), "Dignità del lavoro e civiltà digitale", *Riv. giur. lav. prev. soc*., 1, p. 53 ff.; Passaniti P. (2020), "La dignità nell'ordinamento italiano. Un percorso storico", *Variaz. Temi Dir. Lav.*, 3, p. 507 ff.; Ratti L. (2020), "Funzione della dignità e regolazione del rapporto individuale di lavoro", *Variaz. Temi Dir. Lav.*, 3, p. 607 ff.

[18] On this point, reference may be made to the reflections of De Marco C., Garilli A. (2021), "L'enigma qualificatorio dei *riders*. Un incontro ravvicinato tra dottrina e giurisprudenza", *WP CSDLE "Massimo D'Antona".it*, 435, p. 3.

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In fact, without the subordination standards, the regulation of partnerships determined by the customer, could represent a reasonable balance between the necessity of workers safeguarding, to whom would be applied the subordinated job rules, and those productivity efficiency of the platforms[19].

Nevertheless, the legal efforts will never be exclusively focused on a clear definition of contract types, but they will have to reach a more impactful enhancements of the functional phase of the partnership, in order to guarantee legal relations and the actual protection[20].

This value sounds more crucial when we consider the young workers, that are certainly more vulnerable, because of their lack of previous experiences, and exposed to less safeguarded conditions and form k exploitation, hidden by a presumed independence.

It will be necessary, but not sufficient, to face armonically the question, the introduction of stricter bounds to third parts. The new challenge about protection and promotion of the many workers employed in this field, involves a well balanced mind changing of the whole protection system, starting from a progressive resizing of flexibility politics.

It will be essential not to neglect collective agreements (totally missing in some production fields) and beginning to look with more interest in trade union rights in the gig economy situation[21].

It is for example, non-deferable the introduction of a legal minimum wage[22]. For a guarancy for low-income workers, especially in those fields missing a collective agreement.

As a review of these short reflections, we can say that the increasing of

[19] On this subject, particular reference should be made to Filì V. (2015), "Le collaborazioni organizzate dal committente del d.lgs. n. 81/2015", *Lav. giur.*, 12, p. 1091 ff. However, for a comparison of the main positions that have emerged in the academic literature, reference should be made to Vallebona A. (ed.) (2015), "Il lavoro parasubordinato organizzato dal committente", *Colloqui Giuridici sul lavoro*.

[20] Of this opinion, Romeo C. (2021), "Le nuove regole del diritto del lavoro tra algoritmi e incertezza delle tutele", *Lav. giur.*, 2, p. 139.

[21] On this point, see Di Meo R. (2019), "I diritti sindacali nell'era del caporalato digitale", *Labour & Law Issues*, 5, 2, p. 65 ff.

[22] On this topic, reference can be made to Bavaro V. (2023), "'Adeguato', 'sufficiente', 'povero', 'basso', 'dignitoso': il salario in Italia fra princìpi giuridici e numeri economici", *Riv. giur. lav. prev. soc.*, 4, p. 510 ff.; Santucci R. (2022), "L'appalto e il lavoro: interessi e tecniche di tutele", in G. Proia (ed.), *Appalti e lavoro: problemi attuali*, Torino: Giappichelli, p. 137 ff.; Proia G. (2021), "La proposta di direttiva sull'adeguatezza dei salari minimi", *Dir. Rel. Ind.*, 1, p. 26 ff.; Biasi M. (2021), "Il contrasto al 'lavoro povero' e i nodi tecnici del salario minimo legale", *Lav. Dir. Eur.*, 1, p. 1 ff.; Bellavista A. (2014), "Il salario minimo legale", *Dir. Rel. Ind.*, 3, p. 741 ff.

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the job through digital platforms needs to be followed by a more efficient system of protection, to avoid precariousness and exploitation[23].

What arises from the situation we have just defined, is the trend to commodification of job[24], avoidable through specific legal interventions with the main aim to ensure the value of the work, the protection of the worker and the full and good employment research[25].

It's crucial, to have a legislator capable to show courage and foresight, to guarantee not just the future of digital work, but also the dignity and the rights that belong to who, especially young people, see in these new kinds of job, a gateway to the tomorrow.

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[23] On this point, the reflections of A. Bellavista are entirely agreeable, *Intervento alla tavola rotonda "Innovazioni tecnologiche e nuovi lavori: quali tutele per i lavoratori?"*, cit., p. 165.

[24] The reference is to the guiding principle of the ILO's Philadelphia Declaration of 1944, according to which "labour is not a commodity". In the literature, this principle is particularly present in the reflections of Tiraboschi M. (2021), "'Il lavoro non è una merce": una formula da rimeditare", *Var. Temi Dir. Lav.*, 1, p. 1163 ff.; Bavaro V. (2021), "Sul concetto giuridico di Lavoro fra merce e persona", *Lav. dir.*, 1, p. 41 ff.; Romagnoli U. (2019), "Il lavoro non è una merce, ma il mercato del lavoro è una realtà", *Dir. lav. mer.*, 1, p. 17 ff.; Gallino L. (2007), *Il lavoro non è una merce. Contro la flessibilità*, Roma-Bari: Laterza; Scarpelli F. (1999), "'Esternalizzazioni' e diritto del lavoro: il lavoratore non è una merce", *Dir. Rel. Ind.*, 3, p. 351 ff.; Grandi M. (1997), "Il lavoro non è una merce: una formula da rimediare", *Lav. dir.*, 4, p. 557 ff.

[25] On this point, see notably Bellavista, "Appalti e tutela dei lavoratori", cit., p. 84.

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Digitalization and employee freedom of thought

Giuseppina Pensabene Lionti[1]

1. Introduction

This study provides an opportunity to examine the hermeneutic process that has yet to develop in Italian case law on information and transparency on the use ("intra" and "extra" labour) of social networks by employees, which could even re-modulate the traditional terms of the relationship between them and their employers. In particular, it highlights the new (delicate) balance between the bond of trust on which this relationship is based and the rights of the individual guaranteed at the constitutional level, such as, first and foremost, the worker's right to freedom of expression. The research attempts to provide answers to the many questions that arise in this respect, such as the possibility of using or not using the information shared online by the worker, distinguishing between those that are public and those that are the specific object of a private message or conversation between the worker and another person. All of this without abandoning a critical approach to the national (art. 4, L. n. 300/1970) (Maresca, 2016) and EU rules (Reg. UE n. 679/2016 – GDPR) (Pisani, Proia, Topo, 2022) in force on privacy and employer's remote controls through technological tools (Alvino, 2016).

2. The italian regulatory framework

Freedom of expression is generally recognised by art. 21 of the italian Constitution of 1948, as well as being enshrined in supranational norms of particular relevance such as: art. 10 of the European Convention on Human

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Rights; art. 11 of the Charter of Fundamental Rights of the European Union; art-19 of the Universal Declaration of Human Rights. With specific reference to the worker, freedom of expression is also recognised in the labour law regime (Giugni, 1979) dictated by the italian workers' statute (art. 1, L. n. 300/1970). However, it can be affirmed that the worker's freedom of expression has, nowadays, an autonomous physiognomy in the specific case in which the worker expresses his opinion in the framework of communications made through digital, electronic, computer or technological means and, in particular, through social networks (Del Punta, 2019; D'Aversa, 2019; Cottone, 2017). In this regard, the Constitutional Court has also stated that, in a democratic and pluralistic constitutional system such as the Italian one, which is based on the principle of "checks and balances", it is true, on the one hand, that freedom of expression, as well as the confidentiality of communications and the protection of personal data, are inviolable rights, even constitutionally guaranteed (respectively by articles 21 and 15 of the italian Constitution); it is also true, on the other hand, that these rights cannot be excessively expanded and turned into a form of "tyranny" in relation to other legal situations that equally deserve adequate constitutional protection, such as, first and foremost, the freedom of enterprise guaranteed by article 41 of the italian Constitution (Tenore, 2019). Therefore, the regulatory framework in this matter is, ultimately, also based on the developments of the most recent case law.

3. The limits to freedom of expression in the digital age: the new position of the case law

Up until today, with regard to the freedom of expression of the worker in general, the exercise of this freedom has been considered legitimate (Cass. n. 1173/1986) exclusively when it is carried out within the boundaries of both internal (formal, substantial, and material consistency) and external (respecting legal and constitutional principles) limits (de Mozzi, 2019; Menegatti, 2008), regardless of the number of recipients of the opinion itself. However, recently, with specific reference to the freedom of expression exercised by the worker on social media (or other digital or virtual spaces), the case law has changed its stance, stating that two hypotheses must be distinguished. The first concerns cases where the worker's opinion is expressed through a conversation that, although virtual, is private, meaning it is intended for only one or a few specific users of the network (such as a private message on Facebook or WhatsApp between friends). The second refers to cases where the worker expresses their opinion publicly, for example, in the context of a public conversation conducted through social media or content posted on

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Facebook when the poster's profile is open, meaning anyone who wishes to read the conversation (also the employer) can do so by simply accessing the corresponding webpage. Thus, in the first case, since the conversation is private, even if the worker's opinion may be abusive or defamatory against the employer, the regime of limits to freedom of expression will not apply, also to protect the right to keep private conversations confidential, as guaranteed by the aforementioned art. 15 of the italian Constitution. In contrast, in the second case, since the conversation is public and open to an indefinite number of people, the worker's conduct may become relevant from a disciplinary perspective and subject to sanction by the employer if it violates the limits to freedom of expression set by the case law and by law, namely when it harms the honor, reputation, or image of the employer.

4. Which problems and which possible solutions?

In the light of the new position of the italian jurisprudence described above, it is worth reflecting on some grey areas that arise from it also in consideration of the obligations that the establishment of an employment relationship imposes on both the employee and the employer (arts. 2014, 2015 c.c.; arts. 4, 8 L. n. 300/1970). The greatest perplexities arise in relation to some specific aspects, which are outlined below. One might wonder how to truly distinguish a private conversation from a public one in the context of social media. In fact, it is not always easy to do so. Consider, for example, a WhatsApp conversation that, although initially limited to a small number of users, is potentially open to an expanding number of participants, without being able to control it. Moreover, the content of that conversation can be reproduced an unlimited number of times and, at the same time, directed to an indeterminate number of recipients. Thus, since it is a conversation that can be defined, in this sense, as "constantly evolving", it will be the judge who, in the specific case, must decide (arbitrarily) whether it is a private or public conversation and, consequently, whether the regime of limits on the worker's freedom of expression will apply. It is a gray area because it inevitably involves an excessively subjective examination by the judge. Another perplexity arises in relation to a specific limit on freedom of expression in the context of social media: formal restraint. Indeed, it cannot be denied that today we are increasingly facing a general tendency towards the use, particularly on social media, of progressively more aggressive and violent language. This makes it necessary to reconsider where the limit of formal restraint lies concerning the opinions expressed online, since they are no longer always considered offensive according to common sensitivity and awareness. In this case, the

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solution to this issue should also be left to the personal assessment of the judge in the specific case. At least, another issue that should be considered is whether (and to what extent) an employer can acquire and use the information that an employee posts on social media without violating the current data protection and privacy regulations. A possible legal solution to questions such as these could probably be found by focusing not so much on the first paragraph of art. 8 of the italian Statute (which prohibits the employer from making enquiries into the personal opinions of the employee), but on the second part of the same article which prohibits the employer from making enquiries into "*facts which are not relevant for the purpose of assessing the employee's professional suitability*". Another aspect to consider concerns the relationship between Art. 8 of the GDPR. Most authors tend to relate art. 8 to art. 9 of the Regulation according to which "*the processing of personal data intended to uniquely identify a natural person is prohibited*"; but it could be proposed to link not only Art. 8 of the Law n. 300/1970 with article 9 of the GDPR, but also article 8 with article 22 of the same european regulation. In this way, the focus could be not only on the collection of the employee's personal opinion by the employer through social networks, but also on the subsequent use of that opinion by the employer who, according to art. 8 of the italian Statute (read in the light of art. 22 of the personal data protection regulation 2016), cannot consider it to be the subject of a decision based solely on automated processing. This is essential in the world of work to protect both sides of the employment relationship. In this respect, in addition to the fundamental issues of privacy and employee information discussed above, the protection of the employer should not be forgotten either. Indeed, the nature and type of virtual space (closed or open) which, according to the most recent italian case law, becomes a selective criterion for considering the employee's behaviour as legitimate or not and, consequently, whether or not the legal regime of limits to his freedom of expression is applicable, could be accompanied by other criteria, for example, on the assessment of the seriousness of the employee's conduct and the possible damage that such conduct may cause to the company and its image.

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The impact of Artificial Intelligence on employment relationships in professional firms

Mario Cerbone[1]

1. Introduction: reasons for choosing the thematic area and directions for analysis

My research examines the impact of Artificial Intelligence (AI) on employment relationships within professional firms under the Italian legal system[2].

I have identified this thematic area (which may seem very specific at first glance) because it is fertile in several directions for labour law.

The first direction of investigation enables us to examine the relationship between labour and technology in the context of self-employment. This exploration addresses the longstanding dichotomy between autonomy and subordination, a concept that has always been central to labour law.

The second direction addresses the issue of "special" labour relations, which have a distinct causal foundation; in this context, the uniqueness primarily derives from the predominantly intellectual and creative nature of labour performance in professional firms.

The third area of analysis focuses on the role of labour activities that are essential for safeguarding the fundamental rights of citizens, particularly those with a significant "external" impact. For instance, consider the work of lawyers in law firms, which is crucial for ensuring the exercise of the constitutional right to defence, as established in Article 24 of the Constitution.

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[2] According to the European Regulation 2024/1689 of European Parliament and European Council, "Artificial Intelligence" is defined as "*an automated machine-based system designed to operate with variable levels of autonomy and which can exhibit adaptability after deployment and that, for explicit or implicit objectives, infers from the input it receives how to generate outputs such as predictions, content, recommendations or decisions that can influence physical or virtual environments*" (art. 3, § 1).

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2. The socio-organizational context: AI within the complex organization of professional work

Before addressing the legal issues, it is important to understand the relevant social and organizational context.

It is widely recognized that the introduction of information technology into work organizations and the rise of digitization processes have significantly undermined the structure and organization of work. Today, labour law is undergoing a significant transformation due to its unavoidable interaction with technology (in this perspective, the most recent literature on labour law focuses specifically on AI systems: Treu, 2024; Ciucciovino, 2024a; 2024b; Biasi, 2024; Cristofolini, 2024; Vaciago, 2024; Wass, 2022).

For professional firms, the process defined by the doctrine as the "artificialization" of employer powers, which is carried out using algorithms and the tendency towards decision automation, takes on very peculiar characteristics.

Implementing automated or semi-automatic decision-making in professional firms requires careful consideration and a clear understanding of how to organize the firm effectively as a working environment.

The various organizational models within enterprises complicate unified discussions.

The recently renewed National Collective Labour Agreement, established on February 16, 2024, outlines a minimum framework of rules for professional enterprises. This framework permits the creation of additional rules from other sources. The individual autonomy of each worker, especially in his relationship with the business owner – who may operate as a company – is recognized as the most important source of these additional rules.

Our discussion will focus primarily on the law firm model, which summarizes the three characteristics mentioned in the introduction.

In the "minimum" organizational structure of a professional firm, establishing a clear separation between the firm's activities is particularly crucial for the lawyer. On one hand, there are executive tasks characterized by repetition and primarily measured in quantitative terms; on the other hand, there are tasks related to the intellectual and creative aspects of the business. This second area includes activities that fulfil the technical role of a professional, such as providing legal defence for a lawyer, as well as activities that can be described as the *entrepreneurial function* of that professional. This encompasses the full range of strategic decisions that an enterprise must make. For instance, it includes determining the corporate structure of the business, prioritizing key areas or issues, recruiting employees and establishing methods of external communication.

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3. Potential effects of AI on structural aspects of employer power and mandatory employee positions in professional firms

If this is the socio-organizational context, we can identify the effects of applying automated decision-making in professional firms through AI.

On the employer's side, the distinction between executive or auxiliary activities and those that involve essential intellectual content will become clearer and more precise. This approach is expected to have positive effects by speeding up processes related to compliance and by isolating or rationalizing secondary activities in relation to the core functions of the firm (or company).

This will result in an enhancement of the inherently intellectual content of the law firm's business because space increases and there is no longer that typical compression of overlapping activities.

In executive roles, the employer's managerial authority will focus on selecting the algorithm, its technical features, and the techniques used to manage tasks related to that algorithm.

The situation is different for the intellectual activities of the enterprise. In this case, the effects are more significant.

The first effect is an increase in the entrepreneurial spirit of the profession, reflecting strategic choices and decisions that embody essential intellectual content, which remains unaffected by artificial intelligence systems (the second area of activity, discussed above).

The "entrepreneurial" content of work in the professional enterprise is increased by the intellectual component due to the isolation of the material activities entrusted directly and totally to the machine. This indicates that within this area of the organization – now more clearly defined at the organizational level – are concentrated all the professional skills that support the enterprise in achieving its goals. In this sector, there may be various types of structured work relationships that exist at different levels, with varying degrees of participation in the company's professional decisions. However, the employment relationship will differ significantly from the standard model of a "weak contract" employee. The intellectual content of the work, combined with the automation of executive tasks that we have discussed, will lead to a reduction in the distance between "employee" and "employer". This will create opportunities for contracts that are more aligned with the employer (or, in some instances, with self-employed workers) than with traditional employees.

The use of information technology will emphasize this process of assimilation of contractual positions: think about the use of smart working and the impulse that will flow from it towards a "for goals" worker's

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achievement, by stating a relationship regime different from that of article 2094 of the Civil Code.

It can be argued that the introduction of AI systems in professional enterprises will generate automatic effects of rebalancing and readjustment of the contractual positions of labour compared to the classic image of a structurally unbalanced employment contract. To further strengthen this perspective, the positive effects can be considered also in terms of work/life balance, linked both to smart working and to the described process of increasing the moments of participation in the entrepreneurial function of the activity by the worker himself (a greater "proximity" to the employer).

The effects will also be felt on the trade union side.

The impact on professional enterprises in terms of establishing a more participatory model of sharing between worker and entrepreneur reduces that alienation from the result which characterizes employment and increases motivation to work on objectives and for the objectives of the professional enterprise.

This means that the purpose of the interest bodies needs to be completely rethought. There is certainly a transition from limiting the exercise of managerial power (and of the employer's powers in general) to the phase of "building" the algorithm (on this point, De Stefano, Taes, 2023).

The future scenario calls for the creation of a "new statute" of workers' trade union rights, taking into account digital enterprises and the establishment of new methods of trade union comparison, not conflictual but based on co-determination through participation, implementing the principles of Article 46 of the Italian Constitution (Corti, 2024). It is important to recognize that professional activities play a vital role in safeguarding citizens' constitutional rights. These activities often have an external impact that trade union organizations must consider. Therefore, the model for trade union relations should emphasize participation and collaboration to prevent any potential conflicts from affecting citizens.

4. Concluding remarks

In conclusion, the introduction of AI systems in the peculiar organisation of professional enterprises is capable of opening up very relevant labour law scenarios.

The most significant effect is to "play down" the classic issue of the employee's contractual weakness as a structural condition of the employment contract.

AI is able to eliminate, or at least mitigate, the most marked traits of this

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problem, affirming a new and different approach to the working relationship within the professional company, focused more on the professional and relational skills of the person working, also helping to clarify ambiguities too often underestimated by collective bargaining itself in the past.

Collective bargaining has long since devalued the part of the company's employees who participate in the entrepreneurial function and who in any case ensure the core business of the company. So these employees were excluded from protection exclusively because they were ascribed to the area of self-employment, forgetting that most of the time self-employment was provided under a single client regime and therefore certainly worthy of protection in the same way as the other employees, due to their intrinsic economic dependence on the employer.

This reason should force the trade unions today to overcome the classic approach to protection based on the dichotomy of subordination (high protection) and self-employment (no protection).

The introduction of AI may have this clarifying and rationalising effect, but it should be accompanied by a greater awareness of the distinction between employees in the firm according to the described organisational functions.

The new scenarios induced by AI are very interesting precisely because of the countless potentials that they unfold in terms of protection of labour law for those who work in the company.

We talked about work/life balance, but the positive effects are also and above all on the aspect of protecting the professionalism of the staff members who, at the beginning of their professional career, are being trained to take over the role of the owner of the firm (or partner or associate), by registering with the respective professional Order. It cannot be overlooked that it is precisely this particular condition which deserves to be protected by the trade unions: the condition of workers who undertake a course combining training/apprenticeship/work and which constitutes the heart of working activity in the firm, by marginalising executive or ancillary activities that can be managed with AI.

This structure of the enterprise, which is now more clearly defined at the organisational level, requires a system of protections and safeguards totally different from that currently ensured by national collective agreements, an ad hoc system: a protective system anchored not only to the "general" national bargaining, often neglecting the logic of differentiation of models, but to a "tailor-made" structure sewn by second-level contracts (second-level collective bargaining should be encouraged) and by stronger individual bargaining, given the significant occupational content of the "worker" in the enterprise.

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The centre of gravity is individual autonomy, flanked by more protective areas which can be created by the activities of trade unions in synergy with professional bodies: the area of bilateralism, lifelong learning, on-the-job training, the welfare of enterprises and the protection of workers' welfare.

In terms of content, the most interesting areas are on the "building" side of the figure of the typical worker of the professional enterprise and the search for the classification system that best suits the organizational characteristics (intrinsically flexible) of the same company: in this sector very interesting scenarios open that, following the example of other European systems, can better identify the so-called middle-management within the professional enterprise, as an intermediate sector between governance and "serving" organizational structure.

This process of recognizing the professional role is crucial for enhancing the effectiveness of labour regulations.

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Platform work in Japan and China

Makoto Ishida[1], Yoko Hashimoto[2], Linkai Yang[3]

Summary

Platform work represents a new form of employment characterized by labor relationships in which organizational platform workers meet individual and economic subordination criteria. These workers qualify as "employees" or "workers" under labor law and should be entitled to comprehensive labor protections (Chang, 2021, p. 37).

This article examines the development of platform work, the "employee"/"worker" status of platform workers and legislation aimed at protecting platform workers in East Asian countries.

In Japan, unique legislation for freelancer protection came into force on November 1, 2024. In Korea, the Supreme Court issued a landmark decision regarding the "employee"/"worker" status of platform workers on July 25, 2024.

In China, relevant labor legislation should be enhanced to define platform work more clearly and align the legal framework with the realities of the platform economy. Corporate social responsibility and ESG principles should guide platform enterprises to improve labor conditions and algorithm governance, fostering harmonious labor-management relations in the platform economy.

1. Introduction

The platform economy is one of the most important changes brought about by the digitalization of the world of work. The growth of the platform economy has created new markets and new jobs, but on the other hand, it

[1] Waseda University, Tokyo, Japan.
[2] Gakushuin University, Tokyo, Japan.
[3] Aoyama Gakuin University, Tokyo, Japan.

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has also created the challenge of how to protect platform workers who work through platforms, especially labor platforms. This is no exception in East Asian countries including Japan, Taiwan, China and Korea.

If working on the labor platform is called platform work, there are two different types. The first type is platform work which provides services to users face to face in the real world through platforms. This is called face-to-face or location-based platform work. Examples include transportation services such as Uber, food delivery services such as Deliveroo and Uber Eats, and domestic service such as Helping. On the other hand, the second type is platform work which offers services in virtual world through platforms where no one meets users face to face. This is called non-face-to-face or online-based platform work. Some examples are crowdsourcing platforms such as Upwork, Amazon Mechanical Turk.

In the above mentioned East Asian countries, the first type (face-to-face or location-based) of platform work in the delivery and transportation sectors is gaining attention, while the second type (non-face-to-face or online-based) of platform work is largely being ignored. The question is why the first type of platform work is more common in East Asian countries? This session will shed light on this question through actual situations in each country.

From a legal policy perspective, the issue is how to protect platform workers and how to improve and enhance their working conditions and social security. The debate is whether to extend the existing labor law protection to platform workers or to create a new category of protected workers. This session will also include the current state of legal policies for the protection of platform workers in the above mentioned East Asian countries.

In this article, the situations in Japan and China are examined[4].

2. Japan

2.1. Introduction

In Japan, unlike in Western countries, the issue of platform labor is less prevalent. This can be attributed to the slower pace of digitalization and the cautious introduction of ride sharing. There has only been one case where the employment status of platform workers was contested, and that involved a delivery worker for Uber Eats.

[4] At the panel of the ISLSSL Rome Congress on September 20, 2024, Professor Bo-Shone Fu (National Taipei University, Taiwan) reported on platform work in Taiwan and Professor Shukhan Choi (Seoul National University, Korea) reported on platform work in Korea.

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On the other hand, for the past few years, the protection of freelancers has become a policy issue, and a new law was enacted last year to protect freelancers. The background to this is that freelancing has been seen as a promising employment opportunity for the elderly.

2.2. Definition of platform work

In Japan, there is no legal definition of platform work, however Platform work in Japan is generally understood to have the same meaning as the definition in the EU Platform Work Directive[5]. In this directive "platform work" means any work organized through a digital labour platform and performed in the Union by an individual on the basis of a contractual relationship between the digital labour platform or an intermediary and the individual, irrespective of whether a contractual relationship exists between the individual or an intermediary and the recipient of the service (Art. 2.1(b))[6].

Typically, two types of platform work are recognized. "On-demand work via app" and "crowdwork" are distinguished mainly by the place of work[7]. "On-demand work via app" is performed on-site, while "crowdwork" is conducted entirely online. "On-demand work via app" is the same meaning as the "face to face" or "location-based" platform work.

Tab. 1. Two types of platform work

	Work-on-demand via App	**Crowdwork**
Place of work	On-site	Online
Details of services	Traditional working activities, e.g. transport, cleaning.	-
Example	Uber, Taskrabbit	Amazon Mechanical Turk, Crowdflowers…

[5] Directive 2024/2831, OJ L 2024/2831.

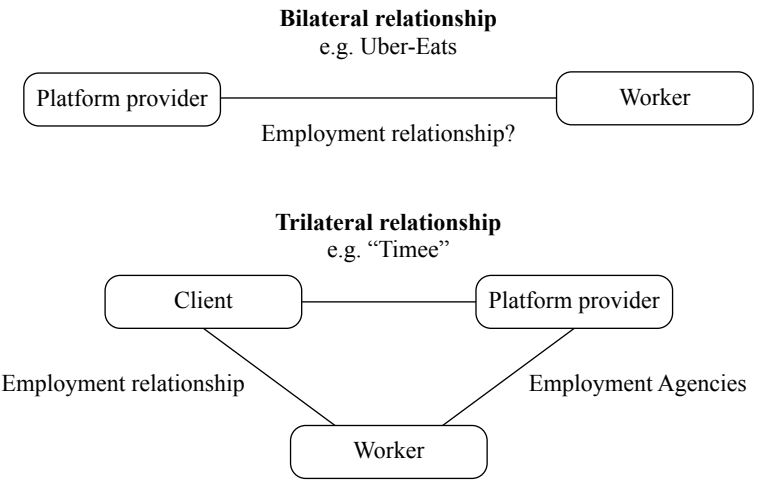
[6] This definition is revised from the proposal of the directive in that it includes not only the relationship between platforms and individuals (bilateral relationship) but also that between intermediaries and individuals (triangular relationship) as platform work.

[7] De Stefano V. (2016), "Introduction: Crowdsourcing, The Gig-Economy, And the Law", *Comparative Labor Law and Policy Journal*, p. 461.

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From another perspective, bilateral and triangular relationships can be distinguished. In a bilateral relationship, there is a direct contractual relationship between workers and platform providers, and it is understood that workers provide their services to the platform providers. The recipient of the workers' services is the platform provider. In a triangular relationship, a platform provider acts as an intermediary between clients and workers, similar to an employment agency.

Figure 1 – Bilateral relationship and triangular relationship



2.3. Bilateral relationship

An example of a bilateral relationship can be seen in the case of an Uber Eats driver. The worker status of the driver is currently being debated in the Labor Commission. On 4 October 2022, the Tokyo Labor Commission recognized the worker status of drivers under the Labor Union Law. In Japan, worker status under the Labor Union Act (LUA) is considered broader than worker status under individual labor laws, such as Article 9 of the Labor Standards Law (LSA). The criteria for determining worker status are similar in both cases, with a focus on subordination to a principal's instructions. However, in collective labor law, economic dependence is also considered, and subordination is more broadly recognized. This case is to be examined below (2.6.2).

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2.4. Triangular relationship

A first example of a triangular relationship is an app called "Timee". "Timee" offers individuals gig work, such as simple tasks in supermarkets or restaurants for a few hours. This type of work is referred to as "short part-time work" (*sukima baito*). There are many other apps besides "Timee" that offer similar opportunities[8].

For example, "Timee" has a license for employment agency services, but the "Timee" app controls working hours to ensure compliance with labor and social security laws[9]. This interference in the employment relationship between clients and workers is unfamiliar to traditional employment agencies.

It is reported that elderly people are finding jobs through a matching app called "Timee". According to an article in the "Asahi" newspaper on August 18, 2024, a seventy-year-old woman works four hours a day every day at restaurants or supermarkets. She could not find a job through traditional methods. Now she earns about 100,000 yen per month, which is indispensable because her pension is insufficient.

About 51,000 people over the age of 65 are enrolled in "Timee", and this number has doubled in the past year.

"Timee" became a publicly listed company this year. The president of the firm is a 27-year-old young man, which is unusual in Japan, where entrepreneurship is weak. According to an interview with the president, Mr. Rei Ogawa in "Nikkei Business" on August 5, 2024[10], the app controls working hours to ensure compliance with labor and social security laws. Specifically, a person can only work once a day and up to 39 hours a week because the Labor Standards Law stipulates 8 hour-workday and 40-hour workweek. If someone works more than 8 hours a day, the employer is required to pay overtime. An employee must enter the social insurance system when he or she earns more than 88,000 yen per month. This example shows that gig work is developing in harmony with labor and social security laws in Japan. However, the president of "Timee" admitted that this compliance is not guaranteed if a user simultaneously uses another app.

The second example is Amazon drivers. There is no legal relationship between Amazon and the workers. Amazon offers an app to allocate goods

[8] It is now a serious problem in Japan that robberies are occurring frequently in residential areas. Young people, seeking short part-time work as "drivers" or for "transportation" through apps, end up being coerced into committing robberies by their employers. The police are taking the role of these apps very seriously, but there is still no effective way to prevent such "criminal part-time jobs" (yami baito).

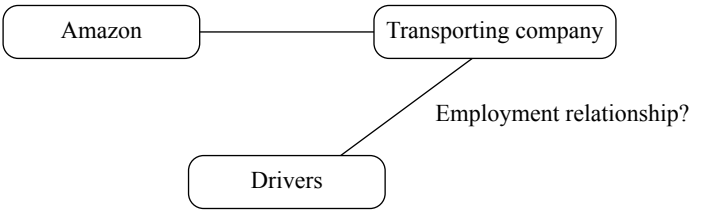
[9] *Nikkei Business*, August 5, 2024, pp. 40-44.

[10] *Ibidem.*

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and manage transportation. The app instructs the route. It is now a problem that drivers must work from early in the morning until late in the afternoon to deliver to consumers. Recently, the labor inspection offices recognized the worker status of Amazon drivers who were working as independent contractors and granted them benefits under the Industrial Accidents Compensation. It was recognized that the instructions provided by the app lead to the subordination of drivers.

Figure 2 – Amazon drivers



2.5. Ride-sharing

Ride-sharing in Japan is another example of a triangular relationship. Ride-sharing was introduced in Japan in April 2024 in a very restricted way[11]. This is called "Japanese ride-sharing" (*Japan ride-share*). The Ministry of Land, Infrastructure, Transport and Tourism estimated the shortage of taxis and allocated a specific number of permitted ride-sharing cars to existing taxi firms in big cities. Currently, ride-sharing is permitted in the 23 wards of Tokyo, as well as in Yokohama, Kawasaki, Nagoya, Kyoto, Sapporo, Sendai, Saitama, Chiba, Osaka, Kobe, Hiroshima, and Fukuoka. These firms must then employ the ride-sharing drivers as their employees. For example, the Ministry estimated in March 2024 that in Tokyo (including the 23 wards, Musashino City, and Mitaka City), there is a shortage of 1,100 taxis between 4:00 PM and 7:00 PM on Fridays and Saturdays, and a shortage of 254 taxis between 12:00 AM and 4:00 AM on Saturdays. According to the "Nikkei Business" on July 16, 2024 only 4% of the allocated cars for ride-sharing is used. The number of the permitted ride-sharing cars is slowly increased. For

[11] Another type of ride-sharing has already been introduced, managed by a local government in an underpopulated area, where the driver is considered self-employed. It is called "public ride-sharing" (*kokyo ride-share*). According to the Transportation Office 600 municipalities have introduced the "public ride-sharing" in October 2024 (Transportation Office in *Kanto*, Car Traffic Division, Passenger-transportation 2. Section, "Japanese Ride-sharing and Public Ride-sharing etc.", 2. Oct. 2024).

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example, since July 2024, more ride-sharing cars have been permitted during rainy weather, as the demand for taxis increases when it rains. In politics, a hot issue is whether ride-sharing should be opened to companies other than the existing taxi firms and whether self-employed drivers should be allowed to work. According to the Transporting Office the matching rate is about 90%[12].

Platform providers supply taxi firms with apps to match clients with drivers. These taxi firms must employ the ride-sharing drivers as their employees. Ride-sharing taxi drivers must display a sign in the car. This sign must include the words "ride-sharing" ("*ride share*").

Ride-sharing is still unfamiliar to most Japanese people. It can be said that Japanese people are hesitant to get into such cars. On the other hand, food delivery services, especially Uber Eats, have become very popular. Uber Eats has recently begun offering an additional service: shopping assistance. Uber Eats drivers will purchase goods from supermarkets for clients.

2.6. New act for the protection of freelancers ("Act on the Proper Transaction of Specific Contracted Businesses")

2.6.1. Introduction

The New Freelancer Law ("Act on the Proper Transaction of Specific Contracted Businesses"), which was enacted in May 2023, came into effect on November 1, 2024. The law aims to protect freelancers from unfair practices by the clients they engage with.

This new law is not focused on platform work. It aims to protect all freelancers. And it applies only to bilateral relationships. Art. 1 of the New Freelancer Law stipulates its aim as follows:

> This law, considering the progress in diversifying work styles in our country, aims to establish an environment where individuals can stably engage in tasks they undertake as independent business operators. To achieve this, it implements measures such as mandating businesses that outsource tasks to specific contracted business operators to clearly indicate the details of their services and other relevant matters. By doing so, the law seeks to ensure fair transactions involving specific contracted business operators and improve the working conditions of individuals engaged in specific contracted work, thereby contributing to the sound development of the national economy.

[12] *Ibidem.*

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According to this provision, the aim of the New Freelancer Law is to develop freelancers – namely, self-employed individuals without employees – and recognize them as a form of new employment opportunity. To achieve this aim, the law stipulates regulations ensuring appropriate contract conditions and a suitable working environment. The former are derived from competition law, while the latter are based on labor law, as detailed below. This unique combination of competition law and labor law makes it a singular piece of legislation from an international perspective.

2.6.2. Definition of a freelancer

Freelancers are defined in the 2021 guidelines by the Fair Trade Commission, the Ministry of Health, Labor and Welfare, and other agencies as "*self-employed individuals or sole proprietors without a physical store or employees, who earn income by utilizing their own experience, knowledge, and skills*". This definition is also reflected in the "New Freelancer Law" for those defined as "specific contracted business operators" or "Specific Contracted Work Engaged Person".

The 2022 Employment Structure Basic Survey (Ministry of Internal Affairs and Communications) was the first to investigate the number of freelancers according to this definition. According to the survey, there are 2.09 million individuals working as freelancers as their primary occupation, making up 3.1% of the total, and 480,000 individuals working as freelancers as a secondary job.

Article 2 of the New Freelancer Law defines the terms as follows:

Definitions in the New Freelancer Law ("Act on the Proper Transaction of Specific Contracted Businesses")

- "Specific Contracted Business Operator": A business operator that is the recipient of contracted work and does not employ any employees.
- "Specific Contracted Work Engaged Person": An individual who is a specific contracted business operator, as well as the representative of a corporation that is a specific contracted business operator.
- "Specific Business Contractor": A business operator that contracts work to a specific contracted business operator and employs employees.
- "Business Contracting": The act of a business operator entrusting another business operator with the manufacturing of goods, the creation of information products, or the provision of services for the purposes of its business.

The principal, who is the other party in a freelancer's contract, is called a "specific business contractor". Both the freelancer and the principal are

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considered business traders, distinguished by whether or not they employ employees.

2.6.3. Provisions of the "New Freelancer Law"

The "New Freelancer Law" includes following provisions. These provisions are divided into those governing appropriate transactions between freelancers and principals (1-3), and those ensuring an appropriate working environment for freelancers (4-6).

Provisions governing appropriate transactions between freelancers and principals:

1) When contracting work to a specific contracted business operator, the content of the services to be provided by the specific contracted business operator, the amount of remuneration, and other relevant details must be clearly specified in writing or by electronic means (Art. 3).
2) The payment date for remuneration must be set and paid within 60 days from the day the services are received from the specific contracted business operator. (In the case of subcontracting, payment must be made within 30 days from the date payment is received from the original client.) (Art. 4)
3) For business contracts lasting one month or longer, the following (1)-(5) actions must not be taken, and actions (6) and (7) must not be used to unjustly harm the interests of the specific contracted business operator:
   (1) Refusing to accept delivery without a reason attributable to the specific contracted business operator (Art. 5 Para. 1, Nr. 1).
   (2) Reducing remuneration without a reason attributable to the specific contracted business operator (Art. 5 Para. 1, Nr. 2).
   (3) Returning goods without a reason attributable to the specific contracted business operator (Art. 5 Para. 1, Nr. 3).
   (4) Unjustly setting remuneration at a significantly lower amount compared to the usual market rate (Art. 5 Para. 1, Nr. 4).
   (5) Forcing the purchase of specified goods or the use of specified services without a legitimate reason (Art. 5 Para. 1, Nr. 5).
   (6) Making the specific contracted business operator provide money, services, or other economic benefits for one's own benefit (Art. 5 Para. 2, Nr. 1).
   (7) Changing or requiring the work to be redone without a reason attributable to the specific contracted business operator (Art. 5 Para. 2, Nr. 2).

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Provisions for improvement of the working environment for specific contracted work engaged Persons:

1) When providing recruitment information through advertisements or other means, false representations must not be made, and the information must be kept accurate and up to date (Art. 12).
2) For continuous business contracts lasting six months or longer, necessary considerations must be made in response to a request from the specific contracted business operator to enable them to balance work with childcare, caregiving, or other responsibilities (Art. 13).
3) Measures such as establishing a system for consultation and necessary arrangements must be taken to address harassment against specific contracted work engaged persons (Art. 14).
4) When terminating a continuous business contract prematurely, in principle, the specific contracted business operator must be notified at least 30 days before the termination date (Art. 16).

2.6.4. Remedies against violations of the law

The Fair Trade Commission, the Director-General of the Small and Medium Enterprise Agency, or the Minister of Health, Labor and Welfare may provide advice, guidance, request reports, conduct on-site inspections, issue recommendations, make public announcements, or issue orders to the specific business contracting operator or others regarding violations. A fine of up to 500,000 yen may be imposed for violations of orders or refusal to cooperate with inspections (Art. 6-9, 17-20, 24-26).

2.6.5. Government initiatives for consultation support, etc.

The government will take measures to establish the necessary systems for handling consultations and other support for specific contracted business operators. Since 2020, the Ministry of Labor and Welfare has entrusted freelancer consultations to the Second Tokyo Bar Association. According to Mr. Yasunari Yamada, a lawyer involved in this consultation process, there were 8,976 consultations in 2023. About 30% of the complaints were related to payment issues. While 64 cases were resolved through mediation, principals often tend to ignore mediation requests from lawyers. Entrusting this function solely to the bar association is insufficient; the government should establish more effective procedures.

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2.6.6. Expansion of the special enrollment in workers' accident compensation insurance

Alongside the enactment of the new law, special enrollment in workers' accident compensation insurance for freelancers has been widely recognized. Special enrollment allows individuals to pay their own insurance premiums to receive protection under workers' accident compensation insurance, unlike employees for whom the employer covers the premiums. This distinction represents a significant difference. While the Japanese Labor Union Federation (*Rengo*) has established an organization to handle the special enrollment procedure for freelancers, questions remain about whether such freelancers are truly "workers" rather than self-employed individuals. If they are eligible for protection as "workers" under workers' accident compensation insurance, is it rational for them to be enrolled in this insurance as "self-employed"? This issue has not been discussed by anyone so far, but it is an important question.

2.6.7. The hybrid nature of the New Freelancer Law as both competition law and labor law

The New Freelancer Law does not specifically focus on platform work. It is intended to apply all freelancers. Therefore, platform workers should be protected by this law in their bilateral relationship with their principals. However, the law does not address triangular relationships involving platforms. Therefore, platform providers that operate as employment agencies are not obliged to comply with this law.

To protect the contract conditions of freelancers, the New Freelancer Law includes provisions similar to those in the Subcontract Act ("Act on Preventing Delays in Payment of Subcontracting Fees"). Specifically, it mandates the obligation to provide written documentation clearly outlining contract terms. Additionally, for business contracts lasting one month or longer, practices such as delaying payment of remuneration or setting significantly low remuneration (price undercutting) are prohibited.

The Subcontract Act does not apply if the client's capital is less than 10 million yen, and about 40% of clients engaging with freelancers have a capital of 10 million yen or less[13]. Therefore, the New Freelancer Law extends protections to freelancers, who often work in conditions similar to employees, thereby broadening their protection.

[13] Cabinet Office, "The Headquarters for Realizing New Capitalism" *(atarashii shihonsyugi jitsugen kaigi*), April 2022.

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Additionally, the New Freelancer Law includes provisions for establishing a harassment consultation system and obligations for clients to accommodate freelancers who are engaged in childcare or caregiving. It also stipulates a 30-day notice requirement for terminating continuous business contracts lasting over six months. The protection against harassment under this law can be seen as an elevation of the guidelines provided by the Ministry of Health, Labor and Welfare into legal requirements.

The oversight of this law involves the Fair Trade Commission for protecting transaction conditions and the Labor Bureau for labor law protections.

The background to the enactment of this law is significantly influenced by the Subcontract Act, which was established in 1956. The Subcontract Act regulates transaction conditions between subcontracting companies and their clients and serves as a special law for the regulation of "*abuses of superior bargaining positions*" in the Anti-trust Law, holding a socio-economic policy function. In contrast to Western regulations that focus on the abuse of market dominance, Japan's approach under the Subcontract Act addresses abuses in specific transaction relationships. The New Freelancer Law builds on this unique Japanese economic law to expand protections for freelancers by extending the regulations of the Subcontract Act.

The New Freelancer Law significantly increases the likelihood of protecting freelancers from unilateral transaction conditions imposed by clients. For example, if a freelance writer is requested by a client to reduce their remuneration by half because the client plans to use ChatGPT, and consults the Fair Trade Commission, the Commission may explain that setting the price based solely on the client's circumstances without sufficient negotiation could constitute "price undercutting" (*kaitataki*) in the meaning of Art. 5 para. 1 Nr. 4 of the New Freelancer Law[14].

The new law is expected to ensure fairer contract terms for freelancers who have weaker negotiating power. Considering that there were previously no legal regulations to address such issues, the new law holds significant importance.

However, a significant issue in the process of enacting the new law is that it did not address whether freelancers are truly self-employed individuals. As mentioned earlier, the definition of freelancers ("*specific contracted business operators*") is broad, and it is possible that some individuals included in this definition are not self-employed but are truly workers who should be covered by labor laws. While self-employed freelancers will receive protections that were previously unavailable (though the fundamental question of why self-

[14] Koichi Koyama (2024), "Legal Responses to Creative Freelancers" (*Creative kei freelancer wo meguru hoteki taio*), *Hōritsu no Hiroba*, vol. 77, no. 4, p. 37.

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employed individuals need protection remains unaddressed here), if the new law's significance is high, the protections it provides are insufficient compared to those available under labor laws if the individuals are truly workers.

2.7. Worker status under Japanese Labor Law

2.7.1. The relative nature of worker concepts in individual and collective labor law in Japan

The worker concept was not re-examined when the New Freelancer Law was enacted, leaving many problems unresolved. This issue is briefly discussed here.

Article 9 of the Labor Standards Act (LSA) defines a "worker" as a person employed at an enterprise or office (hereinafter referred to as an "enterprise") who receives wages, regardless of the type of occupation. In both literature and case law, the criterion for determining a "worker" under the LSA, namely a "worker" in the individual labor law, is interpreted as "subordination to the control and direction of the employer" (*shiyo juzoku sei*). The concrete factors of subordination are considered to include:

- being compelled to follow orders,
- being bound to a designated workplace and working hours,
- being subject to the instructions of the client,
- the nature of remuneration,
- the number of customers, personal capital and facilities, the presence of one's own employees, etc.

The Supreme Court tends to reject the classification of independent contractors as workers[15]. Courts do not consider de facto restrictions on the actual performance or duties of a contract as evidence of subordination.

On the other hand, the definition of worker status under Article 3 of the Labor Union Act (LUA) – which pertains to collective labor law – is interpreted more broadly than worker status under the LSA[16]. Article 3 of the

[15] "Yokohama Minami Rokishocho" Case, Judgement of 28 Novemver,1996, Rodo Hanrei vol. 714, p. 14 (Worker status of a truck driver was denied.); "Fujisawa Rokishocho" Case, Judgement of 28 June, 2007, Rodo Hanrei vol. 940, p. 11 (Worker status of a carpenter was denied.)

[16] Takashi Araki (2022), "Collective bargaining for self-employed in Japan", *Comparative Labor Law & Policy Journal*, vol. 42, pp. 449-464.

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LUA defines a "worker" as a person who earns their living through wages, salaries, or other equivalent income, regardless of the type of occupation. The concrete factors for determining worker status include:

– being integrated as an unnecessary workforce within the client's organization,
– having the terms and conditions of the contract unilaterally determined,
– being compelled to follow orders,
– being bound to a specific workplace and working hours,
– being subject to the control and direction of the principal, and
– negative factors that deny self-employed status, such as the number of clients, personal capital and facilities, and the presence of one's own employees.

The definition of a "worker" under the LUA is considered broader than that under the LSA, but the concrete factors are similar. It can be said that "control and direction" by the principal is a key determinant. The Supreme Court regards de facto restrictions on the actual performance of duties under a contract as evidence of worker status under the LUA[17].

2.7.2. The "Uber Eats" case

The Facts of the "Uber Eats" case are as follows.

"Uber Japan" and "Uber Eats Japan" jointly operate the food delivery service called Uber Eats, which connects restaurants and customers via an app.

X is working as a delivery partner for Uber Eats. X has signed a "Uber Services Agreement" with "Uber Eats Japan", which was prepared by Uber Eats with standardized content. This agreement stipulated that no employment relationship would be established between Uber Eats and the delivery partner.

X, when they want to work, turns on the app developed and provided by Uber Eats and waits for offers at any location of their choice. When an offer comes in, they must immediately decide whether to accept it. The delivery

[17] "Shin kokuritsu Gekijo" Case, Judgement of April 4, 2011, Minshu vol. 65, p. 943 (Worker status of chorus members at an opera theater were approved.); "INAX Maintenance" Case, Judgement of April 12, 2011Rodo Hanrei vol. 1026, p. 27 (Worker status of repairmen at a toilet producing company were approved); "Victor Service Engineering" Case, Judgment of February 21, 2012, Minshu Vol. 66, p. 955 (Worker status of repairmen at a sound equipment manufacturing company was approved.)

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request screen displays information such as the expected delivery fee, the location and name of the restaurant, and the estimated time and distance from the location where the delivery request was accepted to the delivery destination. However, the address of the customer and the delivery location are not shown. While it is up to the delivery partner to decide whether to accept a delivery request, if they continuously reject requests (usually after about three consecutive rejections, although this varies by region), their account is automatically set to offline. Even after accepting a delivery request, it is possible to cancel the order before receiving the food, but doing so increases the delivery partner's cancellation rate, which negatively impacts their rating. Once a delivery request is accepted, the recommended route to the restaurant is displayed on the app. Uber Eats tracks the location of the delivery partner in transit via GPS, and this information is provided to the customer.

Uber Eats has established a "Delivery Partner Guide" and "Community Guidelines" that delivery partners must adhere to. These manuals include instructions and guidance on how to provide services and handle issues that may arise. Additionally, the guidelines prohibit anyone other than the registered person from using the account.

The "Uber Services Agreement" states that Uber Eats evaluates the response rate to offers and may issue warnings to delivery partners. If there is no improvement, access may be suspended.

The restaurant and the customer evaluate the delivery partner after the food has been received and handed over. This evaluation includes items such as "Did not wear a mask". The delivery fee paid by Uber Eats consists of a portion calculated based on distance and ad hoc incentives. With these incentives, for example, if drivers work during highly demanded times or in high-demand areas, they can earn higher remuneration. Because of these incentives, delivery partners cannot help but be concerned about their ratings.

Delivery partners use their own bicycles or motorcycles for deliveries, but the delivery bag with the Uber Eats logo is provided by Uber Eats.

X, along with several dozen other delivery partners, formed an Uber Eats union and requested collective bargaining with "Uber Eats Japan" and "Uber Japan" to address issues such as compensation for accidents, clarification of account suspension criteria, and adjustments to pay. Must "Uber Eats Japan" and "Uber Japan" agree to engage in collective bargaining?

On 25 November 2022, the Tokyo Labor Commission recognized the worker status of drivers under the Labor Union Law. According to the six criteria used in their judgment, the Commission found that the criterion of "not having the freedom to accept service offers from another party" was not met, as drivers could choose when they wanted to work. However, the other criteria were satisfied, and thus the worker status was approved.

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The Tokyo Labor Commission ruled that "Uber Eats Japan" and "Uber Japan" cannot refuse collective bargaining with the union, even though the drivers have no contractual relationship with "Uber Japan". The Commission said that "*With regard to the Uber Eats business, the division of roles among the related companies involved in the business is not clearly distinguished. Substantively, it is reasonable to view the related companies as effectively operating and managing the business as a unified entity*"[18].

2.8. Conclusion: Labor Law and Competition Law

In the Parliament's discussion about the New Freelancer Law, it was affirmed that a freelancer, to whom this law applies – referred to as a "Specific Contracted Business Operator" – is not considered a worker under the LSA, but may be regarded as a worker under the LUA[19]. This understanding reflects the mixed character of the New Freelance Law, which encompasses aspects of both Labor Law and Competition Law.

Moreover, it has been discussed that the New Freelancer Law should also be applied to workers under the LSA, as the regulation of prohibited actions in Article 5 could benefit them. This regulation originates from the Subcontract Act and is somewhat unfamiliar in the context of worker protection. However, as above mentioned, it was recently reported that the Fair Trade Commission responded to a consultation from a freelance writer whose client requested a 50% reduction in remuneration, stating that such an action could be considered a prohibited act under this Article. Similar issues can arise in employment contracts, and there is currently no suitable regulation in Labor Law to address such problems. Therefore, referencing the prohibited actions in the New Freelancer Law could be beneficial in the context of employment contracts.

On the other hand, according to the discussion in Parliament, a freelancer to whom this law applies is not considered a worker under the LSA, and the

[18] This order brings to the mind of the judgment of the Torino Court of Appeal on November 18, 2021 (n. 4991/2020), which recognized the employment status of the firms within the "Uber Galaxy" (*galassia c.d. Uber*). In Japan, the employer status of the principal under the LUA in relation to the employees of a subcontracted company can be recognized when the principal "*actually and concretely controls and determines the working conditions of these employees*" ("*Asahi Hoso*" case, Judgment of the Supreme Court, Februar 28, 2006, Minshu vol. 49, p. 559).

[19] House of Councillors, National Diet of Japan (*Sangiin*), Proceedings of the 211th Diet, April 25, 2023, p. 4 (Etsuko Miyamoto, Ministry of Health, labor and Welfare) and p. 28 (Keiko Aoyama, Ministry of Health, labor and Welfare).

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protection offered by this law is significantly inferior to that of the labor law. As a result, no one is inclined to identify themselves as a freelancer under this law.

The relationship between labor law and competition law could become a subject of intense discussion in Japan in the future.

Recently, the Ministry of Health, Labor, and Welfare recognized industrial accident compensation for truck drivers who delivered goods for Amazon as independent contractors[20]. While the reexamination and expansion of the definition of "worker" under the Labor Standards Law is welcome, it seems inconsistent with the ongoing efforts to protect freelancers.

3. China

3.1. Introduction

China is one of the leading countries in platform economy development. Protecting platform workers, officially referred to as "new forms of employment workers" in China, has been a central issue in labor and employment law[21]. The platform economy in China has enabled flexible employment and supported socio-economic transformation. However, its expansion has simultaneously raised pressing concerns regarding the labor rights of platform workers[22] (Sun, 2024). A prominent issue lies in the layered, sandwich-like contractual relationships designed by platform enterprises. This design complicates the application of subordination criteria (individual, economic, and organizational subordination) to employment relationships. For example, some platform enterprises outsource their core business operations and assist outsourcing companies in excluding labor relationships

[20] Ministry of Health, Labour and Welfare, "Approved Cases of Worker Status under the LSA (Light Truck Driver)", (*rodo kijun ho jo no rodosha ni gaito suru to handan sareta jirei [kei kamotsu jidosha unso jigyo no jidosha untensha]*) December 2023.

[21] For English literature on the legal issues concerning platform workers in China, please refer to: International Labour Organization working papers, Wang Q., Chen Y., Yang Y. (2023).

[22] Professor Sun Ping from the School of Journalism and Communication at the University of Chinese Academy of Social Sciences, after nearly seven years of field research, authored the book Sun Ping (2024). This book reveals the fundamental reasons why platform work, initially regarded as "transitional labor", has turned into "permanent temporariness". The book metaphorically compares platforms to a honey-coated spider web that attracts individuals, who, upon joining, find themselves entangled and unable to break free. The platform system manages not just labor power but labor itself. Ultimately, the fragmented nature of work traps food delivery riders in the platform's "sticky trap". See: *baijiahao.baidu.com/s?id=1812612844922388448&wfr=spider&for=pc* (accessed: 25.11.2024).

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with workers through tailored contracts and processes (Wang, Tong, 2023). Others require platform workers to register as self-employed individuals to avoid employer liability, leaving these workers without adequate legal protection under labor and employment law (Chang, 2021a, p. 40).

According to data from the "Ninth National Workforce Survey"[23] conducted by the All-China Federation of Trade Unions, as of the end of 2022, China had approximately 402 million employed workers, with platform workers accounting for 84 million, or 21% of the total workforce. Key features and issues in platform work include:

- Among food delivery riders, full-time riders ("special delivery riders") make up 74.5%.
- 48% of food delivery riders work over 4 hours per day.
- 90% of food delivery riders are male[24], primarily born after 1980, representing the core labor force.

Many food delivery riders lack established labor relationships with platform enterprises or delivery companies and thus fall outside the protection of labor law. Challenges include income instability arising from piece-rate payment systems, insufficient occupational safety and health protections, limited access to professional training and social insurance, opaque and unreasonable algorithmic governance, and the dispersed nature of platform workers, which hinders self-organization and unionization (Xie, 2022, pp. 108-109). Compared to the food delivery sector, the ride-hailing industry demonstrates a higher rate of labor contracts[25]. Many platform-affiliated companies sign labor contracts with full-time drivers, and some do so with part-time drivers. However, both full-time and part-time platform workers face significant issues with social insurance coverage.

Given the complexity of the platform employment situation[26] (Chang,

[23] *www.gov.cn/xinwen/2023-03/27/content_5748417.htm* (accessed: 25.11.2024).

[24] Some scholars have pointed out that China's current legal system for protecting the rights and interests of workers in new forms of employment lacks a gender perspective and provides limited focus on female groups. It is suggested to explore gender equality within algorithms and incorporate more female-oriented settings in algorithms to enhance the protection of female platform workers. See Ye (2023).

[25] Center for the Study of Contemporary China of Tsinghua University (CSCCTU, 2021), *2021 Research Report on Ride-Hailing Platforms in First-Tier Cities in China*, *www.163.com/dy/article/G9Q2BJEH05506BEH.html* (accessed: 27.11.2024).

[26] The delivery labor process is carried out under the joint direction of the platform company and the delivery company, meaning that delivery workers are subject to the control and supervision of two employers.

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2021a, p. 39) China's legislators, judiciary, and administrative authorities penetrate the intricate relationships between platform enterprises, associated entities, and workers. They should recognize the de facto labor relationships between platform workers and relevant enterprises and further enhance labor protection through legislative reforms. While some scholars have explored this issue from the intersection of labor and employment law and antitrust law[27], this paper focuses on the following aspects: The specific measures China has implemented to protect the rights and interests of platform workers and the existing issues. Whether platform workers who have not signed labor contracts with platform enterprises or their subcontractors can fall under the definition of "employees" under labor law. The scope of labor law rights that platform workers should enjoy.

3.2. Approaches to addressing the issues

3.2.1. The soft law approach and its limitations

China primarily relies on a soft law or administrative guidance approach (Xie, 2024, p. 388) to protect platform workers, supplemented by ongoing legislative exploration. The Ministry of Human Resources and Social Security (MOHRSS), together with other government departments, has issued several guiding documents to regulate platform employment and safeguard platform workers' rights. In 2021, MOHRSS and other ministries issued the "Guiding Opinions on Protecting the Labor Rights and Interests of Workers in New Forms of Employment" (MOHRSS Circular [2021] No. 56), marking a key step in regulating platform employment. Article 18 of the Guiding Opinions emphasized the principle of "*fact-based recognition of employment relationships*" between enterprises and workers. To enhance the operational feasibility of these guidelines, the MOHRSS issued three supplementary documents on November 8, 2023: the "Guidelines on Protecting the Rest and Wage Rights of Workers in New Forms of Employment", the "Guidelines on Disclosing Labor Rules for Workers in New Forms of Employment", and the "Service Guide for Safeguarding the Rights of Workers in New Forms of Employment", collectively referred to as the "Two Guidelines and One Service Guide"[28]. These documents aim to strengthen the protection of

[27] The following paper explores the potential and limitations of protecting the rights and interests of platform workers from the perspective of antitrust law: Chang, Han (2023).

[28] *www.mohrss.gov.cn/xxgk2020/fdzdgknr/ldgx_4234/ldyg/202402/t20240222_513849.html* (accessed: 25.11.2024).

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workers' rights to rest and wages, ensure their rights to know and participate in labor rule formulation and modification, and establish mechanisms to resolve platform work disputes. These measures seek to promote a mutually beneficial balance between platform economy development and labor rights protection (MOHRSS, 2023). This paper argues that China's administrative authorities have adopted a pragmatic strategy to address the protection of platform workers' rights, striving to safeguard the legitimate rights and interests of platform workers while promoting the healthy development of the platform economy.

Furthermore, the concept of "*a situation where the standard of labor relationship is not completely met*" (referred to as an "incomplete labor relationship") introduced in administrative provisions lacks clarity, resulting in inconsistent interpretations across authorities. This ambiguity stems from differing interpretations among relevant authorities regarding the nature and classification of platform employment, as well as variations in the categorization of different types of platform workers (Chang, 2021a, p.41). Equating this term with the classification of "*third-category workers*" (Tu, Wang, Wang, 2023, p. 73) is merely an individual interpretation, lacking both logical and legal basis (Chang, 2021a, p. 41; Xie, 2022, p. 116). Although there are varying interpretations of the "incomplete labor relationship", this provision does not negate the nature of platform workers but instead defines platform labor relationships as a distinct form of labor relationship. Some scholars have suggested introducing the concept of "employment-like person" based on economic subordination to classify platform workers (Lou, 2021). However, the mainstream academic view opposes simply categorizing platform workers as "employment-like persons" to reduce their level of labor law protection, as this approach neither aligns with the current state of labor and employment law theory nor reflects the practical reality (Chang, 2021b, p. 5; Xie, 2022, p. 116). Additionally, local governments in China have issued various regulations regarding platform employment, either recognizing the economic subordination of platform workers through fact-based labor management processes or implementing local provisions to partially protect platform workers' labor rights. However, these regional regulations lack uniformity, resulting in inconsistent and inadequate protection for platform workers across the country (Xie, 2024, p. 391). This paper argues that the aforementioned Guidelines and Service Guides should be revised and elevated to the status of administrative regulations to enhance legal enforceability. Furthermore, improvements to labor legislation are necessary to unify the terminology for platform workers and incorporate them into the employee definition framework.

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3.2.2. Judicial approaches to the classification of platform workers

China's judiciary has adopted a "typical cases" approach to addressing the classification of platform workers, establishing a framework based on "subordination + elements". On April 24, 2023, the MOHRSS and the Supreme People's Court jointly issued the "Typical Labor and Personnel Dispute Cases (Third Group)", which included six typical cases concerning labor relationship recognition across various platform industries (Lou, 2024, p. 291). These cases provide a judicial methodology and logical reasoning for determining labor relationships in platform employment, introducing an industry-specific analysis of the weight of different subordination criteria (Lou, 2024, p. 291).

The judicial stance aligns with the principle of prioritizing factual labor relationships over contractual labels, emphasizing labor management as the core determinant of labor relationships. This approach builds upon the labor relationship recognition rules outlined in Articles 1 and 2 of the "Notice on Issues Concerning the Establishment of Labor Relationships"[29] issued by the former Ministry of Labor and Social Security in 2005. Economic subordination serves as the primary axis of evaluation, complemented by an analysis of individual and organizational subordination, while accounting for both industry-specific commonalities and unique characteristics. Judicial cases have utilized industry-specific analysis to recognize employment relationship, leading to varied decisions. For instance, ride-hailing drivers were recognized as having labor relationships, while crowdsourced riders were not[30]. Despite their importance, these typical cases are not judicial interpretations and, therefore, lack the binding authority of formal legal sources. To enhance consistency and predictability, this paper suggests that the Supreme People's Court systematize and abstract the adjudication

[29] Although the Notice represents an administrative stance, in China's labor dispute resolution mechanism, pre-arbitration is mandatory, making the administrative stance an extension of the judicial position. According to Article 1 of the Notice, the recognition of a labor relationship, in cases where no labor contract has been signed, requires the simultaneous fulfillment of the following three criteria: (a) Individual Subordination: The employer and the worker must meet the statutory qualifications prescribed by laws and regulations.; (b) Economic Subordination: The employer's labor regulations must apply to the worker, who is subject to the employer's labor management and engages in remunerated labor assigned by the employer; (c) Organizational Subordination: The labor provided by the worker must constitute part of the employer's business operations. *www.mohrss.gov.cn/ldgxs/LDGXzhengcefagui/LDGXzyzc/201107/t20110728_86296.html* (accessed: 25.11.2024).

[30] See *www.mohrss.gov.cn/wap/zc/zcwj/202305/t20230526_500567.html* (accessed: 25.11.2024).

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principles from these cases into formal judicial interpretations (Xie, 2018, p. 1566). Such measures would clarify the rights and obligations of all parties involved in platform work disputes, strengthen legal predictability, and mitigate inconsistencies arising from case-specific rulings. Furthermore, as previously mentioned, platform workers in China generally have long working hours. Courts should prioritize working hours as a key determinant in assessing labor management (Zhu, 2023, pp. 151-152), as this factor directly influences the worker's economic subordination.

In addition, the Supreme People's Court has affirmed that social insurance departments possess the administrative authority to confirm labor relationships. For example, in one reply, the Supreme People's Court stated that under Article 9 of the "Labor Law" and Articles 5 and 18 of the "Regulations on Work-Related Injury Insurance", administrative departments for labor can determine whether a labor relationship exists during work-related injury recognition procedures[31]. In a corresponding administrative ruling, the Court upheld a provincial social insurance center's authority to directly confirm the labor relationship during administrative proceedings, affirming its alignment with the legislative purpose of protecting workers' legitimate rights[32]. Accordingly, this paper argues that when a platform worker is injured during work, if the provincial social insurance center recognizes the existence of a labor relationship between the platform worker and the platform enterprise or the outsourcing company, the injury can be classified as work-related, thereby safeguarding the rights and interests of the platform worker.

Judicial practice by local courts in China generally adheres to the following principles in labor relationship recognition: Labor subordination serves as the core evaluative criterion. External manifestations of subordination, especially concerning platform riders, are reasonably adjusted. Case-specific evaluation balances labor rights protection with the development of the new economic model. If the agreements (e.g., cooperation or service contracts) signed between platform enterprises and platform workers fail to match the actual performance of rights and obligations, and individual, economic, and organizational subordination can be established, courts tend to recognize

[31] "Reply from the Administrative Tribunal of the Supreme People's Court on Whether Labor Administrative Departments Have the Authority to Confirm Labor Relationships in Work-Related Injury Recognition Procedures" (2009) Xing Ta Zi No. 12(issued on July 29, 2009). 《最高人民法院行政审判庭关于劳动行政部门在工伤认定程序中是否具有劳动关系确认权请示的答复》（2009）行他字第12号.

[32] Administrative Judgment of the Supreme People's Court of the People's Republic of China (2020) Zui Gao Fa Xing Zai No. 507. 中华人民共和国最高人民法院行政判决书（2020）最高法行再507号.

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the existence of a labor relationship[33]. Key criteria include: The platform enterprise's direction, management, and supervision authority. The worker's lack of substantial autonomy. Stable and continuous income derived from the platform. Integration of the worker's labor into the core business of the platform enterprise. Even if platform enterprises require workers to register as self-employed individuals, supply certain production tools, or receive payment from third parties, such arrangements do not preclude the recognition of a labor relationship[34]. The judicial conclusions reached in these cases support the core arguments of this paper.

3.2.3. Legislative reforms to strengthen collective rights

As noted above, the dispersed nature and high mobility of platform workers hinder collective bargaining channels with platform enterprises. To address this, it is essential to strengthen the organizational mechanisms that protect workers' rights. This involves the establishment of enterprise-level unions, industry-level unions, or geographically based unions to provide platform workers with a structured avenue for rights advocacy. China's legislative framework has responded to this issue by laying the foundation for the organizational protection of platform workers. The 2021 amendment to the "Trade Union Law of the People's Republic of China" explicitly states in Article 3, Paragraph 2 that trade unions should adapt to changes in enterprise organization, workforce structure, labor relationships, and employment forms, ensuring the right of workers to join and organize unions. This provision enables platform workers to join enterprise unions, industry unions, or local unions. In October 2024, the All-China Federation of Trade Unions (ACFTU) issued the "Guidelines for Trade Union Work in Platform Enterprises"[35], focusing on building union organizations within platform enterprises to enhance the protection of workers' rights. In November 2024, the ACFTU, together with the MOHRSS, the China Enterprise Confederation, and the All-China Federation of Industry and Commerce, released the "Guidelines for Negotiating the Rights of Workers in New Forms of Employment". These guidelines aim to guide platform enterprises in consulting with trade unions and worker representatives to

[33] Shanghai First Intermediate People's Court (2021) Hu 01 Min Zhong No. 11591. 上海市第一中级人民法院（2021）沪01民终11591号.

[34] Guangzhou Intermediate People's Court of Guangdong Province (2022) Yue 01 Min Zhong No. 6300. 广东省广州市中级人民法院（2022）粤01民终6300号.

[35] *www.acftu.org/wjzl/wjzlzcwj/qzwj/202410/t20241028_869696.html* (accessed: 25.11.2024).

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formulate reasonable policies on workers' rights and algorithm governance, standardizing negotiation processes and improving effectiveness[36]. Some platform enterprises further protect platform workers' rights and interests by establishing employee representative assemblies. For example, Ele. me, a leading food delivery platform, convened a workers' representative assembly to adopt collective agreements on wages, occupational safety, and gender-specific protections. These agreements apply uniformly to both Ele. me's employees and third-party delivery riders. These initiatives represent a significant milestone in the advancement of collective rights protection within China's platform economy (Pei, 2023, WANG, 2024, p. 112), underscoring the importance of robust organizational mechanism for ensuring equitable labor practices.

3.2.4. Addressing algorithmic control in platform work

The essence of platform work lies in enterprises leveraging algorithms to issue work instructions, evaluate performance, and exercise indirect control over labor processes. Algorithms serve as an "invisible hand", enabling flexible yet precise management (Xie, 2022, p. 119). To protect platform workers' rights, it is essential to improve algorithm governance regulations by expanding disclosure requirements and mandating that platform enterprises consult worker representatives during algorithm modification. Under Article 44 of the Personal Information Protection Law of China, platform workers can assert their right to information. Additionally, they can claim the right to algorithmic explanation based on Article 24, Paragraph 3 of the same law. (Wang, 2023, P. 165). The protection of workers' personal information rights requires stricter enforcement of Articles 1034 and 1035 of the "Civil Code" and the "Personal Information Protection Law". Measures should ensure data security by implementing strict enforcement mechanisms, preventing information leaks, and requiring timely disclosure of incidents, report to administrative authorities, and provide remedies or compensation to affected workers. Furthermore, the extensive application of algorithms in platform enterprises' labor management processes has led to a crisis of worker autonomy. To address this, labor inspection authorities should establish algorithmic labor inspection mechanisms to reinforce the employer management responsibilities of platform enterprises (Tian & Zheng, 2023, pp. 90-91).

[36] *www.acftu.org/xwdt/ghyw/202411/t20241111_870112.html?dBuULwWO=0VXR4LAlqEcMJVZfTtDF56GjRQLGEEuehEqFEv4Ejnt0y9Oy87ytnEEZxQ5MfC9N8RUDux.pDdyoppIGuGk2KcgpoCr0A6qSq* (accessed: 25.11.2024).

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3.2.5. Enhancing corporate social responsibility

The 2023 amendment to the "Company Law of the People's Republic of China"[37] emphasizes corporate social responsibility (CSR). Article 20 encourages companies to actively fulfill CSR obligations, including publishing CSR reports[38], while Article 16 mandates companies to protect workers' rights by enhancing occupational safety and labor conditions. Platform enterprises and their partners should embrace ESG (Environmental, Social, and Governance) principles, publishing annual reports on the protection of platform workers' rights[39]. This would not only enhance brand value and improve financing opportunities but also demonstrate compliance with the "Company Law", which regards employees as stakeholders. Recognizing platform workers as part of the corporate workforce balances enterprise development with worker protection.

3.3. Conclusion

While the aforementioned approaches – soft law, judicial decisions, and legislative reforms – have played a positive role in addressing minimum labor standards, such as wages, working hours, and work injury protection, challenges remain. Most regulations, except the "Trade Union Law", lack clarity, hierarchy, and operability. These issues weaken their overall effectiveness. Given China's long tradition of codified laws, China needs to address these challenges through comprehensive legislative reforms is essential. Furthermore some scholars argue for the enactment of specialized legislation tailored specifically to the unique needs of platform workers (Xie, 2022, p. 114), emphasizing the necessity of aligning such laws with international standards.

[37] *www.npc.gov.cn/npc/c2/c30834/202312/t20231229_433999.html* (accessed: 25.11.2024).

[38] In its Meituan *2023 Corporate Social Responsibility Report*, Meituan, one of China's leading life-service e-commerce platform enterprises, stated that it actively participated in the pilot program on occupational injury protection for new forms of employment launched by the Ministry of Human Resources and Social Security. By the end of 2023, this program had covered 4.5 million delivery riders. Additionally, Meituan collaborated with commercial insurance companies to develop insurance products tailored for riders, achieving 100% coverage for 7.5 million riders. *s3plus.meituan.net/smart/*美团2023年社会责任报告*_vtcpoc.pdf* (accessed: 25.11.2024).

[39] For example, in 2017, Shanghai Lazars Information Technology Co., Ltd. released the first CSR report in China's food delivery industry. Its latest report, *Ele.me 2022-2023 Social Responsibility Report*, emphasizes its commitment to the well-being of 4 million delivery riders on the platform. *www.ele.me/csr* (accessed: 25.11.2024).

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This paper advocates for amending the "Labor Law" to expand the definition of "employees and labor relationship" and exploring the codification of labor law into a flexible and forward-looking labor and employment code[40]. The labor and employment code should integrate international practices[41], labor and employment law theory, and judicial precedents to address demands of digital economy and artificial intelligence (AI).

4. Conclusion

Platform work in Japan, Korea, and China has both common and distinct characteristics. A common observation is that platform work is becoming increasingly prevalent – although its development is restricted to the "face-to-face" or "location-based" type. The rapid growth of platform work is observed in China. In China, 90% of food delivery workers are male, and they do this job as their main occupation. The situation in China could illustrate the future of platform work: platform work is not a new type of work but rather traditional on-site work. Workers who earn their living – and likely that of their families – by providing their personal labor to others have traditionally been regarded as "workers" to whom labor law should apply since the inception of labor law. The worker status of platform workers should be recognized as a matter of course.

[40] Professor Lou Yu argued that the new forms of employment are difficult to apply under traditional labor relationship frameworks. They propose that, if a labor code is to be enacted, it should establish a separate chapter to form a "Small Labor Code" for regulating new forms of employment, distinct from the "Large Labor Code" that governs traditional labor relationships. This paper disagrees with this view, as so-called workers in new forms of employment have not lost the essential characteristics of traditional workers. They still perform labor under the direction and supervision of enterprises (or algorithms) and rely on their labor income for subsistence. Therefore, efforts should be made to simplify rather than complicate the framework. Since existing provisions, corresponding supplements to definitions such as "worker", "labor relationship", and "working hours" are sufficient to address new forms of employment. See Lou (2023).

[41] Professor Xie Zengyi conducted a detailed comparative study on the legislative frameworks concerning platform employment, focusing on California's *AB5 Act*, Article 60 of the *French Labor Code*, Chapter on "Labor Protection for Digital Platforms" in Italy's Legislative Decree No. 81/2015, amendments to Canada's *Labor Code* regarding platform work, and the European Commission's proposed *Directive on Adequate Working Conditions and Rights in the Digital Economy*. Professor Xie concluded that: (a) Specialized legislation for platform employment appears to be a global trend. (b) The primary focus is on the protection of fundamental rights for platform workers. (c) Not all platform enterprises and workers are covered under these legal frameworks. (d) Specialized legislation for platform work is not in conflict with traditional labor law protections. See Xie (2022, pp. 111-114).

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From this perspective the New Freelancer Law in Japan has a unique and unusual character, combining elements of both labor law and competition law. This law considers a freelancer as both self-employed and a worker. Can a single person be both self-employed and a worker at the same time, within the scope of one contract? This law reflects the ambiguity and contradictions in Japanese thinking[42].

The essential problem is the role of the platform provider as an intermediary. In Korea, the Supreme Court's decision on July 25, 2024, recognized the employer status of a platform provider operating a ride-sharing service and offering cars to drivers, and granted dismissal protection. Regarding Uber, its employer status is being recognized internationally[43]. However, in the case of Amazon, its role as an intermediary has so far been limited. In Japan, the application of worker accident compensation insurance to drivers delivering Amazon's goods to consumers has been accepted. The current discussion centers on whether Amazon should engage in collective bargaining with a union of drivers or pay overtime to these drivers.

Compared to the European developments, the issues of algorithmic management have not been fully discussed in East Asia. The protection of privacy and the fight against discrimination should be taken more seriously in East Asia.

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[42] Actually, the New Freelancer Law is the result of a struggle between the Ministry of Economy, Trade and Industry (METI) and the Ministry of Health, Labor, and Welfare over freelancers' protection, who have been ignored for a long time in society.

[43] Hiessl (2024), "Statusfragen in der Plattformarbeit: Europäische Arbetnehmer- und Arbeitgeberkonzepte auf dem Prüfstand", *Soziales Recht*, pp. 140-141.

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Navigating the limits and determining the existence of the employment relationship in the platform economy: primacy of reality, presumption of employment and burden of proof

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1. Introduction

The present contribution constitutes an abbreviated version of the author's previous work, which was presented for the first issue of *Labor*, edited by the University of Santiago de Compostela and the International Society of Labor and Social Security Law[2]. This analysis proposes an international regulation of work through offline digital platforms, applying a comprehensive approach to address the employment challenges in this model. In this way, the need to establish a global regulatory framework that guarantees fair and decent working conditions is identified, highlighting three fundamental principles: the primacy of reality, the presumption of employment and the burden of proof borne by companies that own digital platforms. These principles will be the focus of specific analysis of the present contribution, the essence of which lies in seeking to overcome the obstacles in the legal qualification of

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the employment relationship (resolving the main legal problem that develops in this work organization model) and reducing procedural inequality between workers and platforms.

In addition, the proposal includes a minimum containment network of rights applicable to all platform workers, whether dependent or self-employed, contemplating aspects such as algorithmic management, protection of personal data, working time, remuneration, health and safety at work, freedom of association, collective bargaining and collective conflict. Finally, the proposal emphasizes strengthening control mechanisms to guarantee regulatory compliance. These include more extraordinary powers for inspection bodies, access to crucial information about platform algorithms and the implementation of specific guidelines to monitor compliance with labor standards. Monitoring by the ILO is also highlighted as an essential factor to promote the effectiveness of these measures.

For this reason, the development of this contribution must be placed within this propositional set, which offers an innovative and complete approach that seeks to protect offline platform workers and establish a global standard based on equity and social justice. Its implementation could mark a milestone in regulating work on digital platforms, addressing current challenges and limiting job insecurity.

2. General aspects of a proposal for international labor regulation through digital platforms *offline*

To address the international regulation of work on offline digital platforms, it is essential to prioritize resolving the problem of the legal qualification of the link maintained between platforms and the underlying service providers.

To do this, three essential principles should be established. Firstly, following the ILO Employment Relationship Recommendation, 2006 (No. 198), the determination of the existence of an employment relationship must be based on the principle of primacy of reality. Secondly, a presumption of explicit employment is necessary. Thirdly, platforms must be assigned the burden of proving that service providers are independent entrepreneurs rather than subordinate workers.

Additionally, it is proposed to create a minimum network of rights and protections applicable to all forms of work through offline digital platforms. However, this regulatory proposal would only be effective if the aforementioned principles accompany it. Otherwise, there is a risk of fragmenting labor law, generating unequal standards and even lower standards than those already guaranteed by jurisprudence for these workers.

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Along these lines, the ILO Global Commission on the Future of Work (2019) highlighted the need for technologies to be under human control and in line with the concept of decent work. Regarding work on platforms, it was proposed to create "*a system of international governance of digital work platforms that requires them (and their clients) to respect certain rights and minimum protections*" (p. 46).

Finally, this approach must be complemented by adequate control and compliance mechanisms that guarantee the regulation's effectiveness. Adopting an International Labor Convention could be an important input to achieving these objectives.

3. Guiding principles of a proposal for international labor regulation through digital platforms *offline*

3.1. Primacy of reality

The applicability of the principle of primacy of reality must be the starting point for resolving any dispute over a work relationship's legal classification.

This principle was expressly included in the ILO Employment Relationship Recommendation, 2006 (No. 198)[3], and suggests that in the face of a discrepancy between what could arise from a document or formalities and what could arise contrary to reality, the latter must necessarily take precedence, as it represents the truth of life.

In this sense, Plá Rodríguez (1998) pointed out that "*in case of disagreement between what happens in practice and what arises from documents or agreements, preference should be given to the former, that is, to what happens in the field of the facts*" (p. 313). This principle, inherent to labor law, takes on particular relevance as it presupposes the confirmation of a notorious inequality between the subjects that form part of the employment relationship. Indeed, the basis of this principle lies in the fact that the worker "*does not usually have the independence to discuss as equals with his employer, so that the documents that reflect the content of the contract fully adjust to reality. The way to correct any possible anomaly in this*

[3] Said international instrument provides: "*9. For the purposes of the national policy for the protection of workers bound by an employment relationship, the existence of an employment relationship should be determined primarily according to the facts relating to the performance of the work and the remuneration of the worker, without prejudice to the manner in which the relationship is characterized in any contrary arrangement, whether contractual or otherwise, agreed upon by the parties*".

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sense consists precisely in giving priority to what happens in reality" (Plá Rodríguez, 1998, pp. 332-335).

In a similar sense, Villasmil (2016) indicates that "*before the autonomy of will, the reality of the relationship between worker and employer is privileged*" (pp. 87-88). Indeed, the author points out that, strictly speaking, the idea underlying this principle arises from the attempt to differentiate civil law contracts from employment contracts since, on the one hand, the former confers preeminence on the agreement of wills. On the other hand, in the employment relationship, the execution of the contract itself is preferred.

This principle is fundamental when determining the existence of the employment relationship within the framework of the platform economy since it allows us to rule out an analysis from the legal name of the contracts (usually specified in the terms and conditions) or what arises from the formal records of the social security system. Instead, the reality of the facts is highlighted, that is, the form and modality in which execute the services, omitting any consideration of the nomenclature usually used by the companies that own the digital platforms, who identify the service providers as freelancers (Rodríguez Fernández, 2018).

For this reason, an international regulation should provide a similar solution to that incorporated in the ILO Employment Relationship Recommendation, 2006 (No. 198). This approach would even be coherent with the marked jurisprudential trend extended at a comparative level, from which it follows that the determination of the nature of such a link must be resolved based on the evaluation of the material reality of the facts, especially on the modality of execution of the activity[4].

3.2. Presumption of employment

The second fundamental pillar that should be included in international regulation of work through offline digital platforms is the express consecration of a presumption of employment, whose condition of application is the execution of a job personally.

There are several examples in comparative legislation where a presumption of employment subject to the personal provision of work

[4] To only cite two paradigmatic judicial cases, this criterion was upheld in the Supreme Court, Social Chamber, Plenary, Judgment of unification of doctrine, 09/25/2020, No. of Appeal 4746/2019; and the Supreme Court, "Uber BV and others (Appellants) *v* Aslam and others (Respondents)", UKSC 2019/0029, 19.02.2021.

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has been established. For example, the cases of Argentina[5], Colombia[6], Paraguay[7], Peru[8] and Venezuela[9] stand out in Latin America.

Chile has also incorporated a presumption of employment, but subject to more significant conditions than the simple provision of work personally, by also requiring notes of dependency and subordination[10]. In the case of Europe, most countries (17) do not have or have abandoned the presumption of employment model. In contrast, others (10) enshrine general presumptions for all types of work or presumptions for particular groups of workers (Kullmann, 2021). Without prejudice to this, after the approval of the Directive on work on digital platforms (2024/2831), European Union members must adjust their national legislation and enshrine a legal presumption of employment between platforms and workers, as long as facts are verified that indicate direction and control.

In another order, according to Aguiló Regla (2018, pp. 203-212), there are two different types of presumptions. On the one hand, *hominis* presumptions (formulated under the phrase "it is presumptive"), which "*express a judgment of regularity based on experience to which a high probability of truth is recognized*", and on the other hand, the presumptions established by the norms of presumption (formulated under the phrase "it will be presumed" or "it must be presumed"), whose purpose is to establish a procedural truth.

The same author (2018) maintains that several reasons justify the establishment of presumption rules. At least the following four foundations can be highlighted:

1) A first type of reasons is linked to the probability of truth of the alleged fact. That is, what underlies the dictation or establishment of a normative presumption (or should be presumed) is the acceptance by the legislator of a theoretical presumption (principle of procedural economy).

[5] The Employment Contract Law provides: "*Art. 23. – Presumption of the existence of the employment contract. The fact of the provision of services presumes the existence of an employment contract*".

[6] The Substantive Labor Code indicates: "*Article 24. Presumption. – It is presumed that every personal employment relationship is governed by an employment contract*".

[7] The Labor Code provides: "*Article 19. – The existence of the contract between the person who provides work or uses a service and the person who provides it is presumed*".

[8] The New Labor Procedural Law states: "*23.2 Once the personal provision of services is proven, the existence of an employment relationship for an indefinite period is presumed, unless proven otherwise*".

[9] The Organic Law of Labor, Men and Women Workers indicates that: "*Article 53. Presumption of the employment relationship. The existence of an employment relationship between the person providing a personal service and the person receiving it will be presumed*".

[10] Articles 7 and 8 of the consolidated, coordinated and systematized text of the Labor Code.

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2) A second type of reasons has to do with the reestablishment of the evidentiary balance between the procedural parties in situations in which one of the parties encounters extraordinary difficulties in proving the relevant facts (principle of procedural fairness).
3) Another type of reason responds to the unequal severity that the legal consequences of the process may have for the parties. Therefore, to try to avoid the greater evil, a procedural truth is established and the entire burden of proof is placed on the party that assumes the least risk (principle of prudence).
4) A final type of reason has to do with the function of stabilizing expectations and legal situations that institutions aim to fulfill. Indeed, the issuance of a rule of presumption may respond more to the intention of establishing an institutional regularity or normality in the future, than to trying to account for an already existing regularity (principle of legal certainty, preservation of order) (pp. 213-214).

Specifically, a rule that presumes the existence of the employment relationship if personal work is verified, without any additional characteristics, will not be based on the existence of a high degree of probability that the legal link that unites the parties is of an employment nature and not of a self-employment nature. This is because the maxims of experience do not necessarily indicate such a circumstance.

Notwithstanding this, Aguiló Regla (2018, p. 214) states that it is completely justifiable to establish norms of presumption, even when its foundation is not necessarily based on "it is presumptive" (that is, that the norm establishes a truth background – in our case, "*every time there is personal work, a dependent employment relationship is verified*"), since the relationship between "it will be presumed" and "it is presumed" is not necessary but contingent.

Indeed, the reasons that justify establishing a presumption of employment of such characteristics rest on the other three foundations mentioned by the aforementioned author, related to the principles of procedural fairness, prudence, legal certainty and preservation of order.

Thus, the evidentiary inequality between the parties in a process (a platform worker and a company that owns said platform) is evident, due to the great evidentiary difficulties that exist for the providers of the underlying service. Firstly, due to power differences; secondly, due to the availability of evidentiary means that are usually in the hands of companies; thirdly, by the discretionary and unilateral power of the companies to draft, update and modify the terms and conditions of contracting, as well as the rates, and many other aspects of the execution of the work, etc. Therefore, the

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presumption of employment can contribute to restoring the balance between the parties.

Likewise, it follows with a high degree of reasonableness that the legal consequences that the parties to the process may assume are very different in the event of the non-existence of the aforementioned presumption. In such a scenario, those who should bear the worst or most burdensome consequences would be the service providers, as they run the risk of continuing to be immersed in job insecurity.

Finally, the consecration of the presumption would fulfill another important purpose by trying to overcome the difficulties of legal uncertainty present today. It would also constitute a transcendent input in order to achieve a more or less generalized re-qualification of these situations towards dependent work.

In another order, although it is common that general presumptions (that is, those that apply to more than one form or type of work) and unconditional presumptions (that is, those that are not subject to compliance with certain criteria) are more effective than conditional and specific ones of a sector or type of work (Aloisi *et al*., 2023), it should also be highlighted that a presumption of these characteristics will be highly effective in those legal systems that They have a presumption of conditional employment established, or they do not have a general but specific one established, or they do not even have any presumption of employment established. Likewise, it will not affect those systems that have a general and unconditional presumption enshrined, but on the contrary, it will complement it.

In short, this guiding principle of the presumption of employment would offer multiple advantages since, firstly, it would facilitate the jurisdictional task, given that currently, the most significant difficulties present in the course of litigation, as well as the presence of contradictory judicial resolutions on the qualification of the relationship maintained between the parties, are derived mainly from the interpretative diversity generated in the process of qualification of said relationship, the verification of indications of employment, etc. Secondly, it would also facilitate the task of the controlling entity since the starting point imposed by the presumption will be to consider all service providers who personally carry out the work as dependent workers. Hence, the inspection task and execution, in case of non-compliance, becomes more intuitive and less complex. Finally, the presumption may eventually reduce litigation and judicial costs, although this is not an instrument that ensures that companies proactively re-classify workers as dependents. For this reason, we have indicated that, in addition to these guiding principles, complementary protection measures are required.

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3.3. The burden of proof of the companies that own digital platforms

The third important component that international regulation must provide refers to the burden of proof of the companies that own the digital platforms, which complements the two guiding principles stated above.

Although the presumption of employment would automatically place the burden on companies to prove that an employment relationship does not exist (if they dispute its existence), this third guiding principle is proposed to delimit the figure of self-employment and its indicators (evidence, which companies should accredit). In short, hand in hand with a consecration of a presumption of employment, it is proposed to exhaustively introduce the constitutive elements of a provision of self-employment or the status of entrepreneur of the service provider, which would require to be proven by the companies, for defeat the presumption of employment and rule out the existence of an employment relationship.

Indeed, it is striking that when the legal classification of a relationship involving work is disputed, in our case, when a service provider understands that it is not a self-employed worker but a dependent and employed worker, the other side of the coin is usually omitted. Thus, the employer who denies the employment relationship (controverting it), at the same time, finds himself affirming that the relationship is civil because the service provider is an independent worker. Therefore, the burden of proof of providing elements that prove said autonomy and condition also rests on him.

In short, what is proposed here is that, in close connection with establishing the presumption of employment, the requirement should be that, if disputed, the company must verify the existence of a genuine employer or autonomous worker.

This responds to the idea that, as happens with all rules (and in that sense, we can identify the presumption of employment), "*the legal consequences generically established by the presumption rules are susceptible to being defeated in a particular case. The procedural truth is defeatable by the material truth*" (Aguiló Regla, 2018, p. 218).

Hence, it is suggested that, in this context, the international standard incorporates a subsumptive or syllogistic verification method to verify the existence of independent or autonomous work. As indicated by Ugarte (2005) when explaining subordination, this method implies conceptually defining, in our case, the figure of the self-employed worker, through "*one or more elements exhaustively listed, and considered by the legislator or the judge or whoever corresponds, as essential, in such a way that the absence of at least one of them will necessarily mean the non-application of the concept-definition*".

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In this case, it is proposed to incorporate a burden of proof whose scope includes the accreditation of the following elements by the companies that own the digital platforms:

1) that the worker is free of control;
2) that the company does not direct its work;
3) that the company does not exercise any disciplinary power over the worker, either directly or indirectly;
4) that the worker has functional and organizational autonomy;
5) that the worker intervenes directly in the market by offering his or her services (otherness in the market);
6) that the provision of services offered by the worker has no connection with the brand of the contracting company (unrelatedness in the brand);
7) that the worker is the owner of the essential assets for the provision of the service (unshared ownership of the means of production).

A similar regulatory model was introduced in the state of California, in the United States, when the law called "AB5" (Assembly Bill No. 5) was approved, which requires the company to demonstrate that:

1) the worker is free of control;
2) the worker performs a job different from the platform's line of business;
3) the worker is independently and habitually dedicated to the business he or she carries out for the platform.

In summary, these three guiding principles would operate jointly and coordinately, and they are vital to resolving all cases where problems of classification of legal ties arise.

4. Conclusions

The offline digital platform economy poses significant challenges for labor law, especially in terms of the legal qualification of employment relationships and the protection of workers' rights. This work has proposed a comprehensive international regulation based on the primacy of reality, presumption of employment and burden of proof borne by companies.

These guiding principles offer an appropriate response to the current problems of regulatory fragmentation and procedural inequality between workers and platforms. The principle of primacy of reality allows the true nature of the employment relationship to be identified beyond contractual

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formalities. In contrast, the presumption of employment and the burden of proof oblige companies to demonstrate the independence of the workers, thus balancing the existing evidentiary asymmetries.

Furthermore, the author's proposal emphasizes the need to complement these principles with a network of minimum rights applicable to all digital platform workers. Aspects such as algorithmic management, data protection, working time, remuneration, and freedom of association must be guaranteed as essential elements of decent work. Likewise, control mechanisms, including more extraordinary powers for inspection bodies and algorithm monitoring, are essential to guarantee regulatory compliance and the effectiveness of regulation.

In sum, implementing an international regulatory framework under the proposed parameters would strengthen the protection of labor rights in the platform economy and promote a global standard based on equity and social justice. This regulatory model, in addition to addressing current deficiencies, would constitute a milestone in the governance of digital work and a decisive step towards the consolidation of decent work in the 21st century.

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Digitalización y servicios públicos de empleo. Oportunidades y debilidades en el "Plan de Recuperación, Transformación y Resiliencia" y su plasmación en la Ley 3/2023 de Empleo

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Resumen

La necesidad de resolver los importantes déficits de penetración en el mercado de trabajo que tienen los Servicios Públicos de Empleo en nuestro país, reclamaba desde hace tiempo un cambio importante. En este contexto, el "Plan de Recuperación, Transformación y Resilencia", impulsado como consecuencia de los *Fondos Next Generation*, suponía una oportunidad para superar esa situación y así se pretendió con la Ley de Empleo 2/2023 y su apuesta por la digitalización como un objetivo estratégico para mejorar profundamente esos malos datos. En el presente trabajo se realiza un análisis de las posibilidades que para ello abre la implementación de herramientas electrónicas (algoritmos, IA, LLM, etc.), así como de los instrumentos puestos en marcha con ocasión de dicho Plan para afrontar los retos que implicará tal apuesta. Junto a ello, se plantean importantes interrogantes sobre las deficiencias del marco regulador para hacer efectivos los objetivos pretendidos y, en particular, sobre los riesgos que el modo de llevarlo a cabo puede generar para ciertos colectivos vulnerables

Palabras Clave: Servicios Públicos de Empleo. Ley de Empleo. Mercado de Trabajo y digitalización. Plan de Recuperación, Transformación y Resilencia.

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1. Contexto: la escasa penetración de los servicios públicos de empleo como problema endémico

Desde tiempo se viene subrayando la trascendencia de la digitalización (incluso su carácter disruptivo) en el mundo del trabajo, tanto en lo que de oportunidad tiene como en los riesgos que implica[2]. En esta línea, se resalta la incidencia que puede representar con relación al mercado de trabajo y a las políticas de empleo, en especial, para los Servicios Públicos de Empleo (SPE), tal y como los datos disponibles parecen evidenciar[3].

En concreto, en el ámbito de las políticas de empleo, existe un importante consenso en la conveniencia de implementar ciertas herramientas digitales que permitan la "gestión del dato" (IA, algoritmos, BigData, etc.) con la finalidad de mejorar los deficitarios resultados que tradicionalmente vienen presentando los SPE. Como sabemos, tales servicios, llamados a ocupar una posición central en el mercado de trabajo (especialmente en contextos complejos[4]), no terminan de responder a los retos y objetivos que les serían exigibles, al punto de que, salvo contadas excepciones, es común – en los diversos análisis y acercamiento a los mismos – la crítica a sus muy escasos resultados en términos de penetración en el mercado de trabajo (esto es, de intervención en intermediación y colocación o de implementación de adecuadas políticas activas de empleo – PAE)[5]. España no se encuentra al margen de estas críticas, más bien podría ser un ejemplo paradigmático de esa situación.

Diversas son las razones que pueden explicar tal precariedad en los resultados de los SPE, tanto específicas de nuestro país como generales a todos. Así, en cuanto a estas últimas, deben citarse al menos las que ahora referimos[6]: de un lado, se suele señalar el importante volumen, en términos

[2] OECD (2023), "Employment Outlook 2023: Artificial Intelligence and the labour market". En nuestro país, destacaríamos CES, "La digitalización de la economía" (Informe 3/2017 y su actualización en el Informe 1/2021); y Banco de España (2024), "Informe Anual 2023" (en especial, el Cap. III, El mercado de trabajo español: situación actual, tendencias estructurales y políticas de empleo).

[3] OECD (2024), "A new dawn for public employment services. Service delivery in the age of artificial intelligence", *Artificial Intelligence Papers*, nº 19.

[4] OCDE (2020), "Servicios públicos de empleo en primera línea para solicitantes de empleo, trabajadores y empleadores".

[5] Diversos estudios confirman una incidencia entorno al 2% de las colocaciones existentes se articulan a través de los SPE, aunque con importantes diferencias entre CC.AA.; Alujas Ruiz J.A. (2018), "Análisis de la intermediación laboral del servicio público de empleo por comunidades autónomas", *Ekonomiaz*, 93.

[6] Costa Reyes A. (2024), "La Agencia Española para el Empleo", *Temas Laborales*, (en prensa).

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relativos, de personas trabajadoras pertenecientes a colectivos vulnerables o no necesariamente interesados en la oferta, sino más bien meros "presos" de las PAE (en cuanto beneficiarios de prestaciones por desempleo)[7]. Este perfil de usuario mayoritario de los servicios públicos condiciona en gran medida no solo las actuaciones (previas en muchos casos) que deben llevarse a cabo para que sus circunstancias no se traduzcan en una barrera añadida, sino que, en definitiva, la dificultad aún más una colocación exitosa.

De otro lado, la baja calidad de las ofertas de empleo que gestiona los SPE, lo que en la práctica se traduce en que una parte importante de las personas trabajadoras solo acuda a sus servicios muy ocasionalmente o en circunstancias extremas. Este hecho también explicará el perfil socioeconómico y educativo medio de las personas usuarias antes referido.

Por último, no debemos olvidar el distanciamiento de tales servicios respecto a la necesidades empresariales, fruto de una histórica desconexión entre ambos y concretado en un escaso conocimiento de sus demandas. Una visión tradicionalmente centrada en la oferta de trabajo y en las relaciones laborales (típicas), viene generando una doble consecuencia: por un lado, un alejamiento de los profesionales de los SPE de la concreta realidad empresarial de su entorno y, por otro, como causa-consecuencia de todo lo anterior, una escasa confianza empresarial en que los SPE pudieran atender a sus necesidades de mano de obra (por su consideración como meros gestores-burocracia, ausencia de una actividad selección previa – perfilado –, etc.)[8].

En cuanto a las particulares debilidades de los SPE en nuestro país, citaremos ahora algunas de las que consideramos más relevantes – tres en concreto – y que, a nuestro entender, permiten explicar en una gran parte por qué la actuación de los SPE (incluso una vez creado el Sistema Nacional de Empleo – SNE) no conlleva una reducción drástica del desempleo estructural existente o de generar una confianza mantenida por parte de empresas y trabajadores. Así, comenzaremos por la crítica a su organización, fruto de una estructura descentralizada poco planificada y coordinada, la cual es – en gran medida – una consecuencia derivada de la acción política

[7] Cueto/Suarez (2018), "Un análisis del servicio público de empleo como método de búsqueda de trabajo", *Ekonomiaz*, 93, pp. 62-66 (algunos datos concretos del perfil de desempleado que suele utilizar más el SPE en España – frente a las entidades privadas –, en pp. 70 ff. y 77: personas mayores, con menor nivel educativo y con mayor tiempo en desempleo). Datos que se confirman actualmente, *vid*. *Perfil del Usuario del SEPE: Síntesis Anual 2023*: el grupo de edad predominante es el de mayores de 55 años (32,02%), y más de la mitad de los usuarios presentan un nivel académico de educación general (52,24%). Más del 30% se encuadran en ocupaciones elementales.

[8] Sobre esa "escasa credibilidad de los SPE", también, Alujas Ruiz J.A. (2018), "Análisis de la intermediación laboral…", cit., pp. 93-94.

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de la última década del siglo pasado llevada a cabo por el Gobierno del Partido Popular que impulsó la delegación y asunción de las competencias en empleo por parte de las comunidades autónomas sin una idea previa que ordenara adecuadamente la relación entre todas ellas y para con el Estado en su globalidad. En definitiva, aquella actuación se llevó a cabo sin un plan o visión de conjunto, lo que en la práctica ha supuesto un grave perjuicio para los principios de igualdad y de unidad de mercado[9]. Por afinar algo más, esa decisión no planificada implicó, entre otras consecuencias negativas concretas, un importante problema tanto de falta de información compartida, pues incluso se carecía inicialmente de un sistema común (sea de ofertas y demandas de empleo sea de las políticas a implementar o de la debida conexión entre PAE y prestaciones); como de un análisis y valoración compartido de lo que se entendería como actuación eficiente y, con ello, su conexión con los recursos a atribuir (cuyos efectos negativos se verán aumentados por la ausencia de una *cultura de la evaluación*)[10].

Tal desajuste se ha venido plasmando también en la desconexión entre las diversas políticas públicas de empleo, pues no debe olvidarse que en el mencionado reparto descoordinado de las competencias sobre políticas de empleo se apostó porque las CC.AA. desarrollaran las PAE, mientras que el SEPE mantenía las llamadas *políticas pasivas* (prestaciones frente a situaciones de desempleo), lo que hubiera reclamado una mejor y más fuerte coordinación e información compartida que – como ya hemos referido – no ocurrió. En este sentido, los continuos cambios y reformas en los preceptos de la norma sobre empleo sobre la coordinación de políticas activas y de protección frente al desempleo durante la anterior Ley de Empleo (tanto la de 2003 como el Texto Refundido de 2015) vienen a suponer un reconocimiento a la insuficiente regulación para garantizar la efectividad de tal coordinación y colaboración institucional, pues en todo momento

En esta lógica de escasa integridad y coordinación leal entre Estado y CC.AA., merecería una mención aparte la actuación de aquél en mantener un control centralizado incluso de la gestión y ejecución de cualesquiera prestaciones por desempleo (fue el caso también del denominado PRODI, RDLey 10/2009), sobre la base de una lectura poco generosa de las implicaciones del denominado principio de *unidad de caja*[11]. En esta lógica

[9] Valdés Dal-Ré F. (2016), "El servicio de información de los servicios públicos de empleo como instrumento de la coordinación del Sistema Nacional de Empleo", in Aa.Vv. (Monereo/Márquez, Dir.), *La política y el derecho del empleo en la nueva sociedad del trabajo*; Monografías de Temas Laborales, 56, CARL, pp. 451-452.

[10] AIReF (2019), "Estudio sobre el programa Políticas Activas de Empleo", cit., p. 109.

[11] *Vid*. al respecto la posibilidad abierta, siempre dentro de unas claras condiciones,

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de desconfianza institucional, yendo incluso algo más allá, cabe recordar la creación por parte del Estado de una multitud cambiante, temporal (y prorrogable) y variable (¿caótica?) de programas para dar supuesta cobertura económica a personas desempleadas con especiales dificultades de inserción sobre la base del art. 149.1, 13ª CE (bases y coordinación general de la actividad económica) y, aun así, pretendiendo arrogarse la competencia exclusiva de su gestión y ejecución en detrimento de los territorios (tal fue el caso, por ejemplo, de los extintos PREPARA – RDLey 1/2011 – o el PAE – RDLey 16/2014). Obviamente, esto implicó continuos conflictos de competencia en los que el TC ha venido rechazando la extralimitación del Estado en su pretendida gestión y ejecución centralizada de esos programas creados al margen del art. 149.1. 17ª CE[12].

En segundo lugar, debe resaltarse el tradicional problema relativo a los agentes de empleo en nuestro país. Nos referimos a los déficit endémicos de los SPE en términos de personal, tanto desde una perspectiva cuantitativa como cualitativa (capacitación y cualificación, tareas encomendadas, etc.). Cuestión que hay que relacionar con una pésima política de delimitación y ordenación de los operadores llamados a colaborar con ellos en el mercado de trabajo.

Como adelantábamos *supra*, la falta de una planificación y visión de conjunto y de unos objetivos comunes en el medio y largo plazo, ha venido favoreciendo tradicionalmente la continuidad de un perfil del personal de los SPE más orientado a la gestión y burocracia que a las nuevas necesidades del mercado de trabajo. Esos déficits, lejos de corregirse, pretendieron "taparse" con la implementación y añadido de nuevos agentes que intervinieran en el mercado de trabajo[13]: nos referimos a la diversidad de entidades colaboradoras (que después de años anunciando su fin, la LE 56/2003 no solo mantuvo sino que las impulsó y en la nueva LE siguen siendo un instrumento esencial, ahora consagrado y "privilegiado" – Cap. II, Tít. II y art. 41 LE), y, sobre todo, a las agencias – privadas – de colocación (APC), estas últimas, al albur de una reforma normativa carente de una visión estratégica de las mismas y de su papel dentro del sistema, y en todo caso, de nuevo, con escasa coordinación-colaboración real con los SPE.

También en esta cuestión de los operadores en el mercado de trabajo, debemos subrayar dos aspectos que distorsionaban la adecuada delimitación

para que el País Vasco pudiera gestionar el subsidio extraordinario por desempleo, en STC 133/2019, de 13 de noviembre.

[12] *Vid*. SSTC 100/2017, 153/2017 y 156/2017.

[13] Sugerente, en este sentido, la E.MM. RD 735/1995, por la que se admitían las agencias de colocación en nuestro país por primera vez en nuestra historia reciente.

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de los agentes de intermediación. De un lado, el restrictivo concepto de "*intermediación*", el cual dejaba fuera ciertas tareas instrumentales a la casación, pero esenciales en la intervención en el mercado de trabajo actual, como la prospección de las ofertas de empleo (vacantes) y la selección de las personas trabajadoras (y que, por "casualidad", serán las que implementen los portales digitales de empleo a los que ahora nos referimos)[14]. Todo ello propició el rápido desarrollo de agentes privados en esos ámbitos (empresas de selección) que aprovecharon así esa visión caduca de la intermediación para el desempeño de esas tareas y actividades no estrictamente de intermediación laboral, pero estrechamente relacionadas con ellas – cuando no equivalentes –, y a quienes no se les reclamaría el sometimiento a las reglas que regían las políticas de empleo (principios, objetivos, deberes, gratuidad, etc. – también, Convenio 181 OIT) y que sí se les imponía a las referidas APC[15]. Todo lo cual llevó a reclamar hace más de una década "*la promulgación de una Ley específica sobre agentes intermediadores para dar una mayor fiabilidad, profesionalidad y solvencia a los distintos operadores*", y procurar con ello una mayor transparencia y lucha contra el abuso y la clandestinidad[16].

A todo ello hay que unir, de otro lado, la inacción y descontrol público en relación a los portales digitales de empleo, sobre los cuales se optó por un mal entendido *laisse affair*, de modo que la generalización de los mismos se dio no solo sin una apuesta por un espacio virtual público, sino sin una mínima y adecuada intervención por los poderes públicos sobre tales operadores (siquiera vía LISOS, *ex* art. 16.1, a), pues pese a que se era esperable su aparición[17], en nuestro país operaran en la más clara alegalidad

[14] Si bien pudiera admitirse que en un sentido estricto y clásico estas actividades complementarias solo se integrarían como (una fase de la) intermediación cuando se realizaban conjuntamente con dicha casación (Benavente Torres I. (2021), "La intermediación laboral en España", in Aa.Vv. (Navarro/Costa, Coord.) *Presente y futuro de las políticas de empleo en España*; Bomarzo, pp. 77-78); sin embargo, la realidad ha evidenciado que son un aspecto verdaderamente clave y cualificador de la intermediación en este tiempo (especialmente en la era de la digitalización y la IA). Sobre esas labores excluidas de tal concepto de intermediación que realizan los portales digitales de empleo (como InfoJobs), de Torres Bóveda N. (2022), "Retos de la intermediación laboral a través del uso de algoritmos", in Aa.Vv., *Empleo y protección social*. Comunicaciones del XXXIII Congreso Nacional AEDTSS, MTES, pp. 477-478.

[15] Lázaro Sánchez J.L. (2023), "Concepto y regulación de la intermediación en el mercado de trabajo en la ley 3/2023, de empleo", *Trabajo, Persona, Derecho, Mercado*, Monográfico (Ley de empleo: una visión multidisciplinar), pp. 209 ff.

[16] Rodríguez Escanciano S. (2013), "Colaboración privada en el Servicio Público de Colocación", *Aranzadi Social*, 10, (BIB 2013\310).

[17] *Vid*. Informe OIT previo a la 81ª Conferencia de 1994 para la revisión del Convenio 96, citado por Lázaro Sánchez J.L. (2011), "La reordenación de las actividades a desarrollar por

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o directamente, ilegalidad (*ex* art. 21.bis/art.33 LE 56/2003 y TRLE 3/2015 y art. 3.1 RD 1796/2010)[18].

Se entenderá así que con este lastre competitivo "desleal" (y sin olvidar el fracaso de la extensión de los convenios de colaboración entre tales APC y los SPE o el ya referido "abuso" de las llamadas entidades colaboradas por parte de los SPE[19]), las APC hayan ido menguando cuando no desapareciendo (particularmente las que no operan con medios exclusivamente telemáticos)[20] o siendo "sustituidas" por las ETT desde que éstas pudieron operar como agencias integrales/globales de empleo tras la reforma de 2012.

En suma, como consecuencia de esa inacción normativa y de los SPE en el ámbito digital, el sector privado se ha hecho "con el monopolio de esta actividad" de la intermediación digital, "casualmente" llevada a cabo por agentes que operan exclusivamente de forma virtual, y que ha terminado por dejar fuera o muy descolgados a nuestros SPE de las oportunidades de penetración que posibilita hoy día esa vía de intermediación[21].

Finalmente, y en tercer lugar, otro importante hándicap que advertimos en el caso de los SPE de nuestro país es su estructural infrafinanciación. Lamentablemente, también ha sido una constante que nuestra inversión en políticas (activas) de empleo quedara muy alejada de la media de aquellos países referentes (particularmente, cuando se ponen en relación con la tasa de paro)[22]; pero es que, además y hasta hace apenas unos años, la mayor parte de las partidas económicas venían principalmente dirigidas a medidas de fomento de escasa eficiencia como son los incentivos a la contratación laboral

las agencias de colocación", in Aa.Vv. (Castiñeira Fernández, Coord.), *Relaciones laborales y nuevo modelo productivo*, Monografías de Temas Laborales-CARL, pp. 506 ff.

[18] En extenso, sobre el caso de la red Linkelin, Fernández García A. (2020), "La red Linkelin a la luz del Convenio 181 OIT sobre agencias de empleo privadas", *Documentación Laboral*, 11.

[19] También, Benavente Torres I., "La intermediación laboral en España"; cit., pp. 82-84.

[20] Es interesantes señalar la creciente relevancia de las APC que actúan exclusivamente de forma telemática, pues son las de este tipo las que principalmente crecen en nuestro país (*vid*. datos en: *www.sistemanacionalempleo.es/AgenciasColocacion_WEB/listadoAgencias.do?modo=inicio*).

[21] Vallecillo Gámez M.R. (2021), "La digitalización exprés de los servicios públicos de empleo: retos y desafíos desde una perspectiva comparada", *RTSS-CEF*, 459, p. 152. Esta actitud de los poderes públicos en España contrasta con los buenos resultado que obtuvieron los SPE de países como Alemania con la introducción desde un primer momento de portales virtuales; en Observatorio ADEI, "*Digitalización y políticas activas de empleo en España*", 2015, pp. 23-24).

[22] Recientemente, Banco de España (2024), "*Informe Anual 2023*", p. 214. También, CES, *Memoria sobre la situación socioeconómica y laboral de España*, tanto de 2022 (p. 32, CUADRO A-8) como de 2023 (pp. 194 y 195).

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(que, a pesar de todo, siguen representando un volumen muy importante)[23]. Muy poca atención se realizaba en otras medidas de mayor interés en términos de eficacia (como la orientación, prospección o la formación-recualificación profesional, etc.), y, por ende, se pierde la oportunidad de mejorar los datos de inserción que conllevaría un servicio integral que combine distintos tipos de intervención. "*Este nivel de dedicación constituye una de las diferencias clave con respecto a la configuración más habitual de las políticas activas de empleo en el resto de la Unión Europea. La segunda radica en la baja asignación a las funciones de orientación, que deberían constituir el pilar de la relación de los usuarios con los servicios de empleo*"[24]. En efecto, cabe advertir que tales funciones o actuaciones no suelen ser implementadas directamente por los SPE (centrando a su personal en labores de gestión administrativa y económica relativas a prestaciones, control de subvenciones, concesión de programas, etc.), sino que, a lo sumo, fueron externalizadas a través de los mencionados agentes que "colaboraban" en el desarrollo de las mismas y en un marco normativo sobre financiación de los proyectos y programas de empleo que, hasta la vigente Ley de Empleo 3/2023, era de corto alcance (anual), limitando así la capacidad de gestión y ejecución de los mismos[25].

Obviamente, si esas otras actuaciones y programas de empleo más eficientes se articulaban por la vía de la externalización, se entiende el enorme problema que se generó como consecuencia de la crisis de 2008, con la notable reducción de la inversión pública en políticas activas, pues esas otras actuaciones quedaron prácticamente paralizadas ante la inexistencia de presupuesto y de personal público capacitado para llevarlas a cabo[26].

[23] *Vid*. CES (2022), *Memoria*…, cit., 2022 (p. 217 ff.) y 2023 (pp. 193 y 198). Recordándolo, Pérez del Prado D. (2023), "Derecho, economía y digitalización", *Tirant lo Blanch*, (TOL9.710.962). Algunos datos, en Franco I Sala L. (2021), "El gasto público en políticas activas de empleo en España", *Temas Laborales*, 59, pp. 156 ff.

[24] *Vid*. CES (2023), *Memoria*…, cit., pp. 193 y 201-202. Esta escasa inversión en esas otras actuaciones (distintas a las bonificaciones), viene siendo observada por el CES en anteriores Memorias (2022, p. 217 ff.) y es una realidad que viene de lejos, Observatorio ADEI (2015), cit., p. 9.

[25] AIReF (2019), "Estudio sobre el programa Políticas Activas de Empleo", p. 115.

[26] De hecho, tan solo recientemente "*se constata una recuperación gradual de los niveles de gasto previos a la crisis financiera que, en todo caso, siguen siendo insuficientes para atender adecuadamente las dificultades de inserción del conjunto de la población desempleada*", CES (2022), *Memoria*, cit., p. 217.

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2. El Plan de Recuperación, Transformación y Resilencia como *palanca* y la ley de empleo como *punto de apoyo*: oportunidades de la digitalización en los spe

Para dar respuesta a esta negativa realidad, particularmente sobre la base de oportunidad de la digitalización, nuestro país se ha comprometido a implementar importantes medidas contempladas en el llamado "Plan de Recuperación, Transformación y Resilencia" (PRTR), impulsado como consecuencia de los *Fondos Next Generation* (Reglamento (UE) 2021/241 por el que se establece el Mecanismo de Recuperación y Resiliencia).

Dicho Plan, que se estructura en 4 ejes transversales entorno a los que se ordenan diez *políticas palancas* (que a su vez se integran en diversos Componentes en los que se concretan actuaciones y reformas y su financiación), está suponiendo, sin duda, el principal elemento renovador de nuestro marco jurídico-social, en concreto, por lo que ahora importa, en materia de empleo.

Así, y por lo que aquí interesa, el PRTR contempla importantes objetivos orientados a la eficiencia de las políticas públicas de empleo. Cabe comenzar subrayando la centralidad en todo ello de la Palanca VIII (*Nueva economía de los cuidados y políticas de empleo*), en especial su Componente 23 (*Nuevas políticas Públicas para un mercado de trabajo dinámico, resiliente e inclusivo*). Entorno a lo que con ella se pretende, cobra especial relevancia otras actuaciones estrechamente relacionadas con los SPE. Por un lado, y por lo que respecta a su conexión con las PAE y con la mejora de cualificación digital tanto de empleados públicos como de la ciudadanía en general, este C23 debe a su vez ponerse en conexión con el Componente 19 (*Plan Nacional de Competencias digitales*) correspondiente a la Palanca VII (*Educación y conocimiento, formación continua y desarrollo de capacidades*)[27]. Y, por otro lado, debemos referirnos a la Palanca IV (*Una Administración para el siglo XXI*), destaca el Componente 11 (*Modernización de las AA.PP.*), en particular en su apuesta por la digitalización de la misma y la estabilización del empleo público[28]. C11 que debemos poner en conexión con la referida

[27] Por su interés, también debe destacarse la (inacabada) Ley Orgánica 3/2022, de ordenación e integración de la Formación Profesional.

[28] *Vid*. RD-Ley 14/2021, de medidas urgentes para la reducción de la temporalidad en el empleo público y posterior Ley 20/2021. Sobre el tema y los problemas no resueltos, indico ahora algunos de mis trabajos, como "*De un (no) abuso del Decreto-ley a un posible (nuevo) intento de* lawfare*. Comentario a la STC 145/2023, de 25 de octubre, sobre la constitucionalidad del Real Decreto-Ley 14/2021, de 6 de julio, de medidas urgentes para la reducción de la temporalidad en el empleo público*"; RDS, 104/2023; o, también, "El abuso de la temporalidad en las Administraciones Públicas. El complejo de Penélope del Derecho español"; Temas Laborales, 172/2024 y "Contratación laboral temporal irregular

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Palanca VIII, por cuanto afecta de manera especial al SEPE y su pretendida transformación – dentro de un contexto de reordenación de las políticas públicas de empleo – en la Agencia Española de Empleo (AEE).

Como adelantábamos, el PRTR está conllevando no solo un fuerte impulso inversor, sino, especialmente, un importante actividad normativa reformadora, de la que ahora destacamos la Ley de Empleo 3/2023 (LE) por su clara apuesta por la digitalización como un objetivo estratégico para potenciar las PAE[29]. En relación a las actuaciones de dicha norma que pudieran ahora interesarnos, queremos destacar la implementación y mejora de los instrumentos dirigidos a la coordinación e integralidad de los distintos SPE, en particular, tanto con la referida transformación del SEPE en AEE (como ente coordinador del sistema, Cap. I, Tít. II LE) como a través del Sistema Público Integrado de Información de los Servicios de Empleo (SPIISE, arts. 15 y 16 LE). Y también, muy especialmente, debe subrayarse la reconceptualización de la *intermediación laboral* (art. 3 LE), donde se incluirán ahora actuaciones como la prospección de ofertas de empleo (vacantes) o la selección de personal (e incluso ciertas actuaciones de apoyo a la empleabilidad, en especial, para colectivos vulnerables) en sintonía con el Convenio OIT 181[30].

Respecto a todo ello, nos interesan en este momento señalar las actuaciones y oportunidades que, como consecuencia del referido PRTR, impulsan la digitalización como vía para la mejora de los SPE[31].

2.1. Implementación de herramientas virtuales y digitales

En este ámbito, son varias las líneas en las que se debe actuar y además hacerlo de forma interrelacionada, pues para mejorar la eficiencia de las políticas públicas de empleo (*vid*. E.MM. LE – II), junto al potenciamiento

en la Administración pública. El rayo que no cesa. A propósito de las reformas de 2021 y la jurisprudencia del TS: desde el indefinido no fijo al fijo"; RDS, 2023/103.

[29] Una relación de la concreción de tal objetivo en dicha Ley, en Román Lemos J. (2023), "La digitalización en la ley de empleo: empleo, colocación e intermediación", *Trabajo, Persona, Derecho, Mercado*, Monográfico (Ley de empleo: una visión multidisciplinar), pp. 181-206.

[30] Sobre el posible alcance de la intermediación en la nueva LE 3/2023 y la oportunidad del cambio; Lázaro Sánchez J.L., "Concepto y regulación de la intermediación…; cit., pp. 207-228.

[31] Con todo, ya la *Estrategia Española de Apoyo Activo al Empleo 2021-2024* (RD 1069/2021) – y su última concreción en el *Plan Anual para el Fomento del Empleo Digno 2024* –, contemplaban actuaciones en este sentido (Objetivo Estratégico 4).

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de las herramientas digitales (en particular la IA y otras aplicaciones y algoritmos que aprovechen el potencial del *Big Data)*, debemos también tener en cuenta la capacitación y cualificación en su uso, al objeto de que puedan servir a su objetivo.

2.1.1. Impulso a las herramientas y canales digitales disponibles

La actuación pública abarcaría (*ad intra*) no solo la existencia de un soporte informático común, compartido y colaborativo que asegure la transparencia y la igualdad (principios rectores de la política de empleo, art. 5 LE, necesarios para garantizar la unidad de mercado – art. 139 CE y Cap. II Ley 20/2013); y cuya concesión será el referido SPIISE, del que tratamos después. Pero más allá, decimos, nos referimos a la propia implementación de herramientas como la IA o la LLM en las diversas fases y ámbitos de actuación de los SPE y su interacción con la ciudadanía.

No desconocemos que nuestros SPE cuentan ya con sus propias herramientas digitales (IA y o algoritmos que dan apoyo en el ámbito del perfilado, o la orientación laboral)[32]. No obstante, siguiendo el ejemplo austríaco (EIA 2024, p. 41), se quiere avanzar en este ámbito, porque la IA permite generar un sistema algorítmico que explote las posibilidades del Big Data y mejorar la elaboración de perfiles de solicitantes de empleo para aumentar la eficiencia y la eficacia del asesoramiento[33]. Con todo, y conectando con lo que luego señalaremos respecto a la capacitación del personal de los SPE, la limitada experiencia en la implementación que se viene haciendo de algunas de las referidas herramientas electrónicas ya implantadas (*v.gr*., Send@), se reconoce un uso muy reducido por parte de los empleados, lo que "*revela obstáculos para una implantación generalizada*"[34].

Pero también interesan aquellas herramientas y medidas que inciden (*ad extra*) en la relación con las personas trabajadoras y potenciales usuarios del SPE. En cuanto a los beneficios que una mejora en la implementación y la introducción de herramientas complementarias en tales espacios virtuales

[32] En el caso del SEPE-AEE, el SEND@. En Andalucía el SAE cuenta con el Sistema de Intermediación Laboral de Andalucía (SILA), una interfaz que pretende una actuación integral para lo cual cuenta con diversos algoritmos para el perfilado). Otros ejemplos y sus problemas, Vallecillo Gámez M.R. (2023), "La digitalización de la intermediación laboral: análisis, retos y casuística comparada", in Aa.Vv. (2023), *Empleo y protección social. Comunicaciones del XXXIII Congreso Nacional AEDTSS*, MTES.

[33] Sobre las principales vías de aplicación de la IA en los servicios de empleo, *vid*. CES (2023), *Memoria…*, cit., p. 211 (CUADRO 11).

[34] *Vid*. CES (2022), *Memoria*…, cit., pp. 228-229 (nota 31).

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permite para la población general – y para ciertos colectivos o territorios en particular –, los datos son evidentes[35]. En este sentido, la apuesta por la *inclusión*, como elemento vertebrador de PRTR, exige de los poderes públicos ir al más allá de la necesaria implementación de portales digitales de los SPE y, en particular (DF 11ª LE), respecto al *Portal Único de Empleo* (art. 13., b, 2º LE, *v.gr*., *Empléate*, AEE); y promover otras herramientas y aplicaciones específicas para la ciudadanía y su adecuación a diversos canales o dispositivos.

Consecuentemente, y también por lo que pudimos extraer de la *acelerada* digitalización del SEPE durante la Covid, se hace imprescindible una mayor y mejor apuesta por esos espacios digitales y con ello, además, servir al derecho de "*interacción digital para facilitar la accesibilidad a la información*" (E.MM. III LE).

2.1.2. Mejora en la capacitación digital

Como complemento previo e imprescindible del anterior, se requiere una mejora en la capacitación digital. En este sentido, debemos destacar el ya referido *Plan Nacional de Competencias digitales*, el cual se integra dentro de la llamada estrategia *España Digital 2025* (2020), posteriormente actualizada – también al contexto del PRTR – en la *Agenda España Digital 2026* (julio 2022)[36].

Se contemplan en dicho documentos diversas líneas de actuación con relevancia en materia empleo. De un lado y entre otras inversiones, el PRTR prevé un paquete orientado a las *Competencias digitales para el empleo* (C19.I3) dirigido a actuaciones específicas de (re-)cualificación de personas (des-)empleadas. El objetivo es favorecer la inclusión digital, particularmente de colectivos vulnerables (E.MM., III y Tít. III-Cap. II LE), pero también de territorios desfavorecidos (PRTR, p. 135), sobre todo del ámbito rural, con déficits poblacionales o de acceso a los servicios públicos ("*España vacía*").

Pocas dudas pueden suscitarse sobre lo esencial de este tipo de (re) cualificación, pues deviene imprescindible en una realidad como la actual para procurar un empleo de calidad, ya que, como reconoce el propio legislador,

[35] En extenso, de la experiencia Covid, OCDE (2020), "Servicios públicos de empleo…", cit.

[36] Fruto de la estrategia "España Digital 2025" se implementará otras actuaciones de *soft law*: *Estrategia Nacional de Inteligencia Artificial* (2020), y la llamada *Carta de Derechos Digitales* (2021).

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el "*manejo útil de herramientas digitales y tecnológicas se configuran por esta ley como competencias básicas para la empleabilidad*" (E.MM., III y art. 38 – y 33.2, c – LE). Pero también para aprovechar las oportunidades que ofrece la economía digital y – con ello – para contribuir a la efectividad de las iniciativas recogidas en los diversos *Annual Sustainable Growth Survey* (especialmente, por lo que respecta a su versión 2023, en su conexión con los puntos 2.2 – Productividad – y 2.3 Equidad)[37].

Del mismo modo, junto a esa capacitación, es imprescindible el apoyo técnico por parte de los SPE, en especial para los llamados colectivos vulnerables. La propia norma parece entenderlo así cuando reconoce a las personas usuarias el derecho a un asesoramiento (información-formación) sobre el uso y aplicación de medios telemáticos y de redes sociales para la búsqueda de empleo (art. 13.3, c RD 438/2024, Cartera común de servicios del Sistema Nacional de Empleo).

Y, de otro lado, hay que tener en cuenta la cuestión de la necesidad de garantizar una alta y cualificada capacidad por parte de tales SPE en el uso de herramientas para la gestión del dato (IA, algoritmo, etc.), lo que nos remite al tema clave de la formación y motivación de sus empleados públicos[38]. En este sentido, debe mencionarse otra de las "patas" de aquel *Plan Nacional de Competencias digitales*: el *Programa de capacitación Digital de las Administraciones públicas* (incluido en el *Plan de Digitalización de las Administraciones Públicas 2021-2025*), el cual debe servir para hacer realidad la idea de que "potenciar el uso de la IA en el sector público puede proporcionar a los empleados públicos las mejores herramientas de acompañamiento, en la prestación de unos servicios públicos de calidad" (*Estrategia de Inteligencia Artificial*-EIA 2024)[39].

Adviértase que la capacitación no solo debe limitarse a lo meramente técnico o de uso del aplicativo, sino también a una cualificación más profunda, pues no debe olvidarse la importancia que en este nuevo contexto tiene el *dato* en términos cualitativos (calidad, fiabilidad, no sesgo, etc.), ni las implicaciones que su uso conlleva en términos de potencial afección sobre ciertos derechos fundamentales (igualdad, no discriminación, trabajo,

[37] El PRTR (pp. 93 ff.) se alineaba con las iniciativas emblemáticas "*flagship*" contempladas en la *Annual Sustainable Growth Strategy 2021*, en particular, con la denominada *modernise* y *reskill&upskill*.

[38] OECD (202), "*Harnessing digitalisation in Public Employment Services to connect people with jobs*", Policy Brief on Active Labour Market Policies.

[39] Algunos estudios permiten concluir sus beneficios no solo en términos de productividad y eficiencia en el trabajo de los empleados, sino incluso en la posibilidad de un mayor éxito en aquellos con menor experiencia o cualificación inicial; OECD (2024), "A new dawn for public employment…", cit., pp. 25-26.

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etc.), ya que "*la IA generativa y los LLM también conllevan su propio conjunto de riesgos, algunos de los cuales son particularmente graves para las organizaciones del sector público como los SPE*"[40].

Junto a ello, y en aras a esa implicación y motivación, así como para la revalorización de su trabajo, sería oportuno que tales planes de capacitación integraran medidas para promover la confianza y la aceptación de los sistemas digitales entre el personal de los SPE (sin duda, uno de los aspectos más problemáticos y condicionantes en que la efectividad de todos aquellos objetivos sean una realidad)[41], por ejemplo, incluyendo la participación del mismo en la toma de decisiones en torno a las soluciones o respuestas que puede ofrecer tal herramienta (IA, algoritmo, etc.).

2.2. Fortalecimiento de la cultura de la evaluación

La evaluación de las políticas públicas (en general y las de empleo en particular) viene siendo una cuestión crucial para establecer los objetivos o resultados que las justifiquen y, además, su adecuada y periódica realización ayuda en el diseño de las políticas futuras; ya que permite incluso establecer *ex ante* los indicadores necesarios no solo para la valoración *ex post*, sino también para el seguimiento mientras se implementan (cuestión de especial relevancia en planificaciones plurianuales como las de las políticas de empleo)[42].

La falta de una *cultura de la evaluación* es, sin duda, uno de los grandes déficits de las políticas de empleo en nuestro país[43], donde solo en tiempos recientes se ha exigido una evaluación operativa (y no solo cuantitativa o de gestión de las actuaciones a efectos de financiación) que permita una valoración común, integral y permanente, también de sus resultados (*vid*.

[40] OECD (2024), "A new dawn for public employment…", cit., pp. 21 y 27 ff. Exigencia que también derivaría del art. 4 (Considerando 20) Reglamento UE 2024/1689.

[41] *Vid*. nota 33 y CES (2023), *Memoria*…, cit., p. 207.

[42] OECD (2020), "Impact evaluation of labour market policies through the use of linked administrative data". En dicho informe se plantea además la oportunidad, en el ámbito de las PE, de la llamada "evaluaciones de impacto contrapuesto" (*counterfactual impact evaluations*), que permite obtener una comparativa de los resultados de una actuación en relación a quienes no se beneficiaron de ella. Metodología que es la que se ha aplicado a las primeras evaluaciones en España, en concreto, la llamada *técnica propensity score matching* (PSM); *vid*. SEPE (2023), "Evaluación ex post PAPE 2021. Evaluación por dimensiones del Plan Anual de Empleo 2021", pp. 79 ff.

[43] *Vid*. el imprescindible estudio AIReF (2019) "Estudio sobre el programa Políticas Activas de Empleo". Recientemente, Banco de España, "Informe Anual 2023".

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Plan Anual de Política de Empleo para 2021 – §8 y Anexo V)[44]. En este sentido, no debe desconocerse que es a raíz de los compromisos derivados del PRTR cuando se ha comenzado a fijar reglas claras y comunes para reforzar y generalizar tal cultura de la evaluación al objeto de procurar "*una prestación eficiente de los servicios públicos como factor de productividad, crecimiento y bienestar*" (E.MM. Ley 27/2022, de institucionalización de la evaluación de políticas públicas en la AGE). En esta línea, la LE ha designado al CGSNE como órgano competente para "*analizar, conforme a los indicadores consensuados, el grado de eficacia y eficiencia de la política de empleo*" de los SPE, para con ello elaborar (junto con los agentes sociales – CSEAS) un informe que permita "*facilitar el intercambio de buenas prácticas y para planificar y coordinar la política de empleo a corto y largo plazo*" (art. 10 LE). Igualmente, no debe perderse de vista que tal evaluación es esencial para hacer realidad el *catálogo de instrumentos de empleabilidad* (art. 37 LE).

Con todo, si bien es cierto que tras el referido PRTR "*se producen nuevos avances en la arquitectura y algunas, tímidas, novedades en la evaluación*", no lo es menos que aún "*se mantiene sin grandes cambios la idea general: déficit persistente en la evaluación sistemática y de calidad de las políticas activas de empleo*"[45].

En suma, hay mucho margen de mejora y a ello debe contribuir la digitalización, pues los datos existentes permiten concluir que la aplicación de las herramientas electrónicas (IA, algoritmos, etc.) puede tener un papel clave en la evaluación de las políticas de empleo implementadas y en mejorar sus capacidades de anticipación[46].

2.3. Mejora sustancial de los datos disponibles sobre el mercado laboral

Como es fácilmente comprensible, un modelo económico-productivo como el actual, caracterizado por la inestabilidad, el cambio y la *destrucción creativa*, conlleva un claro reflejo y consecuencia sobre el mercado de trabajo,

[44] Sobre esa primera evaluación, *vid*. SEPE (2023), "Evaluación ex post PAPE 2021…"; cit. Como bien se expresa en ella, la falta de una tradición en el tema ha evidenciado algunas importantes insuficiencias en el PAPE 2021 (formulación genérica de los objetivos estratégicos, falta de justificación de la interrelación entre medidas, objetivos y resultados para una adecuada valoración de la idoneidad material, ausencia de devolución sobre el grado de aceptación de las propuestas realizadas por los agentes que participan en su diseño, etc.).

[45] CES (2023), *Memoria*…, cit., pp. 163-164.

[46] OECD (2024), "A new dawn for public employment…", pp. 24-25.

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que deviene igualmente variable, precario e inseguro[47]. Dicha realidad exigirá de los servicios de empleo una mayor capacidad de anticipación y la implementación de medidas que faciliten y favorezcan transiciones positivas en el empleo (*vid*. art. 4, m LE), lo que sin duda requiere disponer de una buena información (datos sobre ofertas de empleo, perfiles de demandantes, etc.) además de la ya referida labor de su análisis cualificado y especialmente intenso[48].

Para ello, como hemos observado para nuestro país, se refuerzan las competencias y el gobierno del sistema de empleo, con especial protagonismo de la AEE[49]. Pero también, decíamos, con una apuesta porque los SPE (autonómicos) intensifiquen su actuación en materia de prospección de ofertas de empleo, fortaleciendo su relación y servicios a las empresas, en especial, con la selección de personal y detección de necesidades productivas y formativas (arts. 4 y 9 LE); cuestiones ambas que ya adelantamos que la nueva LE ha integrado, ahora sí, dentro de un concepto más amplio-actualizado de las actuaciones incluidas dentro del término jurídico de *intermediación*. El nuevo concepto parece basarse, precisamente, en la centralidad de la finalidad última del proceso (la colocación) y, por tanto, se relacionan "*las acciones que de manera más directa permiten conseguirla*" (y siguiendo una línea evolutiva iniciada ya con la inclusión de la recolocación dentro del concepto de intermediación)[50]. El objetivo pretendido de ese cambio es elevar sustancialmente la casación oferta-demanda de trabajo (*matching*), implementar una mejor coordinación entre las PAE y las pasivas y un más eficiente perfilado de los demandantes de empleo.

Como puede advertirse, todo ello exige igualmente un sistema de información potente, común, transparente y coordinado, pues la cantidad y calidad de la información que manejen los agentes que intervienen en

[47] También, Moreno Díaz J.M. (2021), "Sociedad digital, globalización y representación de los trabajadores en la empresa", Aa.Vv. (Mella/Muñagorri, Dir.), *Globalización y digitalización del mercado de trabajo: propuestas para un empleo sostenible y decente*, Aranzadi, pp. 583-585.

[48] Lo recordaba igualmente, Vallecillo Gámez M.R., "La digitalización exprés…"; cit., p. 148. Sobre las deficiencias en términos de información disponible y su necesaria mejora, *vid*. SEPE, "Evaluación ex post PAPE 2021…"; cit., p. 18 (y multitud de referencias concretas a lo largo de dicho informe).

[49] En las propuestas que se barajan respecto a la estructura de la AEE se fortalecen estas funciones a través del posible Departamento de Digitalización y tecnologías de la información, en Costa Reyes A., "La Agencia Española…", cit.

[50] Sobre todo ello, *vid*. Lázaro Sánchez J.L., "La reordenación de las actividades …", cit. (especialmente, 510 ff.) y, del mismo autor, "Concepto y regulación de la intermediación…", cit., pp. 209 ff. Compartimos su planteamiento en esta cuestión, en particular, respecto a la selección.

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el mercado (en nuestro caso, los SPE), es fundamental para el éxito de la política de empleo[51]. Como sabemos, hasta la actual LE 3/2023, contábamos en España con el SISPE (Sistema de Información de los Servicios Públicos de Empleo, implementado con la Ley 56/2003 de Empleo – art. 7.2), que se introdujo ante la criticable realidad descoordinada preexistente que hemos señalado, donde se evidenció al extremo las consecuencias de la falta de una adecuada planificación en la descentralización, hasta el punto de que las CC.AA. desarrollaron "*sus propios Sistemas de Información, de forma aislada, para realizar la gestión que les era transferida; es decir, sin compartir información con el resto de Autonomías y con dificultad para suministrar datos a la Administración Central*"[52].

En relación a esta cuestión de la falta de coordinación informativa, debemos recordar igualmente que, a dicha estructura territorial-competencial compleja, vino a sumarse la inclusión de diversos y nuevos operadores de empleo, tanto privados como públicos (*v.gr*, entidades locales), lo que multiplicó el problema[53]. Junto a ello, no debe olvidarse la insuficiencia de reglas y consecuencias claras por la falta de comunicación en tiempo real de información por parte de todos esos operadores al referido SISPE[54]. La LE pretende resolver algunos de esos problemas, por un lado, implementando el mencionado SPIISPE (art. 15 ff. LE) – cuya creación, indirectamente, viene a cuestionar el funcionamiento del SISPE – y reforzando tanto la labor de la AEE en esta cuestión como las obligaciones de los diversos operadores que participan o interactúan con los SPE (*v.gr*., en el caso de las empresas, con el genérico "compromiso" de informar sobre vacantes disponibles – *vid*. art. 59 LE, etc.), aunque, como vemos, la normativa se evidencia ambigua, condicionada a futuros desarrollos o acuerdos entre los sujetos o poco clara en cuanto a las consecuencias de su incumplimiento.

[51] Vallecillo Gámez M.R., "La digitalización exprés…", cit., p. 151.

[52] *Vid*. SEPE (2005) "Sistema de Información de los Servicios Públicos de Empleo (SISPE). Modernización de la gestión / Mejora en la medición del paro registrado".

[53] Al respecto, también, Pérez del Prado D., "Derecho, economía y digitalización…"; cit. La multiplicación de agentes ha sido una de las causas que se han alegado para explicar el mal funcionamiento del sistema francés y que ha llevado a ese país a implementar una reforma que implique reducirlos; Véricel M. (2023), "Le plein emploi à tout prix: la loi sur le plein emploi, une reforme fort ambiguë et inadaptée", *Revue de Droit du Travail*, 12, pp. 749 ff.

[54] Como señalara García Piñeiro, "*debe resaltarse la necesidad de la transparencia en los datos de intermediación laboral, porque a día de hoy faltan datos […] por las agencias de colocación*" (en "Política de empleo y nuevas tecnologías", Aa.Vv., *Derecho Del Trabajo y nuevas tecnologías. Estudios en Homenaje al Profesor Francisco Pérez de los Cobos Orihuel*; Tirant lo Blanch, 2020 – TOL8.188.351). Al respecto, debe subrayarse el valor (estratégico y relevante posición) que esa información tiene para quien pretende un lucro de su intervención en el mercado de trabajo; Vallecillo Gámez M.R., "La digitalización exprés…"; cit., p. 151.

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Sea como fuere, además de esa pretendida integralidad del nuevo SPIISPE, se incluyen reglas sobre el acceso y tratamiento de datos, cuestión que deviene un elemento esencial ante el mayor protagonismo de los sistemas electrónicos (IA, *Big Data*) en la toma de decisiones (arts. 16 y 17 LE), especialmente, las automatizadas. Y, de alguna forma, deviene más compleja ante la apuesta por incrementar la colaboración privada-empresarial y, por ende, el acceso de esos operadores a tales datos[55]. En este sentido, no debe dejar de recordarse que desde el ámbito comunitario los sistemas de IA son calificados de alto riesgo cuando se implantan en el ámbito del trabajo y el empleo[56].

El problema clave, entonces, deriva de los importantes déficits normativos en este tema, reconocidos por el propio Gobierno cuando afirma que nos encontramos ante "*un marco legal distribuido y complejo, abarcando regulación europea y nacional de gran heterogeneidad y amplitud. Resulta necesario abordar la regulación desde un enfoque legislativo integral, desarrollando un modelo de* gobierno del dato" (EIA 2024). La experiencia acumulada evidencia la necesidad de mejorar sustancialmente el marco regulador[57].

2.4. Simplificación y agilización de los trámites y procedimientos

Como hemos señalado en varias ocasiones, la tradicional actuación de los SPE en nuestro país ha hecho que en gran medida se centren en tareas burocráticas (*v.gr.*, gestión de prestaciones por desempleo, convocatorias de

[55] *Vid*., para Francia, Camaji L. (2023), "Les données personnelles des demandeurs d'emploi: où est le droit?", *Revue de Droit du Travail*, 10.

[56] Reglamento (UE) 2024/1689 del Parlamento Europeo y del Consejo, de 13 de junio de 2024, por el que se establecen normas armonizadas en materia de inteligencia artificial. En particular, Considerandos 48 y 52 (sistemas de IA independientes) en relación a Considerando 57 y art. 6.2, que remite al Anexo III.4 (y, por su conexión con otras actuaciones que pueden implicar las políticas de empleo – prestaciones, capacitación profesional-, c56 y c58, Anexo III.3 y.5), salvo que se acredite que (no implica un sesgo significativo, C52) no influye "*sustancialmente en el resultado de la toma de decisiones*" en los términos del art. 6.3, 2º (excepción no aplicable cuando la "*IA efectúe la elaboración de perfiles de personas físicas*" – *ex* art. 4.4 Reglamento (UE) 2016/679, RGPD).

[57] Vela Díaz R. (2021), "Digitalización y nuevos trámites automatizados: las decisiones algorítmicas impregnan la actuación de la Administración Laboral y de Seguridad Social", *Trabajo y Derecho*, 83 (La Ley 10241/2021). En cuanto a la posibilidad e insuficiencias de la LISOS 5/2000 para sancionar actuaciones ilícitas vinculadas a la digitalización (particularmente por el uso de la IA), Jover Ramírez C. (2024), "La digitalización de la prestación de servicios: ¿Un reto para la potestad sancionadora de la administración en el Orden Social? Una mirada al Texto refundido de la LISOS", *REDTSS*, 2752024, pp. 167 ff.

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ayudas o programas de empleo, etc.), lo que tradicionalmente ha sido objeto de crítica por desatender su actividad a otros aspectos clave (orientación, prospección, servicios a las empresas, etc.) o, sencillamente, por ocuparse en tareas repetitivas en perjuicio de la atención personal de las personas usuarias de los SPE. Por tal razón son de enorme interés y utilidad los medios y vías electrónicas y el uso de IA en el ámbito del empleo (PRTR, p. 135), pues posibilitan una mayor y más eficiente gestión de esos procesos. Debe recordarse, con todo, que tal iniciativa digitalizadora ya se pretendía desde 2020 en la *Estrategia Nacional de Inteligencia Artificial* (ENIA), recientemente continuada y reforzada en la – palanca 4 de la – *Estrategia de Inteligencia Artificial 2024* (ajustada al Reglamento UE 2024/1689 por el que se establecen normas armonizadas en materia de inteligencia artificial). En concreto, se afirmará ahí que con la digitalización se persigue "*aumentar la eficiencia de los procesos, con el fin de agilizar trámites, automatizar procesos mediante la implantación de robots, permitir una mejor interrelación con la ciudadanía a través de asistentes virtuales o chatbots*" (ENIA 2020).

Sobre la posible efectividad de esta apuesta, se suele señalar que "*España parte de una buena posición en gobierno electrónico y servicios públicos digitales en la UE* […]: *las estadísticas muestran que se encuentra por encima del promedio de la UE (Digital Decade Country Report 2023: Spain) en Servicios públicos digitales para ciudadanos, 86% frente a 77%*" (EIA 2024, p. 40)[58]. De hecho, en el campo del trabajo y la Seguridad Social ya contamos con importantes experiencias de este tipo[59]. Sin embargo, "*los simples datos de uso o la mera existencia de servicios electrónicos no ofrecen información sobre la calidad en la provisión de los servicios públicos*", por lo que también debe subrayarse la necesidad de mejorar su digitalización, sobre todo tras las deficiencias detectadas en los últimos años en dichos ámbitos (seguramente por la mayor utilización y solicitudes)[60].

Como adelantábamos, esta apuesta digital por la eficiencia debería implicar igualmente (y esa parece ser también una razón para su impulso) liberar personal y recursos públicos de las tareas burocráticas y de gestión ordinaria y favorecer así otras actuaciones en el empleo público en este ámbito (PAE: prospección de vacantes, selección, etc.), "*dado que la IA permitirá una reducción de trámites y una automatización de tareas*" y

[58] En línea con lo que se viene constatando en la última década, CES, Informe 3/2017, p. 92.

[59] Vela Díaz R., "Digitalización y nuevos trámites automatizados…", cit.

[60] CES, "Informe 1/2021", cit., p. 105. Subrayando las importantes deficiencias en el SEPE-AEE y en el ámbito del empleo en general, Carreras Roig/Bastida Vialcanet (2023), "Impacto del teletrabajo y la digitalización", Aa.Vv. (Moreno/Romero, Coord.), *Los nuevos escenarios laborales de la innovación tecnológica*, Tirant lo Blanch, p. 76.

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porque "*la capacidad de los robots virtuales y de procesamiento de datos ofrece una oportunidad para optimizar el tiempo y recursos a través de la automatización de tareas rutinarias (*y*) repetitivas eliminando la carga del funcionariado y permitiendo reorientar su trabajo, aportando más valor*" (ENIA'20).

Además, su implementación respondería al derecho a la provisión de los servicios y la prestación electrónica de trámites administrativos o gestiones recogido en el Catálogo de servicios garantizados (art. 56.1, *g* LE).

No obstante, como han evidenciado otros ejemplos en la práctica, esta eficiencia no debe descuidar que la IA nunca podrá sustituir totalmente la interacción humana (cuestión especialmente sensible cuando nos referimos a colectivos vulnerables)[61]. Junto a ello, cabe añadir que aprovechar los beneficios potenciales de la digitalización requiere una fuerte inversión inicial, por lo que la implementación de estas herramientas no debe aprovecharse para descuidar la financiación pública, particularmente cuando la misma es ya deficitaria (pues, además, la implementación de tales herramientas no siempre implica ahorro, sino eficiencia)[62].

2.5. Lucha contra el fraude y la ilegalidad

La IA ofrece oportunidades para que los SPE realicen un mayor control frente al fraude y de la calidad de las ofertas de empleo, incluida la identificación de contenido ilegal o discriminatorio. En cuanto a lo primero (art. 56.1, *i-j* LE), las actuaciones pueden orientarse al indebido disfrute tanto de ciertos incentivos al empleo como de las prestaciones por desempleo. Igualmente, se afirma que su uso puede ser de especial interés para fortalecer la conexión con las PAE que el beneficiario debe realizar y acompañar (también para verificar su efectivo ofrecimiento y, en su caso, realización).

Sin duda, herramientas como la IA facilitan comprobar el ajuste a las obligaciones en materia de empleo, lo que también alcanza a las de Seguridad Social, ya que – a la postre – éstas afectan al acceso a prestaciones (cotización, altas, etc.). Dicho de forma resumida, la IA facilita enormemente su aplicabilidad en un contexto de *Big Data*, ya que permite "*luchar contra el fraude con modelos basados en detección de patrones fraudulentos*" (ENIA 2020).

[61] *Vid*., por ejemplo, Pôle Emploi (2022), "*Charte de Pôle emploi pour une intelligence artificielle éthique*", (especialmente, punto 4. Liberté de choix).

[62] OECD (2024), "A new dawn for public employment…", cit., y "Modernising Latvia's Public Employment Service through Digitalisation Connecting People with Jobs".

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Sin embargo, el riesgo de una mala implementación de dichas iniciativas es evidente y real[63], de ahí, una vez más, la prudencia en su uso, particularmente en caso de beneficiarios de prestaciones o para la implementación de sanciones. A título de ejemplo, debemos señalar el caso de su utilización por parte de la ITSS a efectos sancionadores, pues está generando no pocos problemas debidos a errores y otras cuestiones que inciden sobre las garantías jurídicas[64].

3. La digitalizacion en las políticas de empleo en España: riesgos y déficits del *soft law* y su especial incidencia en los colectivos vulnerables

Parece acertado el consenso generalizado sobre las enormes oportunidades y retos que la digitalización ofrece para la mejora de los SPE. Sin embargo, como hemos podido analizar en las páginas anteriores, su implementación se apoya en instrumentos carentes de fuerza vinculante, o más acertadamente, que no generan derechos subjetivos en las personas afectadas, pues incluso las previsiones de la LE precisan no solo importantes desarrollos normativos sino sobre todo materializar lo que en ellos se indique (y poder tener una adecuada evaluación)[65]. No es tampoco una cuestión nueva, pues aún se sufre el *pecado original* del Derecho del Empleo, ya que el mismo no se construye para fortalecer la posición jurídica de la persona demandante de empleo (y en su configuración de titular de derechos *patrimonializables* en materia de empleo), sino que aún hoy es esencialmente una norma que mira a la Administración y al poder político.

Creemos por ello que, sin desmerecer el esfuerzo que todo lo anterior supone y de la importancia que en todo ello está jugando el PRTR, debemos igualmente subrayar algunos de los problemas reales que no han sido debidamente abordados aún y que pueden cuestionar esa pretendida rápida digitalización de los SPE en general y de la futura AEE en particular.

En este sentido, se han señalado los riesgos referidos al derecho a la privacidad y el tratamiento de datos personales o la posible discriminación

[63] OECD (2024), "A new dawn for public employment…", cit., p. 25.

[64] Vela Díaz, R., "Digitalización y nuevos trámites automatizados…", cit.

[65] Resaltando también esta crítica, particularmente en lo relativo a la digitalización y la Ley de Empleo, Román Lemos J., "La digitalización en la ley de empleo…"; cit. Compartimos por ello la afirmación de que, en relación al PRTR, "*La primacía del seguimiento y control de la ejecución, así como del cumplimiento con las reformas por vía normativa, no aproximan ni la calidad de la implementación ni el impacto de las medidas contenidas en el Plan sobre la población objetivo y el tejido productivo*"; CES (2023), *Memoria…*, p. 206.

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en la gestión del dato (sesgos, etc.) – y ampliamente tratados ya por la doctrina –, o los que plantea el uso de herramientas digitales (portales de empleo, IA, etc.) en la *intermediación* laboral[66], y más en concreto, para el caso español, las dudas en cuanto al alcance/exclusión que el concepto de intermediación en la LE plantea respecto a los sujetos o agentes que operan digitalmente cuando desarrollan procesos automatizados[67]. Pero más allá de esos importantes problemas no resueltos con claridad, queremos aquí expresar nuestra preocupación por las implicaciones que esta apuesta por la digitalización pueden conllevar teniendo en cuenta el perfil general de los usuarios tradicionales de los SPE. Nos referimos al problema de la *brecha digital* y la consiguiente vulnerabilidad de ciertas personas por factores sociales y económicos y de género[68].

Al respecto debe tenerse en cuenta dos cuestiones previas de especial interés ahora: de un lado, como ya advertíamos al inicio, que los principales usuarios de los servicios de empleo son, por opción legal incluso, las personas integrantes de los denominados colectivos de atención prioritaria (art. 50 LE); dentro de las cuales destacamos ahora aquellas que presentan importantes elementos vulnerabilidad digital debido a diversos factores socioeconómicos, médicos, territoriales etc. (*v.gr.,* personas en riesgo de exclusión, baja cualificación, discapacidad intelectual, pero también personas de edad avanzada, etc.)[69]. Y de otro, igualmente, debemos tener presente que, desde hace mucho, los usuarios de los SPE vienen reclamando una mejor y mayor atención personal de tales servicios de empleo, también en lo relativo a la mejorable gestión de las prestaciones vinculadas a situaciones

[66] Vallecillo Gámez M.R., "La digitalización exprés…"; cit., pp. 153 y ff.

[67] Sobre qué deba entenderse por medios exclusiva o totalmente automatizados a efectos del Reglamento comunitario, parece oportuno tener en cuenta la STJUE 07/12/2023 (C634/2021), pues en ella no se excluye la aplicación del art. 22 RGPD cuando la intervención humana sea mínima y fuertemente condicionada por el tratamiento digital. Cabe adelantar que quizás esa conceptualización amplia de la actuación "exclusivamente automatizada" no tenga por qué coincidir con la que permite excluir del concepto patrio de intermediación a ciertos operadores, art. 3, c 2º LE).

[68] *Vid*. CES (2021), "La digitalización de la economía" (*Informes*, 3/2017 y 1/2021, pp. 76 ss). También, Rodríguez Escanciano S. (2024), "La brecha digital de género: reflexiones en las postrimería del primer cuarto del siglo XXI", *RTSS-CEF*, 479; Alegre Martínez M.A. (2024), "El impacto social de las brechas digitales", *Lex Social, Revista De Derechos Sociales*, 14 (2).

[69] Algunas voces llegaron a proponer la inclusión de un nuevo colectivo prioritario: la de los trabajadores con déficit de formación en nuevas tecnología y digitalización con dificultades de integración en el mercado de trabajo; García Piñeiro N.P., "Política de empleo y nuevas tecnologías…", cit. Crítico con la ampliación de colectivos prioritarios hecha por la LE, por su alejamiento de la vulnerabilidad en términos de empleabilidad, Bascón Marín J. (2024), *La política de empleo en los colectivos vulnerables*, Bomarzo, pp. 25-28.

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de desempleo. Por ello mismo – además de por razones de coherencia del sistema –, creemos acertada la opción, consecuencia del PRTR, por la simplificación de los instrumentos y prestaciones por desempleo (RD-L 2/2024, para la simplificación y mejora del nivel asistencial de la protección por desempleo)[70], ya que, en nuestra opinión, y al menos indirectamente, contribuirá a reducir la cantidad de actuaciones que la AEE/SEPE desarrolla en relación a la gestión de tales prestaciones, lo que posibilita centrarse en otras actuaciones de mayor interés para la colocación (orientación, prospección, etc.).

Junto a ello, no debe desconocerse la importancia que la digitalización puede implicar para tales colectivos. Así, en cuanto a la gestión de esas prestaciones frente al desempleo, como reclama el *Pilar Europeo de Derechos Sociales*, vienen siendo una necesidad en aras a garantizar la cohesión social exigida (*Annual Sustainable Growth Survey* 2023 – *vid*. art. 4, *m* LE), particularmente ante los riesgos que implica la flexiguridad y sus efectos en términos de empleo (temporalidad, trabajo atípico, bajos ingresos, etc.)[71]. Al respecto, debemos recordar que tales riesgos y la atención a las personas que los padecen ha sido igualmente objeto de atención por parte del PRTR y se ha visto plasmado en diversos instrumentos jurídicos (*v.gr*., respecto de los autónomos y la prestación por cese de actividad – en diversas reformas en 2021 y 2022 –, o en relación a los contratos temporales marginales o el CTP, en lo relativo al cómputo de los periodos de cotización, incluso el caso de fijos discontinuos y el acceso al subsidio por desempleo, incluido el de mayores de 52 años)[72].

En suma, la inestabilidad en el trabajo se verá incrementada precisamente por las exigencias de la economía digital, lo que provocará un aumento de las transiciones entre situaciones relacionadas con el empleo y, obviamente, eso implica una mayor generalización y desarrollo entre la población trabajadora *sans phrases* y, por ende, más atención por los SPE[73]. Y en esta línea, es

[70] En todo caso, aquella opción responde al objetivo de reordenación del conjunto de ayudas estatales cuyos objetivos se solapan, en especial, respecto al IMV (en línea con la compatibilidad con el trabajo incluida en el RD 789/2022 o con la introducción de los llamados itinerarios de inclusión, L. 19/2021).

[71] En el marco europeo, parece evidente que la estrategia de la *flexicurity* sigue considerándose esencial; McBritton, Spinelli, "Direito sociais, trabalho e cidadania UE", Aa.Vv. (Mella/Muñagorri, Dir.) *Globalización y digitalización del mercado de trabajo*…, cit., p. 192.

[72] No debe olvidarse además (CES (2023), *Memoria*…, cit., p. 201) que "*se observa un mayor porcentaje de éxito* (en términos de inserción) *entre las personas demandantes de empleo que perciben algún tipo de prestación, frente a aquellas que no lo reciben*".

[73] También, Pérez del Prado D., *Derecho, economía y digitalización*..., cit.; Raso

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sobradamente sabido que el desarrollo de la robotización y la automatización en el mundo del trabajo profundizará estos riesgos (por su carácter disruptivo y acelerado)[74], particularmente en relación al empleo llevado a cabo por los colectivos vulnerables[75].

En definitiva, se incrementan las posibilidades de que tales colectivos precisen de la atención de los SPE (tanto respecto a las PAE como en las de protección frente al desempleo), de modo que tal circunstancia se debería tener en cuenta a la hora de implementar tales herramientas electrónicas (BigData, IA, algoritmos), debido a su complejidad – incluso para el usuario medio – y, ante el riesgo cierto de que impliquen respuestas o decisiones automatizadas y no humanas, por los problemas que ello puede generar y a su difícil comprensión y actuación por las personas más vulnerables de estos colectivos[76]. Dicho en otras palabras, "*es menester recordar* […] *que el interés general o público pertenece y beneficia a los ciudadanos, no a la Administración como organización servicial que lo gestiona*"[77].

En definitiva, no debiera olvidarse que "*la digitalización y la IA suponen una oportunidad para acercar la Administración a la ciudadanía y superar las brechas de acceso a la misma, prestando servicios públicos de calidad y asegurando que la ciudadanía pueda elegir el modo en que se comunica con la Administración*" (EIA 2024).

Delgue J., "Las transformaciones del trabajo y las propuestas de la OIT: la Declaración del Centenario", Aa.Vv. (Mella/Muñagorri, Dir.), *Globalización y digitalización del mercado de trabajo*…; cit., pp. 74-76.

[74] Sin duda, la velocidad con la que están desarrollándose estos cambios es una singularidad de esta nueva revolución tecnológica; García Piñeiro N.P., "Política de empleo y nuevas tecnologías…", cit. Como recuerda la autora, ya en la Recomendación 122 OIT (1964) advertía de la necesidad de que la política de empleo tuviera en cuenta los efectos negativos que implican las nuevas técnicas de producción sobre el mercado de trabajo (en términos de sub o desempleo); y así se plasmó de manera más clara en la Recomendación 169 OIT (1984)

[75] También, Bascón Marín J., *La política de empleo*…; cit., pp. 23 ff.; Vallecillo Gámez M.R., "Robotización y políticas activas de empleo: un binomio no solo posible sino necesario que precisa una dedicada actualización", Aa.Vv. (2021), *Congreso Interuniversitario OIT sobre el futuro del trabajo; Ministerio de Trabajo y Economía Social*, pp. 570-572. Riesgo que se traduce también en una menor participación del trabajo en la renta nacional y, por ende, mayor precariedad y bajos salarios en los países avanzados; ILO (2024), "World Employment and Social Outlook: September 2024 Update".

[76] No es tampoco una cuestión nueva (CES, *Informe*, 1/2021, cit., pp. 105-106; Vela Díaz R., "Digitalización y nuevos trámites automatizados…", cit.), pero de lo que ahora advertimos es sobre el riesgo de su generalización y, más aún, su extensión sobre tales colectivos vulnerables.

[77] STS-CA 23/03/2021 (rec 3688/2019 y rec 5270/2019). Sobre las limitaciones a la obligación indiscriminada de relacionarse electrónicamente con la Administración, *vid*. STS (C-A) 11/07/2023 (nº 1953/2023, rec 6391/2021).

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Sin embargo, ya hemos ido señalando a lo largo de este trabajo numerosas dudas y peligros que nos sugiere la forma en que se está implementando esa apuesta por la digitalización de los SPE, sustentadas en gran medida sobre instrumentos de *soft law* (planes, estrategias, cartas, etc.) o de normas que no generan derechos subjetivos fuertes. Cuestión especialmente grave, como ahora pretendemos hacer ver, por la escasa visión de los problemas que tal digitalización implicará para esos colectivos vulnerables. Repetimos, no cuestionamos la apuesta por la digitalización de los SPE (más bien apoyamos y los datos aportados en este trabajo avalan nuestra confianza), tan solo queremos advertir sobre algunos de esos riesgos y las debilidades que presenta el sistema para afrontarlos, especialmente, cuando de esos colectivos se trata.

Y en este sentido, comencemos por referirnos a las ya mencionadas medidas de alfabetización digital, pues siendo necesarias, no deben entenderse como suficientes ni mucho menos que estén garantizadas (o su extensión a la mayoría de tales vulnerables) Así lo reconocía el propio Gobierno (MAETD) cuando admitía insuficientes avances en la capacitación digital de la población y, con ello, una *brecha digital* también territorial (mundo rural) que se proponía combatir con unos objetivos cuantificados (estrategia "*España Digital 2025*")[78]. Tampoco la mera capacitación de la población asegura su eficacia en un ámbito tan cambiante o que la misma alcance por igual a todos los territorios, de ahí la necesidad de reforzar las vías de atención personal e incluso presencial y, en todo caso, de que éstas no se vean afectadas negativamente por la implementación de las digitales (*vid*. arts. 5,d y 7 LE).

La propia LE parece preverlo así (art. 56, g), cuando el *Catálogo de servicios garantizados* reconoce a los demandantes de empleo el derecho a un determinado instrumento: "*un canal presencial o digital alternativo de recepción de los servicios y a recibir una orientación y atención presencial o no presencial*". Respecto a esto último, como aclara el art. 61 LE (referido a la *cartera común de servicios* del SNE, que aglutina, los *garantizados* antes referidos, cualesquiera otros que deban prestarse en todo el territorio del Estado y por todos los servicios públicos de empleo), se prevé implementar, adicionalmente y con carácter accesorio, una cartera digital de servicios cuyo objetivo es facilitar la inmediatez y continuidad en la atención (vía asistente virtual) y la adaptación a las necesidades de las personas usuarias (atención

[78] En cuanto a los datos, en la *Spain Digital Day 2021* (diciembre) se reconocía que el 43% de la población seguía careciendo de competencias digitales básicas. Posteriormente, en el informe "Competencias digitales. Edición 2024" (MAETD, red. es), señalaba que, en 2023, el 66,2% tenía un nivel al menos básico. Recuérdese que el objetivo – *España Digital 2026* – es que para 2026 el 80% disponga de ellas.

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inclusiva). Es decir, "*sin perjuicio de la garantía de la prestación de servicios de forma presencial, que faciliten la accesibilidad de toda la ciudadanía, con la finalidad de no acrecentar la brecha digital*" (*vid*. también arts. 38.2 y 41, c) RD 438/2024).

En suma, esa relación digital con la ciudadanía debería ser una opción, en orden a "*aumentar las interfaces de relación con los administrados*" (ENIA 2021), y no una alternativa o vía preferente sobre esa atención personal, en particular, para esos colectivos digitalmente vulnerables. Siguiendo esta idea, también refuerza esa necesaria multiplicación de vías de relación (junto con la apuesta por la alfabetización digital) la propia mejora pretendida, ya que los datos disponibles apuntalan claramente que una estrategia multicanal supone una mayor eficacia en términos de empleo[79].

No obstante, la experiencia de estos últimos años tras la pandemia Covid ha evidenciado su oportunidad para el uso generalizado de estas herramientas electrónicas para interactuar con la ciudadanía, pero también los importantes problemas que su uso implica (incluso por los innumerables problemas técnicos y la falta de apoyo telemático adecuado), particularmente para los colectivos más vulnerables, que vinieron a agravar los ya derivados de la clara insuficiencia de personal en relación a los beneficiarios existentes (muy por encima de la media comunitaria)[80].

En resumen, la realidad evidencia que esas nuevas vías electrónicas no vienen acompañadas de un fortalecimiento de la atención presencial, y precisamente por ello debe además reiterarse que la atención personal y personalizada e inclusiva que pretende la Ley 3/2023 (art. 5, *d*), remite muy especialmente a la cuestión de las plantillas disponibles de los SPE (en términos cuantitativos y de especialización) para atender esta multitud de canales y diversidad de usuarios, pues la experiencia comparada nos

[79] Observatorio ADEI, cit., p. 26 (referido, precisamente, al sistema austríaco). También, ILO (2022), *Global report "Technology adoption in public employment services. Catching up with the future*", p. 3.

[80] Las descapitalización humana de los SPE y los problemas técnicos de sus sistemas telemáticos (informáticos, telefónicos, etc.) son una constante que la Covid no hizo sino evidenciar en su más cruda realidad, Vallecillo Gámez M.R., "La digitalización exprés…"; cit., pp. 157 ff. Frente a esta situación, la autora nos señala ejemplos de prácticas exitosas en la digitalización de los SPE durante la Covid desarrolladas por otros países. En cuanto a la ratio empleado-usuario en el caso del SEPE-AEE, los datos evidencian que esa brecha no para de aumentar cada año, como lo evidencia, por ejemplo (para cada uno de ellos) el contraste ente personal y beneficiarios de prestaciones en SEPE, *Informe Anual* (empleados) y SEPE, *Datos de los registros del servicio público de empleo estatal. Demandantes de empleo, paro, contratos y prestaciones por desempleo* (beneficiarios). Lo que explica sobradamente las quejas por la falta de una mejor y mayor atención personal en las oficinas; *Vid*. *Informe anual del Defensor del Pueblo* de 2022 (vol. I) y de 2023 (pp. 48 ff.).

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evidencia los graves problemas que derivan de esa implementación digital en un marco de insuficiente apuesta por parte de los poderes públicos respecto a su capital humano[81]. En este sentido, no podemos ser muy positivos, pues se sigue manteniendo un compromiso ambiguo y fuertemente condicionado en este tema de la mejora de los recursos humanos de los SPE (*vid*. arts. 29.1 y 30.1 y en la DA segunda LE)[82].

Finalmente, no deben desconocerse los mencionados errores y problemas que el uso de tales herramientas electrónicas implica en la gestión (fruto en muchas ocasiones de la opacidad en la configuración del algoritmo)[83], y las graves consecuencias que para ciertos colectivos (los más vulnerables en términos socioeconómicos) tiene el control *ex post* que con su puesta en marcha se generalizará, ya que conlleva en muchas ocasiones tanto la necesidad de que los sujetos afectados presenten reclamaciones por la falta de reconocimiento de ciertos derechos (prestacionales, de tipo de servicio, etc.) como, en sentido contrario, frente a los requerimientos de devolución de prestaciones inicialmente otorgadas y que después se "comprueba" que eran indebidas[84]. A nuestro entender, esta práctica de control *ex post* pudiera suponer ciertas contradicciones con la jurisprudencia del TEDH en asuntos en los que el error es imputable en exclusiva a la Administración (EG/SC) – especialmente cuando ésta se demora en tal reclamación –, en concreto, en aquellos casos en los que se trata de prestaciones sociales que constituyen el sustento básico de la persona beneficiaria (lo que ocurrirá en la mayoría de las veces) y ésta actúe de buena fe (*v.gr.,* no aportó datos erróneos ni pudo deducir que existía error evidente, etc.)[85].

[81] Sobre el "fracaso" francés, Véricel M., "Le plein emploi à tout Prix…"; cit., pp. 752-754, 760-761, 763-764. En nuestro país Conde Colmenero P. (2023), "El nuevo marco normativo del empleo: hacia la modernización de las políticas de ocupación y el establecimiento de un modelo de mercado de trabajo facilitador de la transformación digital y la transición ecológica"; *Revista de Trabajo y Seguridad Social-CEF*, 477, pp. 73-74. *Vid*. también CES (2022), *Memoria…*, cit., pp. 228-229.

[82] Costa Reyes A., "La Agencia Española…"; cit.

[83] *Vid*. el ejemplo del *sistema Bosco*, en Godoy O. (2024), "De la digitalización a la inteligencia artificial: actividad administrativa, logaritmos y derechos", *Diario La Ley*, nº 10505, (La Ley 16012/2024); Rosino Calle R.C. (2014), "Avances en IA y Administración Pública, Una nueva herramienta para la claridad en la Administración automatizada", *Derecho Digital e Innovación*, 19 (La Ley 11018/2024). Otros ejemplos en nuestra país y en la UE donde se advertía ya de importantes defectos prácticos de tales tecnologías, en Vallecillo Gámez M.R., "La digitalización de la intermediación laboral…"; cit.

[84] El propio Defensor del Pueblo ha iniciado recientemente (21/08/2024) una actuación de oficio para afrontar este grave problema, "*El Defensor del Pueblo propone limitar la obligación de devolver*" (*www.defensordelpueblo.es/noticias/ingreso-minimo*).

[85] Por tanto, en esos casos, la persona beneficiaria tendrá derecho a que no le sea reclamado

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Costa Reyes A. (2024), "El abuso de la temporalidad en las Administraciones Públicas. El complejo de Penélope del Derecho español", *Temas Laborales*, 172.

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el reintegro (y, por tanto, a que se le devuelva la cantidad que por este motivo le reclamó la EG y que fue reintegrada), sobre la base de que existe de una expectativa legítima de que la decisión no será cuestionada retrospectivamente *ex* art. 1 del Protocolo 1 del CEDH (párrafos 56-57); STEDH 26 de abril de 2018 (caso Cakarevic v. Croacia). Con base en tal pronunciamiento, nuestro Alto Tribunal se ha pronunciado ya sobre el no reintegro de prestaciones de desempleo indebidamente percibidas (art. 55.3 LGSS) cuando se debe a un error de la Administración [SSTS 451/2023, de 27 de junio (ECLI:ES:TS:2023:2997), 618/2024 de 29/04/2024, rec. 858/2022, y 530/2024, de 4 de abril, rec. 1156/2023 (ECLI:ECLI:ES:TS:2024:2072)].

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The Employment relationship and the social network: privacy and collective interests

Federico Pisani[1]

1. Labour profiles in the use of social networks

Considering the employment relationship as completely independent of the use of social networks is unrealistic. The most relevant aspects include the employee's expression of content through digital tools that may harm the employer's reputation, compromise the trust inherent in the employment relationship, or the legitimacy limits of the employer's intrusion into employees' activities on social networks and their expression of "virtual" thoughts. Therefore, it might be useful to test the flexibility of the Italian legal system in keeping pace with modern times, considering the slowness of legislative updates and the rapid digital progress.

In the context of Italian public employment, Decree-Law No. 36/2022 (converted into Law No. 79/2022) addresses protecting the public administration's image as an employer. Article 4, paragraph 1 (introducing Paragraph 1-*bis* to Article 54 of Legislative Decree No. 165/2001), requires public employee codes of conduct to include a section on the proper use of information technologies, media, and social networks to safeguard the public administration's image[2]. Similarly, Article 11-*ter* of Presidential Decree no. 62/2013 (amended by Presidential Decree n. 81/2023), concerning the use of social media by public employees, provides in its first paragraph that "*in using their social media accounts, the employee must exercise all caution to ensure*

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[2] "*Il codice contiene, altresì, una sezione dedicata al corretto utilizzo delle tecnologie informatiche e dei mezzi di informazione e social media da parte dei dipendenti pubblici, anche al fine di tutelare l'immagine della pubblica amministrazione*" (Paragraph 1-*bis*, Article 54 of Legislative Decree No. 165/2001).

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that their opinions or judgments on events, things, or people cannot in any way be directly attributed to the public administration to which they belong". The subsequent paragraph adds: "*in any case, the employee must refrain from any intervention or comment that may harm the prestige, decorum, or image of their administration or public administration in general*"[3].

Clearly, despite the legislator's progressiveness, breaches by the employee related to the duty of loyalty, obligations of fairness, and good faith in contractual performance – including those arising from ancillary protection obligations – are subject to case-by-case assessment. What is most significant is the evaluation of conduct and its alignment with general normative principles[4] such as "*giusta causa*"[5] and "*giustificato motivo soggettivo*"[6].

The most significant issue here is the protection of the "intangible" expression of opinions, ideas, and criticisms that the employee conveys through social media. This raises concerns about the protection of data shared online, its accessibility, and the need to limit its use by the employer for investigative or disciplinary purposes.

However, the relationship between legal prescriptions and digital reality is complex, as the dissemination of personal information lacks clearly defined boundaries.

As is well known, social network users who share their data consent to access by certain selected individuals or anyone (if they choose to make their profile "private" or "public")[7]. This makes monitoring and tracking

[3] "*Nell'utilizzo dei propri account di social media, il dipendente utilizza ogni cautela affinché le proprie opinioni o i propri giudizi su eventi, cose o persone, non siano in alcun modo attribuibili direttamente alla pubblica amministrazione di appartenenza* […] *in ogni caso il dipendente è tenuto ad astenersi da qualsiasi intervento o commento che possa nuocere al prestigio, al decoro o all'immagine dell'amministrazione di appartenenza o della pubblica amministrazione in generale*" (Article 11-*ter* of Presidential Decree No. 62/2013); Bandelloni G. (2023), "Social networks e protezione del lavoratore", *Labour & Law Issues*, 2, vol. 9, p. 40 ff.

[4] Ingrao A. (2021), "Licenziamento disciplinare, libertà di espressione e social network: quando un post fa perdere ingiustamente il posto", *Rivista Italiana di Diritto del Lavoro*, 703 ff.; Del Punta R. (2019), "Social media and workers' right: what is at stake?", *International Journal of Comparative Labour Law and Industrial Relations*, 35, n. 1, pp. 79-100.

[5] 8 The *giusta causa* (just cause) refers to a serious and valid reason that justifies an employer's decision to terminate an employee's contract and typically involves behavior or actions by the employee that are so severe they breach the trust fundamental to the employment relationship.

[6] The *giustificato motivo soggettivo* (justified subjective reason) refers to a less severe reason than just cause, where an employee's conduct or behavior may still be unacceptable but not to the extent that it justifies immediate dismissal.

[7] Cusumano V. (2017), "Rilevanza disciplinare dei comportamenti extralavorativi e

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data particularly easy for employers, who can readily access it with minimal effort[8] – especially when their social profile is freely accessible, an instance that results in greater pervasiveness and ease of employer oversight.

The inevitable daily use of social platforms necessitates a preliminary analysis of the relationship between Article 8 of the Italian Workers' Statute[9] (as special regulation prevailing over general privacy law under Article 113 of Legislative Decree no. 196 of 2003) and the body of information that the employee knowingly makes available to the employer through posts and stories.

In greater detail, under statutory regulation, it is challenging to define the precise meaning of investigation and the debated necessity of an investigative intent, as well as to establish a consistent framework for the relevant facts required to assess an employee's professional aptitude, for which research activities are explicitly permitted.

On this point, however, the question arises as to whether the actual scope of the above-mentioned Article 8 (i.e. the prohibition of investigations) is absolute, independent of the employer's intent to investigate[10] or if it is conditional upon such intent, thereby excluding the collection of information that occurs incidentally or is otherwise unrelated to investigative activities[11].

diffusione di immagini a mezzo 'Social Network'", *Argomenti di diritto del lavoro*, 2, pp. 493-505 (the author commented on the judgment of the Court of Bergamo dated 14 settembre 2016); Tenore V. (2019), "La libertà di pensiero tra riconoscimento costituzionale e limiti impliciti ed espliciti: i limiti normativi e giurisprudenziali per giornalisti, dipendenti pubblici e privati nei social media", *Il lavoro nelle Pubbliche Amministrazioni*, 2, p. 85 ff.

[8] Forlivesi M. (2017), "Il controllo della vita del lavoratore attraverso i social network", in Tullini P. (ed.), *Web e lavoro. profili evolutivi e di tutela*, Torino: Giappichelli, p. 41 ff.

[9] Law N. 300 of 20 May 1970 (*Statuto dei Lavoratori*) "Rules on the protection of the freedom and dignity of workers, trade union freedom and trade union activity in the workplace and rules on employment".

[10] Bernardo P. (2007), "Vigilanza e controllo sull'attività lavorativa, in Commentario di diritto del lavoro", in Carinci F (ed.), *Il rapporto di lavoro subordinato: costituzione e svolgimento*, Torino: Utet, p. 647.

[11] Gallus G.B. (2007), "Verifiche sull'accesso ad internet dei dipendenti e controlli difensivi", *Diritto dell'informazione e dell'informatica*, 2, pp. 200-213 (the author commented on the judgment of the Court of Perugia dated 20 febbraio 2006); Salimbeni M.T. (2013), "Art. 8", in De Luca Tamajo R., Mazzotta O. (eds.), *Commentario breve alle leggi sul lavoro*, Padova: Cedam, p. 744; Donini A. (2017), "Profilazione reputazionale e tutela del lavoratore: la parola al Garante della Privacy", *Labour & Law Issues*, 1, R. 45, the author emphasizes that, if the prohibition of Art. 8 of the Labour Statute is deemed to apply exclusively to commissive investigative activities, the protection of opinions that the employer "receives" without active intervention (because they are data flows from other activities or information that one comes across when surfing the web), will be left exclusively to compliance with the rules of the Italian Privacy Code.

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Another interpretive issue concerns the types of investigations that are deemed lawful under the legal framework. The issue is not merely theoretical, as differing interpretations inevitably affect the burden of proof. In the case of a restrictive interpretation, it becomes particularly challenging to demonstrate the employer's investigative intent.

More problematic is the formulation regarding lawful investigations and the corresponding analysis of what may be used to assess an employee's professional aptitude. Undoubtedly, the complexity revolves around the necessary connection between data collection and the content of contractual duties, which inevitably may involve aspects of the employee's private life. However, it has been deemed inappropriate to sacrifice entirely, in favor of the employee's privacy, the employer's legitimate interest in knowing aspects of the employee's personality (albeit private but publicly accessible) directly relevant to the performance owed by the employee[12].

The employer's interest in functionally analyzing data, however, cannot lead to the indiscriminate search for any activity or expression of the employee's thoughts under the pretext of a tenuous connection to contractual duties. It is essential to delineate the boundary between pure personal traits and personality characteristics relevant to work, considering the indivisibility of a person, who cannot be separated into private and professional roles[13].

The prohibition established by Article 8 of the Workers' Statute, concerning the inviolability of information containing the employee's political, religious, or union opinions, should nonetheless constitute an insurmountable barrier for the employer, as such information cannot be used even when there is a functional connection to professional aptitude[14]. However, even here there remains a residual issue regarding trend-setting companies (*imprese di tendenza*")[15], where the employee's duties involve political, religious, or union-related content. Beyond this possible exception, the rule linked to Article 15 of the Workers' Statute[16] serves as an earlier but broader protection.

[12] Topo A. (2022), "Circolazione di informazioni, dati personali, profilazione e reputazione del lavoratore", in Pisani C., Proia G., Topo A. (eds.), *Privacy e lavoro. la circolazione dei dati personali e i controlli nel rapporto di lavoro*, Milano: Giuffrè, p. 393 ff.

[13] Aimo M. (2021), "Dalle schedature dei lavoratori alla profilazione tramite algoritmi: serve ancora l'art. 8 dello Statuto dei lavoratori?", *Lavoro e diritto*, n. 3-4, p. 587.

[14] De Simone G. (2020), "Pandemia. L'ennesimo stress test per lo Statuto dei lavoratori", *Lavoro e diritto*, 4, p. 749.

[15] Trend-setting companies are business activities that, by their nature, pursue ideological, political, religious, cultural or trade union aims and which, therefore, require coherence between the ideological profile of the enterprise and the people working in it. Typical examples are political parties, religious associations or publishing companies with specific orientations.

[16] Giugni G. (1979), "Sub art. 1", in Giugni G. (ed.), *Lo Statuto dei lavoratori.*

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It prohibits the employer not only from using unlawfully obtained information for disciplinary purposes but also from initially seeking such information[17].

Beyond this possible exception, the rule linked to Article 15 of the Workers' Statute serves as an earlier but broader protection. It prohibits the employer not only from using unlawfully obtained information for disciplinary purposes but also from initially seeking such information.

Realistically, however, Article 8 of the Workers' Statute fails to provide effective protection today, both because the employer does not need to take active steps to obtain data, which may simply appear in a post, and due to the burdensome evidentiary standard required of the employee ("*probatio diabolica*") if data collection by the employer is alleged, given the ease of obtaining data and the difficulty of reconstructing the employer's actions online[18].

Amid the chaos of social networks, it seems that the employee's protection ultimately depends on their own caution (or rather "restraint")[19]. By limiting external access to their page ("private profile")[20], the employee would prevent the employer from easily investigating, bypass interpretations that justify incidental inspections[21], and make such behavior by the employer inherently necessary.

2. The rights granted to the employee by the GDPR and the protection of personal data

As mentioned, upon accepting the contractual and usage terms, social platforms provide users with access to a network of contacts and the service, enabling them to publish and share content.

Commentario, Milano; Rodotà S. (1995), *Tecnologie e diritti*, Bologna, p. 85.

[17] Iaquinta F., Ingrao A. (2014), "La privacy e i dati sensibili del lavoratore legati all'utilizzo di socialnetworks. Quando prevenire è meglio che curare", *Diritto delle relazioni industriali*, p. 1040 ff.

[18] Biasi M. (2021), "Riflessioni sull'attualità dell'art. 8 Stat. Lav. al tempo dei social media", *Il lavoro nella giurisprudenza*, 1, p. 40 ff.

[19] Bandelloni G., "Social networks e protezione del lavoratore", cit., p. 6.

[20] D'Aversa F. (2019), "Il diritto di critica (anche sindacale) nell'epoca dei Social Media, *Labour & Law Issues*, 2, p. 58.

[21] Topo A. (2022), "Circolazione di informazioni, dati personali, profilazione e reputazione del lavoratore", *Privacy e lavoro. La circolazione dei dati personali e i controlli nel rapporto di lavoro*, Milano: Giuffrè, 2022, p. 395, according to the author, the publication of one's own images and personal information by an employee shall be considered as a waiver of confidentiality, if the employee has not adopted access restrictions, and there is no doubt that the employer may make use, for all purposes related to the relationship, of such available information.

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In this context, the service provider assumes the role of the data controller, as defined in Article 4.1 of the GDPR as "*any information relating to an identified or identifiable natural person*".

Beyond informing users about the purposes of personal data processing, the provider must adhere to the fundamental principles outlined in Article 5 of the GDPR[22], including purpose limitation, relevance, adequacy, and minimization, which require the collection of data strictly necessary to achieve predefined objectives. The use of anonymized data is also preferred, minimizing the use of personal information and ensuring that data retention is limited to the time strictly necessary to achieve the intended purposes (principle of storage limitation).

The principle of accuracy must also be observed, requiring data to be complete and correct, safeguarded from alterations or unauthorized access, in line with the principle of integrity and confidentiality.

The application of these principles must comply with the conditions of lawfulness outlined in Article 6 of the GDPR, which legitimizes data processing only in the presence of specific legal bases, such as the data subject's consent, the execution of contractual or legal obligations, the protection of vital interests, or the pursuit of public or legitimate interests, always subject to balancing with the fundamental rights and freedoms of the data subject.

Additionally, data processing must be specifically accepted by the data controller through the provision and explicit consent to the information notice as required by Article 13 of the GDPR, which is governed by drafting criteria designed to make the subject aware and informed[23]. Sharing of information is in any case required, contrary to the past, even in cases where the consent of the data subject is not required, acquiring independent relevance with respect to the subjective right of access[24] and the information collected by the data controller[25].

Moreover, under Article 2, paragraph 2, letter c) of the EU Regulation, even a platform user, while processing data from others on social media, may also be considered a data controller if the data is not used solely for

[22] Bolognini L. (2016), "Principi del trattamento", in Bolognini L., Pelino E., Bistolfi C. (eds.), *Il Regolamento privacy europeo. Commentario alla nuova disciplina sulla protezione dei dati personali*, Milano: Giuffrè, pp. 92-117.

[23] Ogriseg C. (2016), "Il Regolamento UE n.2016/679 e la protezione dei dati personali nelle dinamiche giuslavoristiche: la tutela riservata al dipendente", *Labour & Law Issues*, 2, vol. 2, p. 17.

[24] Italian Supreme Court, judgment n. 6775/2016.

[25] Marazza M. (2016), "Dei poteri (del datore di lavoro), dei controlli (a distanza) e dei trattamenti dei dati (del lavoratore), in *WP CSDLE "Massimo D'Antona".it*, 300, p. 27.

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domestic and personal purposes. Otherwise, they must be regarded as subject to privacy law obligations.

It follows that the employer's use of data collected on social platforms for non-domestic and non-personal purposes may only be used for purposes related to the employment relationship if all the aforementioned safeguards are respected, applying the regulations.

The different case of processing personal data strictly related to the contractual relationship remains, however, lawful and does not require consent, as stipulated in Article 6, paragraph 1, letter b), and recital 44 of the GDPR.

Particularly significant is Article 9 of the GDPR, which, after explicitly prohibiting the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, as well as genetic data, states that such processing is lawful if "*necessary for complying with obligations or exercising specific rights of the controller or the data subject in the field of employment, social security, and social protection law, to the extent authorized by Union or Member State law or by a collective agreement under Member State law, with appropriate safeguards for the fundamental rights and interests of the data subject*"[26].

Also relevant in this context is Article 88 of the GDPR, which allows individual states, through legislation or collective bargaining agreements, to establish more specific rules to ensure the protection of rights and freedoms regarding the processing of employees' personal data in the employment context. These may include purposes such as "*recruitment, performance of the employment contract, including compliance with obligations established by law or collective agreements, management, planning and organization of work, equality and diversity, workplace health and safety, protection of employer or client property, and the exercise and enjoyment, individually or collectively, of rights and benefits related to employment, as well as for purposes of employment termination*". In any case, specific national measures must include "*appropriate and specific measures to safeguard human dignity, legitimate interests, and fundamental rights of the data subjects, particularly concerning transparency in processing, the transfer of personal data within a corporate group or a group of enterprises engaged in a common economic activity, and workplace monitoring systems*"[27].

The development of specific national rules remains bound by the provisions

[26] Gambacciani M. (2022), "L'utilizzabilità nel processo delle prove raccolte in violazione delle norme sulla privacy", *Privacy e lavoro. La circolazione dei dati personali e i controlli nel rapporto di lavoro*, Milano: Giuffrè, p. 812.

[27] Ogriseg C. (2017), "GDPR and Personal Data Protection in the Employment Context", *Labour & Law Issues*, 2, vol. 3, p. 20 ff.

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of Recommendation CM/Rec. No. 5 of 2015 by the Committee of Ministers, drafted pursuant to Article 8 of the ECHR. The first part of the Recommendation (Articles 1-13) outlines the general principles of protecting workers' personal data, as already specified in Regulation No. 679 of 2016, and prescribes rules aimed at limiting data circulation and ensuring maximum transparency in its use. The second part of the Recommendation (Articles 14-21) more precisely identifies the possible forms of control arising from the use of new technologies, introducing rules aimed at reinforcing the principles of transparency and fairness in processing related to "*the use of the Internet and email*"[28].

3. The social network and collective interests: a new form of union representation?

The high transmissive potential of social platforms simultaneously fulfills interests in immediacy and maximum dissemination of communication, as well as providing an effective organizational tool capable of gathering consensus groups based on common interests[29].

It cannot be ruled out that social media may, in the future, prove capable of giving rise to structured forms of interest representation that could qualify as "unions". This is because "*communication via social platforms, in such a scenario, would position the employer's counterpart not as a community or group connected to a digital platform and alternative to a union, but as an entity structurally carrying a genuine collective interest*"[30]. The interconnected structure, in fact, seems fertile ground for the development of a new system of industrial relations[31].

While the hypothetical ability of the digital network to serve as a vehicle for demands from worker-users raises no doubt, the complete replacement of traditional union structures with homogeneous virtual organizations seems less feasible[32]. The first structural point requires assessing whether

[28] Deregibus V., Machì G. (2015), "Raccomandazione del Consiglio d'Europa CM/Rec(2015)5 e Jobs Act: profili di compatibilità e prospettive di tutela", *Bolletino ADAPT*, 26 March 2015.

[29] Bini S. (2019), "Il social network: da luogo a soggetto della rappresentanza sindacale digitale?", *Labour & Law Issues*, 2, vol. 5, p. 18.

[30] Marazza M. (2019), "Social, relazioni industriali e (nuovi percorsi di) formazione della volontà collettiva", *Rivista Italiana di Diritto del Lavoro*, 1, p. 77.

[31] Lassandari A. (2016), "Il sistema di contrattazione collettiva oggi: processi disgregativi e sussulti di resistenza", *Lavoro e diritto*, p. 975.

[32] Pacella G. (2019), "Le piattaforme di food delivery in Italia: una indagine sulla nascita delle relazioni industriali nel settore", *Labour & Law Issues*, /2019.

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the digital environment predisposes the depersonalization of individual interests in favor of identifying a collective interest cultivated and supported by representatives of the union organization.

As observed, the collective synthesis of labor interests is not independent of real-world experience or institutional mechanisms promoting it[33]. This implies that the sum of various individual interests does not equate to the necessary unity of collective aspiration. In other words, the strong individualism permeating the "immaterial" world appears to hinder the rationalization and unity of union action, which is instead essential for corresponding bargaining power in negotiations or confrontations with employer representatives or individual employers.

Another well-known aspect is the functioning of content dissemination dynamics on social media, which are based on algorithmic structures potentially capable of influencing user choices and even shaping decision-making processes in organizational contexts[34]. The crucial issue, therefore, is the interference of algorithms in the free decision-making processes of workers in the collective context. While not mandatory, these processes could be manipulated by mechanisms outside simple self-determination, making them more suggested than genuinely chosen. It is precisely the digital mechanism of forming collective will, which aligns similar demands, that complicates the earlier issue of the homogeneity of collective interests. Due to the mere algorithmic grouping of contiguous positions, it fails to support the unified mediation characteristic of the "physical" industrial system. In other words, it cannot dissolve the rigidity of "irreducible polarity", or consolidate the range of existing interests[35].

Despite the evident difficulties in considering social platforms as suitable venues for the formation and organization of union activity, this has not prevented the effective use of online platforms for exercising union criticism, which must necessarily be balanced against protecting the reputation and honor of the company. The diverse range of protest tools provided by social media, as well as the possibilities to streamline and facilitate the organization of mass events or interfere with the entrepreneur's use of digital channels for promotion, seem indisputable[36].

On this point, however, it is important to recall the balance between the

[33] Tullini P. (2018), "L'economia digitale alla prova dell'interesse collettivo", *Labour & Law Issues*, 1, p. 8.

[34] Faioli M. (2018), *Mansioni e macchina intelligente*, Torino: Giappichelli.

[35] Magatti M. (2019), "Individuo e società: una polarità irriducibile", in Carvelli M., Sapelli G. (eds.), *Metropolis: dai social media all'intelligenza artificiale*, Padova, p. 85.

[36] La Tegola O. (2019), "Social media e conflitto: i nuovi strumenti dell'attività sindacale", *Labour & Law Issues*, 2, vol. 5.

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legitimate exercise of protest and criticism and the necessary protection of the company's image. Even union representatives must comply with the duty of loyalty under Article 2105 of the Civil Code, as well as adhere to standards of good faith and fairness. Case law has established the parameters for exercising criticism against an employer via public platforms, alongside the criminal relevance of conduct constituting aggravated defamation under Article 595, paragraph 3, of the Criminal Code. These parameters include non-offensive and non-defamatory content, civil language, the absence of attribution to the company, and the scope of dissemination of the defamatory post[37] (these parameters are then in fact used to assess the legitimacy of any disciplinary measures applied to the employee). Regarding criminal offenses, it should be noted that the right to criticize can be invoked as a justification under Article 51 of the Criminal Code, provided it is exercised within the limits of factual truth, relevance of arguments, and measured expression[38].

In conclusion, while social networks hold transformative potential in reshaping collective representation in the workplace, their effective integration into traditional union structures remains uncertain. The individualistic nature of digital spaces, coupled with the influence of algorithmic mechanisms, poses significant challenges to achieving the unity and cohesion necessary for collective bargaining. Nevertheless, as technology continues to evolve, social platforms may complement existing industrial relations frameworks by amplifying worker voices, fostering dialogue, and bridging gaps between traditional and modern forms of representation.

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[37] Italian Supreme Court, judgments 35922/2023, 17784/2022, 27939/2021, 10280/2018, 11645/2018.

[38] Italian Supreme Court, judgment n. 17784/2022.

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The key role of GDPR in protecting workers' personal rights: comparing it with the sequel in the European Union Law

Anna Trojsi[1]

1. Preliminary remarks

As is well known, the principles and rules introduced by the EU General Data Protection Regulation 2016/679 of 27 April 2016 (GDPR), and their implementation within the Member States of the European Union, have increased and empowered the protection of workers' personal rights, especially in the workplace relationships, but also in the pre-employment and recruitment phase.

Research objective is to demonstrate and to show that the centrality of the GDPR for the private and public labour sector is confirmed by the subsequent EU legislative acts (Regulations and Directives) of interest to Labour Law.

2. The centrality of the GDPR

In fact, most of these more recent EU legislative acts (almost all of them) stipulate that they are without prejudice to GDPR. They don't seek to affect the application of existing Union Law governing the processing of personal data, in the sense that no provision of them should be applied or interpreted in such a way as to diminish or limit the fundamental right to the protection of personal data, that is still safeguarded, in particular by GDPR. So, rights and obligations of GDPR continue to apply when personal data are collected or processed pursuant to (or in connection with) these later EU Acts, and any processing of personal data or information under them should comply (and be carried out accordingly) with GDPR.

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Recent EU Acts complement the GDPR, as they aim to enhance its enforcement in specific areas where there may be breaches. While GDPR establishes the general framework for the protection of natural persons, these EU Acts lay down rights addressing the concerns that are specific in the processing of personal data. They provides for more specific rules in each context, including to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data within the meaning of Article 88 GDPR. But, in the event of a conflict between the new Acts and Union data protection law (or national legislation adopted in accordance), the relevant Union or national law on the protection of personal data or privacy shall prevail[2].

Consequently, the role of the European Data Protection Board (see its Guidelines) and of the respective (corresponding) independent Supervisory Authorities of the Member States is important in this matter (Schmitz-Berndt, 2024). Their competencies are extended to the responsibility for monitoring the application of new EU Regulations and Directives and their compliance with the GDPR.

3. The GDPR and the subsequent EU Regulations and Directives

In this one and in the following paragraphs, you will find the main regulations (Articles and Annexes; having to omit, for reasons of space, most of the many Recitals) of the recent EU legislative Acts relevant to the area of labour, which refer to the GDPR.

Firstly, in the aforementioned wake of GDPR are the general EU Regulations of the "European strategy for data" (Pathak, 2024; Zanfir-Fortuna, 2024), namely:

- Regulation (EU) 2022/868 of 30 May 2022 (Data Governance Act – DGA), based on the new legal concept of "data altruism" (Trojsi, 2023a) [esp. Article 1(3)];
- Regulation (EU) 2022/1925 of 14 September 2022 (Digital Markets Act – DMA) [esp. Articles 8(1), 13(5)];
- Regulation (EU) 2022/2065 of 19 October 2022 (Digital Services Act – DSA) [esp. Articles 2(4), point (g), 26(3), 38, 40(13)];
- Regulation (EU) 2023/2854 of 13 December 2023 on harmonised rules on fair access to and use of data (Data Act – DA) [esp. Articles 1(5), 4(12), 5(7) and (8), 6(1) and (2), point (b), 37(3) and (5), point (9), 38(3), 40(4)].

[2] On this topic, in general, see Rodotà, 2021.

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But this is also the case with the previous Directive (EU) 2019/1024 of 20 June 2019 ("Directive Open Data" and on the re-use of public sector information) (esp. Articles 1(4), 4(4)).

More specifically with reference to the labour sector, so it is, for example, with: Directive (EU) 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law (so-called whistleblowers); as well as, Directive (EU) 2023/970 of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency (and enforcement mechanisms).

According to its Article 2(1) (*Material scope*), the Directive (EU) 2019/1937 lays down common minimum standards for the protection of persons reporting the following breaches of Union law: (a) breaches falling within the scope of the Union acts set out in the Annex that concern the following areas: (x) *protection of privacy and personal data*, and security of network and information systems [Annex, part I, point (J): as regulated by (ii) Regulation (EU) 2016/679].

Article 17 (*Processing of personal data*) further specifies that any processing of personal data carried out pursuant to this EU whistleblowing Directive, including the exchange or transmission of personal data by the competent authorities, shall be carried out in accordance with *Regulation (EU) 2016/679* and Directive (EU) 2016/680. Any exchange or transmission of information by Union institutions, bodies, offices or agencies shall be undertaken in accordance with Regulation (EU) 2018/1725. Personal data which are manifestly not relevant for the handling of a specific report shall not be collected or, if accidentally collected, shall be deleted without undue delay.

Article 12 (*Data protection*) of the Directive (EU) 2023/970, precisely on the principle of equal pay for equal work between men and women through pay transparency, contextualises some profiles of the data protection regulation, such as the principle of purpose of processing and the limits to the disclosure of salary data of workers, with a role for workers' representatives, labour inspectorate or equality bodies. It stipulates that, to the extent that any information provided pursuant to measures taken under Articles 7, 9 and 10 involves the processing of personal data, it shall be provided in accordance with GDPR (paragraph 1). Any personal data processed pursuant to Articles 7, 9 or 10 of this Directive shall not be used for any purpose other than for the application of the principle of equal pay (paragraph 2). According to paragraph 3, then, Member States may decide that, where the disclosure of information pursuant to Articles 7, 9 and 10 would lead to the disclosure, either directly or indirectly, of the

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pay of an identifiable worker, only the workers' representatives, the labour inspectorate or the equality body shall have access to that information. The workers' representatives or the equality body shall advise workers regarding a possible claim under this Directive without disclosing actual pay levels of individual workers performing the same work or work of equal value. For the purposes of monitoring pursuant to Article 29, the information shall be made available without restriction.

Finally, only the Directive (EU) 2019/1152 of 20 June 2019, on transparent and predictable working conditions in the European Union, doesn't mention the GDPR. It is an exception, at first glance surprising, to be investigated.

4. (*continued*) GDPR and EU AI Act

But above all, the discipline of the most recent Regulation (EU) 2024/1689 of 13 June 2024, laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) (AI Act), is important in this respect (Butt, 2024; Peruzzi, 2023, p. 64).

Article 6(2) of this AI Act classifies, among others, AI systems referred to in Annex III, point (4), as "high-risk AI systems", namely the AI systems listed in the area of "Employment, workers' management and access to self-employment":

1) AI systems intended to be used for the recruitment or selection of natural persons, in particular to place targeted job advertisements, to analyse and filter job applications, and to evaluate candidates;
2) AI systems intended to be used to make decisions affecting terms of work-related relationships, the promotion or termination of work-related contractual relationships, to allocate tasks based on individual behaviour or personal traits or characteristics or to monitor and evaluate the performance and behaviour of persons in such relationships.

So, the rules of Chapter III of AI Act apply to these high-risk AI systems in the area of work, especially those of Sections 2 and 3 (Articles 8-27), concerning: requirements for high-risk AI systems; obligations of providers and deployers of high-risk AI systems and other parties.

About GDPR, see especially Article 2(7) (*Scope*) of AI Act: *Union law on the protection of personal data*, privacy and the confidentiality of communications applies to personal data processed in connection with the rights and obligations laid down in this Regulation. This Regulation shall not affect *Regulation (EU) 2016/679* or (EU) 2018/1725, or Directive 2002/58/

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EC or (EU) 2016/680, without prejudice to Article 10(5) and Article 59 of this Regulation.

Furthermore, according to Annex V, point (5), of AI Act, the EU declaration of conformity referred to in Article 47, shall contain all of the following information: "*5. Where an AI system involves the processing of personal data, a statement that that AI system complies with* Regulations *(EU) 2016/679 and (EU) 2018/1725 and Directive (EU) 2016/680*".

Recital 10 of AI Act then states that the fundamental right to the protection of personal data is safeguarded in particular by *Regulations (EU) 2016/679* and (EU) 2018/1725 and Directive (EU) 2016/680. Directive 2002/58/EC additionally protects private life and the confidentiality of communications, including by way of providing conditions for any storing of personal and non-personal data in, and access from, terminal equipment. Those Union legal acts provide the basis for sustainable and responsible data processing (Ufert, 2020), including where data sets include a mix of personal and non-personal data. Harmonised rules for the placing on the market, the putting into service and the use of AI systems established under this AI Act should facilitate the effective implementation and enable the exercise of the data subjects' rights and other remedies guaranteed under Union law on the protection of personal data and of other fundamental rights.

But already the Explanatory Memorandum of the related European Commission's Proposal for a Regulation on artificial intelligence (AI Act) [COM(2021) 206 final of 21 April 2021] specified (par. 1.2 – *Consistency with existing policy provisions in the policy area*) that consistency is also ensured with the EU Charter of Fundamental Rights and the existing *secondary Union legislation on data protection*, consumer protection, non-discrimination and gender equality. The proposal is without prejudice and complements the *General Data Protection Regulation [Regulation (EU) 2016/679]* and the Law Enforcement Directive [Directive (EU) 2016/680] with a set of harmonised rules applicable to the design, development and use of certain high-risk AI systems and restrictions on certain uses of remote biometric identification systems.

Just two significant examples of virtuous interaction between the GDPR and the AI Act (Butt, 2024).

The first one concerns the regulation of "profiling". Translated into data protection language, the basis of all actions/activities of the AI systems consists of "profiling" operations, in the context of automated individual decision-making processes (Brkan, 2019), as stated by AI Act. According to its Recital 53, "*AI systems used in high-risk use-cases listed in an Annex to this Regulation should be considered to pose significant risks of harm to the health, safety or fundamental rights if the AI system implies profiling within*

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the meaning of Article 4, point (4), of Regulation (EU) 2016/679 or Article 3, point (4), of Directive (EU) 2016/680 or Article 3, point (5), of Regulation (EU) 2018/1725".

Consequently, profiling by AI systems must be subject to the special rules laid down in Article 22 GDPR (*Automated individual decision-making, including profiling*) and to the other specific obligations, rights and administrative fines of GDPR. Article 22 GDPR states the right of the data subject not to be subjected to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her (paragraph 1), unless such a decision: (a) is necessary for entering into, or performance of, a contract between the data subject and a data controller; (b) is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or (c) is based on the data subject's explicit consent (paragraph 2). In the cases referred to in points (a) and (c) of paragraph 2, the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision (paragraph 3). Decisions referred to in paragraph 2 shall not be based on special categories of personal data referred to in Article 9(1), unless point (a) or (g) of Article 9(2) applies and suitable measures to safeguard the data subject's rights and freedoms and legitimate interests are in place (paragraph 4).

The GDPR, in this case, also provides for: specific obligations to inform the data subject [Article 13(2), point (f); Article 14(2), point (g)] (Brkan, 2019); the data subject's rights of access [Article 15(1), point (h)] and to object [Article 21(1)] to data processing; the data protection impact assessment [Article 35(3), point (a)]; and administrative fines [Article 83(5), point (b)].

The second example concerns the link between the fundamental rights impact assessment (FRIA) for high-risk AI systems (Article 27, AI Act) and the data protection impact assessment (DPIA) (Article 35, GDPR). According to Article 27(4) (*Fundamental rights impact assessment for high-risk AI systems*) of AI Act, if any of the obligations laid down in this Article is already met through the data protection impact assessment conducted pursuant to Article 35 of GDPR or Article 27 of Directive (EU) 2016/680, the fundamental rights impact assessment referred to in paragraph 1 of this Article shall complement that data protection impact assessment.

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5. (*continued*) GDPR and EU platform work Directive

Lastly, also the Directive (EU) 2024/2831 of 23 October 2024, on improving working conditions in platform work, is particularly relevant in this respect. It lays down (Article 1(2) – *Subject matter and scope*):

- minimum rights that apply to every person performing platform work in the Union who has or who, on the basis of an assessment of the facts, is deemed to have an employment contract or employment relationship as defined by the law, collective agreements or practice in force in the Member States with consideration to the case-law of the Court of Justice;
- rules to improve the *protection of natural persons in relation to the processing of their personal data* by providing measures on algorithmic management applicable to persons performing platform work in the Union, including those who do not have an employment contract or employment relationship.

Recital 38 of the Directive points out that, while GDPR establishes the general framework for the protection of natural persons with regard to the processing of personal data, it is necessary to lay down specific rules addressing the concerns that are related to the processing of personal data by means of automated monitoring or decision-making systems in the context of platform work (Mangold, 2023).

So, Chapter III (*Algorithmic Management* – Articles 7-15) of the EU platform work Directive contains an articulated apparatus of obligations of platforms in the use of "*automated monitoring or decision-making systems*" (Di Cataldo, 2024, pp. 141-146), such as those of: transparency, i.e. to provide detailed information to persons performing platform work, platform workers' representatives and, upon request, competent national authorities (Articles 9 and 14), as well as trade union information and consultation (Article 13); safety and health (Article 12); regularly, human oversight of automated systems (Article 10); and the right of workers to obtain an explanation from the digital labour platform and the "human review" for any decision taken or supported by the system (Article 11; Recital 49) (Peruzzi, 2023, pp. 73-74).

With regard to data protection, under Chapter III of the EU platform work Directive, see in particular Article 7 (*Limitations on the processing of personal data by means of automated monitoring systems or automated decision-making systems*). It stipulates that digital labour platforms shall not, by means of automated monitoring or decision-making systems:

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a) process any personal data on the emotional or psychological state of a person performing platform work;
b) process any personal data in relation to private conversations, including exchanges with other persons performing platform work and their representatives;
c) collect any personal data of a person performing platform work while that person is not offering or performing platform work;
d) process personal data to predict the exercise of fundamental rights, including the freedom of association, the right of collective bargaining and action or the right to information and consultation as laid down in the Charter;
e) process any personal data to infer the racial or ethnic origin, migration status, political opinions, religious or philosophical beliefs, disability, state of health, including chronic disease or HIV status, emotional or psychological state, trade union membership, sex life or sexual orientation;
f) process any biometric data, as defined in Article 4, point (14), GDPR, of a person performing platform work to establish that person's identity by comparing that data to stored biometric data of natural persons in a database (paragraph 1).

This Article shall apply to all persons performing platform work from the start of the recruitment or selection procedure (paragraph 2). In addition to automated monitoring and decision-making systems, this Article shall also apply where digital labour platforms use automated systems taking or supporting decisions that affect persons performing platform work in any manner (paragraph 3).

Article 8(1) (again about *Data-protection impact assessment*) of this Directive then states that the processing of personal data by a digital labour platform by means of automated monitoring or decision-making systems is a type of processing which is likely to result in a high risk to the rights and freedoms of natural persons within the meaning of Article 35(1) GDPR. When carrying out, pursuant to that provision, the assessment of the impact of the processing of personal data by automated monitoring or decision-making systems on the protection of personal data of persons performing platform work, including on the limitations of processing pursuant to Article 7 of this Directive, digital labour platforms, acting as controllers as defined in Article 4, point (7), GDPR, shall seek the views of persons performing platform work and their representatives. Digital labour platforms shall provide the assessment as referred to in paragraph 1 to workers' representatives (paragraph 2).

Additionally, according to Article 9(6) (*Transparency with regard to automated monitoring and decision-making systems*) of the Directive,

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persons performing platform work shall have the right to the portability of personal data generated through their performance of work in the context of a digital labour platform's automated monitoring or decision-making systems, including ratings and reviews, without adversely affecting the rights of the recipient of the service under GDPR. The digital labour platform shall provide persons performing platform work, free of charge, with tools to facilitate the effective exercise of their portability rights, referred to in Article 20 GDPR and above. Where the person performing platform work so requests, the digital labour platform shall transmit such personal data directly to a third party.

Article 20 (*Communication channels for persons performing platform work*) of the Directive stipulates that Member States shall take the measures necessary to ensure that digital labour platforms provide persons performing platform work, by means of the digital labour platforms' digital infrastructure or by similarly effective means, with the possibility to contact and communicate privately and securely with each other, and to contact or be contacted by representatives of persons performing platform work, while complying with GDPR. Member States shall require digital labour platforms to refrain from accessing or monitoring those contacts and communications.

Finally, Article 24(1) (*Supervision and penalties*) of the EU platform work Directive provides that the supervisory authority or authorities responsible for monitoring the application of GDPR shall also be responsible for monitoring and enforcing the application of Articles 7 to 11 of this Directive as far as data-protection matters are concerned, in accordance with the relevant provisions in Chapters VI, VII and VIII of GDPR. The upper limit for administrative fines referred to in Article 83(5) of GDPR shall be applicable to infringements of Articles 7 to 11 of this Directive. Without prejudice to the application of GDPR, Member States shall lay down the rules on penalties, applicable to infringements of national provisions adopted pursuant to provisions of this Directive or of the relevant provisions already in force concerning the rights which are within the scope of this Directive; the penalties shall be effective, dissuasive and proportionate to the nature, gravity and duration of the undertaking's infringement and to the number of workers affected (paragraph 5).

6. Conclusion

The hypothesis put forward – that is the aim of the research – is, in conclusion, tested: i.e. the corroboration of the key role played by GDPR in Labour Law, emerging from the method of comparison with the contents

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of the successive EU legislative Acts relevant in the field of labour, also considered in their value as a "legal basis" according to the GDPR (Trojsi, 2023b, p. 654).

Subsequent EU Directives and Regulations are in the wake of the GDPR, recognising it as the general legal reference text for the safeguard of individuals with regard to the processing of personal data (Zanfir-Fortuna, 2024). They are intended to serve the protection objectives that the GDPR seeks to achieve.

On this basis, it will therefore be possible to reconstruct the legal statute for the protection of workers' personal data[3], resulting from the combination of the GDPR rules and the relevant rules of the subsequent EU legislative acts, thus also resolving some specific coordination problems. This may prove to boost (to have the effect of increasing) the protective apparatus of workers.

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[3] About workers' right to privacy and data protection, see, among all, Finkin, 2018; Hendrickx, 2019.

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La brecha de género en las competencias digitales en el mercado laboral español[1]

M. Begoña García Gil[2]

1. Introducción

En términos generales en cuanto a brecha laboral los países europeos superan el índice general, ocupando siete de los 10 primeros puestos mundiales en la materia.

A nivel mundial, Islandia ocupa el primer puesto por 15ª vez y es la única economía que ha cerrado su brecha de género alcanzando el 93,5%. Los países nórdicos ocupan cuatro de los cinco primeros puestos: Finlandia es segunda (87,5%), Noruega tercera (87,5%) y Suecia quinta, con un 81,6% de diferencia. Alemania (7º), Irlanda (9º) y España (10º) son los otros países europeos entre los 10 primeros. Nueva Zelanda es el país no europeo con mejores resultados, ya que ocupa el cuarto lugar, con un 83,5% de la brecha cerrada, mientras que Nicaragua ocupa el sexto lugar y Namibia el octavo.

Tanto España como Irlanda volvieron a figurar entre los 10 primeros, con mejoras paralelas de sus puntuaciones globales de paridad de género de 0,7 puntos porcentuales. España alcanzó su puntuación de paridad de género más alta hasta la fecha, con un 79,7% de la brecha cerrada.

Conviene establecer que existen fundamentalmente cuatro brechas de género y su situación actual. De hecho, de las cuatro brechas de género (y los 146 países) cubiertas por el índice, la brecha de género en Salud y Supervivencia es la más cerrada, con un 96%, seguida de la brecha en Logros

[1] Vinculado al proyecto Ser Mujer y Trabajo en la Era Digital/Being Woman and Work in the Digital Age. PROYECTO PUENTE DE INVESTIGACIÓN URJC 2023/SOLCON-130825 IPs M. Luisa Molero Marañón y M. Begoña García Gil y al Panel C4 kdel "Work in a changing world the quest for labour rights and social justice 17-20 september 2024"

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Educativos (94,9%), la brecha en Participación y Oportunidades Económicas (60,5%) y le sigue la brecha de Empoderamiento Político (22,5%).

Partiendo de la consideración de que las mujeres representan el 42% de la mano de obra mundial su representación en los sectores de producción es muy desproporcionada, presentando cifras muy distantes según los sectores.

De entre, el conjunto de brechas que están identificadas conviene establecer que nos vamos a centrar en la llamada brecha digital entendida como "*desfase o división entre individuos, hogares, áreas económicas y geográficas con diferentes niveles socioeconómicos con relación tanto a sus oportunidades de acceso a las tecnologías de la información y la comunicación, como al uso de Internet para una amplia variedad de actividades*"[3]. Dicho de otra forma, la brecha digital es la distancia que hay entre los grupos sociales que disponen de acceso a la red de internet y los que no lo tienen debido a las diferencias socioeconómicas, a la disponibilidad de las herramientas relacionadas con las TIC, el hardware, y al uso que se hace de las mismas a través del software.

Establecida la base del concepto de brecha digital nos centraremos en la perspectiva del género sobre la que se realiza este análisis. El género supone un factor segregante, que desencadena la brecha digital de género, reconocida de manera formal por nuestro ordenamiento jurídico. Así, la Ley Orgánica 3/2018, de 5 de diciembre de Protección de Datos Personales y garantía de los derechos digitales, que, en el art. 81 regula el derecho de acceso universal a Internet, en concreto que "*todos tienen derecho a acceder a Internet independientemente de su condición personal, social, económica o geográfica*". Conformando la importancia del acceso universal sin limitaciones mediante una garantía específica: "*se garantizará un acceso universal, asequible, de calidad y no discriminatorio para toda la población. El acceso a Internet de hombres y mujeres procurará la superación de la brecha de género tanto en el ámbito personal como laboral*".

Por lo que atañe a este análisis, debemos destacar que, en 2024, las mujeres representaban el 28,2% de la mano de obra Science, Technology, Engineering, Art and Mathematics (STEM), pero el panorama está mejorando para el talento en ingeniería de la Inteligencia Artificial (IA).

Aunque los hombres siguen superando en número a las mujeres, en los últimos cuatro años la proporción de talento femenino en IA ha aumentado significativamente en los últimos tiempos.

[3] "Understanding the Digital Divide", Organización para la Cooperación y el Desarrollo Económicos (OCDE), 2001, Disponible en: *www.oecd.org/en/publications/understanding-the-digital-divide_236405667766.html-:~:text=The term "digital divide" refers to the gap,opportunities to access information and communication technologies %28ICTs%29*.

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El problema fundamental es la formación y la adquisición de habilidades para resultar competitivas en el sector STEM.

Respecto de la llamada capacitación en competencias digitales las mujeres se quedan detrás de los hombres y los datos muestran que la presencia de las mujeres es muy inferior, valga como ejemplo que en el sector de la IA y los macrodatos representan tan sólo el 30%2, en la programación el 31%, y en las redes y la ciberseguridad la misma cifra.

Es indispensable salvar la brecha digital y garantizar un acceso equitativo a las competencias tecnológicas emergentes, especialmente respecto a la IA generativa como tecnología de rápido crecimiento con el potencial que tiene a los efectos de ajustarse a las necesidades de las empresas y a la futura creación de empleo.

Según la Comisión Europea, más del 77% de las empresas afirman que la falta de personal con las capacidades adecuadas es un obstáculo a la inversión que plantea problemas para las empresas innovadoras y en digitalización.

2. Visión panorámica de la situación en el mercado de trabajo español

Partimos de la afirmación de la existencia de segregación ocupacional digital en el mercado de trabajo español ya que las mujeres representan aproximadamente el 23% del personal empleado en el sector de las tecnologías de la información y la comunicación (TIC). Sin embargo, este porcentaje disminuye al 16-17% en las ocupaciones de especialistas TIC, al 21% entre el personal investigado habiendo incluso descendido 3 puntos en los últimos 7 años[4].

En España, el porcentaje de mujeres en puestos de dirección en empresas tecnológicas es relativamente bajo. Solo alrededor del 14% de los puestos directivos en el sector tecnológico están ocupados por mujeres. Este porcentaje es significativamente menor en comparación con otros sectores, donde la representación femenina en puestos directivos es mucho mayor. Así en 2024, aunando todos los sectores, conforme al informe "Women in Business 2024" de Grant Thornton, publicado en marzo de 2024, indican que el porcentaje de mujeres CEO se redujo al 27%

En el sector tecnológico el porcentaje de mujeres CEO cae en 2024 del 28% al 19% parece que esto se debe a salidas significativas de mujeres

[4] Disponible en: *www.inmujeres.gob.es/actualidad/noticias/2020/Marzo/vidasdigitales.htm-:~:text=En cuanto al empleo en el sector TIC,descendido 3 puntos en los últimos 7 años*.

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líderes en el sector tecnológico[5] dejaron sus puestos, ya sea por jubilación, cambio de carrera o decisiones personales. Estas salidas no siempre fueron reemplazadas por otras mujeres, revelando una falta de sucesión planificada con perspectiva de género.

Es relevante que se produce una subrepresentación en sectores tecnológicos puesto que las mujeres están infrarrepresentadas en carreras y empleos relacionados con la ciencia, la tecnología, la ingeniería y las matemáticas, es decir sector STEM, perpetuando la exclusión en los sectores más dinámicos de la economía.

3. Causas de la brecha digital

La brecha digital española marcada por el género responde en términos generales a diversas causas, se debe a factores múltiples que se refieren a causas económicas, educativas, geográficas y sociales.

Podemos identificar, en primer orden, el acceso limitado a recursos tecnológicos puesto que muchas personas no pueden permitirse dispositivos como ordenadores, tablets o smartphones, ni pagar una conexión a Internet de calidad.

En segundo orden, la desigualdad educativa centrada en la falta de formación necesaria para utilizar las tecnologías de forma eficiente.

En tercer lugar, las disparidades entre zonas urbanas y rurales ya que el acceso a Internet de alta velocidad y la infraestructura tecnológica son más limitados que en las ciudades, podemos utilizar el término brecha territorial.

En cuarto lugar, la falta de inclusión digital que afecta de forma especial al género ya que en este sector las mujeres trabajadoras están subrepresentadas.

En quinto lugar, también influyen los aspectos culturales y sociales basados en la desconfianza en la tecnología: En ciertos sectores de la población, hay desconfianza hacia el uso de Internet, especialmente relacionado con privacidad y seguridad.

En sexto lugar, la falta de formación en competencias y habilidades digitales. La brecha digital en nuestro país se concentra en el hecho de que

[5] Como Carme Artigas, quien, tras desempeñarse como Secretaria de Estado de Digitalización e Inteligencia Artificial desde 2020, anunció su renuncia en diciembre de 2023 para regresar al sector privado. Durante su gestión, Artigas lideró iniciativas clave en la transformación digital del país y en la regulación de la inteligencia artificial. O bien Mercedes Oblanca, presidenta de Accenture para España y Portugal, fue reconocida en octubre de 2024 por su trayectoria en liderazgo y compromiso con la diversidad. Aunque no se ha informado de su salida, su reconocimiento destaca la presencia femenina en altos cargos del sector tecnológico en España.

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las mujeres tienen menos acceso a programas de formación específicos en tecnología, lo que dificulta el desarrollo de habilidades digitales. Actualmente, el 37,3% de las mujeres en España tiene habilidades digitales inferiores a las básicas, tres puntos más que los hombres. En España tan sólo un 13% de población femenina se gradúa en carreras STEM.

Aunque las mujeres están mejor formadas en términos de educación superior, un 60% de ellas tiene estudios universitarios superiores frente al 40% de los hombres, esto no se traduce en una mayor representación en el sector tecnológico. Solo el 38% de las empresas en España cuentan con especialistas TIC mujeres, y solo un 8% tienen al menos el 50% de sus profesionales mujeres.

Según el Instituto Nacional de Estadística, en 2023, aproximadamente una de cada seis empresas en España tenía expertos en tecnología de la información y la comunicación (TIC). De estas empresas, alrededor del 38% tenían mujeres en sus equipos, pero solo el 8% tenían una proporción igual o mayor al 50% de mujeres entre sus profesionales. Pese a que las mujeres TIC están mejor formadas que sus homólogos masculinos ya que un 60% de ellas tienen estudios universitarios superiores, frente al 40% de los hombres. Sin embargo, esto no se traduce en mejores oportunidades laborales ni mejores salarios.

En séptimo lugar, los estereotipos referidos a los roles de género tradicionales y los estereotipos sobre las capacidades y roles de hombres y mujeres influyen en la elección de carreras. Esto lleva a que menos mujeres opten por estudios en áreas STEM (Ciencia, Tecnología, Ingeniería y Matemáticas).

En octavo lugar, la desigualdad en el entorno laboral. Las mujeres en el sector TIC enfrentan desigualdades en términos de oportunidades laborales, salarios y condiciones de trabajo. Solo el 18% de los profesionales TIC en España son mujeres, y solo el 8% de las empresas tienen al menos el 50% de sus profesionales TIC como mujeres. La discriminación contra las mujeres que trabajan en tecnologías aún persiste. Sufren discriminación salarial, sobrecualificación y techo de cristal[6].

En noveno lugar, la falta de referentes femeninos se produce por la escasez de mujeres en posiciones de liderazgo y como referentes en el sector tecnológico desincentiva a las jóvenes a seguir carreras profesionales en este ámbito.

En décimo y último lugar, la conciliación laboral y familiar. Las mujeres

[6] González Ramos A.M., Vergés Bosch N., Martínez García J.S. (2017): "Las mujeres en el mercado de trabajo de las tecnologías", *Revista Española de Investigaciones Sociológicas*, 159, pp. 73-90.

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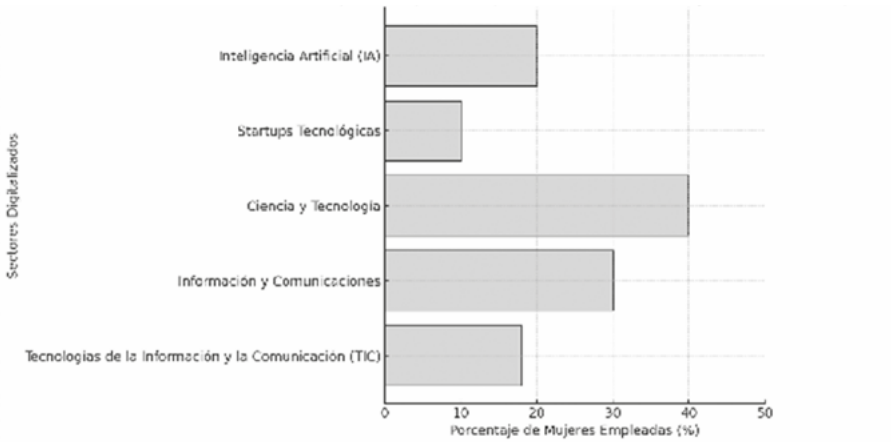
suelen tener mayores responsabilidades en el ámbito familiar, lo que puede dificultar su progreso en carreras que requieren una alta dedicación y flexibilidad.

4. La brecha digital: estado de la situación

La brecha digital de género se ha reducido progresivamente en España, pasando de 8,1 a 1 punto, a pesar de ello las mujeres mantienen una posición desfavorable en competencias digitales y usos de Internet.

Porcentaje de mujeres empleadas en Sectores Digitalizados en España

Fig. 1. Porcentake de mujeres empleadas en sectores digitalizados en España



La presencia de la mujer trabajadora en el mercado de trabajo digitalizado se encuentra concentrada en pocas actividades como puede verse en la *Fig. 1*.

Fundamentalmente, este número es incomparable con los hombres que significativamente son protagonistas en este sector tanto en el plano horizontal como en el vertical. Esto se debe a que las mujeres en competencias avanzadas, como programación, todavía no están lo suficientemente formadas, la brecha digital de género en España es de 6,8 puntos, siendo la media de la UE de 8 puntos.

El porcentaje de investigadoras en el sector de servicios TIC se reduce al 23,4%.

En cuanto al porcentaje de graduados/as en STEM, España se sitúa en la posición 12 dentro de la UE, con una diferencia entre sexos de 17 puntos.

La distribución referida al empleo de las mujeres trabajadoras en el

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sector STEM es bastante desproporcionada, de hecho, el 70% se concentra en el sector de la Salud, seguida de la ciencia y la química, como puede comprobarse en la siguiente figura.

El sector STEM es un sector masculinizado tanto en España como a nivel internacional. Esta masculinización se refiere a la baja representación femenina en estas áreas, así como a la persistencia de barreras culturales, educativas y estructurales que dificultan el acceso y la participación de las mujeres en el ámbito STEM.

En la mayoría de los países, incluido España, el sector STEM sigue siendo dominado por hombres evidenciado por la baja representación de las mujeres en STEM lo que implica un desaprovechamiento significativo del talento femenino, lo cual afecta no solo la equidad, sino también la productividad y la innovación en estos campos. Diversos estudios han demostrado que la diversidad de género en los equipos de investigación y desarrollo mejora la creatividad y la calidad de los resultados[7], lo que provoca que muchos ensayos clínicos no consideran adecuadamente la perspectiva de género, lo cual resulta en una investigación incompleta y con sesgos.

La falta de mujeres en STEM también limita la diversidad de perspectivas en el desarrollo de tecnologías y soluciones científicas. La innovación requiere enfoques diversos y la ausencia de mujeres significa que se pueden pasar por alto las necesidades y problemáticas que afectan particularmente a la población femenina. De hecho, los equipos de investigación que incluyen a mujeres tienden a ser más innovadores y presentan una perspectiva más completa al desarrollar tecnologías y realizar descubrimientos científicos. La investigación muestra que la masculinización del sector STEM limita el tipo de problemas que se investigan y cómo se abordan, excluyendo muchas veces cuestiones importantes que afectan a las mujeres de manera diferente[8].

También la masculinización del sector STEM contribuye a la segregación ocupacional y a la brecha salarial de género. Las mujeres tienen menos oportunidades de acceder a trabajos mejor remunerados, ya que el sector tecnológico tiende a ofrecer salarios más altos. Esto perpetúa la desigualdad económica entre hombres y mujeres.

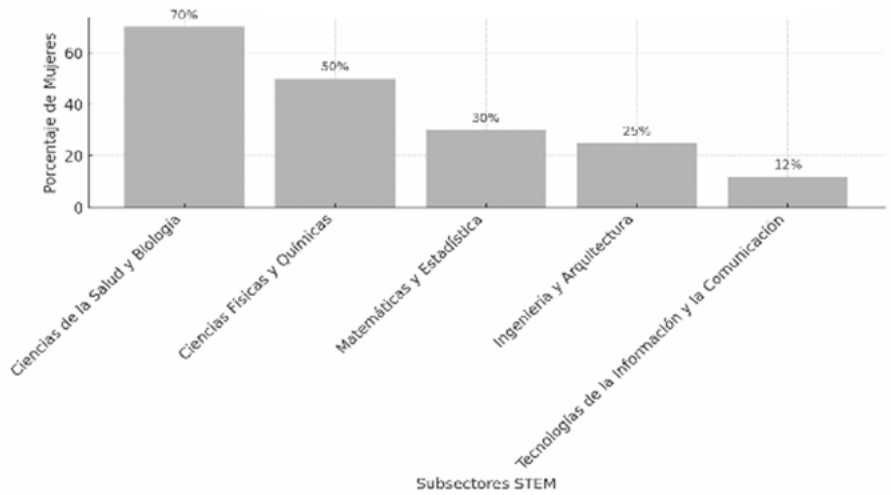
A continuación, podemos apreciar gráficamente la ocupación de mujeres en el sector STEM en España (*Fig. 2*).

[7] "Gender Bias in Biomedical Research", Disponible en: *www.surgjournal.com/article/S0039-6060(14)00429-2/abstract-:~:text=Women have been achieving near parity in MD,PhD pipeline, particularly in fields outside of biology*.

[8] "Inclusion of Women and Minorities in Clinical Trials and the Role of the Principal Investigator", disponible en: *pmc.ncbi.nlm.nih.gov/articles/PMC2859460/*.

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Fig. 2. Partecipación de mujeres en subsectores STEM en España



Solo un 2% de las mujeres ocupadas lo están en el sector TIC, frente al 5,7% de los hombres.

El estudio Barcelona Digital Talent (2019)[9] muestra que solo un 8% de las mujeres ocupan puestos técnicos y especializados y que solo representan el 22% del total de candidaturas presentadas a las ofertas de trabajo ligadas al sector digital.

Los hombres cobran un 8,9% más que las mujeres en su misma posición en este sector.

En cuanto a iniciativa empresarial, apenas representan el 17% en la creación de start-ups.

Sólo un 12% de quienes participan en el desarrollo de innovaciones ligadas a la inteligencia artificial y el Machine Learning con capacidad de decisión de alto nivel son mujeres. Igualmente, solo representan el 11% de las personas que programan código fuente (escribir software).

Menos del 25% del personal investigador en inteligencia artificial en instituciones y organizaciones académicas son mujeres.

En el campo de la ciberseguridad, Sólo un 12% de quienes participan en el desarrollo de innovaciones ligadas a la inteligencia artificial y el Machine Learning con capacidad de decisión de alto nivel son mujeres. Igualmente, solo representan el 11% de las personas que programan código fuente (escribir software).

[9] Disponible en: *ajuntament.barcelona.cat/digital/es/impulsamos-emprendimiento-y-talento-digital/barcelona-digital-talent*.

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Menos del 25% del personal investigador en inteligencia artificial en instituciones y organizaciones académicas son mujeres.

Las habilidades digitales también están relacionadas con la tasa de empleo y el acceso a contratos indefinidos, con diferencias según los grupos de edad y el nivel de las habilidades. En cuanto al empleo en el sector TIC en España las mujeres representan el 23% del personal empleado, el 21% entre el personal investigador y desciende al 16-17% en las ocupaciones de especialistas TIC, habiendo incluso descendido 3 puntos en los últimos 7 años. Casi 3 puntos ha descendido también, desde 2013, el porcentaje de mujeres graduadas en estudios superiores TIC en centros españoles, estando en 2017 es un escaso 12%, el mismo que el de matriculadas. Estos datos manifiestan que la tendencia no parece ser hacia el aumento de la presencia de mujeres en este ámbito.

Se estima que la pérdida de puestos de trabajo en los próximos años para las mujeres será de alrededor de 3 millones de puestos de trabajo salvo que se invierta en formación de habilidades digitales, afectando principalmente a los trabajos administrativos ligados al sector de los servicios, al ser más susceptibles de ser automatizados.

El Informe sobre Brecha Digital de Género 2023 del ONTSI señala que el 92,8% de las mujeres españolas de 16 a 74 años utiliza Internet al menos una vez por semana, apenas dos décimas por debajo de los hombres. Además, España, junto a Dinamarca, es el país de la UE más cercano a la paridad de género en el uso regular de Internet como herramienta.

El Informe *Mujeres y digitalización: de las brechas digitales a los algoritmos*: publicado en 2020 por el Instituto de la Mujer y el ONTSI, este estudio analiza cómo la brecha digital de género se ha reducido progresivamente en España, pasando de 8,1 a 1 punto. Sin embargo, las mujeres aún enfrentan desafíos en competencias digitales y usos avanzados de Internet.

La *Brecha digital de género: Edición 2024 – Datos 2023*: Este informe destaca la importancia de continuar trabajando para cerrar la brecha digital de género en España, promoviendo la igualdad de oportunidades en el acceso a la tecnología, la formación en TIC y el empleo tecnológico.

Por supuesto, a nivel europeo es importante destacar el Informe del Parlamento Europeo sobre el cierre de la brecha digital de género (2020): Este documento aborda la participación de la mujer en la economía digital, destacando la necesidad de políticas que fomenten la igualdad de género en el ámbito digital y la importancia de la educación y formación en competencias digitales para mujeres y niñas.

Así como también el informe *La brecha digital de género en España y Europa: medición con indicadores compuestos*: Este estudio propone

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una metodología para medir la brecha digital de género, permitiendo comparaciones intergénero y análisis intragénero en 31 países europeos.

5. Propuestas y medidas para el cambio en la brecha digital de género

Es muy importante establecer propuestas y medidas para la reducción de la brecha digital de género, entre ellas, a continuación, se ponen en valor algunas de ellas.

- Fomentar la creación de contenidos no lesivos para la igualdad de género, para sensibilizar contra el ciberacoso o cibersexting.
- Apoyar la elección de estudios tecnológicos por parte de las niñas.
- Desarrollar medidas para reorientar la trayectoria profesional de quienes verán sus puestos de trabajo afectados por la digitalización y la automatización.
- Integrar la perspectiva de género en todo el sistema I+D+i relacionado con el diseño y producción de nuevos avances tecnológicos, así como en la formación para la creación de tecnologías (como programación y creación de códigos y algoritmos).
- Promover la transparencia de los sistemas de inteligencia artificial, con el registro y notificación sobre dónde se utilizan y para qué, para atajar los sesgos y la discriminación.

6. Conclusiones

- La brecha digital de género afecta a la mitad de la población y, aunque se está reduciendo en ciertos aspectos, está lejos de cerrarse. Esto sitúa a las mujeres en una posición de desventaja a la hora de acceder a oportunidades y afecta negativamente a la sociedad, ya que no permite aprovechar el potencial de todas las personas que la conforman.
- El 94,6% de las mujeres usan Internet semanalmente, 4,6 puntos porcentuales por encima de la media de la UE, frente al 94,3% de los hombres. La utilización de la Red se ha generalizado entre ambos sexos, pero persisten diferencias en algunas actividades. Las mujeres tienen mayor peso en la búsqueda de información sobre salud, en la comunicación con profesorado o alumnado y uso de redes sociales y los hombres en la lectura de noticias y periódicos, expresión de opiniones cívicas y uso de banca en línea.

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- El nivel de competencias digitales entre mujeres y hombres es similar, pero ellas están muy infrarrepresentadas en las titulaciones TIC. El 65,9% de las mujeres españolas tienen un nivel de competencias digitales básico o avanzado, 0,6 puntos porcentuales menos que los hombres, pero más de 11 por encima de la media de la UE, situada en el 54,3%. El 29,8% de ellas tienen un nivel de competencias inferior al básico frente al 28,8% de los hombres. La brecha se agranda en las titulaciones TIC: solo el 14,3% de las personas egresadas en Informática y el 28,3% en ingenierías son mujeres. También son minoría en la formación profesional relacionada con la informática.
- La mayoría de los especialistas digitales son hombres tanto en España, donde las mujeres suponen el 18%, 1,4 puntos porcentuales menos que el año anterior y nueve décimas por debajo de la media de los Veintisiete, como en el conjunto de la UE. Del 16,4% de empresas que contaba en su plantilla con especialistas TIC en 2023, el 38,7% empleaba a mujeres con este perfil profesional.
- Las mujeres confían menos en Internet y se sienten menos preparadas para afrontar ciberriesgos que los hombres. El 40,7% confía poco o nada frente al 37,7% de los hombres y el 25,7% se siente bastante o totalmente preparada para afrontar problemas de seguridad, mientras que este porcentaje alcanza el 38,7% en el caso de ellos. El 67,8% de las víctimas de delitos sexuales en Internet son mujeres.
- El proceso de automatización lleva consigo la creación de un 20% más de puestos de trabajo vinculados con el sector de la salud y los cuidados, donde las mujeres representan porcentajes elevados del empleo. Debe tenerse en cuenta que la feminización del trabajo de cuidados junto con su demanda creciente debido al envejecimiento de la población hace del sector del cuidado un ámbito de especial interés respecto a los retos del futuro del trabajo desde la perspectiva de género.

¿Cuánto tiempo tiene que transcurrir para que la brecha digital de género desaparezca? La pregunta no es fácil de responder, según el III Índice ClosinGap, publicado en 2023, se estima que, al ritmo actual de avance, la brecha de género en general podría cerrarse en España para el año 2056, lo que representa una mejora respecto a estimaciones anteriores que situaban este horizonte en 2058. Sin embargo, la brecha digital de género específica podría cerrarse en un plazo diferente, ya que su evolución depende de factores como la implementación de políticas públicas efectivas, el acceso equitativo a la educación tecnológica y la transformación cultural hacia la igualdad de género en el ámbito digital.

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Teletrabajadora, conciliación familiar y accidente de trabajo en el domicilio[1]

Macarena Castro Conte[2]

1. Introducción

La avanzada digitalización y robotización de la economía, las tecnologías de la información y la comunicación ha posibilitado que las personas trabajadoras puedan desarrollar la prestación de servicios desde cualquier parte del mundo y en cualquier momento, con posibilidades de una mejor autonomía y flexibilidad.

El teletrabajo ha emergido como una modalidad de trabajo creciente y transformadora en los últimos años, lo que ha dado lugar a nuevas problemáticas y desafíos en el campo del derecho laboral. Si bien, esta flexibilidad plantea nuevos desafíos en términos de seguridad laboral, particularmente cuando los accidentes de trabajo ocurren fuera del centro laboral, específicamente, en el domicilio de la teletrabajadora.

En España, el teletrabajo experimentó un crecimiento notable durante la pandemia del Covid-19, pasando de aproximadamente 1,6 millones de trabajadores al inicio de la crisis sanitaria a cerca de 3 millones en marzo de 2022[3]. Un dato relevante es el cambio en la distribución por género: mientras que antes de la pandemia los hombres constituían la mayor proporción de teletrabajadores, tras su llegada, las mujeres se convirtieron en el grupo

[1] Vinculado al proyecto Ser Mujer y Trabajo en la Era Digital/Being Woman and Work in the Digital Age. PROYECTO PUENTE DE INVESTIGACIÓN URJC 2023/SOLCON-130825 IPs M. Luisa Molero Marañón y M. Begoña García Gil y al Panel C4 kdel "Work in a changing world the quest for labour rights and social justice 17-20 september 2024".

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[3] The Adecco Group Institute, texto disponible en *www.adeccoinstitute.es/empleo-y-relaciones-laborales/evolucion-del-teletrabajo/*, 2023.

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predominante en el teletrabajo habitual. En cuanto a la edad, los grupos con mayor incidencia en el teletrabajo son los de 25 a 34 años, seguidos por los de 35 a 44 años, especialmente aquellos con responsabilidades de cuidado de hijos menores.

Estos datos reflejan una relación importante entre el teletrabajo, la conciliación laboral y familiar, y las dinámicas de género, ya que las mujeres con hijos fueron uno de los colectivos que más recurrió a esta modalidad. Este fenómeno indica que, en gran medida, las mujeres siguen asumiendo la mayor carga del cuidado familiar mientras mantienen sus responsabilidades profesionales desde casa, lo que implica una transformación de los roles tradicionales en el ámbito laboral y familiar.

El teletrabajo, más allá de las cuestiones jurídicas que pueda generar, representa una nueva forma de organizar la actividad laboral, que ofrece una mayor flexibilidad en los horarios. Esta flexibilidad permite que sea el propio trabajador quien organice sus horas, adaptando su jornada laboral a sus necesidades personales. Este cambio favorece la conciliación entre la vida laboral y familiar, un objetivo que, hasta la fecha, ha sido muy demandado.

El teletrabajo ha sido tradicionalmente visto como una herramienta que facilita esta conciliación. Esta posibilidad sigue vigente en el artículo 34.8 del Estatuto de los Trabajadores, que reconoce el derecho de los trabajadores a solicitar adaptaciones en la duración y distribución de su jornada laboral, así como en la forma de prestación del trabajo, incluida la modalidad a distancia, con el fin de lograr un equilibrio entre la vida familiar y laboral.

Asimismo, la Directiva 2019/1158 del Parlamento Europeo y del Consejo también promueve el teletrabajo como una herramienta para facilitar la conciliación de la vida laboral y familiar. Esta directiva establece el derecho de los trabajadores, en particular de los progenitores o cuidadores, a acceder a modalidades de trabajo flexible, como el trabajo a distancia, horarios laborales flexibles o reducción de horas, con la condición de que hayan trabajado previamente un periodo determinado o tengan una antigüedad mínima de seis meses (art. 9.4). Además, la Directiva contempla el uso de estas fórmulas flexibles, incluido el teletrabajo, para el disfrute de permisos de paternidad, permisos parentales (de hasta cuatro meses, que deben tomarse antes de que el hijo cumpla ocho años) y para el cuidado de familiares.

La Ley 10/2021, de 9 de julio, de trabajo a distancia, define en su artículo 2, el teletrabajo como una modalidad de trabajo a distancia caracterizada "*por el uso exclusivo o predominante de medios y sistemas informáticos, telemáticos y de telecomunicación*", fuera del centro de trabajo de la empresa, generalmente en el domicilio de la persona trabajadora o en un lugar de su elección. En este contexto, y teniendo en cuenta lo anterior, se abordan dos cuestiones fundamentales:

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– en primer lugar, se señala las lagunas existentes en la legislación vigente, como la falta de una definición precisa de accidente de trabajo en el ámbito del teletrabajo[4];
– en segundo lugar, se examina la posible extensión del concepto de accidente laboral, tal como lo regula el Real Decreto Legislativo 8/2015, de 30 de octubre por el que se aprueba el texto refundido de la Ley General de la Seguridad Social (LGSS)[5], al teletrabajo en el domicilio de la persona trabajadora.

El riesgo de accidentes en el hogar, aunque inherente a la naturaleza del teletrabajo, no debe ser subestimado, ya que el entorno doméstico no está diseñado ni regulado para las exigencias laborales. En este sentido, la conciliación de la vida familiar y laboral no solo se refiere a la gestión del tiempo entre el trabajo y la vida familiar, sino también a la necesidad de equilibrar las nuevas formas de organización laboral con la protección efectiva de la salud y seguridad de las trabajadoras. Por tanto, es crucial adaptar las normativas y políticas de seguridad laboral para cubrir estos nuevos riesgos, garantizando que los derechos de los trabajadores a la protección y la compensación por accidentes sean igualmente reconocidos en el contexto del teletrabajo.

2. Accidentes laborales en el domicilio de la teletrabajadora: singularidad en el tiempo y en el lugar de trabajo

La determinación de si estamos o no ante un accidente de trabajo tiene evidentemente una indudable trascendencia, pues la protección que ofrece el sistema de Seguridad Social es mayor cuando estamos ante una contingencia profesional que ante una contingencia común.

El artículo 156.1 de la LGSS establece que "*se entiende por accidente de trabajo toda lesión corporal que el trabajador sufra con ocasión o por consecuencia del trabajo que ejecute por cuenta ajena*". Esta definición legal, aunque clara en sus principios, genera numerosas complejidades, al tratar de aplicar el concepto a los nuevos y diversos modelos laborales. Es importante señalar que la relación de causalidad que establece la norma se ha estructurado de manera flexible desde la Ley de 1900, utilizando una fórmula

[4] Sobre ello, véase Ayerra Duesca, N.J. (2022), "Lagunas en torno a la calificación de accidente de trabajo en la modalidad de teletrabajo" LanHarremanak, *Revista de Relaciones Laborales*, 48, pp. 116-129.

[5] BOE 31-10-2015.

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amplia que no es estrictamente rígida. Esta fórmula incluye dos tipos de causalidad: la directa o inmediata ("por consecuencia") y la indirecta o mediata ("con ocasión").

La causalidad directa se refiere a aquellos accidentes en los que la lesión es consecuencia inmediata del trabajo realizado. Es la forma más común y evidente de accidente laboral, y se refiere a situaciones como golpes, caídas o quemaduras que ocurren durante el desempeño directo de la actividad laboral. En estos casos, existe una relación clara y directa entre la actividad realizada y la lesión sufrida.

Por otro lado, la causalidad indirecta no requiere que el trabajo sea la causa inmediata del accidente, sino que basta con que exista una relación indirecta. Es decir, el accidente se produce en el contexto del trabajo, aunque el trabajo no sea la causa directa del daño.

A lo largo del tiempo, el concepto de accidente de trabajo ha experimentado ciertas flexibilidades en su interpretación, especialmente en dos aspectos clave:

- en primer lugar, la inclusión del término "ocasional" permite una ampliación del concepto de accidente de trabajo, pues abarca no solo aquellos incidentes que ocurren dentro del marco estricto de las tareas laborales habituales, sino también aquellos que, aunque no se den en el ejercicio directo de las funciones propias del puesto, se producen como consecuencia del entorno o contexto laboral;
- en segundo lugar, la presunción legal a favor del trabajador en relación con los accidentes ocurridos durante el tiempo y el lugar de trabajo (artículo 156.3 LGSS). Esta presunción resulta fundamental, pues al ser aplicada, descarga al trabajador de la carga de probar el vínculo entre la lesión y el trabajo, elevando el nivel de protección y seguridad jurídica. La única excepción a esta presunción es que la empresa pueda demostrar lo contrario, es decir, que el accidente no guarda relación con el trabajo desempeñado[6].

En este sentido, la sentencia del Tribunal Superior de Justicia de Castilla-La Mancha, de 8 de julio de 2020 (rec. 711/2019)[7], refleja esta

[6] Aguilera Izquierdo R. (2023), "Accidente de trabajo y teletrabajo". *Revista Española de Derecho del Trabajo*, 264, Editorial Aranzadi, SAU (BIB 2023\1134), p. 2.

[7] Literalmente establece: "*El concepto legal de accidente de trabajo, que venía descrito en nuestro sistema de aseguramiento social en el artículo 115,1 de la Ley General de la Seguridad Social de 20-6-94, actual artículo 156 del Texto articulado vigente de 30-10-2015, es de una indudable complejidad, paralela además a la evolución en las formas de prestar el trabajo, que cabe resumir, de acuerdo con la elaboración doctrinal y jurisprudencial, que*

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problemática y analiza la evolución del concepto de accidente de trabajo ante la modernización de las formas de prestación de servicios, con mención de numerosas sentencias del Tribunal Supremo. En particular, se aborda la aplicación del concepto de accidente de trabajo a situaciones que antes no estaban contempladas explícitamente en la normativa, como el teletrabajo.

En definitiva, estas flexibilizaciones y ampliaciones en la interpretación del concepto de accidente de trabajo responden a un enfoque protector que busca garantizar la seguridad y los derechos de los trabajadores, adaptando el marco legal a las realidades cambiantes del entorno laboral y asegurando una cobertura más amplia frente a los accidentes que puedan ocurrir en el ejercicio del trabajo[8].

El teletrabajo introduce una importante singularidad tanto en el tiempo como en el lugar donde se realiza la actividad laboral[9]. En cuanto al tiempo, se da una mayor flexibilidad en los horarios de trabajo, permitiendo que los empleados adapten su jornada laboral a sus propios ritmos y necesidades personales. Los datos derivados del mecanismo de control o de registro de la jornada (normalmente alguna aplicación o programa informáticos) implantado en la empresa serán fundamentales a la hora de determinar si el accidente se ha producido dentro del tiempo de trabajo. Asimismo, se ha incluido como tiempo de trabajo todo aquel en el trabajador se encuentre bajo disposición del empleador, incluyendo así el tiempo de espera o averías.

En cuanto al lugar de trabajo, el teletrabajo permite a los empleados realizar sus tareas fuera del entorno físico tradicional de la empresa, como en su hogar, espacios de coworking, entre otros. Se considera "lugar de trabajo" tanto el espacio donde se lleva a cabo la actividad laboral, como cualquier lugar en el que el trabajador se encuentre por razón de la tarea encomendada, aunque no sea el habitual[10]. Al igual que en el trabajo presencial, el lugar de trabajo puede ser el puesto de trabajo o la oficina a distancia definida en

también evoluciona con alguna frecuencia, en la existencia de una lesión, en sentido amplio, ocurrida en el trabajo realizado por cuenta ajena – y tras la Ley del Estatuto del Trabajo Autónomo de 11-7-07, también incluyendo al Trabajador Autónomo Económicamente Dependiente (TRADE), a la espera de todo lo que pueda resultar de una previsible extensión del teletrabajo –, y con ocasión del mismo" con mención a varias sentencias del Tribunal supremo (fundamento jurídico 3).

[8] Sobre esta ampliación del concepto de accidente de trabajo a nivel legal y jurisprudencial se refiere, entre otros, Aguilera Izquierdo R. (2023), "Accidente de trabajo y teletrabajo", cit., p. 6.

[9] Sobre estas cuestiones, Hierro Hierro F.J. (2022), "Protección social de nuevos colectivos vulnerables", *Digitalización, recuperación y reformas laborales*, Ministerio de Trabajo y Economía Social, Madrid: pp. 167-169, texto disponible en: *redtransparenciayparticipacion.es/?get_group_doc=9/1676276119-AIymundolaboralempresarial.pdf*, 2024.

[10] Sobre ello, Toscani Giménez D. (2022), "La presunción de laboralidad en tiempo y

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el acuerdo específico de teletrabajo. No obstante, surgen dificultades cuando la lesión ocurre fuera del lugar estipulado para el teletrabajo en el acuerdo (por ejemplo, si se teletrabaja en una segunda residencia cuando, según el acuerdo, el domicilio habitual es el lugar fijado para trabajar).

Precisamente, la existencia de tratamiento específico para estos supuestos deriva del hecho de que el centro de trabajo sea a la vez también su domicilio, y, asimismo, del hecho de que, si bien la "jornada efectiva de trabajo" está limitada, no obstante, el "tiempo de trabajo" es más difícil al existir la flexibilidad como característica fundamental de este tipo de trabajo.

En cuanto al resto de accidentes, es decir, aquellos que no ocurren en tiempo y lugar de trabajo, la jurisprudencia ha recordado en varias ocasiones como no actúa aquí la presunción de laboralidad. El STSJ de Madrid el 3 de febrero de 2023 (rec. 812/2022)[11] descartó el accidente de trabajo de un trabajador que estaba teletrabajando y sufrió un infarto que le causó la muerte. El tribunal considera que el fallecimiento no es accidente de trabajo, ya que a pesar de que se encontraba en su puesto de trabajo (aunque ocurriese en el baño del domicilio, la doctrina lo considera puesto de trabajo al igual que haría si ocurriese en el baño de la empresa), no concurre el requisito de temporalidad, ya que no se puede probar que el trabajador hubiera comenzado a trabajar antes del infarto porque el ordenador estaba desconectado desde la tarde anterior y no consta fichaje de jornada. En efecto, ahora, la jurisprudencia del TS en sentencias más recientes, exige para la aplicación de la presunción que el trabajador se encuentre en tiempo y lugar de trabajo, de forma estricta, esto es, que haya iniciado ya su jornada laboral[12].

En definitiva, todo lo señalado muestra como el legislador no ha querido pronunciarse sobre la calificación de accidente de trabajo en los supuestos de teletrabajo, a la espera de que sean los tribunales los que adapten el concepto de accidente de trabajo a las peculiaridades del trabajo a distancia en todas sus variables, y en concreto, el teletrabajo. Sin embargo, son muchas las cuestiones que se plantean por lo que, a mi juicio, sería necesario que el legislador se pronunciara específicamente sobre la compleja relación entre teletrabajo y accidente de trabajo, en lugar de que tengan que ser los tribunales los que vayan haciéndolo caso por caso, con la consiguiente inseguridad jurídica.

lugar de trabajo a efectos de accidente de trabajo", *Diario La Ley, Nº 10183, Sección Tribuna,* LA LEY 10951/2022, pp. 3-5.

[11] STSJ de Madrid el 3 de febrero de 2023 (rec. 812/2022)

[12] Al respecto, entre otras, STS 1008/2021, 13 de octubre de 2021.

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3. La compleja casuística del teletrabajo en materia de accidentes de trabajo en el domicilio

En los últimos años, se han dictado sentencias que han resuelto casos sobre la posibilidad de sufrir un accidente de trabajo cuando se está teletrabajando, y las mismas parten de la jurisprudencia elaborada por nuestro Tribunal Supremo para el trabajo presencial. Pero la situación como se ha dicho anteriormente es diferente y por ello requiere de un análisis bajo parámetros distintos. Dichas sentencias son analizadas en este trabajo con la intención de analizar los criterios aplicables a este tipo de teletrabajo que afecta directamente a las mujeres. Se trata de sentencias emitidas por los Juzgados de lo Social y los Tribunales Superiores de Justicia, pendientes de una eventual intervención del Tribunal Supremo.

Así, se destacan las siguientes sentencias que consideran lo siguientes supuestos accidente de trabajo:

1) Trabajadora demandante que al salir del cuarto de baño de su domicilio para reanudar su actividad laboral tropieza en el pasillo y cae al suelo, lo que le provoca un traumatismo en el codo y en la parrilla costal derecha. Se declara a la trabajadora en situación de incapacidad temporal por accidente no laboral. La mutua considera que, no estando la accidentada sentada en el ordenador en su domicilio, no cabe hablar de lugar de trabajo, de manera que la protección que brinda la norma no debe extenderse a lo ocurrido en cualquier parte de aquel, aún en tiempo de trabajo. Se declara, sin embargo, que la contingencia de la incapacidad temporal de la trabajadora es imputable como accidente de trabajo. Señala la sentencia que "*nadie pondría en tela de juicio la oportunidad de considerar accidente de trabajo el sufrido por un empleado en idéntica circunstancia si trabajase en una fábrica, oficia o tienda. La obligada visita al aseo para atender una necesidad fisiológica, constante el desempeño de la jornada laboral, no puede enervar la presunción legal (Fundamento jurídico Quinto)*". Este caso establece un precedente importante, ya que reconoce que los incidentes que ocurren durante el horario laboral, incluso fuera del espacio de trabajo designado, pueden considerarse accidentes laborales[13].
2) Trabajadora que sufrió un ictus mientras prestaba servicios en modalidad de teletrabajo. Se presentó evidencia de que la trabajadora había gestionado hasta 45 correos electrónicos y atendido 45 llamadas telefónicas en el día anterior al ictus. Se subraya que el ictus no es una

[13] Juzgado de lo Social de Cáceres de 26 de octubre de 2022, sentencia núm. 297/2022.

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patología que, por su naturaleza, excluya la posibilidad de que haya sido causado por el trabajo. Además, no se presentó prueba suficiente para excluir que el trabajo pudiera haber sido un factor desencadenante o coadyuvante de la enfermedad. Es difícil para la Mutua demostrar que no existe una conexión entre el trabajo y la enfermedad, especialmente si el incidente ocurrió en el tiempo y lugar de trabajo. Esto se enmarca en la presunción de laboralidad del artículo 156.3 LGSS, que también es aplicable al teletrabajo. Por tanto, el ictus sufrido durante el teletrabajo se puede considerar un accidente de trabajo[14].

3) Trabajadora que sufre un esguince de tobillo mientras realizaba una pausa durante su jornada laboral en modalidad de teletrabajo. Al levantarse para ir a la cocina a coger un vaso de agua, se torció el tobillo, lo que le llevó a ser ingresada en urgencias y se emitió un parte de baja por accidente. En este caso, el Tribunal recalcó que la definición de accidente de trabajo debe entenderse de manera amplia y en relación con otras normas. Se aplica la teoría de la "ocasionalidad relevante", que tiene dos elementos: el primero, que el accidente no fue causado por una actividad específica del trabajo, pero el segundo, que el trabajo (o una actividad normal dentro del trabajo, como la pausa) fue la condición necesaria para que ocurriera el accidente. La trabajadora estaba en su pausa legal de 15 minutos, que es habitual en jornadas de más de seis horas, y al levantarse para ir a la cocina a beber agua, un acto común durante la jornada laboral sufrió el accidente. Dado que la trabajadora estaba teletrabajando en su domicilio bajo las mismas condiciones laborales que en el centro de trabajo, y el accidente ocurrió durante la jornada laboral en una actividad normal relacionada con el trabajo, el Tribunal consideró que el accidente debía calificar como laboral. Así, se aplicó la presunción de laboralidad del artículo 156.3 de la LGSS y se dictaminó que el accidente era de trabajo[15].
4) Profesora de centro escolar en modalidad teletrabajo sufrió un infarto inmediatamente después de una reunión telemática. La trabajadora, en su jornada laboral, mencionó a un compañero que tenía dolor en el brazo y la espalda. A las 12:00 comenzó una reunión telemática, durante la cual se la notó "aturdida". La reunión terminó a las 14:05 y a las 14:43, su hijo llamó

[14] Juzgado de lo Social JS de Girona (Comunidad Autónoma de Cataluña) Sentencia núm. 199/2021 de 12 noviembre. Un comentario de esta sentencia, véase: Gala Durán C. (2021), "Teletrabajo. La compleja relación entre teletrabajo y accidente de trabajo (comentario a la sentencia del Juzgado de lo Social n.º 3 de Girona de 12 de noviembre de 2020, proc. 524/2020). Accidente laboral", *La Administración Práctica*, 7, Editorial Aranzadi, SAU (BIB 2021\4134).

[15] Tribunal Superior de Justicia de Castilla-La Mancha, (Sala de lo Social, Sección 2ª) Sentencia núm. 1058/2023 de 23 junio).

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a emergencias porque su madre se encontraba mal, desencadenándose el infarto. Se analiza la jurisprudencia sobre la presunción de laboralidad en casos de infarto, destacando que la presunción no se excluye por síntomas previos a la jornada laboral, lo importante es si el trabajo actuó como factor desencadenante de la crisis. En este caso, el infarto se produjo durante la jornada laboral y se manifestó inmediatamente después de la reunión telemática, manteniéndose el nexo de causalidad entre el trabajo y la lesión[16].

5) Teletrabajadora que sufre un esguince de tobillo durante una pausa para descansar de la pantalla, al ir a coger un vaso de agua. El Tribunal concluyó que la trabajadora sufrió la lesión mientras realizaba una actividad normal dentro de su jornada laboral (ir a por un vaso de agua), y que el accidente habría ocurrido igualmente si estuviera trabajando presencialmente en la empresa. Por tanto, se considera que el accidente ocurrió en el centro de trabajo y durante la jornada laboral, aplicándose la presunción de laboralidad del artículo 156.3 de la LGSS y la jurisprudencia del Tribunal Supremo[17].

En conclusión, dado que los supuestos de las distintas sentencias comentadas han ocurrido en tiempo y lugar de trabajo son accidente de trabajo, es decir, mientras las trabajadoras realizaban tareas relacionadas con su empleo en teletrabajo, y no se ha podido demostrar en ningún caso, que el trabajo no fue un factor contribuyente, los distintos incidentes se consideran accidente de trabajo, amparados por la presunción de laboralidad del artículo 156.3 LGSS.

En sentido opuesto, no se consideran accidentes de trabajo los siguientes incidentes:

1) Teletrabajadora que falleció por un infarto en su domicilio. El tribunal dictaminó que dicho fallecimiento no debe considerarse un accidente laboral porque no se pudo probar que la trabajadora estuviera desempeñando su actividad laboral en el momento del infarto. Se destacó que, aunque la trabajadora prestaba servicios desde su hogar, no todo lo que suceda en el domicilio puede considerarse laboral, a menos que haya una relación directa con el desarrollo de las actividades laborales. En este caso, no se demostró que el infarto fuera causado exclusivamente por el trabajo, ya que dicho infarto agudo de miocardio tiene una etiología común

[16] Tribunal Superior de Castilla la Mancha de Aragón, Sala de lo Social, Sección 1ª) Sentencia núm. 20/2022 de 18 enero.

[17] Tribunal Superior de Castilla la Mancha, número 1052/2023, de 23 de junio de 2023.

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y no se acreditó que fuera el único factor desencadenante. En definitiva, como no se pudo probar que el infarto ocurriera durante el tiempo de trabajo, el Tribunal concluyó que el infarto no debía ser calificado como accidente laboral[18].

2) La juzgadora de instancia determinó que no se podía considerar accidente de trabajo el fallecimiento de una representante sindical (vicepresidenta del Comité de Empresa) que sufrió un infarto de miocardio. En primer lugar, no se pudo acreditar que la trabajadora estuviera en el tiempo y lugar de trabajo ni realizando funciones sindicales cuando se sintió indispuesta, ni en su domicilio mediante llamadas o actividades relacionadas. Tampoco se pudo demostrar que estuviera en camino hacia el ayuntamiento para una reunión programada, ya que la distancia desde su domicilio al lugar de la cita era mínima, lo que no permitió considerar el evento como un accidente in itinere. El recurso presentado por la parte interesada afirmaba que la trabajadora ya había comenzado sus funciones sindicales desde las 8 de la mañana, pero no se presentó ninguna evidencia que respaldara esa afirmación. El hecho de que la trabajadora tuviera un crédito de horas sindicales no significa que comenzara automáticamente sus funciones sindicales desde el inicio de la jornada laboral. El crédito sindical permite liberar horas de trabajo, pero no significa que esas horas se dediquen a funciones sindicales de manera inmediata o automática. Por lo tanto, el tribunal desestimó el recurso ya que no se acreditó que la trabajadora estuviera realizando funciones sindicales al momento de su fallecimiento, ni que existiera una relación directa entre su fallecimiento y el ejercicio de esas funciones[19].
3) Se califica como enfermedad común la lesión sufrida por una trabajadora que refirió dolor en el hombro al coger una pantalla de ordenador y que motivó el inicio de un periodo de incapacidad temporal. El tribunal declara que no consta probado que las lesiones que dieron lugar a la baja tuvieran relación con el trabajo, pues no se acreditó tan siquiera que la lesión sucediera en tiempo y lugar de trabajo, pese a que la trabajadora se encontrase prestando servicios a través del teletrabajo. Igualmente, no se acreditó que se encontrase en su domicilio, y aunque así fuese, tampoco se acredita que fuera el lugar donde desarrollaba su trabajo, ni que realmente el accidente sucediera moviendo una pantalla de ordenador y no realizando una actividad ajena al trabajo. Precisamente

[18] Tribunal Superior de Justicia de Madrid, (Sala de lo Social, Sección 4ª) Sentencia núm. 240/2024 de 27 marzo.

[19] Tribunal Superior de Justicia de Castilla-La Mancha, (Sala de lo Social, Sección 1ª) Sentencia núm. 1454/2022 de 16 septiembre.

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por lo anterior, no opera en este caso la presunción de laboralidad dada la ausencia de relación causal entre el accidente y la baja por incapacidad temporal[20].

En los casos mencionados anteriormente, los incidentes no han ocurrido en tiempo y lugar de trabajo, y, por tanto, no son accidentes de trabajo. Y aunque se defiende el enfoque de las sentencias anteriores, se anticipa que, hasta que el Tribunal Supremo se pronuncie, las Mutuas podrán no aceptar fácilmente que casos similares se consideren accidentes de trabajo, lo que podría dar lugar a futuros debates judiciales. Para mayor claridad, se sugiere que esta cuestión sea regulada mediante una norma específica que aclare las incertidumbres al respecto.

4. Teletrabajadoras y accidentes de trabajo *in itinere*

Es fundamental resaltar que las cuestiones relacionadas con el teletrabajo y los accidentes laborales no se limitan exclusivamente a los incidentes ocurridos dentro del domicilio de la trabajadora. En este contexto, es necesario ampliar la comprensión de lo que constituye un accidente de trabajo, especialmente cuando se trata de situaciones como el accidente de trabajo *in itinere*. Este concepto, ampliamente reconocido en la legislación laboral, ilustra cómo la flexibilización de las normas sobre accidentes laborales puede extenderse más allá del lugar físico de trabajo.

El accidente *in itinere* hace referencia a aquellos incidentes que ocurren mientras el trabajador se encuentra en su trayecto hacia o desde su lugar de trabajo. En este sentido, el nexo causal entre el trabajo y el accidente se ha interpretado de manera más amplia, considerando que el trabajo no solo implica las actividades realizadas en el espacio laboral, sino también aquellos momentos en que el trabajador se desplaza hacia o desde su puesto. Esto implica que, si una persona sufre un daño psíquico o físico durante su desplazamiento, dicho accidente puede ser calificado como un accidente laboral, ya que el trabajo, aunque no ocurra directamente en el lugar habitual de trabajo, es considerado al menos la *ocasión* del daño sufrido.

Esta ampliación del concepto de accidente laboral tiene implicaciones importantes para el teletrabajo, ya que, aunque este se realiza en el hogar del trabajador, los accidentes que ocurren durante el desempeño de tareas laborales fuera de la oficina tradicional, o incluso en los desplazamientos relacionados con esas tareas, pueden ser considerados accidentes laborales.

[20] TSJ de Galicia contenido en su sentencia número 988/2022, de 25 de febrero de 2022.

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De esta manera, la legislación reconoce que los factores de riesgo asociados al trabajo pueden extenderse más allá de los límites físicos del centro de trabajo, ofreciendo una protección más amplia a los trabajadores, sin importar el lugar donde realicen sus funciones.

En caso de un modelo de teletrabajo mixto, esto es, aquel en el que se combina el trabajo presencial y el teletrabajo a lo largo de la jornada de trabajo semanal, resulta evidente que los días en que el teletrabajador tiene que desplazarse a la empresa para trabajar puede producirse un accidente de trabajo in itinere; aplicándose la citada jurisprudencia consolidada existente en torno a esta materia. La misma solución se emplearía en los supuestos en que, siendo un día de teletrabajo, el teletrabajador tenga que desplazarse a al centro de trabajo por motivos como una reunión, la entrega o recogida de alguna documentación, asistencia a un curso de formación, etc.

En este sentido, estaría bien que en el acuerdo de trabajo a distancia se elijan lugares distintos para la prestación de los servicios, como telecentros, segundas residencias, espacios coworking, etc., donde aparecen nuevos riesgos. En efecto, pueden producirse accidentes en los desplazamientos que se lleven a cabo en una variedad de situaciones: cuando haya que desplazarse al centro de trabajo para realizar trabajo presencial, para asistir a reuniones, en los supuestos de tener que acudir a revisiones médicas o en cumplimiento de responsabilidades familiares. Pero también, cuando se hayan fijado dos lugares distintos para llevar a cabo el teletrabajo o, incluso, accidentes en el propio domicilio en el recorrido de una habitación del domicilio a otra para realizar trabajo o viceversa. Por todo ello, debido a la adaptación del concepto de accidente in itinere a la realidad social y consiguiente flexibilización del concepto de domicilio podrían reconocerse como accidentes de trabajo in itinere los ocurridos en la modalidad de teletrabajo, cuando la persona teletrabajadora realice algún desplazamiento, siempre y cuando no se rompa el nexo causal[21].

En todo caso, consideramos que es bastante complicado aplicar la figura del accidente de trabajo in itinere a una actividad laboral desarrollada en nuestro propio domicilio, lo cual representa un inconveniente adicional de esta modalidad de prestación de servicios[22]. En este contexto, es relevante destacar la Nota Técnica de Prevención del Instituto Nacional de Seguridad y Salud en el Trabajo (INSST) (NTP 412: 1996) sobre teletrabajo,

[21] En este sentido, Poquet Catalá R. (2017), "Accidente de trabajo in itinere en el teletrabajo: su difícil conjunción", *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*, vol. 5, n. 4, pp. 51-53.

[22] De las Heras García A. (2016), *El teletrabajo en España: un análisis crítico de normas y prácticas*, Ediciones CEF, p. 300.

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complementada por la NTP 1165:2021. Estas notas técnicas establecen criterios para la integración del teletrabajo en el sistema de gestión de la seguridad y salud en el trabajo. En particular, se señala que "*la característica diferencial más sobresaliente del teletrabajo, en relación con la prevención de riesgos, es la ubicación del puesto de trabajo, que se encuentra en un lugar diferente al centro de trabajo de la empresa*".

Además, el binomio que conforman la desigualdad de género y el impacto de las nuevas tecnologías requiere una política preventiva en seguridad y salud laboral desagregada por sexos[23]. En España, las políticas actuales se centran en salvaguardar la salud reproductiva de las mujeres durante el embarazo, el puerperio y la lactancia natural.

Por su parte, la Unión Europea impulsó una Estrategia de Salud y Seguridad en el trabajo (2007-2012), la cual ya reconocía que las desigualdades de género pueden influir negativamente en la seguridad y la salud laboral, así como en el rendimiento y la productividad en el entorno laboral. Por tanto, es necesario adaptar el sistema de prevención de la empresa para incluir el teletrabajo y garantizar a quienes lo realizan el mismo nivel de seguridad y salud que al resto del personal trabajador.

En términos generales, la legislación protege de igual manera a los trabajadores, ya sea que trabajen desde casa o desde sus oficinas. Los incidentes que ocurren durante el horario laboral establecido por la empresa se consideran accidentes laborales y, por lo tanto, deben estar cubiertos por la Mutua correspondiente. No obstante, en estos casos se presenta el desafío de la prueba para demostrar la ocurrencia del accidente y su relación con la actividad laboral. Ello implica que el trabajador debe aportar evidencia suficiente para que la mutua acepte el accidente como laboral. La Mutua, por su parte, debe evaluar esta evidencia de manera rigurosa y objetiva para determinar si el accidente cumple con los criterios legales para ser considerado como tal.

Todo lo dicho anteriormente demuestra que el teletrabajo presenta desafíos importantes en la determinación de lo que constituye un accidente de trabajo. Es fundamental establecer criterios claros para proteger a los teletrabajadores y garantizar que reciban las mismas prestaciones y derechos que sus homólogos en el lugar de trabajo tradicional. Por su parte, los empresarios deben ser conscientes de sus responsabilidades en cuanto a la salud y seguridad de sus teletrabajadoras/es, incluso cuando no están físicamente presentes en la oficina. Esto puede incluir proporcionar equipos

[23] Montes Adalid G.M. (2023): "Empleo digital, conciliación y salud psicosocial de la mujer trabajadora", *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*, vol. 11, n. 2, p. 200.

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adecuados, garantizar entornos de trabajo seguros y respetar los horarios laborales acordados.

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La inteligencia artificial y la discriminación de género en la gestión laboral de personal

Manuela Durán Bernardino[1]

1. Introducción

Las decisiones automatizadas basadas en aplicaciones de Inteligencia Artificial no solo son presentadas como un avance que permite mejorar la productividad de las empresas haciéndolas más competitivas, sino también como una oportunidad para evitar posibles errores o sesgos inconscientes en materia de género, raza o apariencia física de las personas trabajadoras al adoptar decisiones (Gines I Fabrellas, 2024). Sin embargo, la realidad es que plantean nuevos retos y desafíos relacionados con los derechos fundamentales, la privacidad e intimidad, la protección de datos, la igualdad y no discriminación y la seguridad y salud en el trabajo (Monereo, Rodríguez, Rodríguez, 2023). Prueba de ello es la calificación de alto riesgo por parte de la Unión Europea de la adopción de decisiones relacionadas con la selección o contratación de personas, la determinación de condiciones laborales, promoción profesional o la extinción del contrato de trabajo (art. 6 y Anexo III del Reglamento de Inteligencia Artificial). Centrando la atención en el sesgo de género, la inteligencia artificial tiene el potencial de aumentar las desigualdades, incluyendo las existentes entre mujeres y hombres, afectando de forma significativa al derecho a la igualdad y no discriminación, que es un derecho fundamental que deben seguir siendo garantizados con independencia de que la decisión sea tomada por una persona o por un algoritmo.

Ante esta realidad, en el presente estudio se analiza el tratamiento jurídico-laboral de los retos que presenta la Inteligencia Artificial desde la perspectiva del derecho a la igualdad en las relaciones de trabajo.

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2. Marco normativo

2.1. Normativa europea

Si atendemos a la regulación jurídica en el ámbito europeo, la principal iniciativa regulatoria es el Reglamento del Parlamento Europeo y del Consejo por el que se establecen normas armonizadas en materia de inteligencia artificial, de 13 de junio de 2024, que representa un hito en el ámbito internacional, debido a que se trata de una norma de obligado cumplimiento para los países miembros de la Unión Europea.

Su finalidad es establecer una norma armonizada que prohíba determinadas prácticas de inteligencia artificial, estableciendo requisitos específicos para los sistemas de inteligencia artificial considerados de alto riesgo, obligaciones para sus operadores y normas específicas de transparencia para determinados sistemas de inteligencia artificial (art. 1. 2 d) Reglamento de inteligencia artificial). Todo ello con el fin último de reducir al mínimo el riesgo de discriminación algorítmica a través de la implantación de medidas como la realización de pruebas, la gestión de riesgos, la documentación o la vigilancia humana durante todo su ciclo de vida (Fernández, 2019).

Sin embargo, se confía el control de cumplimiento y exigencia de responsabilidad y aplicación de sanciones por incumplimiento a autoridades nacionales.

En lo que respecta a la discriminación por razón de sexo de los sistemas de inteligencia artificial, recoge algunas referencias que merecen ser destacadas (Senent, Ventura, 2024):

A) La Ley establece como límite de actuación de la inteligencia artificial el respeto a la Carta de los Derechos Fundamentales de la UE (art. 7 LIA). Y dado que la CDFUE incluye la prohibición de la discriminación por razón de sexo (art. 21.1 CEFUE) y la garantía de la igualdad entre hombres y mujeres en todos los ámbitos (art. 23 CDFUE), las referencias de la Ley al necesario respeto a los derechos fundamentales permitiría reclamar la consideración, aunque sea implícita, de sistemas de IA de alto riesgo aquellos que puedan tener repercusión negativa para la igualdad de mujeres y hombres. Esta consideración tiene una importante trascendencia ya que los implementadores de sistemas de inteligencia artificial de alto riesgo están obligados a realizar una evaluación del impacto que tiene el sistema de inteligencia artificial en los derechos fundamentales antes de ponerlo en marcha, lo que es un elemento de garantía.

Además, entre los principios generales aplicables a todos los sistemas

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de inteligencia artificial, se incluye el de la diversidad, no discriminación y equidad (art. 4bis.1be), relativo a la igualdad de acceso y a la igualdad de género y la diversidad cultural, evitando al mismo tiempo los efectos discriminatorios y los sesgos injustos prohibidos por el Derecho nacional o de la Unión.

No obstante, se trata de una declaración programática, siendo necesaria una mención expresa a la prohibición por discriminación a las mujeres y/o a la necesidad de adopción de medidas de acción positiva para su superación. De forma que, aunque se trata de un avance, la mirada de género debería ser transversal y sistemática en todos los ámbitos regulados y no fragmentaria y puntual (Senent, Ventura, 2024).

B) En relación a la formación en igualdad y no discriminación de quienes intervengan en el proceso de diseño, implementación, evaluación y uso de la inteligencia artificial, se promueve el desarrollo de un nivel suficiente de alfabetización en esta materia en todos los sectores de la sociedad para los ciudadanos de todas las edades, incluidas las mujeres y las niñas. En este sentido, el Reglamento obliga a los Estados miembros a promover medidas para el desarrollo de un nivel suficiente de alfabetización en materia de IA, en todos los sectores y teniendo en cuenta las distintas necesidades de los grupos de proveedores implementadores y personas afectadas (art. 14), también a través de la educación y la formación y de programas de capacitación y de mejora de capacidades, garantizando un equilibrio adecuado en materia de género y de edad, con la finalidad de permitir un control democrático de los sistemas de inteligencia artificial.

Con independencia de estas referencias, es necesario que los Estados miembros promuevan la formación en materia de igualdad y no discriminación, de forma que se incluya de forma efectiva en todos los niveles de la educación obligatoria, con especial incidencia y desarrollo en materias y grados universitarios dirigidos a la formación de quienes intervengan en la cadena de creación e implementación de los sistemas de inteligencia artificial, en caso contrario, los sistemas que se desarrollen seguirán reproduciendo los sesgos discriminatorios que se dan en la sociedad, potenciándolos de forma intensificada. En España, la obligatoriedad de la formación en igualdad en las universidades está establecida desde el año 2004, sin embargo, en la actualidad son pocos los planes de estudio que tienen alguna asignatura relacionada con esta materia.

Del mismo modo, se establece que las personas físicas encargadas de garantizar la vigilancia humana de los sistemas de inteligencia artificial de alto riesgo tengan un nivel suficiente de alfabetización en esta materia.

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C) Otro aspecto importante es el relativo a la presencia equilibrada de mujeres y hombres tanto en las medidas que se adopten para garantizar el respeto a los derechos de las personas afectadas como en la composición de los órganos que vayan a tomar decisiones en relación con los sistemas de IA. Sin embargo, la Ley hace referencia de forma puntual y fragmentaria, solo el artículo 57 bis, que regula la estructura del consejo de administración del comité europeo de inteligencia artificial, establece que en el nombramiento de los miembros y suplentes del consejo de administración se tendrá en cuenta la necesidad de equilibrio entre mujeres y hombres.

D) Por último destacar la obligación de que los implementadores de sistemas de inteligencia artificial de alto riesgo lleven a cabo una evaluación del impacto en los derechos fundamentales antes de ponerlo en marcha.

Como se comprueba, aunque en el texto no se recoge ninguna mención explícita a la igualdad, al menos si se observa en el desarrollo de la Ley una tendencia a incluir una presencia equilibrada de mujeres y hombres, tanto en las medidas que se adopten en garantía del respeto a los derechos de las personas usuarias o afectadas, como en la composición de los órganos que vayan a tomar decisiones en relación con los sistemas de inteligencia artificial.

2.2. Normativa española

Si centramos la atención en la normativa jurídica interna del estado español en materia de inteligencia artificial, la principal norma reguladora básica sigue siendo el art. 23 de la Ley 15/2022, de 12 de julio, integral para la igualdad de trato y la no discriminación, que establece que las Administraciones públicas, en el ámbito de la Estrategia Nacional de Inteligencia Artificial, la Carta de Derechos Digitales y de las iniciativas europeas, han de favorecer el uso de una inteligencia artificial ética, confiable y respetuosa con los derechos fundamentales. Para ello han de poner en marcha mecanismos para que los algoritmos involucrados en la toma de decisiones tengan en cuenta criterios de minimización de sesgos, transparencia y rendición de cuentas, siempre que sea factible técnicamente. Dichos mecanismos deben comprender tanto el diseño de la inteligencia artificial como los datos con los que se entrenan, abordando su potencial discriminatorio. Uno de los mecanismos que de forma explícita se prevé es la realización de evaluaciones de impacto que determinen el posible sesgo discriminatorio y la creación de un sello de calidad de los algoritmos. Sin embargo, no se concreta el procedimiento para llevarla a cabo ni de

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quien depende de su ejecución, por lo que en realidad es una declaración de intenciones que probablemente esté pendiente de un desarrollo reglamentario (Senent y Ventura, 2024).

Mayor avance se pude apreciar en la regulación de las infracciones y sanciones en materia de igualdad de trato y no discriminación (título IV), relacionándose su graduación con la gravedad de las acciones tipificadas, que van desde la inobservancia de lo establecido en la Ley hasta los actos que constituyan discriminación, discriminación múltiple o reiteración de la infracción, pudiendo llegar las multas hasta los 500.000 euros (Aba, 2023).

En relación a los límites a los sistemas de inteligencia artificial, la norma más específica sigue siendo la Ley 12/2021, de 28 de septiembre, por la que se modifica el Texto Refundido de la ley del Estatuto de los Trabajadores para garantizar los derechos laborales de las personas dedicadas al reparto en plataformas digitales, en la que se obliga a las empresas a compartir con los sindicatos las reglas en las que se basan los algoritmos que pueden afectar a las condiciones laborales. Así, la Ley introdujo una nueva letra d) en el art. 64.4 ET que establece la obligación de información a los representantes legales de los trabajadores sobre los parámetros, reglas e instrucciones en los que se basan los algoritmos o sistemas de inteligencia artificial que afectan a la toma de decisiones que pueden incidir en las condiciones de trabajo, el acceso y el mantenimiento del empleo, incluida la elaboración de perfiles (Rivas, 2022). En estos casos, no se exige que la decisión sea íntegramente automatizada para que exista el deber de información (Losada, 2022).

Es un ejemplo de cómo la regulación concreta del ejercicio de los derechos fundamentales de las personas irá incluyendo obligaciones de transparencia y protección en relación a la utilización de recursos de inteligencia artificial (Senent, Ventura, 2024).

Por otro lado, España, adelantándose a la aprobación del Reglamento europeo, ya preveía en 2021 (Ley 22/2021, de 28 de diciembre, de Presupuestos Generales del Estado para el año 2022, disposición adicional centésimo trigésima) y 2022 (Ley 28/2022, de 21 de diciembre, de Fomento del Ecosistema de las Empresas Emergentes) la creación de la Agencia Española de Supervisión de Inteligencia Artificial, aprobándose su Estatuto con el Real Decreto 729/2023, de 22 de agosto.

Se trata de una entidad de derecho público adscrita al ministerio de Asuntos Económicos y Transformación Digital, con personalidad jurídica independiente, patrimonio propio y autonomía en su gestión. Entre sus objetivos y finalidades está (art. 4):

– Supervisión, asesoramiento, concienciación y formación dirigidas a entidades de derecho público y privado para la adecuada implementación

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de la normativa nacional y europea en relación al uso adecuado de los algoritmos.
- Inspección, comprobación, sanción en materia de inteligencia artificial.
- Minimización de los riesgos que pueda suponer el uso de nuevas tecnologías, el adecuado desarrollo y potenciación de los sistemas de inteligencia artificial.

En su cumplimiento, la actuación de la Agencia se centrará en:

- Fomento de entornos reales de prueba de los sistemas de inteligencia artificial, para reforzar la protección de los usuarios y evitar sesgos discriminatorios.
- La supervisión de la puesta en marcha, uso o comercialización de sistemas que incluyan inteligencia artificial y, especialmente, aquellos que puedan suponer riesgos significativos para la salud (Molero, 2022), seguridad, igualdad de trato u no discriminación, en particular entre mujeres y hombres, y para los demás derechos fundamentales.

Entre sus principios cabe destacar (art. 8):

- La integración del principio de igualdad de trato entre mujeres y hombres, promoviendo la perspectiva de género y una composición equilibrada de mujeres y hombres en sus órganos, consejos y comités y actividades.
- El apoyo al desarrollo y uso de sistemas de inteligencia artificial con perspectiva de género, incorporando el principio de igualdad de oportunidades entre mujeres y hombres en su diseño y ejecución y promoviendo la realización de evaluaciones de impacto capaces de identificar posibles sesgos discriminatorios por cualquiera de los motivos prohibidos por el ordenamiento jurídico. Todo ello con la finalidad última de eliminar los sesgos discriminatorios, en particular, los sesgos de género.
- La supervisión y, en su caso, sanción de acuerdo con lo estipulado en la normativa europea.

En ejecución del principio de presencia equilibrada en sus órganos, se recoge que la designación de los miembros del Consejo Rector se ajustará al principio de igualdad de género, promoviendo la perspectiva de género y una composición equilibrada de mujeres y hombres (art 15.7).

Igualmente, cabe destacar el Real Decreto 817/2023, de 8 de noviembre, que establece un entorno controlado de pruebas que el ensayo del cumplimiento de la PRIA. El entorno controlado de pruebas, denominado

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sandbox, posibilita la cooperación entre los usuarios y los proveedores de inteligencia artificial y pretende acercar a las autoridades competentes las empresas que desarrollan la inteligencia artificial con la finalidad de definir una guía de buenas prácticas para la implementación del Reglamento Europeo de inteligencia artificial. Es destacable que dicho entorno tendrá un procedimiento para la selección y admisión de las empresas proveedoras y clientes de sistemas de inteligencia artificial y un Comité asesor de expertos.

El entorno controlado de pruebas se define como entorno o experiencia, con una duración determinada, que proporciona un contexto estructurado para el desarrollo de las actuaciones necesarias que posibiliten a proveedores y usuarios de los sistemas de inteligencia artificial de alto riesgo, sistemas de propósito general y modelos fundacionales que realicen las pruebas necesarias para implementación de los requisitos establecidos en este Real Decreto, bajo la supervisión del órgano competente (art. 3.2). Entre las funciones del grupo de personas asesoras expertas está el velar por el cumplimiento del principio de igualdad de género en el desarrollo de las tareas encomendadas, y en su designación se atenderá al principio de presencia equilibrada entre mujeres y hombres (art. 27.3).

En el Plan de Recuperación, Transformación y Resiliencia del Estado Español también se asume, de forma transversal la igualdad de género, encontrándose entre sus objetivos el de acelerar la transformación digital de la economía y la sociedad, proporcionando un clima favorable a la inversión y al refuerzo del tamaño de las empresas, para aumentar la productividad y competitividad de toda la economía a través de tecnologías digitales disruptivas como la Inteligencia Artificial. Entre sus treinta líneas de actuación se incluye la 16, Estrategia Nacional de Inteligencia Artificial, que fija ente sus objetivos potenciar la inteligencia artificial inclusiva y sostenible específicamente para reducir la brecha de género, la brecha digital, apoyar la transición ecológica y la vertebración territorial.

En términos generales, se trata de normas de derecho blando en las que se comprueba que se ha entendido claramente la necesidad de aplicar una perspectiva de género en el ámbito de la inteligencia artificial. Sin embargo, todavía no existe ningún Plan o proyecto específico que lo desarrolle y lleve a cabo, siendo actualmente una regulación insuficiente para garantizar el derecho a la igualdad y no discriminación de las personas trabajadoras (Rivas, 2022).

Parte de la doctrina entiende que la ineficacia de la regulación clásica reside principalmente en tres motivos (Todolí, 2024): en primer lugar, la normativa en esta materia se ha venido centrando en la protección de la privacidad e intimidad del trabajador, olvidando que el resto de derechos en juego (como el derecho a la salud, la autonomía individual y colectiva,

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la capacidad de negociación o los derechos antidiscriminatorios), también necesitan protección. En segundo lugar, la normativa se ha centrado en dar soluciones individuales a problemas que son colectivos. Un ejemplo claro lo encontramos en el reglamento de protección de datos, que se centra en una protección individual. En tercer lugar, el Reglamento General de Protección de Datos no es una norma laboral específicamente pensada para los trabajadores, sino que se trata de una normativa transversal, que no solo regula los derechos de los trabajadores sino también los del consumidor, usuarios y particulares. En consecuencia, sus reglas de funcionamiento no atienden los principios básicos del ordenamiento laboral, en cuyos cimientos está el reconocimiento de la autonomía colectiva, la limitación de la autonomía individual, la garantía clara de derechos o las normas de derecho mínimo necesario.

3. Conclusiones

Los sistemas de inteligencia artificial se presentan como modelos matemáticos objetivos y neutros, sin embargo, no solo reproducen las discriminaciones de género existentes, sino que las perpetúan y amplifican a gran escala y a una alta velocidad. Además, al eliminar la subjetividad de las decisiones adoptadas con las herramientas tradicionales, aplicadas directamente por una personal, se impide que dicha subjetividad pueda actuar como elemento corrector de las discriminaciones existentes (Gines I Fabrellas, 2024), al no tener empatía (Rodríguez, 2023). Ante este contexto, resulta necesario adoptar medidas técnicas (Friedle, Martín, Núñez, 2021) y jurídicas para evitar sesgos y discriminación de género en el uso de algorimospara la toma de decisiones laborales de forma automática. Atendiendo al nuevo reglamento europeo y a la normativa española aprobada en los últimos años, se puede concluir que se ha entendido claramente la necesidad de aplicar una perspectiva de género en el ámbito de la inteligencia artificial, sin embargo, queda mucho camino por recorrer para que se adopten medidas efectivas que garanticen la igualdad de mujeres y hombres y se fomente un uso de la inteligencia artificial en el que se empodere a las mujeres. En base al análisis realizado, se considera que para eliminar los actuales sesgos de género de la inteligencia artificial y contribuir a la igualdad efectiva de mujeres y hombres, resulta necesario:

1) Promover una formación obligatoria en igualdad y no discriminación por razón de sexo. La Ley europea de inteligencia artificial ya ha introducido la necesidad de promover un nivel suficiente de alfabetización en

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materia de inteligencia artificial pero para conseguir que las personas desarrolladoras y usuarias sean capaces de identificar las fuentes de sesgo y corregirlas, es necesario que las normas y políticas europeas promuevan que la formación en materia de igualdad y no discriminación se incluya de manera efectiva en todos los niveles de educación obligatoria, con especial incidencia y desarrollo en las materias y grados universitarios dirigidos a la formación de quienes hayan de intervenir en la cadena de creación e implementación de los sistemas de inteligencia artificial.

2) Se debe garantizar la presencia equilibrada de mujeres y hombres en todos los órganos con poder de planificación y decisión en el proceso de creación y aplicación de los sistemas de inteligencia artificial. Este es uno de los principios impulsados por la Unión Europea que lo incluye en diferentes ámbitos, pero especialmente en investigación. Por ejemplo, en los programas de investigación Horizonte 2020 y Horizonte Europa 2021-2027 requieren la composición equilibrada en los equipos de investigación y en los de evaluación.
3) Eliminar los sesgos de género en el diseño de algoritmos y en las bases de datos sobre las que se nutre para garantizar que los datos usados para el entrenamiento de la inteligencia artificial son representativos de la realidad de la población para que se va a usar, asegurando que sean equilibrados. En este sentido, es importante destacar que la Ley europea de inteligencia artificial incluye la obligación de las empresas proveedoras de sistemas de inteligencia artificial de alto riesgo de garantizar la calidad de los datos de entrenamiento, incluyendo medidas como la realización de una evaluación previa de la disponibilidad, cantidad y adecuación de los datos necesarios.
4) Asegurar el funcionamiento no sesgado de las aplicaciones utilizadas para selección de personal, asignación del trabajo, evaluación del rendimiento laboral, promoción profesional, determinación de la retribución, fijación de turnos de trabajo o de control digital de los trabajadores.
5) Mejorar el proceso de concreción de los órganos y procedimientos de supervisión de su cumplimiento y, cuando proceda, de la aplicación de sanciones ante su incumplimiento.
6) Garantizar la efectividad de las normas de transparencia e información algorítmica.

En términos generales, resulta necesaria una regulación jurídica del proceso de diseño, desarrollo y aplicación de los sistemas de inteligencia artificial en la que no solo se garantice el respeto de los derechos fundamentales en general, sino que además se incluya una referencia explícita al principio

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de igualdad y no discriminación de las mujeres, que contemple y favorezca también un uso positivo de tales sistemas, en el sentido de convertirlos en herramientas para el empoderamiento (Senent y Ventura, 2021).

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"Techno-bias": un enfoque "gender-sensitive" en la salud y seguridad de los trabajadores

Valentina Aniballi[1]

1. Introducción

Cada vez es más notoria la necesidad de abordar el debate sobre la relación entre "inteligencia artificial y trabajo" no solo en términos puramente cuantitativos (por ejemplo, en relación con la posible pérdida de puestos de trabajo), sino también con vistas a la salud y la seguridad de los trabajadores, reduciendo su exposición a factores de riesgo que derivan de la tecnología. De hecho, el uso de sistemas automatizados (es decir, basados en la ejecución de uno o varios algoritmos) puede favorecer la reducción o eliminación de riesgos[2], introduciendo al mismo tiempo nuevos peligros para el trabajador (colisión con el cobot, estrés derivado de la vigilancia algorítmica constante, intensificación del trabajo, etc.). A nivel europeo, este tema involucra distintos marcos normativos, empezando por el Reglamento (UE) 2024/1689 del Parlamento Europeo y del Consejo, de 13 de junio de 2024 (*AI Act*), por el que se establecen normas en materia de sistemas automatizados, es decir sistemas que presentan características de autonomía y capacidad inferencial[3].

Esta breve contribución nace precisamente de la convicción de que varios factores afectan negativamente a la calidad del entorno de trabajo,

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[2] En este sentido se nombran: exoesqueletos que reducen el riesgo de sobrecarga biomecánica, gafas que detectan distracciones, cascos que controlan la fatiga, drones o visores de realidad virtual que evitan la exposición a zonas o materiales peligrosos, "trampas inteligentes" que identifican las curvas de población de los insectos, lo que permite reducir el uso de productos fitosanitarios y los riesgos de intoxicación asociados. La reconstrucción del marco ético aplicable es bastante compleja (entre otros, Pérez-Ugena Coromina, 2024).

[3] Más detalles en: Peruzzi, 2024a, pp. 78-81; Bassotti, 2024.

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especialmente si adoptamos una "visión holística" de la "seguridad laboral" que también tenga en cuenta adecuadamente la perspectiva de género vinculada a las nuevas tecnologías.

En primer lugar, cabe señalar que, aunque la literatura científica subraya que el teletrabajo tiene el potencial de mejorar la situación de las mujeres en el mercado laboral no pasa desapercibido al mismo tiempo que, en relación con determinados perfiles, las mujeres se ven más perjudicadas que los hombres. Tampoco hay que olvidar que la exposición a riesgos psicosociales suele tener una incidencia mayor en las teletrabajadoras que en los teletrabajadores[4].

Además, cabe destacar la presencia de sesgos de género en los sistemas de inteligencia artificial. En efecto, los datos utilizados para entrenar modelos de inteligencia artificial pueden contener sesgos, heredados de la sociedad, lo que conduce a resultados distorsionados. Se trata de sistemas que aprenden automáticamente extrayendo información de grandes cantidades de datos. Si estos datos no representan correctamente la realidad y la variedad humana, sino solo una parte de ella, o si reflejan patrones históricos discriminatorios, los estereotipos y prejuicios permanecen y se amplifican.

Tras aclarar algunos aspectos definitorios, se abordará el tema propuesto basándose en algunas coordenadas proporcionadas por el ordenamiento jurídico italiano.

2. Estereotipos de género en la tecnología

Un *bias* (sesgo) es una distorsión cognitiva resultante de percepciones erróneas, es decir, automatismos mentales que generan creencias y dan lugar a evaluaciones y decisiones que, en última instancia, conducen a la

[4] Véase el *Discussion Paper* (2024) publicado por la Agencia Europea para la Seguridad y la Salud en el Trabajo (European Agency for Safety and Health at Work) titulado "*Exploring the Gender Dimension of Telework: Implications for Occupational Safety and Health*". El *Discussion Paper* también incluye referencias a investigaciones que adoptan un enfoque interseccional, en la medida en que el género se entrelaza con otras divisiones sociales como la clase o el estatus socioeconómico, la raza y la etnia o la orientación sexual. Como subraya la propia Agencia, algunos estudios han revelado diferencias de género en la "ciberenfermedad", siendo las mujeres las que manifiestan síntomas con mayor frecuencia (*Safe and healthy work in the digital age – Healthy Workplaces Campaign 2023-2025*). En cuanto a la cuestión de género, cabe señalar también el informe de la UNESCO sobre "Inteligencia Artificial e Igualdad de Género", que ofrece un marco para una IA que favorezca la igualdad de género y el bienestar de las mujeres. Dicho informe plantea la necesidad de reforzar una serie de aspectos, entre ellos, el de aumentar la participación y el liderazgo de las mujeres en la educación, la investigación, el desarrollo y la aplicación de la IA, a fin de que se tengan en cuenta sus voces, experiencias y necesidades.

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formación de un pensamiento que contiene prejuicios y estereotipos. Es una forma de sesgo más o menos inconsciente o implícito que se produce cuando se atribuye apodícticamente ciertas actitudes y estereotipos a un determinado tipo o grupo de personas. Se trata de lecturas distorsionadas de la realidad que acaban influyendo, incluso significativamente, en nuestros procesos mentales.

Frente a un comportamiento que muestra favoritismo hacia un género en detrimento de otro, se suele hablar de "sesgo de género". Sin duda, ciertos conceptos evolucionan con el tiempo y lo mismo ocurre con la identidad de género, cuyo significado ya no es solamente binario[5].

Hablamos de "techno-bias" para referirnos a una distorsión cognitiva (sesgo de género) en la tecnología que puede presentarse en los procesos y en los algoritmos de inteligencia artificial (IA) y aprendizaje automático. Este sesgo puede manifestarse de diversas formas. Un ejemplo es la escasa representación de las mujeres y las personas no binarias en las carreras STEM (Ciencia, Tecnología, Ingeniería y Matemáticas); otro ejemplo es el desarrollo de tecnologías que responden en menor medida a las necesidades de determinados géneros o la aplicación de algoritmos que penalizan a determinados grupos demográficos (Unesco, 2017; Leavy, 2018).

Baste recordar que, con ocasión del Día Internacional de la Mujer 2024, el estudio de la UNESCO *Bias Against Women and Girls in Large Language Models* reveló la preocupante tendencia de los grandes modelos lingüísticos (LLM) a producir sesgos de género, así como homofobia y estereotipos raciales. El procesamiento del lenguaje natural (NLP – *Natural Language Processing*) y la traducción son ámbitos en los que los prejuicios sexistas son especialmente frecuentes (Floris, 2023, p. 46; Luccioli *et al*., 2020).

Otros ejemplos de la presencia de este problema en la PNL son los mecanismos de selección de *curricula vitae* puesto que, si un sistema de IA para la selección de personal se entrena con datos históricos en los que los puestos de liderazgo están ocupados predominantemente por hombres, podría desarrollar una preferencia por los candidatos masculinos.

Dicho de otro modo, los algoritmos de selección automática de candidatos pueden reflejar sesgos implícitos debido a los datos con los que se entrenan, favoreciendo a los candidatos masculinos para determinadas profesiones, como las profesiones del sector tecnológico[6].

[5] El género es una tipificación social, cultural y psicológica. Se trata deuna construcción social, a diferencia del sexo que caracteriza y define el aspecto biológico-anatómico de una persona.

[6] A este respecto, cabe señalar que el *software* de contratación utilizado por Amazon se basaba en un modelo que había "autoaprendido" a reconocer a los candidatos masculinos

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Al fin y al cabo, un algoritmo que deba gestionar y ejecutar procedimientos de selección de personal para un determinado tipo de trabajo, en el caso de que contenga uno o varios sesgos, puede formular una clasificación injusta y discriminatoria. La presencia de este y de otros tipos de sesgo en el marco de la IA produce sistemática e injustificadamente resultados menos favorables, más injustos o perjudiciales para un género que para otro.

En realidad, asimismo en lo tocante a la fase de desarrollo de la relación laboral, es importante que los sistemas utilizados no recurren a algoritmos que, en última instancia, puedan dar lugar a clasificaciones discriminatorias. Es bien sabido, por ejemplo, que algunas empresas multinacionales especialmente activas en el sector de las TIC utilizan la inteligencia artificial para adecuar las competencias de los empleados a los puestos vacantes o con una perspectiva de progresión profesional.

Esto es posible a través de plataformas de formación y desarrollo, que permiten a cada empleado construir de forma autónoma su propia trayectoria profesional con un plan de formación adjunto, lo que ayuda a simplificar las actividades operativas y a reforzar el empoderamiento del empleado de cara a su futuro. Además, estas plataformas suelen estar integradas en el sistema de gestión de procesos de RRHH. De este modo, la inteligencia artificial también ayuda a mantener actualizado el catálogo de las habilidades y los niveles de competencia de los empleados, pudiendo también sugerir cursos de formación en relación con el rol y la carrera profesional.

3. La perspectiva del ordenamiento jurídico italiano: posibles claves de interpretación

Basándose en la perspectiva holística de la seguridad en el trabajo mencionada en las páginas anteriores, el punto de partida en la legislación italiana es el artículo 2087 del Código Civil, en virtud del cual la obligación de seguridad que incumbe al empresario que "*está obligado a adoptar las medidas que, de acuerdo con la naturaleza particular del trabajo, la experiencia y la técnica, sean necesarias para proteger la integridad física y la personalidad moral de los trabajadores*". Es decir, se exige una interacción

como preferibles. Un modelo que se "entrenaba" a partir de un conjunto de datos construido sobre la base del currículum. Aunque el sexo o la etnia no formaban parte del conjunto de variables introducidas en el modelo, el algoritmo correlacionó de forma independiente (*proxy discrimination*) estas características con el rendimiento de los candidatos, reflejando y amplificando discriminaciones presentes en el contexto social. Sobre posibles formas de discriminación algorítmica, véase, entre otros: Barbera, 2021; Peruzzi, 2024a; Gaudio, 2024.

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dinámica entre el contenido de la obligación de seguridad y la evolución tecnológica, siendo esta tanto una posible fuente de nuevos riesgos (que deben ser evaluados y gestionados) como un parámetro para actualizar el nivel de diligencia exigido (Peruzzi, 2024a, p. 79).

Además, el artículo 28 del Decreto Legislativo 81/2008 obliga al empresario a evaluar todos los riesgos para la salud y la seguridad de los trabajadores, incluidos los relacionados con las diferencias de género, la edad y la procedencia de otros países.

La norma no exige que se consideren nuevos riesgos, sino que se realice un análisis global de los riesgos para la seguridad y salud en el trabajo, con el fin de determinar las medidas de prevención y protección adecuadas, teniendo en cuenta las características específicas de los propios trabajadores. La norma tampoco proporciona indicaciones sobre el método que debe emplearse, ni existen normas reglamentarias o técnicas que indiquen la vía metodológica a seguir.

Como ha observado la doctrina más atenta, aún hoy, en los documentos de evaluación de riesgos, se confunden las diferencias entre un género y otro con la protección de las madres trabajadoras, que, sin embargo, ya se contempla en una disposición legal específica (Decreto Legislativo n. 151/2001).

Asimismo, no es correcto hablar de "riesgo de género", porque la pertenencia a un determinado género no conlleva, en efecto, ningún riesgo. Se trata más bien de integrar la evaluación de todos los riesgos laborales desde una perspectiva de género, prestando atención a las diferencias resultantes tanto de las características particulares (biológicas, sociales y culturales) de hombres y mujeres como de la interacción que los trabajadores y las trabajadoras tienen dentro de la propia organización (riesgos organizativos y psicosociales).

Cabe recordar que en 2024, el INAIL[7], el Instituto nacional de accidentes de trabajo, publicó un informe que subraya la necesidad de analizar los riesgos laborales teniendo en cuenta las diferencias biológicas, sociales y culturales existentes entre hombres y mujeres (INAIL, 2024).

En este sentito, el INAIL recomienda "fotografiar" la situación de la empresa, es decir, definir algunos indicadores significativos (la población trabajadora diferenciada por sexo, igualmente en lo que atañe a los puestos ocupados, las funciones desempeñadas tanto en la empresa como en la gestión de la salud y la seguridad, el acceso a la formación/información no obligatoria, la posibilidad de desarrollo profesional, etc.). Además, el

[7] INAIL – Istituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro: *www.inail.it/portale/it/inail-comunica/pubblicazioni/catalogo-generale/catalogo-generale-dettaglio.2024.07.la-valutazione-dei-rischi-in-ottica-di-genere.html*.

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INAIL recomienda revisar las metodologías de evaluación de riesgos: en el análisis de determinados riesgos, la diferencia debida a las características antropométricas y fisiológicas es significativa, mientras que en otros riesgos (por ejemplo, organizativos y psicosociales) debe tenerse en cuenta el concepto más amplio que subyace al término "género". Igualmente, el informe reconoce la importancia de que todas las partes interesadas en el proceso de evaluación, incluidos los representantes de la seguridad de los trabajadores[8] y el médico competente, así como de permitir la participación activa de las mujeres en los procesos de toma de decisiones relacionados con la seguridad y la salud en el trabajo.

Sin embargo, la evaluación de riesgos se vuelve cada vez más compleja si se tiene en cuenta que, en el marco de la Ley de IA (*AI Act*), el proveedor de un sistema de IA tiene, en primer lugar, la obligación de comprobar si el sistema debe clasificarse como "de alto riesgo". En caso afirmativo, deberá determinar y evaluar los riesgos y establecer un sistema de medidas para gestionar tales riesgos (artículo 9). Se trata, en particular, de los riesgos conocidos y razonablemente previsibles en condiciones de uso correcto del sistema o de los que podrían surgir en caso de un uso indebido y razonablemente previsible del sistema. Se exige al proveedor que adopte prácticas adecuadas de gobernanza y gestión, incluyendo, entre otras cosas, un examen para evaluar posibles sesgos (obviamente pertinentes desde una perspectiva antidiscriminatoria, especialmente en el caso del aprendizaje automático), así como medidas para localizarlos, prevenirlos y mitigarlos (artículo 10). En particular, se requiere "*el examen atendiendo a posibles sesgos que puedan afectar a la salud y la seguridad de las personas, afectar negativamente a los derechos fundamentales o dar lugar a algún tipo de discriminación prohibida por el Derecho de la Unión, especialmente cuando las salidas de datos influyan en las informaciones de entrada de futuras operaciones*" (artículo 10, apartado 2, letra f). Además, se exige la adopción de "*medidas adecuadas para detectar, prevenir y mitigar posibles sesgos detectados con arreglo a la letra f)*" (artículo 10.2.g). A este respecto, es interesante señalar que el artículo 10, apartado 5, de la Ley de IA (*AI Act*) autoriza "excepcionalmente" (y en determinadas condiciones) a los proveedores a tratar categorías especiales de datos con arreglo al artículo 9 del RGPD "*en la medida en que sea estrictamente necesario para garantizar la detección y corrección de los sesgos asociados a los sistemas de IA de alto riesgo*". Por tanto, el proveedor está obligado a establecer un sistema de gestión de la calidad que garantice el cumplimiento del Reglamento (artículo

[8] El Representante de los Trabajadores para la Seguridad (RLS) y el Representante de los Trabajadores para la Seguridad Territorial (RLST).

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17), incluidos los mencionados sistemas de gestión de riesgos y de datos (Peruzzi, 2024b).

A este respecto, será útil considerar algunas de las soluciones de las que ya dispone el ordenamiento jurídico italiano.

3.1. Una mirada al "estado del arte"

Cada ordenamiento jurídico activa sus proprios "anticuerpos" para hacer frente a los retos que plantean – en el marco laboral – los cambios económicos, sociales y organizativos. Algunos de ellos, aunque no surgieron con el objetivo específico de solventar los problemas relacionados con la evolución tecnológica, pueden resultar útiles.

En este sentido, cabe mencionar el "Certificado Empresarial sobre Igualdad de género en Italia" (CEIG), una medida que ha sido fortalecida y revisada, en particular, a partir de las disposiciones reglamentarias dictadas en aplicación del PNRR. Tiene como objetivo reducir la brecha de género en lo que respecta a las oportunidades de crecimiento en la empresa, fomentar la adopción de políticas de igualdad a nivel de empresa y mejorar la posibilidad de acceso de las mujeres al mercado laboral, al liderazgo y a la armonización de tiempos de vida (artículo 46-*bis*, párrafo 1, del Decreto Legislativo n. 198/2006, Código de igualdad de oportunidades, modificado por la Ley n. 162/2021 – "Ley Gribaudo").

Está emitido por los organismos de certificación acreditados (según el Reglamento CE 765/2008) que operan sobre la base de la Práctica de Referencia UNI/PdR 125:2022[9] y de indicadores (Cultura y estrategia), con el fin de ayudar a concienciar a las empresas para que presten atención a estos perfiles, también a efectos de desarrollar buenas prácticas.

El procedimiento de obtención del Certificado se inicia de forma voluntaria y a petición de la empresa. Las empresas que consiguen este Certificado tienen derecho a un incentivo en forma de exención de cotización. Estas empresas pueden obtener una puntuación de bonificación para la evaluación – por parte de las autoridades titulares de fondos europeos, nacionales y regionales – de las propuestas de proyectos a efectos de la concesión de ayudas estatales para

[9] La práctica de referencia UNI/PdR 125:2022 define criterios, prescripciones técnicas y elementos funcionales para la certificación de la igualdad de género en las empresas. La práctica de referencia UNI/PdR 125:2022 es una forma moderna de "soft law" que pretende aumentar los niveles de madurez organizativa de las empresas en el ámbito de la igualdad; se presenta como un manual de cultura organizacional de la igualdad que debe inspirar a las empresas, pero también a las administraciones públicas, que aspiran a la certificación.

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cofinanciar las inversiones realizadas. Por último, en sus licitaciones, los poderes adjudicadores indican los criterios de bonificación que se proponen aplicar en la evaluación de las ofertas a favor de las empresas titulares del Certificado.

Además, el artículo 46 del "Código de igualdad de oportunidades", modificado por la Ley n. 162/2021, establece que las empresas que cuenten con más de 50 trabajadores están obligadas a elaborar, cada dos años, un informe[10] "*sobre la situación de los trabajadores y trabajadoras en cada una de las profesiones y en relación con la situación de la contratación, la formación, la promoción profesional, los niveles, los cambios de categoría o cualificación, otros fenómenos de movilidad, la intervención del Fondo de Garantía Salarial, los despidos, las prejubilaciones y jubilaciones, y las retribuciones efectivamente abonadas*". Para las empresas (públicas y privadas) de hasta 50 trabajadores, el informe se elaborará con carácter voluntario[11].

Si examina con mayor detenimiento, la cuestión del riesgo de discriminación vinculado al uso de procesos automatizados está adquiriendo cada vez más importancia a nivel nacional. En términos de información, la cuestión se aborda en el artículo 1-*bis* del Decreto Legislativo n. 152/1997, prestando especial atención a la protección de los trabajadores (por cuenta ajena y por cuenta propia) y a los sistemas automatizados de toma de decisiones y supervisión. La norma especifica que la información debe indicar los fines y objetivos de tales sistemas, su lógica y funcionamiento, las categorías de datos y los parámetros utilizados para programarlos o entrenarlos, incluidos los mecanismos de evaluación de las personas, las medidas de control de las decisiones automatizadas y los posibles procesos de corrección, las métricas utilizadas para medir estos parámetros y los impactos potencialmente discriminatorios de estas métricas.

Debe tenerse en cuenta también el artículo 30 del Código de Contratos Públicos (Decreto Legislativo n. 36/2023), en favor de los operadores económicos, que reconoce la posibilidad de que las "*stazioni appaltanti*" y los "*enti concedenti*" automaticen sus actividades recurriendo a soluciones tecnológicas, incluida la inteligencia artificial. Sin embargo, "*las decisiones*

[10] El informe se remite a las RSA (*Rappresentanze sindacali aziendali*). En el sitio Web del Ministerio de Trabajo se publica una lista de las empresas que han remitido el informe. La Inspección Nacional de Trabajo comprueba la veracidad de las denuncias. En caso de denuncia falsa o incompleta, se impone una multa de entre 1.000 y 5.000 euros.

[11] Cabe señalar asimismo el Decreto-ley n. 77, de 31 de mayo de 2021, "*Governance del Piano nazionale di ripresa e resilienza e prime misure di rafforzamento delle strutture amministrative e di accelerazione e snellimento delle procedure*", que, en su artículo 47, ha incluido la previsión de determinadas obligaciones a las que están sujetas las empresas que participan en contratos públicos.

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adoptadas mediante automatización respetarán los principios de […] *no discriminación algorítmica, por lo que el titular aplicará las medidas técnicas y organizativas adecuadas para evitar efectos discriminatorios contra los operadores económicos*". El apartado 4 establece que las "stazioni appaltanti" y los "enti concedenti" "*adoptarán todas las medidas técnicas y organizativas apropiadas para garantizar que se rectifiquen los factores que den lugar a datos inexactos y se reduzca al mínimo el riesgo de errores, así como para evitar la discriminación de las personas por motivos de nacionalidad, origen étnico, opiniones políticas, religión, creencias, afiliación sindical, características somáticas, estado genético, estado de salud, sexo u orientación sexual*" (Peruzzi, 2024b).

4. Perfiles de sostenibilidad social y breves observaciones finales

Bien entendido, hay que recordar que la desigualdad de género – en todas sus formas, incluidas las que se manifiestan a través de medios tecnológicos – supone un obstáculo real para el desarrollo sostenible.

De hecho, uno de los diecisiete Objetivos de Desarrollo Sostenible definidos por las Naciones Unidas y que los Estados se han comprometido a alcanzar para 2030 es la consecución, a nivel mundial, de la igualdad de género y el empoderamiento de todas las mujeres y niñas. En particular, el Objetivo 5 de la Agenda 2030 es lo suficientemente amplio para incorporar la adopción de cualquier medida que tenga como finalidad contrarrestar las formas de discriminación o la violencia de género. Llevando este razonamiento al extremo, podríamos hablar de violencia algorítmica cuando, por ejemplo, en los sistemas de inteligencia artificial ciertos "sesgos inconscientes" arrojan resultados discriminatorios.

Sentado lo anterior, cada vez parece más necesario relacionar la consecución de la igualdad de género con las indicaciones proporcionadas por el índice ESG (*Environment Social and Governance*), que es la síntesis de una serie de condiciones que hoy son fundamentales para una "buena empresa". El índice ESG se convierte así en una herramienta crucial para evaluar el rendimiento de las empresas en términos de sostenibilidad y responsabilidad social. En el factor "S", es decir, la cuestión de la sostenibilidad social, influyen contextos sociales, económicos y jurídicos que son variables, lo que hace difícil establecer una única dimensión "S" a escala mundial. Sin embargo, esa dimensión incluye transversalmente el tema de la igualdad de género.

En esta línea se sitúa la *Corporate Sustainability Reporting Directive*[12]

[12] Directiva (UE) 2022/2464 del Parlamento Europeo y del Consejo, de 14 de diciembre

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(CSRD), es decir, la Directiva europea que establece y formaliza un método inequívoco para medir e informar sobre la sostenibilidad corporativa[13]. Cada vez más empresas tendrán que adoptar gradualmente las ESRS (*European Sustainability Reporting Standards*) para elaborar su informe de sostenibilidad.

Por lo que respecta a los factores sociales, la CSRD exige informar sobre aspectos como las condiciones de trabajo, la participación de los interlocutores sociales, la negociación colectiva, la igualdad, la no discriminación, la diversidad y la inclusión y los derechos humanos. No obstante, la información exigida por la Directiva no se limita a elementos descriptivos ni a señalar los objetivos previstos, sino que debe ir acompañada de la identificación de los "efectos adversos, reales y potenciales" de las actividades de la empresa sobre su propia mano de obra y la mano de obra de la cadena de valor en relación con todos los factores y cuestiones sociales indicados por la propia Directiva (Treu, 2024).

Precisamente porque a los "*arquitectos del nuevo trabajo*" se les exige competencia en el "*diseño integrado de organización, tecnología y trabajo*" (Butera, 2022)[14], no cabe duda de que los nuevos desafíos que se plantean tienen que ver con los sesgos (ocultos) en los sistemas de IA, sobre todo desde la perspectiva más amplia – aunque difícil de alcanzar – de la sostenibilidad.

Quizá pueda parecer demasiado ambicioso imaginar una herramienta de autoaprendizaje flexible y dinámica, que sea capaz de poner de manifiesto situaciones potenciales de riesgo a partir de los datos recogidos y sugerir estrategias adecuadas de gestión y prevención. Con una visión más evolucionada, la IA se utilizaría para mejorar las condiciones de trabajo[15], es decir, para entrenar los algoritmos con un conjunto de datos que sea lo más

de 2022, por lo que respecta a la presentación de información sobre sostenibilidad por parte de las empresas. Cabe mencionar el Decreto Legislativo n. 125/2024, de aplicación de la Directiva (UE) 2022/2464. El legislador italiano introduce otros aspectos que afectan a las empresas que operan en Italia. En concreto, dicho Decreto Legislativo exige a las empresas que informen a los representantes de los trabajadores en el nivel adecuado, así como que examinen con ellos la información pertinente y los medios para obtenerla y verificarla. A su vez, los representantes de los trabajadores comunican su dictamen, en su caso, al órgano de administración y supervisión.

[13] Directiva (UE) 2024/1760 del Parlamento Europeo y del Consejo, de 13 de junio de 2024.

[14] F. Butera habla de "procesos de cambio participativos" abiertos a empresarios, gestores privados y públicos, investigadores y científicos, profesores, sindicalistas y, más en general, a personas.

[15] Según el proyecto de ley, la IA puede utilizarse para mejorar las condiciones de trabajo, siempre que se respete el principio de equidad y no discriminación. Asimismo, se prevé la creación de un Observatorio.

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diverso y representativo posible, supervisando constantemente los resultados obtenidos para interceptar posibles sesgos y rectificar los algoritmos. Esto significa enseñar a los sistemas de inteligencia artificial a reflejar nuestra sociedad en toda su diversidad, y no solo ciertos aspectos de ella, pues, de lo contrario, acabaríamos perpetuando por defecto la tendencia a los prejuicios y la discriminación.

Pues bien, si bien todo eso, por un lado, puede reducir la desconfianza hacia la tecnología en favor de una visión cada vez más holística de la seguridad y la salud de los trabajadores, existe, por otro lado, otra cuestión espinosa que llama la atención de los intérpretes: definir el perímetro de la obligación de seguridad que incumbe al empresario sobre todo cuando se exige una interacción dinámica entre el contenido de la obligación de seguridad y la evolución tecnológica.

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La efectividad de las prácticas corporativas del sistema de valores ESG y el futuro de las relaciones de empleo en Brasil

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1. Introducción

La sigla anglosajona *ESG – Environmental, Social and Governance* (Medio Ambiente, Justicia Social e Gobernanza Ética), que significa el conjunto de prácticas ambientales, sociales y de gobernanza ética ha llamado la atención de las categorías económicas, es decir, de las empresas en general interesadas en la obtención de lucros en el mercado de acciones. De hecho, las organizaciones empresariales que están preocupadas y desean atingir criterios de sostenibilidad, de modo a obtener altas calificaciones como socialmente responsables y sostenibles deben adoptar y desarrollar buenas prácticas. Los criterios utilizados por los inversores, en el momento de la realización de sus aportes de capital, son de verificación respecto de dichas calificaciones, de manera a comprobar si las empresas adoptan realmente o no las prácticas sostenibles, llevándose en consideración la *pluridimensionalidad* de esta misma sostenibilidad (Oliveira, Cecato, 2016). Tanto es así, que la incorporación de temas relacionados al *ESG* en el ambiente corporativo ya se ha convertido en verdadera estrategia y modelo de negocios, donde se une propósito y lucro. La cuestión indisociable es la tendencia a la generación de duplos códigos de conductas, por empresas que desean apenas obtener lucros, en el contexto del mercado de capitales, y expandir sus marcas. Dicho factor puede que acabe por incrementar la producción de códigos de conductas antiéticos en realidad, existentes

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puramente para satisfacer criterios superficialidades, y a la vez, obtener lucros. Por eso, se hace necesario involucrar la discusión de dichas cláusulas sostenibles relacionadas a la consecución, principalmente del "S" de la sigla ESG, en la pauta de las negociaciones colectivas de trabajo, entre categorías económicas y profesionales. Según Bobbio (1919) "*los derechos no nascen todos de una vez; nascen cuando deben o pueden nascer*". En este sentido, no es demasiado afirmar el real sentido del "S" que nos toca, y que constituye uno de los pilares de una nueva gran discusión, tan cara para la sociedad como un todo, que es la creación de un sistema sostenible para el futuro de las próximas generaciones.

2. Alcance del "S"

El ideal de Justicia Social surge en el año de 1946, con la primera revisión de finalidades de la Organización Internacional del Trabajo (OIT), proclamadas en Versailles (1919) cuando fue creada, en el seno de la Conferencia de la Paz. Como predecía KANT (1795) en su obra icónica *La paz perpetua*, es necesaria una organización internacional de los Estados como única forma de garantizar la protección de los derechos del hombre, *y por ande la paz perpetua*[3]. Dicho en otras palabras, la Paz mundial y la Justicia Social, siguen siendo actuales en el presente escenario del Derecho Internacional Público y del Trabajo especialmente. La búsqueda garantista de un valor mínimo civilizatorio, en el ámbito de las relaciones de trabajo, la protección de los derechos individuales y colectivos de los trabajadores es constante (Silva, Santos, 2018).

A partir de entonces un nuevo modelo debe prevalecer, el de solidaridad, igualdad y tolerancia. Para hablar de una verdadera cultura de derechos fundamentales no basta no tomar partido, teniendo en cuenta la pluralidad de creencias y pensamientos en una sociedad, casi controlada por algoritmos (Harari, 2024, p. 309 ff.), hay que asegurar que dichas posturas sean respetadas y no desconocidas.

Todavía, hace falta mencionar el documento matriz de todo el movimiento hacia al cambio del sistema de creencias con relación a la temática de la

[3] LAFER en su presentación de la obra traducida al portugués (BOBBIO, 2002) comenta el prefacio de la edición italiana *Per la Pace Perpetua* (Org. Nicolao Merker, Roma, Riuniti, 1985), realizado por el mismo autor y añade que Kant fundamenta el derecho cosmopolita en el derecho de hospitalidad universal y apunta que una de sus características será la de una época de la historia en que la violación del derecho ocurrida en un punto de la tierra, sea sentida en todos los demás.

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sostenibilidad. La Agenda de sostenibilidad 2030 de la ONU, adoptada en la Asamblea General de la ONU, el año de 2015: "Transformando nuestro mundo: la agenda 2030 para el desarrollo sostenible". Dicho documento es un guía para acciones de la comunidad internacional para los próximos años, y también un plan de acción para todas las personas y el planeta que es colectivamente creado para colocar el mundo en un camino más sostenible y resiliente hasta el 20230.

Importante también reafirmar el propósito en este documento, conforme el objetivo 8º que se dedica al desarrollo sostenible en el trabajo, que reafirma la necesidad de se concretar el trabajo digno y el crecimiento económico. El desarrollo sostenible se caracteriza por la preocupación en no comprometer las generaciones futuras a satisfacer sus necesidades. ¿Qué empleo deseamos para las generaciones futuras?

2.1. El surgimiento de la sigla ESG en el mercado financiero: un necesario cambio de mentalidad

La primera vez que esta sigla surgió fue en 2004, en el Informe *Who cares Wins*, publicado por el *Pacto Global de la Organización de las Naciones Unidas* (ONU) en conjunto con el Banco Mundial para demostrar a las empresas la necesidad de ajuste en sus estrategias y operaciones a los principios universales correspondientes a los Derechos Humanos, Trabajo, Medio Ambiente y Anticorrupción, así como para el desarrollo de acciones que contribuyeran para el enfrentamiento de los desafíos de la sociedad en el recto de implementación de dichos principios. La atención para la aplicación de las prácticas *ESG* ha sido provocada por Kofi Annan, a los 50 CEO's de grandes instituciones financieras sobre como integrar fatores sociales, ambientales y de gobernanza en el mercado de capitales. En seguida, el Programa das Naciones Unidas para el Medio Ambiente – Iniciativa Financiera (UNEP-FI) publicó el informe *Freshfield*, que mostraba la importancia de la integración de la *ESG* para evaluación financiera. Luego, en 2006, fueran establecidos los *Principios de la Inversión Responsable (PRI*) que, con apoyo de la ONU, trajeron más clareza cuanto la relevancia de los temas ambientales, sociales y de gobernanza.

Así, el alcance del *S* en el primer momento pasa por la concientización de implementación de principios volcados a la sostenibilidad y de una mudanza de mentalidad respecto de los derechos humanos del trabajo, cuya la centralidad es la dignidad de la persona humana del trabajador. Los 10 principios universales definidos por la iniciativa del Pacto Global de la ONU, son:

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1) la protección y apoyo pelas empresas de los derechos humanos reconocidos internacionalmente;
2) asegurar su no participación en violaciones de esos derechos;
3) apoyo de las empresas a la libertad de asociación y el reconocimiento concreto del derecho a la negociación colectiva;
4) eliminación de todas las formas de trabajo forzado o compulsorio;
5) abolición efectiva del trabajo infantil;
6) eliminación de la discriminación en el empleo;
7) apoyo por las empresas de una abordaje preventiva a los desafíos ambientales;
8) desarrollar iniciativas para promover mayor responsabilidad ambiental;
9) incentivo al desenvolvimiento y difusión de tecnologías ambientalmente amistosas;
10) el combate de la corrupción.

Relevante es el papel del *compliance* (Carloto, 2021) en los ambientes corporativos, justo para garantizar la observancia de los derechos humanos del trabajo, así como fiscalizar la existencia o no de códigos duplos de ética, una vez que, en el ámbito del Derecho del trabajo, los códigos de conductas se asemejan a los auténticos reglamentos empresariales correspondientes al surgimiento de la sociedad empresarial y comercial, como organización primera del poder directivo del empleador. Los canales de comunicación deben ser fiables, para que los trabajadores no sufran represalias, o sean perseguidos. En Brasil es despido es libre, debido a la laguna legal del art. 7, I, de la Constitución Federal de 1988, con lo cual ya se habla de *despidos humanizados*, una vez que la denuncia vacía del contracto es practicada mayoritariamente.

El cambio de mentalidad es inevitable, por lo tanto, en las prácticas de las sociedades empresariales y comerciales, una vez que se pretenda obtener las ventajas en el mercado de capitales inherentes a la adhesión a los principios del Pacto Global que se propone a beneficiar las empresas conscientes de su Responsabilidad Social Empresarial, además de los valores intrínsecos a la ESG.

3. El acervo legislativo e iniciativas del poder público convergentes a la ESG

La Constitución Federal de 1988, de Brasil, establece el estado democrático de derecho, donde el progreso económico este asociado a lo social, de manera que los derechos humanos y derechos constitucionales del trabajo son previstos en articulados propios. Brasil ha ratificado todos los Convenios

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de la OIT integrantes de la Declaración universal de 1998 de la OIT, con excepción del Convenio 87, sobre la libertad sindical, teniendo en cuenta, la propia organización sindical prevista en la CLT, que limita la adhesión de los trabajadores a sindicatos fuera de la base territorial de sus contratos (Silva, Horn, 2009). Los Pactos internacionales sobre derechos humanos (DUDH, PIDCP, PIDESC, Pacto de San José etc.) han sido ratificados.

El acervo legislativo es convergente a la ESG, apenas se puede criticar modificaciones realizadas a raíz de la Reforma Laboral del 2017 (Ley 13.467/2017) que ha promocionado modalidades atípicas de contrato, como por ejemplo el contrato intermitente de trabajo (art. 443, §3º y 452-A, de la CLT) que por supuesto, es precario. Con respecto a la posibilidad de subcontratación en cadena (art. 4-A, §1º, de la Ley 6.019/74, modificada por la Ley 13.429/2017) también es criticable el ordenamiento jurídico infra constitucional. También modalidades atípicas de contratos profesionales han surgido, con la Reforma Laboral de 2017, como la figura del autónomo exclusivo, en cláusula negativa de vinculo de empleo de trabajador por cuenta ajena subordinado (art. 442-B de la CLT), contrariando el principio de la *primazia* de la realidad, donde constatase que el Derecho del Trabajo ejerce "*una fuerza de atracción en cuanto a la extensión del ámbito subjetivo*", esto es, en cuanto al concepto de trabajador profesional que pierde "sus adjetivos" de trabajador por cuenta ajena desvelando su vocación de Derecho de actividad profesional (Monereo, 1996, p. 79).

Con respecto al Derecho colectivo del trabajo, la reforma laboral ha privilegiado la negociación colectiva, como forma de flexibilizar las normas laborales, a la vez que el derecho sindical ha padecido un proceso de inestabilidad por modificaciones en la forma de recaudación de fondos para el costeo de las entidades obreras. El Convenio 98 de la OIT (OIT do Brasil, 1994) ha sido puesto a prueba en un contexto de crisis de representatividad aliada a la desestructuración de las entidades obreras y profesionales. Las libertades de asociación y filiación han sido afectadas por el proceso de burocratización de adhesión (Hazan, Fonseca, 2021). De forma que el diálogo social, en lo que se refiere al propio *derecho vivo* que presupone la autonomía de la voluntad colectiva (Giugni, 2004; Da Rocha Brandão, 2016; Barbato, 2018) ha sufrido desgaste. Sin embargo, es oportuno mencionar que, en la medida en que la negociación colectiva es alzada a la categoría de instrumentos preferentes de reglamentación laboral, los sindicatos aparecen justos en su papel de protagonistas en las relaciones colectivas de trabajo, reforzando, como consecuencia, la posibilidad de desarrollo de las ideologías conexas al derecho sindical, como se estudia en teorías e ideologías en Tarello (2002).

Atendiendo a ideales también relacionados y convergentes a la ESG, en julio de 2023, ha sido publicada la Ley 14.611/2023, que trató de la igualdad

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salarial y de criterios remuneratorios entre hombres y mujeres, por esta se garantiza que mujeres y hombres serán remunerados igualmente para trabajos idénticos o en el ejercicio de las mismas funciones (arts. 1º y 2º), también ha sido modificada la CLT (art. 461, §6º) para obligar el pago de las diferencias salariales, en caso de discrepancia (art. 3º), en el art. 4º de la ley ha sido determinado mecanismos de desarrollo de políticas de promoción e igualdad salarial que se identifican con aquellos utilizados por el *compliance* (canales de denuncia, transparencia en informes salariales, fiscalización contra la discriminación salarial, incremento de la capacitación de las mujeres).

Por otro lado, tampoco se puede olvidar la contribución del *Programa de Empleos Verdes* de la OIT (Oliveira, Cecato, 2016)[4], debido a los cambios climáticos, también ha sido desarrollado en Brasil, desde luego, una iniciativa bastante valiosa de la OIT. Por ello, las políticas corporativas de la ESG prescinden de cierto grado de espontaneidad en algunos aspectos y una autentica consciencia de su Responsabilidad Social Empresarial.

3.1. El protagonismo del MPT hacia la efectividad de la Justicia Social

La búsqueda del "S" en las relaciones de empleo involucra la actuación de la institución pública de máxima importancia en la estructura política brasileña: el *Ministério Público do Trabalho* (MPT). La Constitución brasileña dispone, en sus artículos 127 y 128, I, sobre la creación legal de esta institución[5]. El órgano posee actuación primordial en la defensa de los derechos colectivos del trabajo (Miessa, 2024, p. 97), o sea, en la defensa de los intereses de un conjunto despersonalizado de trabajadores. El MPT puede ejercer dicha función de defensa del interés público de tres formas:

[4] Cf. p. 215: "*O desenvolvimento do Programa empregos verdes estão sendo assistido, pela OIT, em mais de 30 países em desenvolvimento (inclusive o Brasil). A assistência presta-se, dentre outras possibilidades a: propor programas de formação nos níveis internacionais, regionais e nacionais em colaboração com a unidade de formação sobre empregos verdes do CIF-OIT (Centro Internacional de Formação da OIT); elaborar diagnóstico e estabelecer priorizações identificando os sectores econômicos que destruam de elevado potencial para empregos verdes e orientar a formulação e execução de políticas eficazes nos níveis nacional e setorial para a criação de empregos verdes*" (OIT, 2016).

[5] Cf.: "*Art. 127. O Ministério Público* é *instituição permanente, essencial* à *função jurisdicional do Estado, incumbindo- lhe a defesa da ordem jurídica, do regime democrático e dos interesses sociais e individuais indisponíveis.* […] *Art. 128. O Ministério Público abrange: I – o Ministério Público da União, que compreende:* […] *b) o Ministério Público do Trabalho*".

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1) como "fiscal de la ley" participando de procesos dotados de "interés público" (eg: acciones de accidente de trabajo/discriminación y etc.);
2) como autor de acciones colectivas y actos investigativos;
3) como órgano pedagógico por medio de actos normativos, cómo, por ejemplo: *notas técnicas*, *portarías* y *recomendaciones*.

La expresión "medio ambiente" abarca mucho más que el ecosistema que contiene el entorno de una localidad o territorio (DELGADO, 2018, p.744). La lucha por condiciones justas y favorables al trabajo y la protección del cuerpo humano que trabaja implica en el establecimiento de un procedimiento específico de tutela a la altura de la preservación de la dignidad humana, así como la preservación de los derechos personalísimos de los trabajadores. Según SUPIOT (2007) *una tutela que dignifique los cuerpos que trabajan más allá de las máximas simplistas*. Decir apenas que "*el trabajo dignifica el hombre*" es ignorar la necesidad de un Medio Ambiente de Trabajo digno y apto a asegurar, de forma efectiva el derecho a la salud y la vida de los trabajadores. No se puede ignorar que el ser humano, como *ser psicosocial*, desarrolla enfermedades físicas y psicológicas, dentro del ambiente de trabajo[6].

La prevención de los riesgos laborales en el medio ambiente de trabajo ya constituye, incluso, objeto de pesquisa del área de derecho ambiental del trabajo. Desde esta perspectiva, se puede vincular algunos principios básicos, por ejemplo, *prevención, precaución, no adjetivación y monetización de los riesgos*, véase Mello (2008) y Moreira (2015).

El MPT realiza acciones coordinadas hacia la concretización del medio ambiente del trabajo adecuado para todo y cualquier trabajador, así como se posiciona en favor de la constante ampliación de alcance material de los derechos sociales. La actuación del MPT no se limita a las relaciones de empleo declaradas, las típicas que involucran el trabajador por cuenta ajena, sino también todo tipo de trabajador, es decir aquellos que se encuentran al margen del contrato de trabajo. La protección social de los motoristas por aplicativos[7], la lucha contra el *trabajo esclavo contemporáneo*[8], la

[6] Así, en el año de 2023 el síndrome de *Burnout* pasó a ser incorporada à lista da OMS de las enfermedades ocupacionales (CID-11 QD85).

[7] El MPT enjuició diversas demandas contra plataformas de aplicativo *Uber*, *99*, *Rappi* en la búsqueda del reconocimiento de los derechos laborales de los motoristas de aplicativos, así como publicó *notas técnicas* sobre eventuales derechos, disponible en: mpt.mp.br/pgt/noticias/nt-plp-12-2024.pdf (acceso: 03.01.2025).

[8] Más allá de las demandas represivas e indemnizatorias fueran creadas, el campo preventivo, la *Coordenadoria Nacional para a Erradicação do Trabalho Escravo (Conaete)* y, posteriormente, *o Observatório Digital do Trabalho Escravo* para monitorear el tráfico

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defensa de los derechos sociales en el contexto excepcional de la Pandemia da Covid-19[9], el activismo constante por la ratificación de los Convenios de la OIT y el combate de accidentes de trabajo[10], también son de interés de este órgano. Concretamente desde la actuación en el desastre de la ruptura de la barrera de la mina *Córrego do Feijão*, de responsabilidad de la empresa *Vale do Rio Doce*, en *Brumadinho,* en el Estado de *Minas Gerais,* el 25 de enero del 2019, el cuarto más grande desastre ambiental de la historia, habiendo victimizado de forma letal 250 trabajadores[11], así como en las operaciones rescates, que han sacado más de 1.600 trabajadores de *condiciones de trabajo análogas à la esclavitud* en diversos Estados brasileños a lo largo de los últimos 4 años[12].

Indudablemente, el MPT, por lo tanto, actúa como una muela propulsora en la efectividad de los derechos sociales. Mucho más que un órgano fiscalizador del poder público respecto a las supuestas violaciones de los derechos laborales, o de enjuiciamiento de demandas preventivas y represivas. La publicación de notas técnicas, la realización de escuchas institucionales activas de los interlocutores del diálogo social ante el poder público, hacen que el MPT sea de máxima relevancia en la efectividad de los derechos sociales en Brasil. A modo de conclusión se verifica que el interés por la concreción de la Justicia Social, por parte de este órgano, sea convergente a la dimensión social de la ESG.

de personas en situación de trabajo forzado en Brasil, disponible en smartlabbr.org/trabalhoescravo (acceso: 03.01.2025).

[9] Han sido publicadas diversas *portarias* y *notas técnicas* con respecto al teletrabajo, entrega de suministros de protección específicos (alcohol gel/mascarillas) y enfoque en la negociación colectiva por encima de la previsión legal de las *Medidas Provisórias* (art. 62 de la Constitución Federal de 1988) laborales editadas en el período pandémico, que flexibilizaban normas constitucionales respecto al Derecho del Trabajo, permitiendo acuerdos en los contratos de trabajo individuales, disponible en *www.prt23.mpt.mp.br/informe-se/noticias-do-mpt-mt/1287-coronavirus-veja-aqui-as-notas-tecnicas-e-as-recomendacoes-do-mpt* (acceso: 03.01.2025).

[10] Fue creado el *Observatório de Segurança e Saúde no Trabalho* con objetivo de promover diligencias en favor del medio ambiente del trabajo "*guiada por dados*", disponible en smartlabbr.org/sst (acceso: 3.01.2025).

[11] En este caso, hubo enjuiciamiento inmediato de *Ação Civil Pública* buscando la reparación en beneficio de las familias de las víctimas y obtuvo un acuerdo de cerca de R$ 700.000,00 (setecientos mil reales) de danos morales para cada familiar de 1º grado y R$ 200.000,00 (doscientos mil reales) para los demás así como de, un mínimo, de R$ 800.000,00 (ochocientos mil reales) para cubrir los perjuicios materiales de eventuales dependentes, disponible en www.prt3.mpt.mp.br/comunicacao/noticias-do-mpt-mg/1072-barragens (acceso: 03/01/2025).

[12] Disponible en *agenciagov.ebc.com.br/noticias/202408/maior-operacao-da-historia-brasil-trabalho-escravo-resgata-593-trabalhadores*, (acceso: 03.01.2025).

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4. Actualidad sobre empleabilidad, desempleo y perspectiva laboral

En que pese la existencia del acervo legislativo convergente del "S", así como de la actuación contundente del MPT en su consecución, la realidad del mercado laboral queda lejos de satisfacer los rectos de la sostenibilidad en el empleo. Todavía no hay implementada, en las relaciones de empleo, la mejor práctica de la Agenda del Trabajo Digno y tampoco la adecuación del medio ambiente del Trabajo puede ajustarse pacíficamente ante las exigencias de las normas de prevención de riesgos laborales. La herencia del período de esclavitud, la división social del rol de género y la propia construcción inicial de los derechos sociales en Brasil (obtenidos en el contexto de amplio autoritarismo estatal) son cuestiones estructurales que hace falta acordar y tenerse en cuenta respecto al tema de la efectividad de los derechos sociales (Rodrigues Jr, 2019, pp. 41-44) y que hasta hoy, dificulta el establecimiento de un derecho colectivo del trabajo no corporativista preocupado en la búsqueda de mejores condiciones de trabajo (Romita, 2001, p. 57).

Los principales elementos que nortean las políticas ESG en las relaciones de Trabajo son:

1) el cumplimiento de las normas laborales, con enfoque en las reglas de medicina y seguridad en el trabajo;
2) incentivos efectivos a la adopción de medidas que promocionen la diversidad e inclusión;
3) utilización responsable y cautelosa de los medios de comunicación y estrategias de marketing respecto a la exposición de los trabajadores;
4) utilización de sistemas de gobernanza corporativa enfocado en la prevención y prohibición de conductas discriminatorias (raza/género/etnia/religión y etc.) y atentatorias a la dignidad de los cuerpos que trabajan (acoso sexual y acoso moral);
5) la preservación de criterios éticos claros, mediante publicación de ideas de misión, visión y valores, que impidan la corrupción en el medio corporativo[13].

Cuanto, al cumplimiento de normas laborales, aunque el desempleo en el país esta em baja histórica[14] la informalidad y la autonomía permanecen implacablemente en el seno de la organización social brasileña. Más de 40

[13] *valor.globo.com/empresas/esg/artigo/diretrizes-esg-no-ambito-trabalhista-opcao-empresarial-ou-questao-de-sobrevivencia.ghtmlsobrevivencia.ghtml* (acceso: 03.01.2025).

[14] Disponible en *www.cnnbrasil.com.br/economia/macroeconomia/desemprego-recua-*

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millones (2/5 de la población activa) están en la informalidad, viviendo relaciones de trabajo autónomo o para subordinado al margen de la protección laboral (Delgado, 2006, pp. 141-143). Si el cumplimiento de la ley ya es una dificultad mismo ante aquellos que son empleados indiscutiblemente, la laguna del paraguas protector de la legislación laboral para 2/5 de la población ocupada es bastante sintomática de un sistema que autoriza la convivencia de altos cargos ampliamente protegidos con autónomos económicamente vulnerables, al margen de una mínima protección social (Mannrich, 2015, pp. 249-251).

Con respecto a la inclusión hay muchos puntos de conflictos. En Brasil, aunque exista una legislación protectora para las personas minusválidas e, incluso, una previsión expresa de reserva de puestos de trabajo (Art. 93 da Ley n. 8213/91[15]) hay un alto índice de violación de la ley[16]. Igualmente, hay previsión de igualdad entre hombres y mujeres, todavía, el informe *Global Gender Gap Report* de 2023 indica que ni siquiera en 100 años será posible alcanzar la igualdad definitiva entre géneros en el medio no ambiente de trabajo (WEF, 2023, p. 5). A pesar de que sean la mayoría de la población, las mujeres representan apenas 43% de la fuerza de trabajo brasileña[17] y, conforme informe de transparencia salarial, reciben en media 19,4% menos para realizar las mismas funciones que hombres[18]. La lupa en la cuestión racial es aún más impar, puesto que mujeres negras reciben 46% menos que hombres blancos y 34% menos que mujeres blancas[19]. A lucha contra el acoso sexual y el racismo en el medio ambiente de trabajo por códigos y guías de buenas prácticas es fundamental para la efectividad del "S".

Aunque existan importantes conquistas legislativas en el campo del Derecho antidiscriminatorio, es fundamental tener en cuenta que es cada

a-61-menor-patamar-do-trimestre-encerrado-em-novembro-na-serie-historica/ (acceso: 03/01/2025).

[15] Cf. "*Art. 93. A empresa com 100 (cem) ou mais empregados está obrigada a preencher de 2% (dois por cento) a 5% (cinco por cento) dos seus cargos com beneficiários reabilitados ou pessoas portadoras de deficiência, habilitadas, na seguinte proporção: I – até 200 empregados……2%; II – de 201 a 500……3%; III – de 501 a 1.000……4%; IV – de 1.001 em diante……5%*".

[16] Pesquisa da Unicamp (Universidad Federal de Campinas) ha revelado que 82,4% de las empresas paulistas dejaron de cumplir con a Ley de Cotas. Disponible en: *unicamp.br/unicamp/ju/noticias/2022/09/30/mais-de-80-das-empresas-paulistas-descumpriram-cota-para-contratacao-de/* (acceso: 03.01.2025).

[17] Disponible en: *www.gov.br/trabalho-e-emprego/pt-br/noticias-e-conteudo/2024/Marco/mulheres-no-mercado-de-trabalho-uma-evolucao-constante-rumo-a-igualdade* (acceso: 03.01.2025).

[18] *Ibidem*.

[19] *Ibidem*.

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vez más dura la flexibilización y, asimismo, la desconstrucción de cláusulas pétreas constitucionales respecto de los derechos fundamentales (salario mínimo/igualdad salarial/ intangibilidad salarial) de los trabajadores (Delgado, Amorim, 2020, p. 16)[20]. De estas tendencias flexibilizadoras una que interesa directamente a este trabajo es la prohibición de isonomía salarial (es decir, la autorización de la discriminación salarial) entre trabajadores por cuenta ajena y subcontratados, que ejerzan la misma actividad en favor de la misma empresa y en el mismo local de trabajo, en este caso identificase la *terceirização interna* (Viana, 2017, pp. 56 ff., 66 ff.), que antes de la Reforma Laboral del 2017 (Ley n. 13.467) era considerada ilícita en las actividades esenciales de la empresa, y todo ello, en razón de la defensa del sacrosanto derecho fundamental de libertad de empresa y del principio de la libre iniciativa[21].

El contexto agudizado de flexibilización ha demostrado que el camino hacia la efectividad del "S" no depende solo del cumplimento de la ley, sino de la propia espontaneidad del poder directivo en desarrollar políticas corporativas que atiendan a los criterios de la Agenda de Sostenibilidad, la cual nos hace siempre pensar en las generaciones futuras.

5. Conclusión

Brasil posee un territorio continental, y como parte de ello, se encuentra la floresta amazónica, que mundialmente es reconocida como el pulmón del mundo, por lo tanto, los temas volcados a la preservación ambiental son de relevancia exponencial, y es precisamente en este contexto, que las miradas de la comunidad internacional se vuelven hacia nuestro país.

A modo de conclusiones, se puede afirmar que el debate sobre la sostenibilidad no puede quedarse al margen de las cuestiones laborales, sino más bien en el meollo, porque sostenibilidad no es apenas hacer una obra

[20] Cuanto, al salario mínimo legal vigente por la política monetaria del país, el trabajador a tiempo parcial (OJ 356 da SDI-I do TST) y el trabajador intermitente (art. 452-A de la *Consolidação das Leis do Trabalho-CLT*) pueden ganar menos que un salario-mínimo desde que receban una "hora mínima" proporcional al mínimo mensual, los trabajadores encarcelados (art. 29 da Ley de *Execuções Penais* de Brasil) y los militares (Ley 13.954/2019) posen salarios-mínimos por debajo del piso de los demás trabajadores. En este caso, el STF no camina al lado del Derecho del trabajo garantista, teniendo en cuenta que dichos dispositivos legales han sido juzgados como siendo constitucionales: ADPF 336 (encarcelados), ADI 5826 (intermitentes) y SV 6 (militares).

[21] Véase Sentencia del STF, en el RE-635.546, Pleno, Rel. Marco Aurélio Mello (vencido), *Brasília*, *Dje* de 27.03.2021, Tema de Repercusión General 383.

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arquitectónica en una empresa para que parezca moderna, no es crear una placa de sanitarios comunes para hombres y mujeres, más sin cuestionar en el seno del dialogo social, junto a los interlocutores, mejores condiciones de vida y trabajo, verdaderos códigos de conduta, una gobernanza ética y responsable.

La cuestión laboral esta centrada en el cambio de mentalidad, hacer con que las mejorías de condiciones de trabajan dejen de ser un pasivo laboral, y si una posibilidad de ganar contribuyendo para un mundo mejor, las empresas que se filian a estas ideas son las que están dispuestas a hacer la diferencia. Las agencias calificadoras y sellos de calidad deben de ser consecuentes, ante todo. Esto es menos que un grano de arena.

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Artificial intelligence, protection of workers' rights and trade union participation

Eufrasia Sena[1]

1. Introduction

Nowadays the artificial intelligence (hereinafter AI) is a real component of human life and even if it is able to simplify the performance of various tasks, on the other side, it seems to "govern" many aspects of the working, social and relational life of everyone (De Santis, 2024)[2].

In recent years we are witnessing a significant increasing of the use of artificial intelligence in company life, with the most varied purposes: cost reduction, increasing the level of flexibility and speed, improvement of the quality and hr management too. Indeed, the AI is able to regulate the entire productive mechanism, such as working hours, intensity of performance, pay rate, career progression, up to choices about the termination of the relationship, with implications which involve the life of the employees (Pisano, Nastari, 2024; Sena, 2024).

The delegation of complex tasks and decisions to a machine that is other than "us", raises multiple legal questions, relating to the limits to be placed on digital intermediaries, as well as the definition of fundamental rights and freedoms, at personal, social and political level (Biasi, 2024).

In fact, while automation is limited to simplifying and accelerating certain existing processes, doing them without human intervention, AI makes the machine capable of replacing man, who delegates to it the analysis of the

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[2] This contribution is based on an interdisciplinary research (Pisano S., ed., 2024) conducted within the Department of Law of the Università of Napoli Parthenope (Italy) by scholars of labour law, public law, constitutional law and business economics, in order to verify the impact of artificial intelligence on corporate governance.

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external environment, in order to interpret it and make choices (Floridi, Cabitza, 2021).

This is the background of the recent European legislation on artificial intelligence[3], that aims at providing an uniform regulation within Europe of AI systems as regards their development, marketing and use "*in accordance with the values of the Union*" (Loi, 2023) and it is part of a wider mosaic of actions, aimed at combining the development of digital technologies with the protection of the fundamental rights of the person (Peruzzi, 2023). In a so articulated regulatory framework, based on the personal data and digital services rules (GDPR), the IA Act aims to ensure that AI systems operating within the EU market comply with the EU fundamental rights legislation and the European values. For this purpose the EU shapes a "people-centred" model for AI systems, in order to "*be confident that the technology is used safely*", as indicated in the accompanying report[4].

The question falls within the scope of the risk assessment for "unknown technology" and of the consequent applicability of a precautionary principle: since the mechanisms of operation of the IA and the extent of the risks that could arise for the worker are not fully known, its potential for injury can be assessed only in abstract terms (Rota, 2020). Indeed, all the European approach to AI can be defined as "risk-based", in the sense that it crosses the criteria of precaution and risk assessment. In particular, the IA Act describes a pyramid system, distinguishing between low-risk systems to which no limitation applies, low-risk systems for which only transparency requirements apply and high-risk systems, for which stricter restrictions are foreseen, up to systems with unacceptable risk, the use of which is strictly prohibited (Barbera, 2023). Consequently, the risk should be identified, assessed and mitigated, up to restricting or prohibiting the use of a certain technology if it may lead to potentially serious risks, even if not precisely quantifiable *ex ante*. Overall, this regulatory choice appears to be substantially borrowed from the GDPR, with the difference that while in the privacy regulation the nature of the data processed is relevant, in the rules about AI count the type of algorithm, which feeds on data (Peruzzi, 2023).

[3] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

[4] Report on the proposal for the regulation of the European parliament and of the Council on laying down harmonised rules on Artificial Intelligence (Artificial Intelligencce Act) and amending Union Legislative Acts, *www.europarl.europa.eu/doceo/document/A-9-2023-0188_EN.html*.

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2. Algorithm's "dangerousness" and trade union participation

With specific reference to employment relationships, the question of the "dangerousness" of the algorithm can be approached according to a broader key reading: any occupational activity may present risks, as it is well known in the OHS system, where the principle of the highest technologically possible safety, does not coincide with the total and absolute guarantee of the absence of risks, but it means that employers must commit to reducing them as much as possible in the light of the knowledge offered by science and technology at a given time, while maintaining the need for constant updating of procedures and protective systems (Ales, 2013; Buoso, 2020; Lai, 2017; Natullo, 2021; Pascucci, 2022).

The same can be said, with the necessary differences, compared to the use of AI: first, the most probable or common foreseeable risks must be identified, programming the machine so that it does not incur; then, a progressive adaptation work is required, by examining the concrete ways of managing employment relationships and introducing the necessary corrective measures (Sena, 2023).

In this context, it seems to me that the participation of workers through their representative bodies is essential, as it is in safety matters with the role and function of the worker's representative. Furthermore, in the digital field the absence of a specific discipline widens the role of the social partners, assigning collective bargaining, both at national and company level, the task of regulating the situation in practice (Mainardi, 2020). In Italy, for example, the collaboration between companies and social partners has been particularly useful during the covid emergency and this participatory mechanism could be replicated, although with new forms adapted to the new challenges that digital technologies pose.

The Italian legislator has taken a similar route also for the implementation of the Directive on transparent and predictable working conditions, providing that the information on the operation of automatic hr management systems should be given not only to employees but also to "*trade union representatives at the workplace; or, in the absence of these representatives, to the Unions comparatively more representative at national level*" (Zilli, 2022).

For this system to work, however, it is necessary that there would be specialized figures within the unions who can understand the digital mechanisms in order to negotiate consciously to protect workers' rights, while respecting strict confidentiality obligations (Aloisi, De Stefano, 2020).

The EU Directive on digital platforms moves in this direction, providing for the possibility for trade union representatives to be assisted by an expert during information and consultation procedures on the use of automated

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monitoring systems (Pizzoferrato, 2022). Although this Directive is limited to platforms, nothing prevents, in the future, an extension of its scope also to other companies, even not operating on the web, but using similar systems of hr management.

3. For an ethically oriented approach to the use of AI: human monitoring, risk assessment and participation

Human monitoring, risk assessment and participation can therefore be the pillars on which an ethically oriented approach to the use of AI in working relationships should be based, according to a model of "*human rights due diligence*" (Peruzzi, 2023)[5], that is part of the relationship between business and protection of human rights in order to promote business processes respectful of these rights, according to a model started with corporate social responsibility (Giovannone, 2024).

Due to the impetus of European legislation, models of non-financial disclosure have been widespread for some years. In this way companies report their performance in the socio-environmental field, according to a model of accountability, through which those who use certain resources provide an account of their use[6]. Such a mechanism could also concern the use of digital and telematic resources that could have social effects that would harm workers' rights and the company, which profits from using these systems, must take care of their consequences.

Although corporate social responsibility is often seen by the companies themselves only as a marketing tool, for the unions it can represent an opportunity to influence corporate strategies and to promote disclosure mechanisms related to the use of AI in the management of employment relationships too (Tarquinio, 2023).

Without this kind of participation, we would have only the protections provided for by the anti-discrimination and privacy protection legislation, that could be inadequate, either because they operate when the damage has already occurred, and because the technical nature of algorithmic systems

[5] United Nations Development Programme, *Human Rights Due Diligence: an interpretative guide*, *www.und org/sites/g/files/zskgke326/files/2022-10/HRDD%20Interpretive%20Guide_ENG_Sep%202021.pdf*.

[6] Consider all the relevant European legislation, from Directive 2014/95/EU on the collection of non-financial information, that already ten years ago had provided for public interest entities with defined size limits a mandatory reporting on non-financial information, until the most recent EU Directive 2024/1760 on corporate sustainability due diligence (c.d. CS3D or CSDDD) of 13 June 2024.

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can make difficult to prove a discrimination. On the other way around, the provision of specific requirements in the algorithm programming would not only reduce the risk of workers' rights being infringed, but would also make it easier to assess, at a later stage, whether discrimination actually exists (Barbera, 2023).

Overall, therefore, the current approach to business issues that may involve different stakeholders, understood as anyone with the power to influence or may be influenced by the actions of an organization, is based on the prediction of participatory mechanisms. So the involvement of trade unions is foreseen in the corporate social responsibility, because unions, as workers' representatives, are directly or indirectly bearers of interests worthy of protection and potentially in conflict with those of the undertaking.

The very recent Corporate Sustainability Due Diligence Directive[7] is a first step in this direction, because it provides for a "*meaningful engagement with stakeholders*". In fact, according to art. 13: "*Consulted stakeholders shall be allowed to make a reasoned request for relevant additional information*" and "*In consulting stakeholders, companies shall identify and address barriers to engagement and shall ensure that participants are not the subject of retaliation or retribution, including by maintaining confidentiality or anonymity*".

Even if the scope of the Directive is limited, it can provide a basis for its subsequent implementation and such a participatory mechanism could be validly extended also to the application of AI mechanisms, promoting its "ethical" use (Magni, 2024)[8].

In conclusion, therefore, an adequate mechanism for the protection of workers should be based on a number of basic principles: preventing forms of management exclusively algorithmic; applying anti-discrimination protection where the use of algorithms results in discriminatory prejudice to workers; promoting awareness of the mechanisms by which the algorithms for hr management work through the involvement of trade unions, in line with a policy that can be imported from the OHS system, as well as from other forms of trade union participation already present in the way of enterprises in relation to issues of social importance. For example, indeed, the EU Directive on gender pay transparency provides for the obligation of "joint assessment of wages" with employee representatives (Lamberti,

[7] EU Directive 2024/1760 on corporate sustainability due diligence (c.d. CS3D or CSDDD) of 13 June 2024.

[8] European Commission, High-level group for Artificial Intelligence, *Ethics guidelines for trustworthy AI*, *op.europa.eu/en/publication-detail/-/publication/d3988569-0434-11ea-8c1f-01aa75ed71a1*.

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2024). It means that transparency, implemented through trade union comparison, is considered a prerequisite for equal pay, because it allows trade union representatives to monitor, first of all, the effective respect of the principle of equal pay at company level and therefore to provide the worker who may be discriminated with valid evidence to be used in the judgment (Peruzzi, 2021).

The issue is certainly very complex, but once again the protection of workers must be ensured by means of their own representative bodies. The world of AI has infinite potential and infinite pitfalls, often not easily known (Treu, 2022): as in the first and second industrial revolution, the discovery of the steam engine and the electric energy changed the world of work definitively and imposed forms of aggregation among workers to defend their rights, similarly in the so called fourth industrial revolution (Schwab, 2016) trade unions are called to "adapt" themselves to the changed economic reality, finding new spaces of action and new modes of intervention, not so much and not only in a conflictual key, but above all according to a collaborative model. Furthermore, the necessary involvement of the trade union in such a process obviously requires knowledge of the technological tools and their potentialities, and the issue becomes even more complex where there is no trade union presence, such as in small companies or in sectors with low levels of trade union participation (Ales, 2022; Senatori, 2020). For these reasons, the digital revolution may represent a new test of the real representativeness of trade unions, as well as their ability to identify appropriate means of protecting workers against new problems arising from technological development.

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Implicaciones de la digitalización y la IA en el concepto de tiempo de trabajo, y su necesaria renovación

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1. Introducción

El fenómeno de la digitalización y, más recientemente, la inteligencia artificial (IA), está transformando de manera profunda y transversal todos los ámbitos de la sociedad, con un impacto significativo en las relaciones laborales. En este contexto, el tiempo de trabajo se ve fuertemente influenciado por la tecnología, generando oportunidades y desafíos para las partes de la relación laboral.

El aumento de la digitalización y el uso de la IA en el trabajo, junto con la proliferación de las nuevas formas de trabajo, como el trabajo en plataforma y el aumento de modalidades de trabajo atípicas, han intensificado la flexibilidad en la gestión del tiempo laboral. En casos extremos, esto ha derivado en un desplazamiento del tiempo de trabajo hacía una lógica basada en el cumplimiento de objetivos o tareas concretas, lo que conlleva riesgos importantes.

Para las personas trabajadoras, la hiperflexibilidad que proporciona estas tecnologías plantea desafíos para numerosos derechos laborales, entre otros: seguridad y salud, conciliación entre la vida laboral y personal,

[1] Contratado Predoctoral de la Universidad de Sevilla. Este trabajo es parte de la ayuda PRE2022-104936, financiado por MCIN/AEI/10.13039/501100011033 y por el FSE+. Asimismo, se realiza en el marco del Proyecto de Investigación "*La negociación colectiva como instrumento de gestión anticipada del cambio social, tecnológico, ecológico y empresarial*" (PID2021-122537NB-I00), financiado por MICIU/AEI /10.13039/501100011033 y por FEDER, UE. El presente trabajo, presentado en el XXIV Congreso Mundial *La búsqueda de derechos laborales y justicia social*, forma parte de los avances de la tesis doctoral actualmente en desarrollo, en la que se profundizará y ampliará el análisis aquí presentado.

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o a unas condiciones laborales justas, afectando en algunas ocasiones a derechos fundamentales[2]. Por su parte, las empresas enfrentar riesgos como el aumento de la competencia desleal mediante la precarización de las condiciones laborales de tiempo de trabajo, una mayor inseguridad jurídica debido a la falta de adaptación normativa, y un aumento en la litigiosidad.

En este contexto, la institución del tiempo de trabajo desempeña un papel fundamental en el adecuado funcionamiento de las relaciones laborales por varias razones. Primero, el tiempo de trabajo se considera un elemento esencial del contrato de trabajo, puesto que la obligación del trabajador consiste en la puesta a disposición del empresario para que la utilice en un proceso productivo durante un determinado periodo de tiempo: la jornada de trabajo (Alarcón Caracuel, 1988; Alonso Olea, 1988). Segundo, está vinculado con los elementos de laboralidad, especialmente con la dependencia o subordinación, en cuanto que el tiempo de trabajo se caracteriza por la ausencia de libertad del trabajador y, simultáneamente, supone un presupuesto básico y un límite para el ejercicio de la facultad de dirección y organización del empresario. Por último, guarda relación con otros derechos, entre otros, seguridad y salud, conciliación de la vida personal y laboral, salario o protección social (Cruz Villalón, 2024).

Consecuentemente, ante el impacto del cambio tecnológico en la institución del tiempo de trabajo, surge la necesidad de analizar si el concepto actual de tiempo de trabajo responde a los desafíos del nuevo contexto productivo y garantiza tanto la eficacia normativa como el buen funcionamiento de las relaciones laborales. En este marco, el presente trabajo pretende contribuir, de manera modesta, al debate científico laboral sobre la renovación del concepto del tiempo de trabajo en el nuevo contexto productivo.

Con este propósito, y en síntesis por razones de espacio, se aborda, en primer lugar, el análisis del concepto normativo de tiempo de trabajo, con una breve referencia a la evolución jurisprudencial del Tribunal de Justifica de la UE (TJUE) y del Comité Europeo de Derechos Sociales (CEDS). En segundo lugar, se examina la incidencia del nuevo contexto tecnológico en dicho concepto, destacando la litigiosidad reciente y la tendencia regulatoria de la nueva normativa.

[2] EU-OSHA (2024). Digital technologies at work and psychosocial risk: evidence and implications for occupational safety and health. Recuperado en: *osha.europa.eu/sites/default/files/documents/Digitalisation-and-PSR_EN.pdf*.

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2. El concepto de tiempo de trabajo en la normativa internacional y su evolución

El surgimiento de la normativa laboral está estrechamente vinculado al tiempo de trabajo tanto a nivel internacional como en España, como evidencian el Convenio n. 1 de la OIT sobre las horas de trabajo en la industria (1919) y a la Ley Benot (1873), que estableció límites a la jornada diaria para los menores trabajadores en industrias. En términos generales, en sus inicios, las normas laborales carecían de una definición precisa de tiempo de trabajo, en un contexto productivo caracterizado por la estabilidad del parámetro espacio-temporal[3]. Es decir, sin la presencia del elemento locativo (fábrica o centro de trabajo) y temporal (jornada establecida), el trabajador no podía prestar servicio debido a las características de la organización productiva de la época.

En el panorama internacional, salvo algunos convenios de la OIT (como el n. 30, 51 o 67) que consideran que el tiempo de trabajo es *el tiempo durante el cual el personal esté a disposición del empleador,* no existe una regulación explicita del concepto tiempo de trabajo. En plano regional europeo, la Carta Social Europea (CSE) reconoce el derecho a la limitación de la jornada y el derecho al descanso sin definir previamente el concepto de tiempo de trabajo. A nivel de la UE, la definición del tiempo de trabajo surgió con la Directiva 93/104/CE sobre tiempo de trabajo[4], mantenida sin cambios en la vigente Directiva 2003/88/CE[5].

2.1. El concepto en la UE de tiempo de trabajo y su evolución jurisprudencial

El art. 2.1 de la Directiva 2003/88/CE de ordenación de tiempo de trabajo define el tiempo de trabajo como: "*todo periodo durante el cual el trabajador permanezca en el trabajo, a disposición del empresario y en el ejercicio de*

[3] La regulación de la limitación de la jornada y del derecho al descanso dada su relevancia no solo se recoge en la normativa laboral sino en normativa transversal, por ejemplo, en el art. 24 de la Declaración Universal de Derecho Humanos, el art. 2 de la Carta Social Europea o el art. 31 de la Carta de Derecho Fundamentales de la UE, adquiriendo la naturaleza de derecho humano universal y derecho fundamental.

[4] Consejo de la Unión Europea. (1993). *Directiva 93/101/CE, de 23 de noviembre de 1993, relativa a determinados aspectos de la ordenación del tiempo de trabajo*. Diario Oficial de las Comunidades Europeas, 13 de diciembre de 1993, L 307, pp. 18-24.

[5] Parlamento Europeo y Consejo de Europa. (2003), *Directiva 2003/88/CE, de 4 de noviembre de 2003, relativa a determinados aspectos de la ordenación del tiempo de trabajo*, Diario Oficial de la Unión Europea, L 299, pp. 9-19.

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su actividad o de sus funciones, de conformidad con las legislaciones y/o prácticas nacionales". En contraste, se considera tiempo de descanso "*todo periodo que no sea tiempo de trabajo*".

Aunque incluye tres elementos (locativo, disponibilidad y funcional), el concepto actual ha evolucionado jurisprudencialmente, flexibilizando dichos elementos para dar respuestas a realidades productivas distintas del trabajo convencional industrial y garantizar la eficacia de la Directiva sobre tiempo de trabajo. En este marco, la labor del TJUE se ha centrado en evaluar la concurrencia estos elementos, permitiendo clasificar este proceso en dos fases temporales según el grado de flexibilidad aplicada.

De la jurisprudencia del TJUE se derivan tres elementos clave de la Directiva sobre tiempo de trabajo: primero, su objetivo de mejorar las condiciones de trabajo de las personas trabajadoras y garantizar una mejor protección de la seguridad y salud, lo que excluye interpretación restrictiva; segundo, la naturaleza comunitaria del concepto de tiempo de trabajo, que requiere una interpretación autónoma del derecho de la UE, independientemente de las normativas de los Estados miembros, para garantizar la plena eficacia de la Directiva. Además, el TJUE subraya que los derechos de la Directiva derivan del derecho fundamental recogido en el art. 31.2 de la Carta de Derechos Fundamentales de la Unión Europea, lo que refuerza la prohibición de interpretaciones restrictivas; y, tercero, el carácter dual de la Directiva, que establece un sistema binario sin categorías intermedias entre tiempo de trabajo y tiempo de descanso.

El análisis evolutivo de la jurisprudencia del TJUE sobre el concepto de tiempo de trabajo se divide en dos fases:

1) Primera fase flexibilizadora (2000-2018): El TJUE considera que toda guardia presencial es tiempo de trabajo, al concurrir los tres elementos y al entender que la obligación de estar presente en un lugar determinado forma parte del ejercicio de las funciones laborales. Esta etapa se distingue por la diferenciación entre guardias presenciales y localizadas. En las guardias localizadas, el TJUE establece que, aunque los trabajadores deben estar disponibles y localizables, pueden organizar su tiempo personal con menos restricciones, considerándose tiempo de trabajo solo el dedicado a la prestación efectiva. En cambio, las guardias presenciales se consideran en su totalidad tiempo de trabajo, dada la obligación de estar físicamente presente en el lugar designado por el empresario.
2) Segunda fase flexibilizadora (2018-actualidad): Se flexibiliza el elemento locativo para determinar el tiempo de trabajo en las guardias localizadas, evaluando el grado de restricción de libertad del trabajador durante los periodos sin prestación efectiva. Según la valoración anterior, el TJUE

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distingue dos tipos de guardias localizadas: aquellas que no limitan significativamente la libertad del trabajador y las que imponen especiales limitaciones. En este contexto, el TJUE destaca que deben analizarse todas las circunstancias del caso, especialmente el plazo de reincorporación y la frecuencia de las intervenciones. Así, cuanto más breve sea el plazo, menor es la libertad del trabajador, y a mayor frecuencia de intervenciones, menor es su libertad, siendo irrelevantes las intervenciones si el plazo de reincorporación es muy breve.

2.2. El concepto de tiempo de trabajo a la luz de la Carta Social Europea y la posición del Comité Europeo de Derechos Sociales

La controversia sobre la naturaleza de las guardias localizadas también se suscita a la luz de la Carta Social Europea (CSE), habiéndose pronunciado el CEDS en numerosas ocasiones. En este sentido, es relevante mencionar las decisiones del CEDS derivadas de reclamaciones colectivas en Francia, en las que se valora la adecuación de la normativa francesa, que permite computar como tiempo de descansos las guardias de disponibilidad, con la CSE.

Respecto a la controversia francesa, el CEDS concluye que equiparar los periodos de guardia con los periodos de descanso constituye una violación del derecho a una duración razonable de la jornada de trabajo, según el art. 2, apartado 1, de la Carta revisada, en base a los siguientes motivos: primero, los periodos de guardia localizada en los que el asalariado no es llamado intervenir, aunque no constituya tiempo de trabajo efectivo, no pueden ser, sin límite alguno, asimilados a un tiempo de descanso en el sentido del art. 2 de la Carta, salvo en el marco de profesiones concretas o en circunstancias particulares, y de acuerdo con los mecanismos apropiados; segundo, estos periodos de disposición impiden indiscutiblemente que el trabajador se dedique a actividades de su libre elección y no sufrir riesgos derivados de la situación del trabajador de dependencia; y, tercero, la ausencia de trabajo efectivo, constatada con posterioridad respecto a un periodo de tiempo en el que el trabajador no tenía a priori libre disposición, no constituye, por tanto, un criterio suficiente de su asimilación a descanso (Salcedo Beltrán, 2022; CEDS, Denuncia n. 22/2003, p. 35-37; CEDS, Denuncia n. 147/2017, pp. 67-68).

Tras lo expuesto, se observa un estándar de protección distinto entre el TJUE y CEDS, siendo inicialmente este último superior, sin perjuicio del carácter casuístico de resolución. A grandes rasgos, podemos destacar dos diferencias en sus resoluciones, sin que ello implique necesariamente una

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incompatibilidad, ya que la Directiva 2003/88 establece una protección mínima. Primero, el TJUE distingue entre dos tipos de guardias localizadas (limitativas y no limitativas de la libertad del trabajador), mientras que el CEDS considera las guardias, en general, como limitativas. Segundo, en cuanto al concepto de tiempo de trabajo, el TJUE aplica un sistema binario (tiempo de trabajo y tiempo de descanso), mientras que el CEDS abre la posibilidad de un sistema de equivalencias parciales, lo que podría generar una tercera categoría intermedia.

3. Nuevo contexto productivo, efectos y normativa reciente

3.1. El nuevo contexto productivo y su incidencia en el tiempo de trabajo

La capacidad de incidencia de la digitalización y la IA en las relaciones laborales es altamente significativa debido a la convergencia de tecnologías que conforman la llamada tecnología 4.0, caracterizadas por su capacidad de rápida transformación. Una de las principales características de esta irrupción tecnológica es su universalidad, ya que afecta a todas las economías, sectores productivos y todos los trabajos (Cruz Villalón, 2017).

La incidencia de la tecnología genera una transformación en los trabajos, impactando especialmente en el tiempo de trabajo al incrementar la flexibilidad e, incluso, desplazándolo o abriendo la posibilidad de que este deje de ser un factor de medida principal de la prestación laboral. Esta irrupción tecnológica en las organizaciones productivas presenta ventajas, como la posibilidad de gestionar la jornada laboral de una forma más eficiente, aumentar la productividad, implementar un control más efectivo y permitir una mayor flexibilidad en la organización del tiempo por parte de las personas trabajadoras, fortaleciendo sus derechos de conciliación de la vida personal, familiar y laboral. Sin embargo, la misma tecnología plantea desafíos, como la difuminación de las fronteras entre tiempo de trabajo y tiempo de descanso, lo que reaviva el conflicto relativo a la calificación de tiempo de trabajo, especialmente en contextos productivos con mayor presencia de tiempos de guardia o disposición. Por todo ello, es necesario analizar si el concepto actual de tiempo de trabajo sigue siendo eficaz para abordar las transformaciones del nuevo contexto productivo.

En este contexto, como señala la doctrina, la influencia de la tecnología en el tiempo de trabajo genera una dualización laboral y una individualización de las condiciones de trabajo. Este desplazamiento del tiempo de trabajo impacta de manera desigual a las personas trabajadoras, dependiendo de su

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nivel de cualificación y el valor añadido de la actividad que desempeñan. La afectación es especialmente severa para quienes realizan trabajos de bajo valor añadido o trabajos subyacentes, como los *riders* o los conductores de Cabify (Valverde Asensio, 2020). En estos casos, el desplazamiento del tiempo de trabajo no solo cuestiona la naturaleza de la relación de trabajo, sino que también precariza las condiciones laborales al excluir los tiempos improductivos, lo que incide en derechos como el descanso y la conciliación entre la vida personal y profesional.

En este sentido, gran parte del trabajo en plataformas se sustenta en la disponibilidad de las personas trabajadoras, cuya jornada carece de un horario determinado, estando condicionadas por la recepción de solicitudes de los clientes. Esta organización productiva genera un incremento de los tiempos improductivos durante la espera del encargo, los cuales, en muchas ocasiones, no son considerados como tiempo de trabajo ni retribuidos.

3.2. La conflictividad actual de los tiempos de conexión a la plataforma digital

En la actualidad, la organización productiva a través de plataformas está generando un importante nivel de conflictividad jurídica respecto a la naturaleza de los periodos de conexión a dichas plataformas, con pronunciamientos divergentes por parte de los tribunales españoles. Para abordar esta controversia, los tribunales responden a dos cuestiones principales: en primer lugar, determinar la normativa aplicable, es decir, si corresponde aplicar la Directiva de 2003/88 o algunas de sus excepciones, como la relativa a trabajadores del transporte regular de pasajeros o trabajadores móviles; y, en segundo lugar, establecer la naturaleza jurídica del tiempo que las personas trabajadoras permanecen conectadas a la aplicación.

En primer lugar, la Sentencia del Tribunal Superior de Justicia de Murcia (STSJ de Murcia 591/2023), considera aplicable la Directiva 2003/88, calificando el tiempo de conexión a la aplicación como tiempo de descanso. Este razonamiento se basa en la ausencia de una obligación de permanencia en un lugar físico y en la falta de prueba sobre un tiempo de respuesta exigido al trabajador.

En segundo lugar, la Sentencia del Tribunal Superior de Justicia de Madrid (STSJ de Madrid 1133/2023) aplica una excepción prevista en la Directiva 2003/88, otorgando un carácter determinante al convenio colectivo de transporte de pasajeros en vehículo de turismo mediante arrendamiento con licencia VTC de la Comunidad de Madrid. Este convenio se sustenta en las excepciones contempladas en los arts. 17.3 y 18 de la directiva. En

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base a lo anterior, el tribunal desestima la demanda al no acreditarse qué proporción de horas corresponde a tiempo de trabajo efectivo y cuáles son horas de presencia.

Por último, la sentencia del Tribunal Superior de Justicia de Madrid (STSJ de Madrid 91/2024) determina como aplicable la Directiva 2003/88, concluyendo que el caso no se encuentra dentro de las excepciones previstas en la misma. Además, sostiene que, incluso si fueran aplicables dichas excepciones, el tiempo de conexión no puede considerarse tiempo de presencia, ya que el trabajador está en su lugar de trabajo dispuesto a prestar servicios en cualquier momento.

Consecuentemente, se evidencia que este modelo de negocio gestionado por la plataforma digital genera conflictividad. Los casos mencionados muestran que, a pesar del reconocimiento de vínculo laboral entre la plataforma y los trabajadores, el funcionamiento de la plataforma no se ajusta al régimen normativo aplicable.

3.3. Normativa de la Unión Europea reciente y tiempo de trabajo

En este contexto, con el fin de abordar los riesgos asociados al uso de sistemas de inteligencia artificial en todos los sectores, y con una notable incidencia en el ámbito laboral, se aprobó recientemente el Reglamento General de Inteligencia Artificial (Sepúlveda Gómez, 2023)[6]. Además, en lo que respecta específicamente a la organización del tiempo de trabajo y a la protección de los derechos de los trabajadores en el contexto digital, se adoptó la Directiva (UE) 2019/1152 relativa a unas condiciones laborales transparentes y previsibles en la Unión Europea[7] y, más recientemente, la (UE) Directiva 2024/2831 relativa a la mejora de las condiciones de trabajo en plataformas[8].

La Directiva de condiciones laborales transparentes refuerza el derecho de información de las personas trabajadoras y establece una serie de derechos subjetivos vinculados al tiempo de trabajo, entre los que destacan:

[6] Parlamento Europeo y Consejo de la Unión Europea (2024), *Reglamento (UE) 2024/1689, de 13 de junio de 2024, por el que se establecen normas armonizadas en materia de inteligencia artificial*, Diario Oficial de la Unión Europea, pp. 1-144.

[7] Parlamento Europeo y Consejo de la Unión Europea (2019), *Directiva (UE) 2019/1152, de 20 de junio de 2019. Relativa a unas condiciones laborales transparentes y previsibles en la Unión Europea*, Diario Oficial de la Unión Europea, L186, pp. 105-121.

[8] Parlamento Europeo y Consejo de la Unión Europea (2024), *Directiva (UE) 2024/2831 del Parlamento Europeo y del Consejo, de 23 de octubre de 2024, relativa a la mejora de las condiciones de trabajo en plataformas*, Diario Oficial de la Unión Europea, pp. 1-26.

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el derecho a una previsibilidad mínima del trabajo (art.10), que faculta al trabajador a rechazar un trabajo de patrón imprevisible (art. 10.2), y el establecimiento de unas garantías adicionales para los trabajos a demanda (art.11). Sin embargo, esta directiva no prevé ninguna particularidad sobre el concepto de tiempo de trabajo, a pesar de su estrecha relación de su contenido con los periodos de guardia o disponibilidad en los trabajos a llamada. Desde nuestra perspectiva, el derecho a rechazar un trabajo no resulta suficiente para garantizar el objetivo de la directiva, especialmente en lo que respecta a garantizar una previsibilidad mínima en los trabajos de patrón imprevisibles.

Por otro lado, la reciente Directiva de mejora de condiciones de trabajo en trabajo en plataforma no aborda específicamente el concepto de tiempo de trabajo. Su enfoque se centra en garantizar una correcta determinación de la situación laboral de los trabajadores de plataformas digitales y en promover la transparencia, equidad y la rendición de cuentas de la gestión algorítmica. No obstante, la obligación de la plataforma de informar sobre el uso de los sistemas automatizados de seguimientos y toma de decisiones puede constituir una herramienta relevante para evaluar, en los supuestos de guardia o disponibilidad laboral, el grado de libertad real del que dispone la persona trabajadora, lo que proporcionaría elementos adicionales para determinar la naturaleza jurídica de dichos períodos.

Consecuentemente, aunque la reciente normativa avanza en la mejora de las condiciones laborales en los trabajos digitales, no resuelven la controversia relativa al concepto de tiempo de trabajo. Esta laguna impide una protección efectiva del derecho al descanso y de la limitación de la jornada de las personas trabajadoras. Además, la debilidad del derecho a la desconexión digital agrava esta situación, siendo necesario reforzar estos derechos (Molina Navarrete, 2017). En este sentido, no solo debe de reconocerse la facultad del trabajador, sino también deben establecerse límites imperativos para las empresas, lo cuales no dependan de la voluntad de las partes.

4. Consideraciones finales sobre la necesidad de adaptación normativa

En el nuevo contexto productivo, la controversia sobre el concepto de tiempo de trabajo se intensifica tanto en términos cuantitativos como cualitativos. Las formas de trabajo basadas en el uso intensivo de la tecnología han generado una hiperflexibilidad y un desplazamiento del tiempo de trabajo, lo que plantea un reto para la eficacia de la normativa, afectando especialmente a los trabajadores menos cualificados que prestan

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servicios subyacentes. Un ejemplo claro de este fenómeno lo representa los trabajadores de plataformas como *riders* o conductores de Cabify.

Uno de los principales riesgos de este desplazamiento es la deslaboralización. Sin embargo, la simple declaración de laboralidad de estos trabajos no soluciona la ineficacia normativa, ya que el aumento de los tiempos de disponibilidad amenaza derechos como la limitación de la jornada, el descanso, la remuneración adecuada y la conciliación entra la vida personal, familiar y laboral.

En este contexto, consideramos imprescindible una intervención normativa internacional, dada la naturaleza global del fenómeno, que aborde el concepto de trabajo de manera adecuada a los nuevos riesgos. Esto es esencial para garantizar los derechos de las personas trabajadoras y prevenir la competencia desleal entre empresas, que puede derivar del uso indebido de los tiempos de disponibilidad.

Para lograr este objetivo, y siguiendo la tendencia evolutiva de la jurisprudencia del TJUE y del CEDS, así como los riesgos derivados del aumento de la flexibilidad en las nuevas formas de trabajo, se propone, como medida a *lege ferenda*, que el concepto de tiempo de trabajo se identifique con la disponibilidad del trabajador para prestar servicios, sin la exigencia de los elementos locativo y funcional. No obstante, para garantizar la flexibilidad en sectores o actividades cuya naturaleza lo requieran, la negociación colectiva podría regular los periodos de guardia o disponibilidad, permitiendo un cómputo parcial de equivalencia de tiempo de trabajo, según el grado de restricción de la libertad del trabajador.

Adicionalmente, sería la negociación colectiva la encargada de proporcionar garantías para los periodos de disponibilidad, regulando su organización, compensación (económica o en tiempo de descanso) y preaviso. En este sentido, no se propone la prohibición de los tiempos de disposición, sino su control, evitando que sean utilizados para eludir los derechos previstos en la Directiva de tiempo de trabajo y asegurando la flexibilidad en aquellos sectores y actividades en los que sea justificada, bajo un marco de garantías.

Con esta reforma, cambiaría la regla general, que considera que los periodos de disponibilidad como tiempo de descanso, obligando a que su regulación se realice a través de la negociación colectiva, y reconociendo derechos mínimos a las personas trabajadoras afectadas por este instrumento de flexibilidad empresarial. De este modo, la negociación colectiva no solo actuaría como un mecanismo de flexibilización empresarial del tiempo de trabajo, sino también como mecanismo de control, garantizando la transparencia, la previsibilidad y la finalidad de los periodos de disponibilidad, adaptándolos a la necesidad del sector de actividad.

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Por todo lo expuesto, consideramos indispensable una renovación del concepto de tiempo de trabajo que, por un lado, garantice la eficacia de los derechos de las personas trabajadoras, y por otro, sea compatible con una organización laboral flexible y preserve la seguridad jurídica.

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Exploring new frontiers in union rights' protection. An experimental research at the intersection of labour law and computational legal studies[1]

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Abstract

In recent years, the pandemic and the evolution of digital technologies have reshaped work relationships (e.g., remote and platform work), raising new legal challenges for worker protection and collective representation. Workplace "loneliness", a hallmark of contemporary capitalism, exacerbates individualization and hinders collective interests, creating new obstacles for traditional trade union rights. This paper explores an ongoing research project combining labour law, computational legal studies, and techno-regulation to propose innovative strategies for safeguarding workers' rights in the digital age. The first part examines how trade union rights have adapted to virtualization and dematerialization, analyzing collective agreements that reinterpret workers' assembly rights. The second part presents WorkMeter, an experimental app supporting workers' connections, collective awareness, and regulatory analysis in the platform economy, with a focus on food delivery. The discussion advocates a strategic, inclusive approach to integrating technology into union activities, balancing innovation with the complexities of evolving work models.

1. Introduction

In recent years, due to both the pandemic and the relentless evolution of information technologies, new working relationships (e.g., remote work, hybrid work, digital work platforms) have emerged that require novel

[1] This article builds upon ideas and analyses previously explored in Lettieri *et al*. (2019), Lettieri & Donà (2020) and these prior studies have been revisited, extended, and integrated to fit the specific aims and scope of the present work.

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standards of protection and collective representation, raising unprecedented legal issues.

To give just one meaningful example, the "loneliness" at the workplace, seen as a structural feature of the actual stage of capitalism in the "lonely century" (Hertz, 2021), has a peculiar impact on traditional trade union rights. As a matter of fact, the individualization of work relationships and, finally, the absence of a physical workplace due to the "virtualization" of the latter, have led to a sort of Hikikomori, i.e., a "social withdrawal" of workers a factor that heavily contributes to the creation of a competitive environment among workers that often prevents the formation of a collective interest.

The paper revolves around an ongoing research project that brings together labour law, computational legal studies (Lettieri, 2020) and the perspective of techno regulation (i.e. the regulatory use of information technology) to come up with novel approaches to the protection of workers' rights in the digital age. On the other hand, the urge for more effective safeguards for workers in the digital economy has clearly emerged in the last few years both at national and European levels. The EU Directive on working conditions in platform work is a clear example of such a need (COM(2021) 762 final).

In such a scenario, our attention will be focused on integrating existing trade union rights with techno-regulatory solutions. The first part will dwell on the reinterpretation of traditional trade union rights. In our work we have indeed analyzed how well-established union rights have evolved legally and factually in accordance with the development of technologies and the transition of work to models of remoting and dematerialization (Donà, Morocco, 2021). The analysis of different collective agreements shows social parts' ability to reinterpret workers' assembly rights, even if the adoption of more innovative solutions is conditioned by economic factors.

The second part of the presentation will consider the concrete use of IT s to design innovative technical solutions upholding workers' rights protection. Heading in this direction, we will present WorkMeter, an experimental cross-platform (mobile and web) application designed to support new approaches to the analysis of the platform economy and its issues (Lettieri, 2019). Particularly focused on food delivery, the initiative pursues several, tightly connected objectives: connecting workers, facilitating the sharing of experiences for collective consciousness development, evaluating platform conduct, and extracting data-driven insights on labour market trends and regulatory policy effectiveness. The analysis will explore the complexities of bringing such a perspective into union activities, advocating for a multifaceted approach that balances technology's potential benefits with its challenges. The focus will be on a strategic and inclusive approach to enhance trade union rights in the dynamically changing work landscape

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2. Scenario: the challenge of digitalization for union and workers' rights

In the present context we are witnessing a technological evolution moving at a speed which tends to exacerbate the "liquidity" of contemporary society. Currently, work activity is carried out in an "ontologically digital" context, even if it shows phases of greater or lesser digitalization. Today one could go so far as to say that "every job is digitalized" since most work activities are connoted by a digital component or characterization, with the consequence that the physical and digital dimensions feed off each other and tend to interpenetrate.

Within this context, the collective dimension of the employment relationship has also undergone intense change. In fact, on the one hand, new technologies can intensify the union's sphere of action, multiplying opportunities to contact a wider audience of workers, even those who are distant from one another; on the other hand, building collective action may prove more problematic, since moments of physical contact between workers are more difficult to come by. Thus, technology exposes the phenomenon referred to as "disintermediation" of labour relations, configuring modes and places of consensus gathering and decision-making with respect to which traditional means of collective autonomy have significant limitations. There is talk in the doctrine of a "digital ecosystem" which, in the context of information and communications law, is intended to set up an integrated system of relations, including labour relations, mediated by technology (Aniballi, 2022).

In this sense, there is also talk of a "technosphere" to indicate an environment in which humans contact each other in an automated way, which is far from the purely "humanist" concept of physical contact between workers in order to aggregate and "form unions".

Certainly, then, the impact of digitalization on the collective dimension of work has also led to a profound crisis of the union (Zappalà, 2024). This is based on the assumption that the spread of smart technologies and disintermediation would lead to a drastic reduction of the union's role as a collective actor.

However, it should be noted that there has been no shortage of renewed union activism of new forms of representation, albeit with modes and techniques of intervention far removed from more traditional forms of action. The use of digital technologies has also enabled novel ways of conducting union action and exercising collective rights, which have allowed new paths of aggregation and confrontation as compared to traditional ones, so as to broaden the representative potential of collective subjects.

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These forms of aggregation have mainly involved the world of labour platforms, which increasingly represent the guise of "artificially intelligent" employers.

Technological changes and the increasing use of systems that use artificial intelligence in workplaces, in addition to providing new areas for conflict, also identify new potential for social actors to intervene in more evolved organizational contexts, such as those that take up the integral enterprise, seen as a workplace organized on reengineered management models tailored to the individual and the development of his or her intelligence and creativity, put at the service of productivity, and this is the direction in which Workmeter's experimentation is moving. One could imagine an "ideal factory", which lends itself to function as a laboratory of technical and social experimentation within which a network of communities operates, in which one sees ample space for the fulfilment of the union's strategic capacity, seen as a partner of the enterprise within cooperative modules for productivity and corporate welfare.

In this context, there has been a new intervention of the union, as an entity capable not only of accompanying technological changes, but also aiming to modify the innovation circuit to be more effective, increasing the economic performance of the enterprise, while at the same time improving the organizational well-being of workers.

With this in mind, in June of 2020, the Social Partners' Framework Agreement on Digitalization was concluded among the major European trade unions and business confederations. This negotiation agreement aims to incentivize a partnership approach in addressing the most important challenges posed by the processes of digitalization of work, as well as to assist workers in the use of digital technologies, equipping them with appropriate skills through continuing education.

In particular, it is an autonomous bilateral Framework Agreement which, in the face of the challenges brought by the digital economy, invites trade union actors operating at the European level to stimulate, at all levels, a dynamic circular process which is functional in achieving a consensual digital transition, capable of seizing opportunities, as well as preventing and minimizing risks, thus ensuring the best possible outcome for both employers and workers.

This objective is achieved, above all, through the identification of skills to deal with the ongoing technological transition, and seeks to mitigate the tensions arising from the digital divide. It is in this perspective that the social partners find a shared interest between the company and the workers in the effects that training can create in terms of skills renewal, capable of preparing the actors, namely the companies, the workers and the unions, for the digital challenge.

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In spite of the ambivalence of the fallout from the use of AI systems on labour relations which has been supported by the most recent international surveys and research, which confirm how the complexity and opacity of AI technologies and the generation of information asymmetries resulting from worker surveillance can increase power imbalances, as well as the union's ability to represent itself, the surveys themselves confirm that the adoption of technologies with artificial intelligence components in companies that have internal forms of worker representation is significantly associated with better working conditions than the adoption of the same systems by companies where no collaborative labour relations exist.

The union effect of a mitigation of the risks associated with the use of AI systems would be supported from multiple points of view. In many cases, in fact, taking a cue from the numerous studies on automation, some international research highlights how, where the introduction of new technologies is managed "in collaboration" with the union, worker representation is more capable of influencing the organizational arrangements, especially in terms of training intensity and process innovation, so as to foster complementarity between work and new technologies, while also mitigating the risks related to a worsening of working conditions, helping to direct corporate choices towards technological solutions which are more oriented towards the welfare of workers.

2.1. Evolution of union rights in the digital age

The use of artificial intelligence systems in companies, as it does not always fit into virtuous paths, can generate new forms of control and subjugation falling to the algorithmic management, which conditions and modifies the traditional contractual arrangements of the labour contract, significantly increasing the powers of the employer (Alosi, De Stefano, 2020).

In addition to the usual employer powers, there is another power which is exercised: the computational power. In fact, algorithmic management and the exercise of the so-called computational power, which derives from enabling technologies which use artificial intelligence for the management of human resources in the company, create a new imbalance in the contractual as well as in the employment relationship, in addition to creating a new form of technological and informational subordination of employees for which there is an even greater need for collective protection (Faleri, 2021).

It is precisely with respect to the techniques of using artificial intelligence systems in human resource management that the Social Partners' Framework Agreement on Digitalization, cited above, notes the risks associated with

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the spread of such systems and highlights how important it is for the social partners to ensure that the systems themselves do not undermine, but rather increase, human involvement and skills at work (Rota, 2020).

Beyond fostering the spontaneous and active involvement of the social partners in the algorithmic management of work, it is clear that the real challenge to the trade unions' role in the digital transition is played on these very grounds, where a real regulatory and multilevel gridlock persists (Peruzzi, 2023) which wants to ensure human oversight and control over artificial intelligence systems and data processing, as well as the transparency and comprehensibility of the systems themselves. This is where the national and supranational debate is focused, leading to the first forms of regulation of the use of artificial intelligence systems in human resource management and the first judicial interpretations concerning the unions' rights to understand the logic of operation of automated decision-making systems, the difficulties arising from the intertwining and overlapping with the Data Protection Regulation (GDPR), and the potential of new and old tools, such as Art. 4 of the Workers' Statute of Rights, which show their ability to evolve with society.

A significant role, but one that probably still needs to be explored, is that of collective actors associated with evolving technologies, which can be linked to the introductory phase of risk assessment particularly related to the use of artificial intelligence systems. We have witnessed a significant increase in the risk-based approach, based on the assumption that risk assessment and identification of appropriate mitigation measures should be primarily conducted by the subjects targeted by the regulation.

In the national context, the approval of Legislative Decree 104 of 2022, the so-called Transparency Decree, marked a decisive shift in the labour point of view on the issue, since, by introducing Article 1(a) to Legislative Decree 152 of 1997, it expressly gave Italian labour organizations the right to access data and request information on how fully-automated decision-making systems operate. The right of access to information and clarification of the logic and operation of automated systems is given to the individual, who can also exercise it through trade union, company and territorial representatives, as well as through collective representation, in particular, pursuant to paragraph 6, "[through] *the company trade union representatives, or* [through] *the unitary trade union representation, and in the absence of the aforementioned representatives,* [through] *the territorial branches of the trade union associations comparatively more representative at the national level*".

In fact, Article 1 of Legislative Decree No. 152/1997, introduced by Legislative Decree No. 104/2022, provides information obligations

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for workers and trade unions on the use of fully (as of 2023) automated monitoring systems; however, it is very limited in subjective and objective scope (automated decision-making and monitoring systems that affect, in any way, the person or the performance of any person who performs a predominantly personal work activity are excluded) (Valente, 2024).

This is provision is more broad than the Italian provisions implementing the GDPR, but it is also far broader than the Platforms Directive because it is applicable to all employers. By expanding the channels of information, this framework entrusts trade unions with a great endowment of information which can be used, in favour of the individual worker, for the verification of the legitimacy of a subsequent act of management of the labour relationship, as well as to protect the collective interest of the entire group of workers concerned, as a basis for possible negotiation or for the activation of legitimate forms of conflict (Zappalà, 2024). This rule has attracted criticism from Italian scholars, who have commented on how its broad formulation has opened the risk to forms of bureaucratization of the information developed by consultants who will unlikely be able to help workers or their representatives understand how automated decisions were made, but above all, it is unreasonable in that the legislature is considered to have attempted to solve a complex phenomena with a simple rule and an excessive sanctioning approach without keeping in mind the changing European framework of regulation of artificial intelligence, data governance, digital platforms and digital markets/services (Faioli, 2023).

2.2. Challenges posed by digitalization to the protection of rights: the "dematerialization" of the workplace

In the 1970s, with the Workers' Statute, the concept of the workplace was the backbone in the construction of the structures of the regulation of the employment relationship. Thus, a collaborative relationship was established between people in the context of a well-defined spatial and conceptual sphere defined as the enterprise, seen not only in terms of activity, but also as a social formation (Topo, 2022).

In this context, the production unit, under Art. 35 of Law 300/1970 and Art. 2(1)(t) of Legislative Decree 81/2008, does not concern only the physical place of business activity, as per Art. 2028 of the Civil Code, nor the context of performance and measurement of individual performance, but also the guarantee of the sociality of work, which also represents an intangible dimension of interpersonal relations closely related to work.

The workplace, then, from a structural element in the construction of

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the employment relationship, is significantly weakened by the development of entrepreneurial activities that take place mainly on digital platforms and through the use of tools that allow even those working in more traditional production contexts to carry out activities outside the office or factory and by business and labour relations that are increasingly transnational and thus lead to an additional element of disaggregation. This reality was accelerated by the Covid-19 pandemic which imposed remote work on most workers, albeit in ways rarely attributable to agile work, or platform work (Topo, 2022). It is therefore important to reestablish the centrality of collective bargaining put in place by organizations that are actually representative of workers' interests, but also to reflect on the essence of work, assessing how it can be organized using new technologies.

Technology, in fact, has the potential to enable the detection of a whole range of activities, regardless of the spatial-temporal location of work performance. Like the individual dimension, the collective dimension is also affected by the different conceptions of the place and time of subordinate work, i.e., the classic legal categories of our discipline.

In light of the reflection carried out, it can be considered that a close link is created between labour law and technology that affects the very case of the workplace, seen as the space in which work activities take place. And it is mainly as a result of agile work that, especially in the Italian experience, the place of performance loses its "fixed" nature and the work activity performed beyond the company perimeter forces a rethinking of the place-time-work activity triad.

2.3. The need for in-depth information and knowledge

Transparency, diminished in a plurality of information rights and duties now present in different regulatory frameworks, has assumed a role as a transversal principle capable of conveying universal protections within and beyond this particular case, becoming a new paradigm of labour law (Faleri, 2021) that, despite its limitations and fragilities, increasingly wants to assert a new model of business and corporate governance, a model where the transmission of information is aimed at achieving active management of the corporate environment and relationships, but also the promotion of shared models, thus satisfying the information needs of all the company stakeholders.

In the panorama of the broader issue of information, consultation and control rights attributed at the European and national levels to trade unions, the issue of collective rights to information in the field of human resource

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management using artificial intelligence and related employer obligations of disclosure has acquired its own autonomous character (Zappala, 2024).

Collective information rights play a central role in the Digital Platform Work Directive, particularly in Article 13 thereof. This obligation to inform and consult is then complemented by a more specific obligation to ensure transparency in the way automated decision-making systems operate. Article 9 of the recently approved Digital Platforms Work Directive includes an obligation to make a whole detailed set of information about automated decision-making and monitoring systems available before they are put in place or at any time upon request, including to employee representatives of digital platforms; as well as an obligation that trade unions participate in and inform them about "human surveillance" of automated systems, including through assessments of the impact of those systems on working conditions (Art. 10).

Also of particular note is the granting of workers' representatives the right to request, on behalf of platform workers, human review of automated decisions (Art. 11). There is also the possibility, upon the specific request of the representatives themselves, to have information on the number of people working through platforms and on the applicable contractual conditions. In addition, there is the possibility for the representatives themselves to act, judicially and administratively, on behalf of and in support of persons performing work through digital platforms (Art. 19) and to be able to take advantage of a channel of communication with the platform workers themselves (Art. 20).

Thus, we have a series of rights which aim for the involvement of collective actors in understanding the mechanisms of operation of quite substantial automated systems, which could ensure important spaces for transparency, involvement and dialogue of trade unions on how work platforms operate.

4. New Paradigms of Research and Protection

Issues above sketched provide a clear picture of the challenges that legal systems must address. These challenges highlight the inadequacy of traditional legal remedies and raise fundamental questions for research. While one evident issue lies in investigating how algorithms impact individual and collective rights, another challenge involves developing new forms of protection suited to interactions fully mediated by technology.

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4.1. Critical Data and Algorithm Studies

The points discussed in the previous sections suggest that understanding how algorithms operate is essential for evaluating the legal implications of workforce analytics and for devising countermeasures suited to the particular nature of interactions in a digitized society. Legal remedies cannot address unknown dynamics, and violations of rights protected by legal systems cannot be countered without tools to analyze algorithmic complexity.

This issue is clearly highlighted in a study by the Panel for the Future of Science and Technology of the European Parliament, which examines the technical and regulatory challenges involved in directing algorithms toward socially desirable goals (Castelluccia, Le Métayer, 2019). The study, predating more recent regulatory efforts, emphasized the need for criteria such as fairness, impartiality, and non-discrimination in algorithmic decision-making systems (ADS). Of particular interest was the criterion of "understandability" of the software code – namely, the practical possibility of reconstructing the links between the input (data) and output (decisions) of such systems.

The recognition of a "*right to explanation*" (Goodman, Flaxman, 2017) represents an essential step in this direction, enabling individuals to demand accountability for algorithmic decisions impacting their lives. This right has been solidified at the regulatory level through the GDPR (General Data Protection Regulation), which profoundly affects automated decision-making (European Parliament and Council, 2016). Article 22 of the GDPR allows such processes only if adequate safeguards are ensured for "*the rights, freedoms, and legitimate interests of the data subject*", including the fundamental right to challenge algorithmic decisions. This right inherently requires the contestability of decisions, thus necessitating scrutiny of the algorithms and their functioning.

Building on these early reflections, the *White Paper on Artificial Intelligence* (European Commission, 2020), marked an initial step toward addressing the increasing opacity of AI systems. It identified audits and compliance assessments as key tools for ensuring the reliability of algorithms and fostering trust. However, despite its forward-looking vision, the White Paper left unresolved many challenges related to the practical implementation of these tools (Lepri *et al*., 2018).

The regulatory framework further evolved with the adoption of the European AI Act in 2024 (European Parliament and Council, 2024) that introduced significant protections for individuals, particularly concerning high-risk AI systems. Article 86 of the Act establishes a "right to explanation", granting individuals the right to obtain clear and meaningful explanations

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about the role of AI in decision-making and the main elements of such decisions. This provision applies particularly to cases where decisions have legal effects or significantly impact individuals' health, safety, or fundamental rights. By complementing the GDPR, the AI Act strengthens the broader legal framework for transparency and accountability in algorithmic decision-making.

Together, these developments reflect an evolving understanding of the legal and technical challenges posed by algorithmic systems and an increasing commitment to addressing them through a robust regulatory framework. Nonetheless, numerous factors still hinder practical implementation. On the one hand, the necessary regulatory and institutional conditions for creating public mechanisms for systematic algorithm analysis remain incomplete (Danaher *et al*., 2017). On the other hand, there is the crucial issue of algorithmic opacity and the challenges in understanding how these systems generate their potentially harmful effects.

A paradigm deserving attention in this perspective is undoubtedly represented by the so-called *Critical Data and Algorithm Studies* (CDS), an area of research that has emerged in recent years (Iliadis, Russo, 2016; Kitchin, 2017; Noble, 2018), partly due to the impact of high-profile cases such as Cambridge Analytica on public opinion and collective awareness.

The research theme is not entirely new. The need for critical reflection on Big Data and algorithmic decision-making systems had already been emphasized by computer scientists particularly mindful of the potentially negative repercussions of the technologies and heuristics resulting from their research (Isaak, Hanna, 2018). However, the reflection developed so far has been characterized by an almost exclusive focus on technical aspects and a practical problem-solving approach without the necessary integration between technical and broadly critical perspectives.

To address this gap, CDS proposes a new approach to critically studying digital practices and their implications, aiming to integrate various disciplines: law, computer science, sociology, economics, behavioral sciences, and ethics. The issues at stake, moreover, require knowledge that transcends the boundaries of individual research areas: What are the components of an algorithm beyond the software code? How do algorithmic systems end up embedding values and biases, and how can these be identified? How and based on what criteria are the data used by algorithmic systems for decision-making collected? How can we operationalize fairness, think about ethics in algorithmic systems, and manage accountability in decision-making processes shaped – either consciously or unconsciously – by developers, users, managers, laws, software code, and hardware technologies? Through which pathways do culture, legal rules, and society influence the creation of

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algorithms, and vice versa? How can algorithmic management promote the erasure of human judgment through rationalization and automation?

Reflecting the breadth of these questions, the methodological framework of CDS is extremely heterogeneous and includes a variety of research practices, still in the process of being defined. A recent note outlining the CDS research agenda lists no fewer than nineteen approaches, ranging from ethnographic surveys to action research, forensic analyses, and computer forensics, as well as the study of court cases and the collection of secondary data. This variety should not be seen as excessive. The critical investigation of algorithms and their potential aberrations requires reconstructing a network of relationships – those that connect data, algorithms, economic and social dynamics, and legal relationships – that is intricate and technically complex. Methodological eclecticism and cross-fertilization among research areas are, to some extent, an inevitable choice, regardless of the factual context under consideration.

In this perspective, *Critical Data and Algorithm Studies* also aim to catalyze the evolution of that part of labor law studies and labor studies concerned with the digitalization of the labor world. Over the past two years, several works have already emerged investigating the risks associated with the introduction of algorithms in the workplace and labor policies. These studies integrate legal, political, and economic analyses with the study of software code and the application of computational heuristics to data derived from the implementation of the algorithms themselves. Information technologies and computation thus become part of the processes of evaluating the effects they themselves produce. This same perspective, as we will see shortly, also applies to their regulation.

4.2. Computational Law: Technology as a Regulatory Tool

In the previous section, we focused on Critical Data Studies as a response to the evident need – also relevant to labor law – for a deeper understanding of the mechanisms in a society governed by data and algorithms. However, developing more refined cognitive methods represents only a partial response to the challenges labor law faces in a digitized society.

The past decades have been marked by an exponential increase in contexts where human actions – whether social, personal, or economic – are mediated by information technologies (Bratton, 2016). This shift presents new challenges to legal systems. Traditional policies and rules often prove inadequate to effectively safeguard rights in digital contexts. As demonstrated by the evolution of the "*privacy by design*" (Langheinrich, 2001; Rachovitsa,

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2016) paradigm, legal protections are increasingly conceived and developed alongside the technological and organizational solutions that must implement them.

The number of contexts affected by this transformation in protective tools is growing. From labor platforms and e-commerce to social media, robotics, and the Internet of Things, it is becoming increasingly clear that what can or cannot be done depends less on abstractly applicable legal norms and more directly on the technological infrastructure and software code governing our interactions. In light of this, the idea of using information technologies, data, and algorithms for regulatory purposes is far from unrealistic: employing hardware and software tools to establish legal relationships, safeguard rights, and discourage – or even prevent – violations of legal norms represents a frontier that both legal science and practice must begin to explore.

The concept now known as "techno-regulation" is not new but originates from the early expansion of the web. The internet is the context in which the inherently normative role of computer code was first identified and discussed, providing the foundation for a legal reflection that has significantly developed over the years (Brownsword, 2004; Hildebrandt, Gaakeer, 2013; Van den Berg, Leenes, 2013; Hildebrandt, 2011; Leenes, 2011; Amato Mangiameli, 2017). The initial insights on this matter date back to the late 20th century when Joel Reidenberg, director of the *Center on Law and Information Policy at Fordham University*, highlighted how, in cyberspace, traditional law is accompanied by technical standards and design choices that play a decisive role in determining what users can and cannot do. This gave rise to what Reidenberg called "*lex informatica*" (Reidenberg, 1997; Lessig, 2009) a system of rules parallel to state law, consisting of provisions embedded in technological artifacts and capable of being automatically enforced.

However, *lex informatica* is only a starting point. The realization of technology's inherently regulatory function quickly translated into the idea of intentionally using technological artifacts to implement the legal regulation of economic and social relationships. Building on this perspective, legal philosopher Roger Brownsword introduced the concept of the "normative environment" (Brownsword, 2004) in the early 2000s, envisioning technological infrastructures capable of implementing new ways to protect legally relevant interests (Brownsword, 2015).

Technology, in fact, can impose behavioral constraints with a level of effectiveness and immediacy often far superior to that of legal norms. While legal norms merely establish what people must or must not do, technological artifacts directly determine what people can or cannot do, making the intervention of an authority to punish lawbreakers ex post unnecessary (Hassan, De Filippi, 2017).

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Scientific and technological development plays a crucial role in this context. The technologies underlying the first DRM systems (Liu, Safavi-Naini, & Sheppard, 2003) have been joined by solutions enabling the emergence of techno-regulatory models applicable to new and increasingly complex contexts. Blockchain (De Filippi, 2018), the technological paradigm that uses distributed and encrypted databases to securely manage transactions between network nodes, represents a paradigmatic example. After its initial applications related to digital currency creation, blockchain quickly found a place in the legal domain, thanks to its ability to host small pieces of code – "*smart contracts*" – that allow software to manage the negotiation, formation, and execution of obligations arising from contractual relationships, bypassing the need for traditional contracts.

The list could go on. Reflection on techno-regulatory models has already led to numerous experimental experiences and hypotheses, ranging from the use of cryptography and web platforms to protect intellectual property in the circulation of 3D industrial models to the development of intelligent agents capable of assisting users during their online interactions to protect them from scams (Kerikmäe, Rull, 2016). Computational law – a legal system made up of laws and contracts written directly in computer code and capable of automatic execution when predefined conditions are met – embodies, in practice, a new dimension of normativity. The integration of computational law and techno-regulation into ordinary legal practice is destined to transform the very nature of law.

That said, this path is not without uncertainties. Using systems that automatically process data related to every aspect of our lives for regulatory purposes risks becoming a threat not only to individual constitutionally guaranteed rights but also to the rule of law itself (Bayamlıoğlu, Leenes, 2018; Hildebrandt, 2018; Yeung, 2018). If unchecked, the power of algorithms could lead to new forms of discrimination, control, and abuse. This raises new challenges for policymakers and legal research alike, which require new frameworks suited to the current forms of hybridization between algorithms and reality (Lettieri, 2020).

5. Towards Data-Driven Labor Studies: An Experimental Project

As suggested in the preceding sections, the perspectives of Critical Data Studies and techno-regulation require efforts that go beyond theoretical speculation. A critical examination of the consequences arising from automated management systems and worker profiling, as well as the development of new protections, necessitates the creation of *ad hoc*

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technological tools. Without data collection and analysis, without algorithms and information technologies, finding effective solutions to the problems generated by the digitalization of the labor market will be difficult.

In light of this premise, it is evident that the broad field of labor studies is increasingly intersecting with the language of computation and the tools of computer science as integral components of new research pathways. These pathways are marked by a rethinking of objectives, work methods, and, most importantly, relationships with other disciplines.

Within this framework, a research initiative aims to converge labor studies and data science to explore new approaches to analyzing and regulating labor in the digital economy. The reference scenario is that of digital labor platforms – a universe characterized by a variety of issues such as the atomization of work processes, low levels of social protection for gig workers, pervasive and opaque algorithmic control, scarcity of independent information, discrimination, and abuses – that call for more in-depth empirical investigations and more effective regulatory solutions. The starting point is a proposal, already formalized at the theoretical level, speculating on the possibility of achieving higher levels of protection for gig economy workers by integrating legal remedies with technological tools.

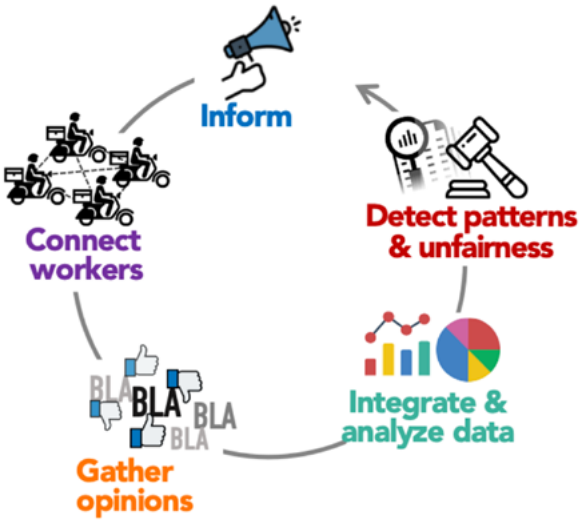
Based on this premise, the project aims to define, through experimental activities, a research perspective and a methodological framework functional not only to a better understanding of the dynamics of digital labor but also to a more effective governance of the economic and legal relationships occurring within it.

The project is built around *WorkMeter*, a prototype platform accessible via the web and a mobile app. Conceived as a "virtual laboratory" for experiments tied both to the paradigm of *Critical Data Studies* and to that of techno-regulation, *WorkMeter*'s primary component is a module that enables gig economy workers – after registration – to share and discuss evaluations related to their experiences with platforms such as *Amazon Mechanical Turk*, *Deliveroo*, and *Uber*.

The information collected through this simple form of interaction serves as the starting point for experiments involving different categories of participants. On the one hand, there are external users (platform workers, citizens, and potentially public administrations) who use the platform for practical purposes, such as expressing evaluations, engaging in discussions, observing platform ratings to decide which company to work for, or even conducting monitoring activities. On the other hand, researchers can delve into the dynamics of digital labor using both the data analytics tools provided by the platform and raw data downloadable for analysis with external tools.

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Fig 1. WorkMeter workflow



a) Data Collection and Critical Analysis

The first goal is to gather data to enable data-driven analyses of work in the gig economy. Once integrated with geographic and temporal information and analyzed using data mining techniques (or other computational social science methods such as social GIS or sentiment analysis), the evaluations provided by crowdworkers can yield insights useful for addressing both normative and empirical questions:

- Assessing the impact of legislative policies, for example, by verifying compliance with workers' rights.
- Conducting detailed analyses (in terms of temporal and spatial resolution) of gig workers' working conditions.
- Identifying patterns in the behavior of market operators, such as unfair practices or distortions induced by the algorithmic governance of the workforce.

b) Experimental Design of Techno-Nudging Solutions

Information technologies can have a profound impact on promoting trust and cooperation among economic actors, especially within online communities where it is easy to establish global reputational networks.

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Building on this awareness and recent reflections on techno-regulation, the project seeks to explore the potential of nudging labor platforms toward fair practices by leveraging the reputational impact of worker evaluations.

In this framework, gig workers' opinions serve as the starting point for a broader process involving the application of information extraction techniques (e.g., to identify recurring irregularities in platform or algorithmic decisions) and visualization techniques (e.g., to make the evidence produced more accessible and understandable). The adoption of this strategy aims to amplify the conditioning effect of the reputational mechanism implemented. Still under development, the platform comprises – both in its web and mobile versions – five integrated modules, each contributing in various ways to achieving the research objectives.

The first module, "Know your rights", aims to provide workers accessing the system with basic information useful for making informed and, as much as possible, accurate evaluations regarding the conduct of digital labor platforms. To achieve this, the module briefly presents workers' rights, currently focusing on the protections recognized by the Italian legal system.[1]

The second module, "Rate your gig", allows crowdworkers to evaluate the digital platforms they work for, based on a series of predefined criteria (e.g., employer fairness, timeliness of payments).[2] These criteria are closely linked to the legal obligations presented in the previous module.

The third module, "See platform's rating", provides real-time data analysis and visualization features. Various types of graphical representations (maps, line charts, etc.) enable visitors to intuitively access the insights derived from crowdworkers' evaluations (e.g., trends over time of evaluations for a specific platform, comparisons of ratings across different platforms).

The results produced by these evaluations can be discussed in the "Connect with others" module, a forum designed to allow crowdworkers to share information, problems, and ideas related to their work for the platforms. Even when conducted exclusively online, interaction with other workers who share similar issues and questions is a valuable element, not only for fostering the critical awareness that workers need but also for enriching the evaluations of the platforms.[3]

The final module, "Download raw data", is designed to allow researchers, public administrations, and citizens to download the data collected by GigAdvisor – after anonymization – using standard formats that enable further analysis outside the app, in line with the paradigm of open science.

As previously mentioned, the app and website that form the platform are still undergoing technical refinements. Once the development process is complete, the project will enter its second phase, during which the tools will be made available – with the collaboration, where possible, of unions

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and/or trade associations – to specific groups of workers. This will initiate monitoring periods for specific areas of the gig economy, aimed at providing valuable information in terms of sample representativeness and the temporal and spatial resolution of the data collected.

6. Conclusions

In concluding this work, a few considerations seem appropriate. We are navigating a domain that is both new and old. The legally significant interests at stake in the cases discussed in the preceding sections belong to the established "acquis" of labor law – a body of values, principles, and protections that legislation, legal scholarship, and jurisprudence have developed over time at both national and international levels. The right to clear and transparent working conditions, prohibitions against discriminatory acts, and privacy protections are not, as we are well aware, novel concepts in an absolute sense.

At the same time, however, we cannot overlook the transformations of the legal dimension induced by technological evolution. Big Data and the algorithms that process them are here to stay. Used responsibly, data can bring enormous benefits to society, with positive impacts spanning from the economy to scientific research.

The point is that, in this new scenario, updating and historicizing the principles and interests we have discussed require the adoption of new paradigms, both to understand reality and to intervene effectively in it. In a world governed by data-driven algorithms, it is inconceivable to manage the processes of the economy and the labor market solely with traditional categories and tools of legal thought. This applies, in our view, to both cognitive and regulatory dimensions.

Evaluating the impact of technological innovation on the world of work requires analyses capable of uncovering the complex factual interactions linking data, computation, legal rules, and the actual practices of labor and business activities. To achieve this, the exegesis of positive law or doctrinal and jurisprudential interpretations must become part of a broader analytical perspective, where diverse fields and knowledge – from computer science to statistics – are destined to converge and co-evolve, even in terms of research questions.

A similar argument can be made for the implementation of rules aimed at ensuring greater protection of workers' rights. In a kind of paradox, information technologies are both the source of problems and part of the solution: addressing the risks generated by data and algorithms necessarily involves leveraging data and algorithms themselves. From this perspective,

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the hybridization of legal protections and technological tools – a hallmark of the techno-regulation paradigm – emerges as a worthy avenue of exploration in the years to come.

This co-evolutionary process also underscores the importance of adapting traditional labor rights, such as those related to union representation and collective bargaining, to the digital age. In particular, trade unions can play a pivotal role in advocating for the integration of algorithmic transparency and fairness into workplace practices. Ensuring that algorithms do not exacerbate inequality or undermine workers' rights requires active engagement from unions to monitor, evaluate, and challenge the impact of algorithmic management systems. By leveraging new tools and methodologies, unions can help bridge the gap between technological innovation and the protection of fundamental labor rights, fostering a regulatory framework that is both inclusive and effective.

Law, after all, effectively fulfills its ordering function when it reflects the changes occurring in society and when it operates on the same level as the phenomena it seeks to regulate. In a world where technology plays an intrinsically normative role, it makes sense to think of embedding legal rules within technological artifacts.

This, inevitably, has implications for research. Understanding and regulating the dynamics described in the previous sections (and many others traversing algorithmic society) cannot be confined within the boundaries of a single discipline. Developing regulatory strategies suited to new scenarios requires addressing legal issues through the lenses of other disciplines. To this end, jurists are not called to abdicate their role or relinquish their methodological toolkit but rather to expand and enrich it with new languages.

What lies ahead, and should be encouraged, is a co-evolutionary, circular process in which the problems of the legal world transform into challenges for computer science, and, in turn, the solutions devised by computer science fuel new regulatory solutions. Among the challenges of the near future is systematically exploring how the perspective of Critical Data Studies can be applied to labor law – for example, by defining guidelines for conducting technically and legally sound analyses of the impact of algorithmic mechanisms and exploring possible techno-regulatory solutions.

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Protection against the risks and abuses of algorithmic management in the European legal system: the need for an integrated approach

Pia De Petris[1]

1. The algorithmic management: opacity and risks to workers' fundamental rights

Algorithmic management involves shifting traditional organizational and managerial tasks from human staff to intelligent machines. These machines, as an expression of a more rapid, accurate, and objective form of management than human oversight, promise to enhance the efficiency, productivity, and competitiveness of the digitalized enterprise, creating the most pervasive and systematic integration of technology into business activities. The organizational change underlying this shift is characterized by depersonalization: algorithms are entrusted with – or perhaps more appropriately, delegated – some of the prerogatives that are typically assigned to the employer and the client, or otherwise left to managers: assign tasks, give instructions, monitor and assess the work performed, provide incentives, or impose penalties.

The area where algorithmic management is most extensively tested is undoubtedly digital platform work, where sophisticated algorithms are capable of managing, almost entirely, the organization of work (Santucci, 2024). Recently, however, in Europe, automated management systems are also spreading to more traditional sectors, such as logistics and services (for example, in the case of wearable devices, see Kelly-Lyth, Thomas, 2023).

Regarding the use of such systems, one of the greatest risks for the protection of individuals subjected to automated systems is the difficulty of interacting with the "machine" and reconstructing its exact functioning, and

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thus understanding the impact it has on their working conditions (algorithmic opacity, point out by Burrell, 2016).

This difficulty, when applied to the workplace context, risks further exacerbating the informational asymmetry and power imbalance that characterize the employment relationship.

So, the issue of algorithmic opacity can be considered a sort of "meta-risk" since, without decoding the functioning of the algorithmic machine, it is difficult to prevent and monitor other potential risks arising from the use of such systems: privacy violations, discrimination, breaches of the limits on control and disciplinary power, and so on.

In this context, the advent of Artificial Intelligence[2], understood as the computational mechanism that constantly processes new inference criteria between data and makes efficient decisions based on such processing, deducing from the inputs received "*how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments*" (Art. 3 of Regulation No. 2024/1689 – "AI Act").

With the advent of AI, it has become even more difficult to identify, after the decision-making process, the factors and variables on which the automated decision was based, as well as the precise weight of each factor in the decision itself[3]. Considering this reality, protective measures need to be rethought from a more proactive approach, aimed at minimizing the risks of uncontrolled, distorted, or discriminatory effects caused using digital automation in the workplace from the outset.

2. The European approach to the risks of automated management: a mapping of the sources of law

As anticipated, in the Era of automation and AI, the essential challenge is to adapt the framework of protections to new work organizations, seeking to limit and neutralize the risks associated with the exercise of unchecked and opaque power.

This challenge has been at the core of the European regulatory agenda in recent years, which has adopted a series of distinct regulatory acts designed for different (but often complementary) purposes. Nevertheless, despite the numerous and diverse European regulatory measures, it is still possible to discern a coherence in the regulatory approach, which, on an axiological

[2] See Ponce Del Castillo, 2024; Cefaliello, Kullmann, 2022, p. 542.

[3] Cristofolini, 2024.

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level, is grounded in the anthropocentric principle ("human in command" and "human in-the-loop"[4]); on the legal technicality level, it instead relies on the modulation of protections based on the level of risk (risk-based approach[5]), according to the principles of precaution and prevention, as a safeguard of fundamental rights (Aloisi, De Stefano, 2023).

The risk-based regulatory approach is elevated as the driving force of the Artificial Intelligence Regulation and the protection of algorithmic transparency as outlined in the Directive No. 2024/2831.

In particular, the AI Act absolutely prohibits the use of certain tools deemed to pose an excessively high risk to fundamental rights. According to Art. 5 of the AI Act (which takes effect six months after the Regulation's entry into force), systems involving gamification, social scoring, and emotion recognition in the workplace are prohibited, except for systems that recognize physical states introduced for health and safety purposes.

Conversely, for systems that pose a high risk to fundamental rights – including those applied in the workplace –, the Art. 6 of the AI Act imposes several obligations on both providers and deployers: providers must conduct verification, risk mapping, implement a risk management system, and train users; employers, as users in the employment context, are responsible for ensuring transparency, providing both individual and collective notifications, monitoring, and explaining the decision-making processes that impact fundamental rights.

Indeed, although there is no unified regulatory framework in European law (which is certainly desirable[6]) for the algorithmic management of labour relations, European legislation is nonetheless dotted with regulatory segments that can be invoked to counter the risk of algorithmic opacity (Prassl, 2022).

Alongside the general and provisions of the AI Act, three fundamental regulatory safeguards can be identified:

- data protection;
- anti-discrimination protection;
- algorithmic transparency and explainability.

[4] See: Peruzzi, 2023, p. 30.
[5] Gellert, 2020.
[6] See De Stefano, Wouters.

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3. Regulatory systems against algorithmic opacity: data protection

The functioning of AI and automated management systems relies on the management and analysis of large amounts of data. To prevent the risk of algorithmic opacity, data protection is essential, serving as a primary shield against invasive monitoring and data processing practices that undermine the freedom and dignity of workers[7].

The Regulation No. 679/2016 (GDPR) aims to hold companies accountable in preventing risks to fundamental rights such as freedom, dignity, and self-determination, following a risk-based preventive regulatory model.

The GDPR requires companies to adopt suitable legal and technical-organizational measures to protect personal data, transparency, and fairness in data processing, in line with the principles of purpose limitation, transparency, and minimization. To ensure compliance with these principles, the GDPR grants the data controller specific rights to advance information (Art. 13 GDPR) and rights to access data under processing (Art. 15 GDPR).

The Art. 22 GDPR recognizes "*the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her, or significantly affects his or her person*".

The guarantee does not apply in cases where the data subject has given their consent and in situations where automated processing is necessary for the conclusion or performance of a contract. However, in any case, the third paragraph of Art. 22 provides for the obligation to adopt appropriate measures to safeguard the "*right to obtain human intervention from the data controller, to express one's opinion, and to contest the decision*".

Therefore, even when authorized, automated processing must still be subject to measures that protect the rights, freedoms, and legitimate interests of the data subject, at the very least by guaranteeing the right to express one's opinion, contest the decision made by the algorithm, and request and obtain human review.

Finally, Art. 35 of the GDPR, to ensure the effective implementation of the provisions, requires a Data Protection Impact Assessment (DPIA) to be carried out by the data controller (Peruzzi, 2022).

However, all these safeguards could lose their effectiveness in the face of opaque and difficult-to-interpret algorithmic systems. Consider the principles of purpose limitation, accuracy, adequacy, relevance of processing, and data minimization, which are central to the GDPR: their practical applicability could be weakened in systems equipped with self-learning capabilities, where the objectives and goals to be achieved are not necessarily predefined, as

[7] See Abraha, 2023, p. 180; Prassl, *Regulating Algorithms at Work*, cit., p. 30.

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these systems have the ability to replace the usual cause-and-effect sequence with a more opaque and free correlation between a multitude of variables. This can lead to the possibility of unexpected outcomes.

It then becomes necessary to reflect, following the integrated approach outlined earlier, on the contribution of other regulatory segments involved, to assess whether these can overcome such limitations.

4. Anti-discrimination protection

The use of anti-discrimination law can help counter algorithmic opacity. While automated systems may deliver more rational and impartial decisions compared to human ones, they also risk amplifying discrimination in more insidious ways, making it harder to detect and sanction. The opacity of algorithmic mechanisms complicates efforts to prevent and control such phenomena. A single distorted data point or criterion can trigger a spiral of bias propagation, leading to systemic and structural discrimination.

Consider, for example, the case of the algorithms used by Deliveroo and Glovo, programmed to rank riders based on availability and punctuality, discriminated against workers who, due to strikes, illness, disability, religious obligations, or family needs, were absent more frequently and unable to meet the rigid attendance standards imposed by the algorithm[8].

In response to the new risks of algorithmic discrimination[9], traditional anti-discrimination law – originally designed to address human discrimination – has proven effective in tackling this frontier of discrimination as well (Santagata, 2021).

Indeed, algorithmic discrimination does not alter the structure of discriminatory offenses or the concepts of direct and indirect discrimination. Anti-discrimination law focuses on the discriminatory effect, not the intent. Discrimination can still be considered direct even without human intent, as it targets the impact on protected groups. This protection extends to potential harm and cases of collective discrimination, where specific victims may not be identifiable.

Therefore, since the concept of discrimination does not require any intentionality, it cannot be ruled out that algorithmic discrimination may also constitute direct discrimination[10]. As is well known, direct discrimination is

[8] Court of Bologna 31/12/2020; Court of Palermo del 17/11/2023, on which a referral is allowed, including for references, to De Petris, 2024, p. 225.

[9] See Kelly-Lyth, 2023, p. 152 ff.

[10] See Prassl, Binns, Kelly-Lyth, 2023, p. 144 ff.

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subject to broader protections, leaving no room for justifications, unlike indirect discrimination, which occurs when an apparently neutral criterion or practice has a disproportionately adverse effect on members of a protected category.

However, it is also true that algorithmic discrimination may be harder to detect, especially when it takes the form of "proxy discrimination", where the discriminatory effect occurs through an indirect reference that is nonetheless correlated with membership in a protected category.

In such cases, the discriminatory potential may be even more obscured, although European anti-discrimination law provides an easing of the evidentiary burden in favour of the victim of discrimination (Santagata De Castro, Santucci, 2015). The risk of algorithmic opacity affects the recognizability of discriminatory treatment, making it more difficult for the workers to offer of evidence of the discrimination suffered due to the algorithmic rule, which is difficult to decode.

5. Algorithmic transparency as a preliminary safeguard against algorithmic opacity: the Directive n. 2024/2831/EU on platform work

Recent European regulatory measures recognize "algorithmic transparency" as an essential tool for protecting against the opacity and inaccessibility of algorithmic and AI systems implemented or applicable in the workplace (Zappalà, 2023).

The protection of transparency in employment relations has been revitalized by Directive No. 2019/1152/EU, which, in response to the specific protection needs of new forms of atypical work (especially within the digital context), has the merit of complementing the promotion of informational transparency with that of predictability and security of working conditions. To this end, it establishes certain "minimum requirements" on these matters[11]. In the new Directive, transparency serves not only as a tool for rebalancing information but also to uphold the "minimum rights" of work security and predictability. These rights are introduced by the Directive to protect both subordinate workers and falsely self-employed individuals (see Gramano, 2021).

The importance of transparency as a protective tool is emphasized by the latest European legislative initiatives, which identify the "algorithmic transparency" as a new regulatory pillar for managing and limiting employer power mediated by algorithms, thereby strengthening the effectiveness of existing regulatory mechanisms. In particular, the protection of algorithmic

[11] On this point, see Georgiou, 2022, p. 195.

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transparency is pursued through the Platform Work Directive (Directive No. 2024/2831/EU), recently adopted by the European Parliament and Council (Giovannone, 2024, 500).

To ensure better working conditions in platform work, the new Directive grants important transparency rights particularly in cases involving "*automated monitoring systems*" and "*automated decision-making systems*".

In both cases, the Directive specifies that these systems have a "*significant impact on working conditions*" and pose a "*high risk to the rights and freedoms of natural persons*" (Art. 8).

To minimize these risks – a goal already pursued broadly under the AI Act – Art. 7 of the Directive strictly prohibits the processing of personal data that are not directly relevant and necessary for fulfilling the employment contract (e.g., data from private conversations or sensitive data, including biometric, health-related, emotional, or psychological data, as well as data related to the exercise of fundamental rights, especially union membership and the right to strike).

Subsequently, Art. 9 of the Directive introduces extensive information obligations for platforms towards workers, their representatives, and, upon request, the relevant national authorities.

Specifically, for both types of algorithmic systems (monitoring and decision-making), a general obligation exists to provide information on the use or commencement of any experimental phase of these systems (Rosin, 2022).

With regard to monitoring systems, platforms must disclose the categories of data and activities subject to monitoring, including client evaluations; the monitoring objective and the methods by which the system aims to achieve it; the recipients or categories of recipients of personal data processed by such systems; and any transmission or transfer of this personal data, even within a group of companies (Art. 9, paragraph 1, b).

In relation to automated decision-making, an obligation exists to provide information on all types of decisions supported or made by automated systems, even if these decisions do not significantly impact platform workers.

More specifically, platforms are required to disclose the categories of data, the main parameters, and the reasons underlying decisions that affect a worker's contractual status or decisions with adverse effects, particularly regarding non-payment, or the restriction, suspension, or closure of a worker's account (Art. 9, paragraph 1, c).

In the Directive, the principle of algorithmic transparency is complemented by two fundamental guarantees:

– human monitoring of automated systems (Art. 10), which must be carried out periodically (at least every two years) by qualified human personnel

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to assess specific risks, particularly those related to health and safety, as well as ensuring equal treatment for platform workers;

– contestation and human review of automated decisions (Art. 11), with an obligation to provide written justification for any decision that limits access to work or its remuneration. However, the requirement for written justification could easily be circumvented by automatic text-generation systems, which allow machines to provide a generic justification independently. Therefore, to ensure the effectiveness of this provision, it seems essential to interpret the guarantee of "written justification" as personalized justification (related to the specific case) drafted by human personnel.

Finally, to seal the framework of protections, on one hand, Art. 16 strengthens the investigative powers of the judiciary: "*national courts or other competent authorities may order platforms to disclose relevant evidence under their control*" (Gaudio, 2024); on the other hand, Art. 18, paragraph 2, establishes that the digital labour platform is required to provide justification for any decision to exclude a worker from the system.

The regulation of algorithmic management in terms of algorithmic transparency under this Directive is essential, as it represents the first structured regulation of this phenomenon.

However, two issues arise regarding the risks of algorithmic opacity. First, the Directive applies solely to digital platform work, one of the most widespread forms of algorithmic management, but not the only one. Consequently, outside platform work, the protection of other forms of algorithmic management is left to the independent initiatives of the Member States[12]. Furthermore, a second crucial issue emerges: the algorithmic transparency safeguards outlined in Directive No. 2831/2024 need to be supplemented by a guarantee of algorithmic comprehensibility or explainability.

6. From algorithmic transparency to algorithmic explainability

The effectiveness of algorithmic transparency rights, introduced in European law about individual aspects of platform work, depends on the concrete "explainability" of algorithmic functioning.

This algorithmic explainability requires a technical synthesis of relevant

[12] In Italy, Spain and Germany rights to algorithmic transparency have been introduced for all employment relationships involving the automated decision-making or monitoring systems. For further reading: Corti, 2023; Cardo, 2022.

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information, requested "upstream", which ideally should be carried out not by the employer or client, but by collectively organized entities with prior training (Gaudio, 2024). Otherwise, there is a risk of imposing an "information overload" that would still be ineffective in redressing workers' informational asymmetries (Zappalà, 2024).

On this point, the Directive No. 2024/2831, in Art. 11, Recognizes for platform workers the right to an explanation of the impact and functioning of algorithms.

In a generalized key, the Art. 86 of the AI Act stipulates that "*a person affected by a decision based on the output of a high-risk AI system, which produces legal effects or significantly impacts their health, safety, or fundamental rights, has the right to obtain from the deployer (employer or client) clear and meaningful explanations about the role of the AI system in the decision-making process and the main elements of the decision made*".

The right to obtain from the platform, without delay, a transparent and intelligible explanation for any decision made or supported by an automated system helps to resolve doubts regarding the existence, within data protection law (specifically Art. 22 of the GDPR), of an independent right to an explanation of the impact and functioning of automated processes (Wachter *et al*., 2017; Malgieri, Comandé, 2017).

6. Concluding remarks

The EU lacks a unified framework for regulating algorithmic management in labour relations, but existing provisions, such as data protection (GDPR) and anti-discrimination laws, help mitigate risks. These safeguards limit employer control and support judicial challenges to algorithmic impacts. However, their effectiveness is weakened by informational asymmetries that prevent workers from understanding algorithmic effects, making legal protections harder to invoke. To address this, stronger rights to algorithmic transparency and explainability are needed, operational before automated systems are deployed. While the AI Act and Platform Work Directive introduce important protections, their scope is limited, and an integrated interpretation of existing laws cannot fully resolve opacity issues. The best solution is a dedicated regulatory framework for algorithmic management in labour relations, incorporating transparency rights, explainability standards, and a reduced burden of proof for workers. Collective representatives should also have access to algorithmic information to enhance individual protections and strengthen collective bargaining. This approach could ensure fairness and accountability in the digital age.

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What kind of transparency is fit for labour law purposes. Evidence from case law on automated decision-making systems

Vincenzo Cangemi[1]

1. IA systems and the transparency principle

The widespread adoption and use of artificial intelligence across various social contexts have immediately highlighted the necessity of ensuring transparency in automated decision-making processes. Although the use of artificial intelligence systems demonstrates significant potential in their diverse applications, it simultaneously fails to guarantee that their outputs are free from errors and biases (Parviainen, 2022; Mazzucca, 2024), as has also been evident in certain case law (see Trib. Palermo 17 November 2023; Trib. Bologna, ord., 31 December 2020).

For this reason, at both the international and European levels, the principle of transparency has been emphasized as a tool enabling individuals to assess the accuracy of decisions made by the system and, if necessary, to challenge them.

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2020; European Commission, 2018; 2019), following the recommendations of the High-Level Expert Group on Artificial Intelligence (2019), have promptly implemented a strategy aimed at ensuring a human-centric approach to AI and promoting the design and use of transparent automated systems. Enabling "*humans to understand* [the basis of] *their actions*" (European Commission, 2019, p. 14), while minimizing the risk of biases or errors, strengthens users' trust in the technology they interact with and promotes the safe and reliable use of such systems.

This commitment has been reflected in regulatory measures, including the introduction of specific transparency obligations in the recent Regulation (EU) 2024/1689 on artificial intelligence and other sectoral regulations, such as the Directive on improving working conditions in platform work. It aligns with and complements Regulation (EU) 2016/679, which governs the protection of personal data processed through automated decision-making, including profiling. The same objective is also pursued by recent national regulations, which have introduced similar transparency obligations in the workplace.

The regulatory framework has recently been enriched at the international level by the approval of the Council of Europe's Framework Convention on Artificial Intelligence, Human Rights, Democracy, and the Rule of Law (CETS 225). This convention obliges the signatory States to implement measures to ensure adequate transparency throughout the entire lifecycle of artificial intelligence systems.

There has been an intense debate among scholars regarding the extent of these transparency obligations and, in particular, the possibility of establishing a right to explanation for decisions based on automated systems, especially following the publication of the GDPR. While it is possible to observe a general consensus regarding the right to an explanation of the automated decision-making process within the context of that regulation, the possibility of configuring a right to an explanation of the specific decision resulting from such a process has been more widely debated (in a positive sense see Godman, Flexaman, 2017; in contrast, Wachter, Mittelstadt, Floridi, 2017, argued against the existence of such a right).

This issue now needs to be revisited and reconsidered in light of recent regulatory developments and initial judicial applications to understand which aspect of transparency can be deemed most appropriate in protecting workers exposed to automated decision-making systems in the workplace. Transparency, in fact, far from being understood uniformly, has a multifaceted character and can be expressed in various ways depending on the different context of application and the recipient of the information.

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2. The different dimensions of transparency

Transparency is one of the fundamental principles that various stakeholders involved in the design, development, and use of artificial intelligence systems are required to ensure in order for this innovative technology to be considered ethical and reliable. As previously mentioned, transparency is not a unified concept, as different approaches to the transparency of artificial intelligence systems can be identified – ethical, technical-informatic, or legal – which are closely interrelated.

From a legal perspective, in particular, the concept must necessarily be understood in relational terms (Felzmann, Fosch-Villaronga, Lutz, Tamò-Larrieux, 2020; Kemper, Kolkman, 2019), in light of the context of reference, i.e., the person interacting with the system (Henin, Le Métayer, 2022) and their level of competence, the type of system used, and the application it is put to. For a person exposed to an automated decision-making system, this implies, in particular, the right to understand the reasons behind an automated decision that affects her.

In the scholar debate following the entry into to force of Regulation (EU) 679/2016, this right was identified with various terms and nuances, referring to explainability (Wachter, Mittelstadt, Floridi, 2017; Pagallo, 2018), knowability (Palmirani, Sapienza, 2021), legibility (Malgieri, Comandè, 2017), and interpretability (Gallese, 2023) of automated systems. Beyond the specifics of individual positions, there is a general consensus that, with regard to the individuals concerned, legal transparency is realized through the comprehensibility of the reasons underlying the adoption of an automated decision.

Therefore, what is relevant is not only the technical information about the system's functioning or the source code of the algorithm, which in itself requires a certain level of specialization on the part of the individuals to be truly effective, though it can still hold some importance. Rather, and this is even more pertinent in the labor context, for a person exposed to an automated decision-making system, the actual and concrete comprehensibility of the decision made by the system matters most (see Opinion of Advocate General Richard De La Tour delivered on 12 September 2024, Case C-203/22 – CK, § 76).

Indeed, there is no doubt that the provision of technical informational obligations regarding the decision-making process, related to the system's structure and the elements used, as well as the underlying logic of data processing, can play a certain role in implementing the principle of transparency (Wachter, Mittelstadt, Floridi, 2017). However, for this principle to be effective, it is necessary to additionally ensure a full understanding of

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the system's functioning and the decisions made by it (Leslie, 2019), so that individuals can grasp, based on their existing competencies, "*the substantial (not mere technical) justification that resulted in a specific output*" (Gallese, 2023, p. 3).

This can be achieved by enabling individuals to independently understand "*the logic, the significance and the envisaged consequences of an algorithmic decision-making*" (Malgieri, Comandè, 2017, p. 50), as well as the "complex structures" related to the data used, which reveal the relationships among the data, their significance, and their types (Palmirani, 2020, p. 86).

This "*enhanced articulation of the principle of transparency, which also entails the full comprehensibility of a rule expressed in a language different from that of law*" (Italian Supreme Administrative Court, 8 Avril 2019, n. 2270), aims to guarantee the "*right to an effective judicial remedy*" (CJEU 21 June 2022, C-817/19, *Ligue des droits humains*, § 195).

Only the actual comprehensibility of an automated decision enables the individuals involved to consciously exercise the rights they are entitled to (Kaminsky, 2019; Pasquale, Malgeri, 2024). Hence, it is necessary to adapt (High-Level Expert Group on Artificial Intelligence, 2019) both the method of disclosure and the content of the information to the specific context (ICO, The Alan Turing Institute, 2022). This ensures that the holder of the automated decision can assess its compliance with the purposes established by law and, if necessary, challenge it.

The relational approach to transparency, which implies the comprehensibility of decisions made by automated systems scaled according to the context, finds its legal foundation in the multi-level regulatory framework, broadly understood, that governs the phenomenon of artificial intelligence. Consider in this sense, for example, article 8 of the Council of Europe's Framework Convention CETS 225 on Artificial Intelligence, Human Rights, Democracy, and the Rule of Law; articles 12-15 and 22 Regulation (EU) 2016/679; articles 26, para 7 and 86, Regulation (EU) 2024/1689; Chapter III, Directive (EU) 2024/2831 on improving working conditions in platform work.

3. In search of the working context between assisted and automated decision-making processes

In the workplace, automated decision-making systems can be used by employers, both as tools for workforce analytics and as instruments of algorithmic management in a strict sense, to manage work performance through the automated exercise of employer powers (Baiocco, Fernandez-

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Macías, Rani, Pesole, 2022). What differs is the type of interaction that may arise between the human and the automated system. In the first case, it can be described as an "*assisted decision-making process*" where the system supports a human decision. In the second case, it is an "*automated decision-making process*", as the decision is made independently by the system (Sapienza, 2024).

The analysis of case law on automated decision-making systems in the workplace has revealed that such tools are primarily used for evaluating job applications in a hiring process (U.S. District Court for the District of Massachusetts, case Baker v. CVS Health Corp., n. 23-11483), assigning work location (Italian Supreme Administrative Court, 8 Avril 2019, n. 2270), allocating specific tasks (Tribunal of Padua 3 March 2023; Tribunal of Catania 4 November 2021; Tribunal of Padua 16 July 2019; Gerechtshof Amsterdam 4 aprile 2023, ECLI:NL:GHAMS:2023:796; Rechtbank Amsterdam 11 marzo 2021, ECLI:NL:RBAMS:2021:1018.), evaluating of worker performance (Tribunal of Turin 12 March 2024; Tribunal of Turin, decree 7 Agust 2023; Tribunal of Palermo, decree 20 June 2023; Tribunal of Palermo, decree 3 Avril 2023; Verwaltungsgericht Hannover 9 Febrary 2023), and for dismissal (Gerechtshof Amsterdam 4 Avril 2023, ECLI:NL:GHAMS:2023:793; Rechtbank Amsterdam 24 February 2021, ECLI:NL:RBAMS:2021:1415; Tribunal da Relação de Lisboa providência cautelar de 09 Avril 2022; Court of Appeal of Reggio Calabria 29 January 2021).

In most cases, these represent forms of employer powers that, in the analog world, were already subject to "*obligations to provide reasons or justifications for managerial decisions*" (Ciucciovino, 2024, p. 7; Lukács, Váradi, 2023, p. 5) and must now, in the evolving digital context, additionally be made transparent. The expansion of algorithmic employer powers and the risk of opacity in automated decision-making necessitate therefore an inevitable counterbalance in terms of protections.

Transparency, however, should not be understood as a new condition for the legitimacy of exercising employer powers. Instead, it serves as a functional tool for understanding the prerequisites for such legitimacy. To determine how transparency should be articulated, it is necessary to begin with an empirical analysis of the relevant context, considering the use of automated decision-making systems and the recipients of transparency with whom the employer may interact. As previously noted, it is crucial to conceive of transparency in a dynamic and relational sense.

The analysis of case law reveals a scenario where automated decision-making systems, as broadly interpreted by the Court of Justice (CJEU, 7 December 2023, C-634/21, *Schufa Holding AG*), are predominantly employed. The reference is, in particular, to systems that make decisions

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without any meaningful "*human involvement in the decision process*" carried out by those "*who has the authority and competence to change the decision*" (Article 29 data protection working party, 2018).

Human intervention in the judicial decisions considered was not "*contemporary nor subsequent to the system's decision*", but mostly limited to "*prior stages, such as merely inputting data, which was nonetheless processed*" (Tribunal of Turin, decree 7 Agust 2023; Tribunal of Palermo, decree 20 June 2023). Moreover, it was not necessary "*to advance the sequence of operations leading to the decision*" (Tribunal of Turin 12 March 2024).

Only in a couple of cases where the system was used for profiling activities – one decided by the Austrian Administrative Court (Verwaltungsgerichtshof 20 febbraio 2024, Ro 2021/04/0010-11), and the other by the Administrative Court of Hannover (Verwaltungsgericht Hannover 9 febbraio 2023) – it was found that the human decision was subsequent to the system's output. However, this intervention was merely formal, as it was decisively conditioned in advance by the outcome of the automated system.

In such cases, as also acknowledged by the Court of Justice (CJEU, 7 December 2023, C-634/21, *Schufa Holding AG*), in order to avoid "*a risk of circumventing Article 22 of the GDPR*", the system's output should not be regarded as a mere "preparatory act". Rather, it constitutes a genuine decision, as it produces "*effects significantly affecting the data subject*", and the subsequent "*action of the third party* […] *draws strongly on it*". For this reason, scholars rightly suggest focusing on the "*'quality' of human input*" rather than the timing of the intervention, in order to identify the automated nature of the systems (Peluso, 2023; Biasi, 2024).

The main recipients of decisions made in the workplace are the workers, who typically lack the technical skills necessary to read and interpret the technical elements of the functioning of the artificial intelligence system and the source code of the algorithm on which it is based. At the same time, workers are already in a position of negotiating imbalance in relation to the employer, which means they will not only have limited ability to challenge an automated decision-making process, but their opportunities to exercise their rights are also restricted if the employer does not properly fulfill his obligations. This is likely evidenced by the fact that, in the majority of the judicial decisions published so far, a significant role in promoting legal actions has been played by trade unions (Tribunal of Palermo, 17 November 2023; Tribunal of Bologna, order 31 December 2020).

In light of recent regulatory developments, the role played by trade unions is no longer limited to the judicial process but is progressively expanding to include the implementation phase of the systems within the organization

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of work. Therefore, although trade unions are not a direct recipient of automated decisions, it can be fully considered one of the key actors involved in the implementation and use of automated decision-making systems in the workplace. In fact, they play a supportive and protective role for workers concerning the implementation of systems in the workplace, as well as in the understanding and potential challenge of decisions. Access to information regarding automated systems can, in fact, be instrumental in more effectively exercising other protections already recognized by the legal system, such as anti-discrimination protection (Aloisi, 2024).

The presence of an organizational support structure for the activities of trade union representatives and the possibility of being assisted by an expert, as provided in some legal systems, like France or Germany, and now reiterated by Article 13, paragraph 3, Directive (EU) 2024/2831 on improving working conditions in platform work, certainly places trade unions "*in a privileged position, compared to that of workers considered individually*" (Gaudio, 2022). It could therefore be envisioned that the trade union would have a different degree of transparency, one that complements the actual comprehensibility of the decision, already recognized for workers.

It could, therefore, play a more significant role in the implementation phase of technology in the workplace than in the remedial phase. To do so, it should have access to more general and technical information on the functioning of automated decision-making systems (Molè, 2023), although the question regarding the trade union's actual ability to face this challenge and withstand the technical confrontation during the "negotiation" of the algorithm (De Stefano, 2019) remains unresolved (Soto, Corredor, Diez, 2023; Cangemi, 2024).

4. Concluding remarks

The regulatory and case law analysis of the transparency of automated decision-making systems employed in the workplace conducted thus far has highlighted elements useful for reflecting on some issues that have emerged in the scholar debate to date.

The principle of transparency should not be understood as a uniform concept but rather as multifaceted, requiring adaptation according to the specific context of application and the recipient of the information. For workers, who are the main subjects affected by automated decisions in the workplace, this principle must be translated into substantive comprehensibility of the decision. This ensures they can independently understand the rationale behind employer choices and assess their legitimacy. Therefore, information

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about the automated decision-making process must be provided by the employer in a manner that enables workers to exercise their rights in an informed and meaningful way.

This approach, first and foremost, clears the way of issues related to the protection of trade secrets in automated systems, as it does not require the disclosure of the source code of the algorithm to explain the functioning and reasoning behind an automated decision. As observed, only with respect to transparency obligations fulfilled towards trade unions can the provision of technical information about the systems potentially be envisaged. However, Article 3, par. 1, lett. c), Directive (EU) 2016/943 considers the acquisition of trade secrets lawful when it occurs in the exercise of information and consultation rights.

At the same time, it has been argued (Peruzzi, 2022, Gragnoli, 2022) that this approach, centered on comprehensibility, presents certain challenges that call its effectiveness into question, particularly when applied to the intrinsic opacity of artificial intelligence systems based on machine learning algorithms. This objection is undoubtedly significant, given the undeniable difficulty in achieving transparency for this kind of algorithm.

The case law analysis, at least within the Italian context, currently depicts a scenario where the use of systems based on deterministic algorithms prevails in the workplace. For such systems, the issue of opacity does not arise. Consequently, it is possible to ensure workers an effective understanding of the outputs in these cases. The ongoing and unstoppable technological evolution, however, encourages the interpreter not to stop at this mere observation but to identify more robust solutions, as what may not be possible today could very well be achievable in the near future.

From this perspective, one could then question the appropriateness, if not the legitimacy, of using such opaque systems to make decisions that have a significant impact on workers, at least for those decisions that require specific obligations of reasoning or justification of managerial choices (Aktinson, Collins, 2024; Gragnoli, 2022).

The recent regulatory trend aimed at holding the employer-entrepreneur accountable for the adoption of organizational decisions seems to suggest such a conclusion. The principle of accountability emerging from EU legal sources on automated systems (see for example art. 10, Directive (EU) 2024/2831 on improving working conditions in platform work) requires the employer to adopt appropriate technical and organizational measures to ensure that the implementation of automated systems respects the fundamental rights of workers.

This is, moreover, an approach consistent with the European "new socio-economic paradigm" of Industry 5.0 (Casale, Rinaldi, 2023), which implies

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a shift in perspective in the relationship between workers and technology. In this paradigm, technology should be at the service of workers and must be employed in the workplace with full respect for their fundamental rights, such as the right to privacy, autonomy, and human dignity (European Commission. Directorate-General for research and innovation (Breque, De Nul, Petridis, 2021).

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Final Report: Research Group "Automation and Digitization of Labour Relationships"[1]

Daniel Ulber[2]

For this report, the members of Research Group 4: "Automation and Digitization of Labour Relationships" were consulted and, through joint meetings and the work of subgroups, examined the legal implications of automation and digitization for the world of work.

The research group recognized the need to focus the discussion due to the wide range of issues. Consequently, they agreed on three key subject areas, forming sub-working groups to address them:

1) Digitalization and working time;
2) Employment status, employment contract and modern forms of work (platforms);
3) Effects of digitalization on the collective representation of workers'[3] interests.

[1] Halle (an der Saale), August 2024. *Thanks to the Members of the Research Group*: Prof. Stefano Bellomo (University Sapienza of Rome, Italy); Prof. Fabiola Bogado Ibarra (National University of Entre Ríos, Argentina); Prof. Sebastian Coppoletta (National University of the Litoral, Argentina); Prof. Valentina Franca (University of Ljubljana, Slovenia); Prof. Roberto Padilla Parga (University of Talca, Chile); Prof. Septimiu Panainte (Alexandru Ioan Cuza University of Iași, Romania); Prof. María Sepúlveda Gómez (University of Sevilla, Spain); Prof. Carla Spinelli (University Aldo Moro of Bari, Italy). *In collaboration with*: Dario Calderara (University Sapienza of Rome); Antonella Gravinese (University Aldo Moro of Bari); Maike von Restorff (Martin-Luther University Halle-Wittenberg).

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[3] The terms "worker" and "employee" are predominantly used interchangeably, as this report does not intend to address various delineation issues. Such a delineation was not considered practical in an international report since the terminology and categorization differs a lot across legal systems.

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In each of these areas, changes in the world of work have led to new legal issues. Modern information and communication technology means that workplaces are dissolving and people are working together less frequently in the same place and at the same time. This complicates the recognition of employment relationships as the basis for workers' rights, particularly in platform work. Additionally, enforcing rights through collective interest groups is more difficult when workers are dispersed due to the lack of shared workplaces.

The use of artificial intelligence (AI) by employers also introduces new regulatory tasks for collective bargaining parties. AI permeates the entire employment relationship, from applicant selection to performance reviews, raising various issues from data protection to anti-discrimination law. The blurring of the boundaries of work with the simultaneous isolation of workers and the associated possibilities of dissolving the employment relationship through digitalization emerged as common concerns across all sub-working groups. Other issues identified by the working group members in connection with the topic were also addressed.

Initially, the members of the working group identified topics on which the country reports were to be written. Since the research group only comprises people from Europe and Latin America, the results cannot be regarded as globally representative. Country reports were received from the following countries or regions: Argentina, Chile, Germany, Italy, Slovenia, Spain, the European Union and an overview study for Latin America. In order to broaden the information base, members of the working group coming from the European Union were also asked to include EU law in their reports. In addition, further studies from other countries were considered when available. Reports from international associations, especially of the International Labour Organisation (ILO) were also reviewed.

1. Introduction

The development of digitalization and artificial intelligence has led to profound changes in the world of work. Technologies that were once considered futuristic are now integral in many industries and are shaping the way work is organized and performed. This presents significant challenges to traditional legal principles and regulations in labour and social law. Platform work, in particular, represents a substantial upheaval.

The report first explores the connection between digitalization and working time. Digital devices enable work from anywhere and at any time. This has led to increased flexibility but, at the same time, is also increasingly

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blurring the previously sharp distinction between working time and leisure time. This creates new challenges in the area of working time regulation and health protection. In this context, the term "time porosity" was coined to describe the mutual influence and overlap between working time and leisure time, which can lead to personal and family conflicts. As a result, debates about the "right to unavailability" have intensified. At the same time, digitalization can also be seen as a decisive factor in the enforcement of working time regulations through the implementation of digital working time recording systems. However, it is important not to lose sight of ensuring adequate employee[4] data protection.

The second part of the report addresses the platform economy as a new form of labour relations. Digital platforms often try to employ their workers as freelancers or in temporary employment relationships without adequate protection. This has given rise to the so-called gig economy, in which traditional employment relationships are increasingly replaced by project-based and short-term contracts. However, the innovations have not dissolved the asymmetrical relationship between the parties involved. Rather, economic dependencies persist and raise a variety of labour and social law issues. At the heart of the employment law debate is the question of the employment status of platform workers. They are often neither clearly classified as employees nor as self-employed, leading to legal uncertainties and protection gaps. Other key issues include the entitlement to payment of the statutory minimum wage, occupational health and safety, working time regulations, protection against dismissal and the possibility for platform workers to have their accounts deactivated or blocked by the company providing the platform. Platform workers also often lack sufficient access to social security systems including health, pension, and unemployment insurance, posing long-term social risks. Overall, a global trend can be seen to regulate these new types of labour relationships and create minimum standards. An undertaking that is quite complex given the diversity in the design of the respective working models.

The report then examines the impact of digitalization and AI on trade union and workers' representatives. Here, too, it is evident that the digital transformation of the economy poses major challenges for industrial relations and collective bargaining. The lack of adaptation of the current legal framework to the digitalization of work requires new legal regulations

[4] The terms "employee" and "worker" are predominantly used interchangeably, as this report does not intend to address various delineation issues. Such a delineation was not considered practical in an international report since the terminology and categorization differs a lot across legal systems.

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and a renewal of the institutions of collective labour law. Collective interest groups need to focus more on digitalized work contexts and the associated issues such as algorithmic work allocation and employee data protection. Simultaneously, trade unions should also make greater use of digital services themselves in order to continue to reach workers and remain effective in the world of work despite the increasing decentralization and isolation of the workforce due to the rise in home office and platform work.

This study aims to analyse the key labour law and social law issues in the context of digitalization and automation. It highlights the legal challenges arising from the new forms of work and discusses possible solutions and regulatory strategies to ensure both the protection of platform workers and the flexibility and innovative strength of the digital economy.

2. Digitalization and working time

Most of the countries included in the report are experiencing a shift from "traditional" professions in industry or the agrarian sector, where the life of the worker is organized around whether they are working or not – essentially whether they are in the factory or not – to jobs that are affected by digitalization. Recent developments show that traditional jobs still exist, and a significant number of jobs are performed in this setting. Nevertheless, in recent years, working time has undergone significant changes facilitated by digitalization.

Often legislation solely differentiates between working time, defined as the period during which the worker is at work, at the employer's disposal and in the exercise of their activity or duties, and rest time, defined as any period that is not part of working time. Recent technological developments and the consequent evolution of work organisation have led to growing difficulties in qualifying certain situations.

The process of digitalization of work has also increasingly allowed work to be performed remotely, resulting in an intensification and extension of working time.

2.1. General developments

Digitalization has significantly altered traditional working patterns, blurring the boundaries between work and personal life. The advent of digital communication tools has enabled continuous connectivity, often leading to extended working hours and the intrusion of work into personal

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time. Delocalization of the work in general makes this a more and more important issue. The Covid-19 pandemic has forced remote work situations and therefore resulted in some legal regulation.

As the legal and actual demarcation between working hours and free time becomes increasingly difficult, new legal questions arise. This concerns, for example, health protection in the event of psychological stress due to permanent accessibility via messenger, apps or telephone.

It is also notable that platform work leads to more intense exposure of workers to excessive working time requirements from employers. Special attention must be paid to the situation of double or multiple employment relationships, as platform workers often have a main job and only work for platforms on the side or additionally. In addition, due to the large number of requests and the structure of some apps, they are particularly required to be available and ready to receive orders at all times. This is especially true if there is an obligation or incentive to constantly appear as "active" or "connected" in the app in order to receive better or better remunerated orders.

The intrusion into private life is pronounced as a special problem for people performing care tasks for others (family members) and therefore have no real option to react to these intrusions. This leads to an additional stress for those performing unpaid care work in families. Remote work has ambiguous effects. If the decision on how it is performed lies with the worker it can be used to improve work-life balance, allowing for childcare, reducing commuting time, and leading to increased work autonomy and better use of working time. However, in most cases, where remote work is performed under more or less control by the employer, it can increase the pressure on workers to always be available or to work in their free time, resulting in isolation and a blurring of the boundaries between work and leisure time. The hyper-connectedness to which these workers are exposed often results in increased stress due to the difficulty of discerning between work and private life.

2.2. Legal measures

As a basic principle, it can be said that most countries have set a legal limit on daily working hours. In some countries, this results directly from the constitution, for example in Argentina and Spain. The limitation is acknowledged in international human rights instruments that in some countries have constitutional status, or common law instruments that have a sub-constitutional but supra-legal status (primarily ILO Conventions Nos. 1 and 30).

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In many countries, the general rule is that the working time is limited to 8 hours per day and 48 hours per week. The second norm aligns with the working time directive within the European Union and is – with some exceptions[5] – the general rule in all member states. There is no direct but an indirect limitation for the daily working time as the working time directive guarantees a minimum rest period of 11 hours between to assignments. It is notable that in general working time regulation in most countries is still attached to the classical paradigm of work. There is no special regulation on working time in digital environments, apart from a strong tendency to establish special regulation on working time for teleworkers.

Specific legislation on the regulation of working time that responds to the new productive reality in the digital economy is rare. No country in the report has substantially changed the concept of a limitation of daily working time. However, there are some new developments regarding mobile work or telework. Nevertheless, in response to the challenges of digitalization, various legal frameworks and policies have been proposed or implemented to regulate working time in the context of digital work.

The lack of specific legislation addressing working time in digital environments has created scenarios where certain individuals need special protection due to their unique vulnerabilities – protections that general regulations, which are based on traditional work paradigms, cannot provide. This issue is particularly evident in at least two key areas.

Firstly, platform workers are affected. Although the digital nature of their work seems to offer flexibility in regulating working hours, it actually exposes them to excessive demands from employers, which they may find difficult to resist.

Secondly, individuals performing caregiving and assistance tasks, predominantly women, face unaddressed vulnerabilities. The absence of specific regulations allows for the extension of work hours into caregiving time, as digital communications between employers and working women often blend work tasks with care responsibilities. Consequently, women are subjected to the dual pressures of work obligations and gender-based caregiving roles within a patriarchal social structure, highlighting the need for a protective legal framework to address these intersecting demands.

[5] In Italy and Slovenia, for example, the general rule about working time is set at 40 hours per week (art. 3, par. 1, d.lgs. 66/2003). The average working time may in no case exceed 48 hours per seven-day period, including overtime (art. 4, par. 2, d.lgs. 66/2003).

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a) Right to (digital) disconnect

Various countries have introduced laws to ensure the right to disconnect for all (e.g. Mexico, Slovenia, Spain and other countries in South America) or at least for teleworkers (Argentina) or agile workers (Italy, Art. 19 l. n. 81/2017) – allowing workers to disengage from work-related communications outside of official working hours. This legislation attempts to contain work time and prevent it from encroaching on non-work time. The regulation focuses on the following aspects:

- Prohibition of the requirement to perform tasks or to communicate with the employer outside of the working time, at least for teleworkers (Argentina, Slovenia, Spain)
- Obligation for employers to develop an internal policy to the right to disconnect at least after consultation of the relevant union or the works council (Slovenia)
- Ensuring respect for rest time, leave, holidays, as well as personal and family privacy outside legally or conventionally established working hours (Slovenia)
- The explicit extension of this right on new forms of work (e.g. remote work, flexible hours)

In Italy, Art. 19 l. 81/2017 stipulates that "*the agreement should also identify the worker's rest time as well as the technical and organisational measures necessary to ensure the worker's disconnection from technological work equipment*". Art. 2, c. 1-ter of Law Decree 30 2021 states that "*the right to disconnection from technological instruments and IT platforms is recognised to the worker carrying out the activity in agile mode, in compliance with any agreements signed by the parties and without prejudice to any agreed stand-by periods. The exercise of the right to disconnection, which is necessary to protect the worker's rest time and health, cannot have repercussions on the employment relationship or on remuneration*".

In April 2024 the European Comission launched the first-stage consultation of European social partners to gather their views on the possible direction of EU action on ensuring fair telework and the right to disconnect[6].

However, the enforcement of such laws remains a challenge due to the pervasive nature of digital communication. There is also a lack of a clear understanding of when a disconnection occurs not only in fact but also in the legal sense. In some countries (e.g. Slovenia and Spain), collective

[6] *ec.europa.eu/commission/presscorner/detail/en/ip_24_1363*.

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bargaining and the works council play a strong role in the enforcement of the right to disconnect. The right is enforced by the control authorities and violations can be sanctioned by fines.

b) Remote work/telework

Special regulations on remote and telework has been established after the Covid-19-pandemic. The strong role of collective agreements in this matter is also evident. These regulations focus, for example, on agreements on remote work and the right to revoke these agreements.

Additionally, there is regulation that focuses on who decides on the schedule of the remote work. In Spain, like Italy, remote workers have a right to a flexible schedule, although it must be exercised within the framework of the remote work agreement and collective bargaining, respecting mandatory availability times and regulations on working time and rest.

In the EU, there is a general rule, since the decision of the ECJ in the CCOO case[7], that the working time needs to be recorded. This rule is applicable on remote and telework. However, the rule has not yet been formally adopted in all member states (e.g. Italy), so there is the question whether national law can be interpreted in accordance with the judgement. Accordingly, the German Federal Labour Court has ruled that not only the Working Hours Act but also the Occupational Health and Safety Act must be interpreted in accordance with the Directive in order to comply with the requirements of the Working Time Directive. For this reason, employers in Germany are already obliged to record the start and end of daily working hours in accordance with Section 3 (2) No. 1 ArbSchG. A legislative procedure to implement the decision has currently been started but has not been pursued any further.

c) Obligation to record working time

With the ever-increasing overlap between working time and leisure time and the lack of connection between presence at the workplace and working time due to digitalization, the issue of measuring working time has become increasingly important. This is all the truer when it comes to people who perform knowledge work.

In some countries, e.g. Spain and Italy, there is now a legal obligation

[7] Court of Justice of the European Union (Grand Chamber) Judgment of 14 May 2019, CCOO case, C-55/18.

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for every employer to record the daily and weekly working hours of every employee. In Slovenia, recent legal changes go even further by mandating that employers must record the working hours of everyone working on their premises. This includes not only employees but also students, self-employed individuals, and others. These changes, implemented in 2023, were primarily driven by trade union pressures addressing violations such as exceeding working hours, unpaid labour, and insufficient breaks.

These regulations implement the Working Time Directive, from which the ECJ in the CCOO case derived an obligation for the member states of the European Union to provide for such a recording of working time. This obligation also covers, but is not limited to, the recording of overtime. The primary objective of this regulation is health protection. Employers can only comply with legal requirements on working hours if they know at what time a worker has started and finished their working day. This information must also be provided for remote or telework. It is important to note that this regulation prevents companies from surreptitiously requiring overtime without proper remuneration and, in some cases, without social security contributions. Intensive discussions focus on how this regulation can remain compliant with Data Protection regulation.

The core element of working time recording is that it is not an end in itself, but should enable the enforcement of rights to daily and weekly rest periods and the maximum weekly working time. Workers who do not know how long they have worked cannot assert their related rights. Employers who do not know how long their workers have worked cannot fulfil their duty to health protection through maximum working hours. This leads to requirements for a system of working time recording. The ECJ has stated that EU Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured. The innovative feature of this system is its ability to enable employers, workers, and inspection bodies to verify and demonstrate – in an impartial, reliable, and objective manner – the correct enjoyment of the rights provided by the Charter of Fundamental Rights and the directive. In the absence of such a tool, the current recourse is to the means of proof admitted by the legal system, which, in the opinion of the Court of Justice, "*do not enable the number of hours the worker worked each day and each week to be objectively and reliably established*". Due to the discretion of the member states, it is not yet clear which system can comply with these criteria. The records are intended to solve the problem of proof that arises when working hours fluctuate. However, as these are occupational health and safety regulations, it also seems clear that the system is not intended to document breaches of the law, but to prevent them. This implies that the employer must

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make the records in such a way that he can take note of them and must use them to prevent infringements of working time legislation from the outset.

In addition, working time recording can also be applied to people who work remotely. Employers can still leave it up to them to decide how they organize their working hours (start, duration, interruptions, etc.) in all cases respecting legal regulations and collective bargaining agreements but must ensure that the hours worked are recorded. In particular, they must establish a system that makes it possible to calculate the daily working time worked by each worker, in accordance with the requirements established in the CCOO case cited above. There are various technical solutions for this, such as apps that can be used to record working hours via a smartphone. Such apps are also able to automatically inform workers that they should stop working if they exceed the statutory maximum working hours or stop working if they fall short of the minimum rest periods. The costs are marginal, so this option is also available to small and medium-sized companies.

On the other hand, the biometric identification of workers for recording daily work hours requires, in accordance with the European Data Protection Regulation (GDPR), the explicit consent of the data subject for processing such personal data. Its use is not covered by Article 9 (2) (b) of the aforementioned regulation. The recent European Regulation on Artificial Intelligence, adopted on June 13, 2024, excludes from its scope AI systems intended for biometric verification. This includes authentication systems whose sole purpose is to confirm that a specific natural person is who they claim to be, as well as systems used for identity verification to access a service, unlock a device, or ensure secure access to premises. The full application of the European Data ^Protection Regulation remains unaffected.

Where regulation transposing the requirements of the ECJ exists, an obligation to record working time is imposed and is further specified by regulation, e.g., on the question of whether paper registers are sufficient.

d) Transparency of working time schedules

Closely linked to the issue of recording working time are legislative measures aimed at improving the transparency of the working time ordered by the employer. In Italy, for example, the employer is obliged to inform the workers of the planning of normal working hours if the employment contract provides for the organisation of working hours to be wholly or largely foreseeable (e.g. by publishing work schedules in advance). If the employment relationship is characterized by largely or entirely unpredictable organizational methods, the employer shall inform the worker about:

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1) the variability of the work schedule, the minimum amount of guaranteed paid hours, and the remuneration for work performed in addition to the guaranteed hours;
2) the reference hours and days within which the worker is required to perform work tasks;
3) the minimum notice period to which the worker is entitled before the start of a work assignment and, if permitted by the contractual type in use and agreed upon, the deadline by which the employer can cancel the assignment".

This is especially applicable for on-demand work whenever it is not possible to schedule working hours and, therefore, to an ex ante determination of the time of performance.

2.3. Judicial decisions

An important player among the courts as far as working time is concerned is the ECJ.

a) ECJ – Matzak

In the Matzak case, the Court expanded the concept of working time to include those cases where the worker is at the employer's disposal, even if at home. The Court reasoned that the worker's availability to the employer means that such intermediate time serves the employer's organisational interest, preventing the worker to achieve the psychological relaxation of normal rest periods. Nowadays, the demarcation line between situations and temporal segments attributable to the concept of "working time" and those forms of fulfilling work obligations that fall outside of it has been effectively delineated by the case law of the Court of Justice, which has repeatedly clarified that the distinguishing criterion is found in the intensity of the constraints imposed on the worker during periods of readiness. Key criteria for distinguishing between working time and rest periods include: the time period available to the worker to resume work from the moment the employer requests it; the frequency of tasks performed during the on-call period; and the "non-negligible" duration of interventions carried out, which limit the possibility of freely managing one's time during the worker's inactive periods.

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b) ECJ – CCOO

As mentioned earlier the ECJ decided in the CCOO case, that "*in order to ensure the effectiveness of those rights provided for in Directive 2003/88 and of the fundamental right enshrined in Article 31, Paragraph 2, of the Charter, the Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured*".

3. Employment status, employment contract, and modern forms of work (platforms)

The dissolution of the connection between workplace and working time can especially be experienced in the different forms of platform work. However, the issue at hand is not merely the interpretation or application of individual employment rights but rather the core question of the general applicability of labour law.

This new form of employment remains to be the subject of discussion, including judicial discussions, regarding the legal qualification of the relationship between the worker and the platform, particularly in the case of home-based distribution. Most legal systems distinguish between subordinate workers (employees) and autonomous workers (self-employed), applying different systems of protection to each category. The applicability of labour law depends on the classification of the contract as an employment contract. This raises significant issues as platforms attempt to avoid the applicability of labour law to their platform workers. Therefore, it is crucial to determine whether platform work constitutes an autonomous legal relationship or subordinate employment.

A major problem in this context is that platforms refuse to enter into collective agreements on platform work, arguing that the platform workers are self-employed (see below). The potential for a greater role for unions is widely discussed but encounters challenges when the status of workers as employees is unclear.

3.1. General developments

The rise of platform work, driven by algorithmic systems, has become a prominent feature of modern labour markets.

Platform workers – such as those in ride-sharing or food delivery services,

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as well as those working online – often operate under conditions that lack the protection afforded to traditional employees, such as social security, healthcare, and stable contracts. The precarious nature of platform work calls for a re-evaluation of employment classifications and protections. Digital platforms, not only in Latin America but globally, have contributed to work precarization.

The major problem is that platforms attempt to avoid the status employer/worker. This manifests through two strategies. On the one hand, attempts are made to organise the activity in such a way that the platform employees appear to be self-employed. On the other hand, there are platforms that attempt to act purely as intermediaries for orders. In the latter scenario, the question arises as to whether there could be potential for simplifying the guarantee of certain rights for platform workers that are otherwise reserved for employees, regardless of the classification of their contractual relationship.

Another specific problem in this context is that platforms do not compensate for the time workers are logged onto the platform but not performing a "task", making it economically advantageous for them to keep users available for as long as possible. On-call times, which are generally unpaid, are interrupted by microtasks of short duration. Often platforms define minimum times for availability and block users who do not comply with them. This creates a precarious situation for the workers who are prevented from using their labour elsewhere, thereby increasing their dependency on the platform.

3.2. Legal measures

In its report *Realising decent work in the platform economy*, published in 2024, the ILO identified 41 global legislative instruments addressing decent work on digital platforms[8]. The ILO stated that regulation of platform work was highly dynamic and developing rapidly with legislative proposals under consideration in several jurisdictions, including Australia, Brazil, Colombia, Costa Rica, the European Union, Peru, the Philippines and Uruguay.

According to the report, regulation of platform work varies by country but generally includes:

– amendments to existing labour legislation to include platform work (for example, in Belgium, Chile, Croatia, France, Italy and Portugal);

[8] *www.ilo.org/resource/conference-paper/ilc/113/realizing-decent-work-platform-economy* (accessed: 30.07.2024), p. 29 ff.

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- specific standalone legislation on platform work (for example, in China and the Canadian Province of Ontario);
- sector-based legislation (for example City of Seattle and Washington State, United States);
- specialized laws that extend labour and/or social protections to platform work (for example, the social security laws of India and the Republic of Korea).

The ILO report also found that beyond these approaches, platforms and platform workers fall – depending on their classification – within the ambit of laws relating to wage employment, self-employment or dependent self-employment.

The latter was also a result that was confirmed in the analysis of the working group's national reports. There seemed to be a tendency not to perform special regulation on platform work, although some steps have been taken in countries like Italy and Chile. This absence of regulation has redirected protective action directly to the jurisdictional sphere.

More prevalent are attempts to integrate this phenomenon into the existing structures of labour law (Germany, Argentina). There has been a gradual trend to classify the working relationship of platform workers directly as subordinate, without going through the norm on hetero-organized collaborations. Even where legal systems do not go that far, there is a tendency to provide "strengthened" protection for workers who are particularly vulnerable, such as riders, extending the protections of subordinate work to them.

The reason for this is probably that legislation often lags behind, prompting courts and practitioners to initially address the phenomenon with existing laws. In Germany, for example, this has led to case law that generally allows platform workers to be categorised as employees. This categorization leads, for example, to the applicability of dismissal protection law as well as holiday law and other labour laws. In Slovenia, by contrast, there have not yet been any court cases regarding platform work, nor have there been any legislative attempts to change the existing regulations. Consequently, platform workers may bring their employer to court to demand an employment contract based on the general rules in the Employment Relationship Act.

Where statutory law explicitly lays out minimum standards for platform workers, they focus on minimum remuneration, anti-discrimination, and protection against exclusion from the platform and reductions in work opportunities attributable to the non-acceptance of performance.

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a) Classification of the platform workers

The ILO Report from 2024 found that in most countries, the enjoyment of labour rights by workers is intrinsically related to their employment status[9]. The correct classification is therefore of outstanding importance when it comes to the protection of this group.

Efforts to address the legal status of platform workers have led to some legislative initiatives aimed at providing clearer definitions and protections. In Argentina, the absence of specific regulations for platform work means that general labour norms, such as the Employment Contract Law, are applied. This approach has led to varying interpretations and applications of the law, highlighting the need for specific regulatory frameworks to address the unique aspects of platform work. An advantage is that some countries, such as Argentina, provide for a presumption of employment under certain conditions, making it more likely for platform workers to be recognized as workers. However, this approach is typically limited to distribution platforms.

In the case of Spain, a legal norm was approved in 2021 to guarantee the labour rights of people dedicated to delivery in the field of digital platforms, which has its origin in a tripartite agreement of social dialogue. This is a pioneering regulation in Europe, which establishes the legal presumption that the relationship that unites the parties is an employment one, provided that the employing party exercises business powers of organization, management and control directly, indirectly or implicitly, by means of algorithmic management of the service or working conditions, through a digital platform.

This concept was also part of the recently adopted EU Platform Directive[10]. Article 5 of the directive determines that member states should establish a legal presumption in favour of an employment relationship (as opposed to self-employment). Accordingly, a contractual relationship between a digital work platform and a person working via this platform is considered to be an employment relationship if there is evidence of control and direction. If the platform wishes to disprove this assumption, it must prove that the contractual relationship is not an employment relationship.

According to the ILO Report from 2024 a presumption of an employment under certain circumstances was also implemented in other countries such as Portugal, Spain, Belgium and Croatia. Conversely, there is also legislation in

[9] Ivi, p. 49.

[10] *www.europarl.europa.eu/news/de/press-room/20240419IPR20584/parlament-nimmt-richtlinie-uber-plattformarbeit-an* (accessed: 24.06.2024).

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which a presumption of self-employment has been introduced (e.g. in the US State of Washington)[11].

In 2020, voters in the US state of California supported a ballot proposal (Proposition 22) by Uber and its allies, allowing app-based services like rideshare and delivery companies to classify drivers as independent contractors rather than employees. The proposition was implemented in the Business and Professions Code section 7451. While the law allegedly aims to protect gig economy workers' independence by enabling them to choose to work as independent contractors and, for example, set their own hours, it should be noted that independent contractors are generally not covered by the state's workers' compensation laws, therefore lacking protection in this regard. California's Supreme Court has now upheld the measure.

In some countries labour inspection has the authority to object if individuals who are employees are categorised as self-employed by a platform and can also impose fines in this case (Argentina).

b) Algorithmic management

The development of the platform economy is closely tied to the advancement of algorithmic management, as many modern labour platforms use algorithmic management systems to oversee their work processes.

Algorithmic management uses data analytics and automated systems to optimise workflows, monitor performance and make decisions regarding work allocation. These algorithms can determine which tasks are assigned to a worker, how payment is processed or which performance criteria need to be met.

While algorithmic management in platform work can enhance efficiency and flexibility, it also presents challenges. It can lead to significant monitoring and control over workers, who often have limited transparency and opportunities for participation. Furthermore, algorithmic decisions can sometimes result in unfair or incomprehensible working conditions and compensation.

In addition to the new regulation on the presumption of employee status, the EU Directive on Platform Work includes provisions related to algorithmic management in platform work to promote transparency, fairness, human oversight, security and accountability in this context (Art. 1 (1) (b) of the Directive). To better protect the data of platform workers,

[11] *www.ilo.org/resource/conference-paper/ilc/113/realizing-decent-work-platform-economy* (accessed: 30.07.2024), p. 51 ff.

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the Directive introduces rules based on the understanding that consent to the processing of personal data is often not genuinely voluntary due to existing power imbalances[12]. In this sense, Art. 7 of the Directive restricts the processing of certain personal data through automated monitoring and decision-making systems. For example, it prohibits the processing of data related to the emotional or mental state of the person working in platform work and using personal data to predict the exercise of fundamental rights, including the freedom of association, the right to collective bargaining and action, or to draw conclusions about the existence of grounds for discrimination.

Algorithmic management should also become more transparent for platform operators, their representatives and national authorities. Art. 9 of the Directive outlines transparency and information obligations related to automated monitoring systems and automated systems used to make decisions that affect platform workers, including their working conditions. This includes algorithmic decisions on work assignments, earnings, health and safety, working time, promotion or equivalent measures, as well as contractual status, including restrictions, suspensions or terminations of the platform worker's account[13]. Human oversight of automated systems is also mandated under Art. 10 of the Directive. Additionally, according to Art. 11 (1) (a) of the Directive, platform operators should be able to receive a clear and understandable explanation for each automated decision. Art. 11 (2) stipulates that such explanations must be provided no later than the date when a decision that directly impacts the employment or other contractual relationship – such as restricting, suspending, or terminating the account – takes effect.

Given the often transnational organization of platforms, there is a need to improve transparency in cross-border situations (Art. 1 (1) (c) of the Directive). To address this, the Directive includes notification obligations for platform operators (Art. 16) and information requirements for authorities and platform operator representatives (Art. 17).

The AI Act, recently adopted at the EU level (see Part IV.2), will profoundly influence the growing digitalization of the workplace, where AI is increasingly integrated across various domains. This is especially pertinent in the realm of platform work, where AI is already extensively utilized.

[12] Recital 39 f. of the Directive.
[13] Recital 45 of the Directive.

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c) Other relevant aspects

Besides the problem of classifying people employed in the platform economy and the use of algorithmic management, a major problem is that platforms allow users to rate the tasks of the platform workers, which can lead to a situation of a lock-in since the rating is not transferable to other platforms. This limits the option to switch to a different employing platform.

Another issue is that economically dependent individuals can be blocked by the platforms without any protection against this de facto dismissal. This has led to prohibitions in some countries against exclusion from the platform or other sanctions in case of a refusal to perform an assignment from the platform. In Italy, for example, exclusions from platforms and reductions in work opportunities as a consequence to the non-acceptance of the service are prohibited.

3.3. Judicial decisions

According to the ILO Report from 2024 there is a significant amount of case law on the classification of workers on platforms but no consensus on whether to classify such workers as employees or self-employed workers[14].

Several judicial decisions have affirmed the employment nature of relationships in platform work. For example, in Argentina, Spain, and Germany, courts have ruled in favour of recognizing platform workers as employees, thereby entitling them to employment protections or at least a heteronomous status. The decisions are based on the following arguments:

- Personal work directed by another as a requirement for the worker status can also be fulfilled
- Integration into an external business organization that determines the work conditions
- Platform workers have no control over the characteristics of the product transported, as they must comply with the company's rules
- Incentives and gamification lead to a situation of subordination
- Platform workers are often subject to strict controls both by the company and consumers, who rate their performance through the application, indicating the labour relationship in this type of service.
- The right to reject an assignment becomes irrelevant if this leads to

[14] *www.ilo.org/resource/conference-paper/ilc/113/realizing-decent-work-platform-economy* (accessed: 30.07.2024), p. 49 ff.

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sanctions (lower rating, no access to "good" assignments, loss of privileges) from the platform. This practically forces the contractual partner of the platform to accept the assigned tasks. Under these circumstances, even if there is no direct obligation to perform a task or service, this implies no actual freedom.

In Italy, the Supreme Court in the leading case of riders[15] recognized a so called "remedial approach" that bases itself on certain regulatory indicators to provide "strengthened" protection for workers who are particularly vulnerable as contracting parties, such as riders, extending the protections of subordinate work to them. Art. 2 of Legislative Decree No. 81 of 2015, provides that hetero-organized collaborations, identified as those continuous, predominantly personal collaborations organised by the commissioning party, are subject to the regulations of subordinate work, with some exceptions. Therefore, the employer must accord to the hetero-organised workers the same economic and regulatory treatment applied to employees engaged in similar or related tasks. According to the Italian Supreme Court, Art. 2 is a "*disciplinary rule that does not create a new legal paradigm*". In other words, adopting an anti-fraud perspective, the lawmaker has merely established the "*application of the contract of employment regulations to continuous, predominantly personal collaborations organised by the commissioning party*". As a consequence, there would be no incentive for the employer to classify a worker as either hetero-organized or employee, since the applicable regulatory framework would remain the same in both cases.

Contrary developments can also be observed in case law. In California, the Supreme Court recently dismissed a lawsuit filed by the Service Employees International Union (SEIU) and four drivers against Business and Professions Code section 7451, allowing app-based services like rideshare and delivery companies to classify drivers as independent contractors rather than employees. The plaintiffs had argued that the law conflicted with the California Constitution, which grants the legislature extensive authority to create and enforce a workers' compensation system. The Supreme Court found that there was no constitutional conflict, affirming that voters can exercise their own power regarding compensation laws.

The ILO Report from 2024 found that legal challenges to platform workers' self-employment status are common in Europe, Central Asia, and North America, but less so in Africa, Asia, the Pacific, and Latin America[16].

[15] Corte di Cassazione, 20 January 2020, n. 1663.

[16] *www.ilo.org/resource/conference-paper/ilc/113/realizing-decent-work-platform-economy* (accessed: 30.07.2024), p. 49 ff.

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4. Effects of digitalization on the collective representation of workers' interests

Digitalization has profoundly affected the collective representation of workers' interests, reshaping traditional union activities and bargaining processes. While technology offers new avenues for union engagement, such as social media and digital communication tools, it also introduces challenges like reduced physical interaction and increased individualism among workers. Automated systems for managing tasks and performance further complicate these dynamics, reinforcing power imbalances between employers and workers. This necessitates new legal and organizational strategies to protect workers' rights in the digital age.

4.1. General developments

Digitalization has significantly impacted the collective representation of workers, complicating traditional forms of worker organization and bargaining.

On the one hand, technology enables new ways of conducting union activities, providing broader interaction, aggregation and discussion spaces than traditional ones. This includes using social media to promote collective initiatives, company mailing lists and new dynamics of union conflict. However, the spatial and temporal flexibility inherent in digital work environments makes it challenging for workers to engage in collective actions and negotiations. The lack of physical interaction complicates the construction of "collective action", adding individualistic tendencies of online workers to the already known crises in union representation mechanisms in the digital ecosystem.

Additionally, processes such as recruitment, task assignment, training, and performance management have been delegated to automated systems, a phenomenon referred to as the "algorithmic management". AI and algorithmic management reinforce the power imbalance between employers and workers through asymmetrical information relationships. To counteract this imbalance, information and consultation rights are seen as protective instruments. International and supranational legal frameworks, such as the ILO directives and the EU General Data Protection Regulation, support this approach (see the ILO Code of Practice on the Protection of Workers' Personal Data, sections 5.8, 5.11, and 12.2; the EU Regulation 2016/679 (GDPR), Recital 43). For its part, the European Regulation on Artificial Intelligence of 13 June 2024 states that "*Before putting into service or using*

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a high-risk AI system in the workplace, deployers who are employers shall inform the workers' representatives and the workers concerned that they will be exposed to the use of the high-risk AI system" (Art. 26.7).

The trade unions are already beginning to respond to these developments to some extent. In Italy, for example, trade union initiatives include the promotion of a "digital trade union card" and a "digital check-off" process based on blockchain technology by the Metallurgical Federation Fim-CISL. The three main Italian Confederations also agreed in March 2017 in the document *An Italian Way to Industry 4.0 Looking at the Most Virtuous European Models* on highlighting the lack of awareness regarding the new skills necessary to accompany and support Industry 4.0 processes, whose full implementation is "*an essential condition for enhancing the quality and competitiveness of production, economy and labour in our country*". Concerning the situation in Spain, the Fifth Agreement for Employment and Collective Negotiation (V AENC), published on May 19, 2023, is notable. It results from social dialogue between Spanish business organizations (CEOE and CEPYME) and trade unions (CCOO and UGT). It establishes criteria for collective negotiation across various sectors and levels. The V AENC addresses commitments on artificial intelligence, remote work, and digital disconnection, and includes a specific chapter on "Technological, digital and ecological transition", covering technological and digital transition, the European Framework Agreement on Digitalisation, AI and the guarantee of human control, and the right to information on algorithms. In Slovenia, by contrast, social partners have not taken any significant activities on this regard.

In the field of platform economy new unions are forming to address the needs of platform workers in various Latin American countries. In Argentina, the Association of Platform Workers (APP) and the Motorcycle Riders, Messengers, and Services Union (ASIMM) are emerging as key organizations striving for official recognition and the development of specific regulations through collective bargaining. Similarly, in Colombia, the Union of Platform Workers (Unidapp) and in Ecuador, the Front of Digital Platform Workers of Ecuador (Frenapp), are also establishing themselves. A similar union for delivery drivers (Sindikat dostavljalcev) was established in Slovenia, but it has not yet made a significant impact. These union entities aim to gain recognition as legitimate representatives of platform workers and to create tailored labour regulations to better address the unique challenges faced by workers in the digital economy.

A major problem is that if platform workers are not recognized as employees in some countries it is called into question whether trade union rights are applicable to them. This question is not without importance, especially in

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European competition law, because associations of self-employed people who jointly enforce rights against other companies could be classified as cartels. There is a tendency to recognize the rights of platform workers to organize nevertheless as they are at least in a similar situation as workers. But the right of self-employed persons to organize in trade unions and the option to conclude collective agreements upon their rights is not clear in all legal systems.

However, unionization in this area is still in its early stages. The reasons are the high mobility of platform workers, divergent interests among them, and lack of contact, which weaken their organization and unionization efforts. Additionally, the competitive nature fostered by platform business models, legal restrictions on self-employed workers joining unions, and the atomization of work in the digital economy further challenge traditional union structures. In Latin America, these issues are compounded by violence against union activities and precarious labour conditions, which overshadow the digitization process in the region.

It also has to be noted that in some countries like Argentina, the digitalization of production processes is not a primary concern for unions due to the country's severe and persistent economic problems. Collective bargaining tends to focus on job preservation and wage protection rather than digital issues. When digitalization is addressed, it often involves multinational companies imposing their own labour regulations. Additionally, Argentina's economic crisis has hindered technological advancement compared to other developing countries.

4.2. Legal measures

Legal protections for collective bargaining and social dialogue remain crucial in the digital age. It is therefore remarkable that in Chile recent reforms recognise the exercise of collective labour rights for teleworkers and platform workers. In the case of telecommuting and teleworking, it will be the employer's duty to inform the workers of the existence of trade unions in his organisation and to allow membership. In the case of the contract of workers of digital service platform companies, it recognises the right of workers to form and join trade unions, as well as the right to bargain collectively. Still beyond this recognition of the collective rights of remote or platform workers, the determination of the conditions of the employment contract in each case is a matter for individual negotiation between the worker and the employer or digital company.

In Argentina, constitutional rights and international conventions support

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collective negotiations, emphasizing the need for laws that protect and facilitate worker organization in a fragmented and flexible work environment. It is also generally noted that the current regulatory frameworks are inadequate for the digitization of work. There is an urgent need for new legal regulations and the renewal of collective legal and labour institutions. State regulatory authorities often refer the regulation of labour aspects of digitization and the use of AI to collective bargaining (as seen in Spain and the EU). Especially in the EU this can lead to unequal opportunities for workers to participate in the digital transformation and result in significant inequalities in workers' digital rights. Another consequence of this tendency is the observation of the different speeds at the creation of digitalization standards. On the one hand, there are public standards that rapidly advance the digital transformation of companies. On the other hand, there exists an individual and collective labour law framework from the past, which can hardly be applied to the new digitized work contexts.

However, a tendency to regulate algorithmic management can be observed in some countries where information and consultation rights are being implemented.

In Spain, for example, a new right of information to the representative bodies of the people working in the enterprise, has recently been recognized: *the right of algorithmic information*, consisting in the duty of all companies (which have one of these bodies: committee of enterprise, or staff delegates, and trade union delegates) to inform such bodies "*of the parameters, rules and instructions on which the algorithms or systems of artificial intelligence are based that affect the decision-making that may affect working conditions, access and maintenance of employment, including profiling*". While this can be seen as a breakthrough in the representation of collective interests, it has to be noticed that participation functions only through information.

The Italian legal framework concerning collective rights to information and consultation mainly stems from the implementation of European Union law. Recently, Article 4 of the Legislative Decree No. 104/2022, implementing Directive 2019/1152/EU on transparent and predictable working conditions in the European Union, and amending Article 1 of the Legislative Decree No. 152/1997, has introduced information rights to the benefit of workers and trade unions. According to this provision, employers or public and private clients must inform workers about the use of automated decision-making or monitoring systems relevant to hiring, task assignment, work performance, and contractual obligations. For the first time in Italy, the law foresees information rights on the use of automated decision-making or monitoring systems, which are granted not only to individual workers – who can also exercise them through works councils or territorial trade unions – but also

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directly to the workers' representatives. Recently, Art. 4 of the Legislative Decree No. 104/2022 has then been modified by the Legislative Decree No. 48 of May 4, 2023 (the so-called "Labour Decree"), which amended Article 1-bis of the Legislative Decree No. 152/1997. In this sense it was clarified that providing information is mandatory not only regarding fully automated decisions making system, but also with respect to those which imply human intervention, even if merely accessory.

In Germany the Works Council Modernization Act of 14 June 2021[17] responded to the increasing use of AI, particularly in personnel selection, in the form of algorithmic decision making systems (ADM systems)[18]. The use of such systems was made dependent on the consent of the works council. In the same legislative act works councils were also given an explicit right of co-determination in the *organization* of mobile work. However, there is generally no right of co-determination with regard to the *introduction* of mobile work itself.

Digitalization also affects the practical work of trade unions and workers' representatives. In Germany, under the Works Council Modernization Act, meetings of the works councils can now be held in digital form under certain circumstances. Still, in-person meetings are prioritized, and employers must provide suitable premises. During the Covid-19-pandemic, a special regulation also allowed meetings of the entire workforce of a company to be held digitally or in hybrid form using audio-visual equipment. This regulation finally expired on April 7, 2023 and was not extended again. Meetings of the entire workforce are therefore once again only possible in person. The expiry of the regulation has been criticized in view of a workforce that is sometimes spread across the entire country (or even beyond).

In Slovenia, no initiatives have been launched to address AI-related issues or similar concerns in the labour market. Social partners remain primarily focused on traditional collective bargaining topics such as wages, compensation, and annual leave, with little involvement in tackling emerging challenges related to digitalization and AI.

4.3. Judicial decisions

Judicial decisions in various regions have reinforced the importance of protecting collective rights in the context of digital work. These rulings often highlight the necessity of adapting existing legal frameworks to address the

[17] Federal Law Gazette 2021 I No. 32.
[18] BT-Drs. 19/28899, p. 15.

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challenges posed by digitalization, ensuring that workers can effectively organize and represent their interests.

The introduction of the information rights regarding the implementation of instruments of algorithmic management grounds the workers "representatives" power of control in this context. In Italy, for example, their violation can be sanctioned as "anti-union conduct" under Article 28 of the Workers' Statute. Trade unions can file a lawsuit in response to harmful behaviours adopted by companies aimed at preventing and/or limiting the exercise of trade union rights. The judge will issue an order for the employer to provide the necessary information. This was the case with the ruling of the Tribunal of Palermo, decree of April 3, 2023. It was clarified that if information can be requested "also" by trade unions, according to Art. 4 of the Legislative Decree No.104/2022, they hold an additional right besides those granted to each worker, which entitles them to file the lawsuit under Article 28 of the Workers' Statute, in case of infringement. This judgement aligns with the Italian Courts rulings on platform work, which have contributed to improving working conditions and recognising platform workers' rights as a consequence of the litigation strategies pursued by trade unions and CGIL in particular.

Another important aspect regards the digital access to companies for trade unions. In Germany, for example, trade unions have the right of access to the company based even on the constitution. However, this right of access is not tailored to an increasingly digitalized world of work, in which the company as a physically existing unit is increasingly disappearing. For example, there are courier services that, apart from administrative headquarters, no longer have any business premises at all. The traditional forms of communication used by trade unions, such as posting notices on notice boards or distributing leaflets, are therefore hardly possible any more. But even in those companies that still have a local branch, communication is shifting to the digital realm due to the use of home office arrangements and modern communication technology. Important tools for trade union activities, such as the traditional notice board, which, under Art. 25 of the Workers' Statute of Italy, must be made available by the employer in locations accessible to all workers within the production unit, lose importance. Therefore, digital accesses for works council elections and for the purpose of general recruitment of new members are being discussed.

In Germany the issue so far has mainly been dealt with in case law. With regard to communication by email, the Federal Labour Court has granted trade unions the right to send emails to workers' company email addresses for advertising purposes, even without the employer's consent and without being requested to do so by the workers[19]. Regardless, this case concerned

[19] BAG of January 20, 2009 – 1 AZR 515/08, NZA 2009, 615.

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email addresses that were already known to the trade union as they were its own members. However, the extent to which communication for the purpose of recruiting new members can take place with those whose email addresses are not yet known to the union has not been conclusively clarified by the highest court. The Bonn Labour Court recently rejected a claim by the trade union to forward an email pre-formulated by the trade union to all of its employees[20]. The court considered it sufficient that the employee association was given the opportunity to provide information to all employees via the company's intranet. In a decision by the Nuremberg Higher Labour Court, a trade union's right to access and use the employer's electronic communication channels and to receive a complete list of the email addresses of all employees working in a company was rejected[21].

In Italy, some collective agreements regulate digital access rights and the organisation of online meetings. As a rule, companies must provide elected employee representatives with electronic notice boards and suitable IT platforms for remote meetings. The case law is also moving towards the "digitalization" of traditional trade union rights, including the use of email for trade union communication. A landmark judgement from the 1990s[22] confirmed the right of trade unions to use electronic bulletin boards. Recently, the Supreme Court found that the dissemination of union communications by email falls within the protected activity of Article 26 of the Labour Statute and is permitted as long as it does not interfere with productive processes[23].

5. Varia

5.1. Digital work control devices

The use of digital devices by companies for these purposes is not new, but it now acquires a different scope for several reasons: it is expressly regulated by law, which respects only one fundamental right, the right to privacy, without incorporating any criteria from established constitutional doctrine concerning this matter and fundamental rights. Additionally, the potential for rights violations has increased due to the use of new digital technologies, including AI, which can more significantly compromise these rights. In Spain,

[20] At least in the case of: ArbG Bonn v. 11.5.2022 – 2 Ca 93/22, NZA-RR 2022, 351.
[21] LAG Nuremberg v. 26.9.2023 – 7 Sa 344/22.
[22] Pretura di Milano, decreto 7 aprile 1995.
[23] Cass. n. 35643 of 22 December 2022 e n. 35644/2022 e Cass. 7 marzo 2023, n. 7799.

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this has led to special regulation, through Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights. Despite the importance of this regulation, it is considered necessary to establish a specific labour regulation that regulates digital rights in the field of work and guarantees the fundamental rights affected by digitization.

5.2. The Artificial Intelligence Act of the EU

The EU member states have just recently passed the world's first law on the regulation of AI creating standardised rules. The main objectives are to promote safety and trust in AI systems, protect the fundamental rights of citizens and promote innovation. The regulation classifies AI systems according to risk types, defines requirements for high-risk AI and ensures transparency, fairness and human oversight in their use in order to guarantee the ethical and legally compliant use of AI. Some of the regulations also have an impact on legal relationships under labour law.

The AI Act categorises certain AI systems as high-risk if they have a significant impact on the rights and safety of individuals. According to appendix III, these high-risk systems include those used in areas such as human resources management. High-risk AI systems are subject to stricter requirements in terms of safety, transparency and human oversight.

However, Article 2(11) of the AI Act contains an important exception regarding labour law provisions: The Regulation does not prevent the Union or Member States from enacting laws, regulations, or administrative provisions that offer greater protection for workers' rights in relation to AI systems, or from endorsing more favourable collective agreements.

6. Conclusion

The comprehensive analysis of labour market conditions underscores the profound impact of digitalization on work patterns, employment classifications, and collective representation. The reports collectively call for enhanced regulatory frameworks to address these challenges, ensuring adequate worker protections and adapting workers' representation mechanisms to the realities of the digital age. Policy reforms are urgently needed to safeguard workers' rights and promote fair labour practices in an evolving employment landscape.

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7. Appendix

7.1. National Report Argentina (by Fabiola Bogado Ibarra[24], Sebastián Coppoletta[25])

7.1.1. Digitalization and working time

as outlined in the introduction, with the Second Industrial Revolution, electricity and the production line began to shape the economic productive paradigm upon which labor law would later be built. This concept implies a production center where individuals come to work. In contrast to the dispersion inherent in the agrarian world and the atomization of the artisanal workshop, the factory emerges as the total place where all elements of the productive process converge. Thus, work is geographically situated; it is performed in a specific place – the factory – to which one commutes, thereby enabling the concept of the working day[26]. The life of the worker begins to be organized according to whether they are working or not, which essentially means whether they are in the factory or not. Life's timing, determined by the workday, becomes perfectly delineated.

Upon this classical productive paradigm, Argentine labor regulation was built, encompassing both collective aspects (laws 14.250 and 23.551) and individual aspects (Employment Contract Law – Law 20.744). Specifically concerning the regulation of working time, Article 14-*bis* of the National Constitution recognizes the worker's right to a limited workday. This right is also acknowledged in international human rights instruments that have constitutional status, or common law instruments that have a sub-constitutional but supra-legal status (primarily ILO Conventions Nos. 1 and 30). At the level of ordinary legislation, Law 20.744 generally regulates the workday under the concept of the time during which the worker is at the employer's disposal. Specifically, Law 11.544 and its regulatory decree No. 16.115/33 regulate various types of workdays, with the daytime norm limited to 8 hours daily and 48 hours weekly.

The digitalization of the production process has, among many consequences, the possibility of dispensing with the localization of work, as the provision of work through digital means allows work to accompany the individual at all times. Consequently, the logic of the workday also loses its foundation, as the clear division between work time and non-work time,

[24] National University of Entre Ríos.

[25] National University of the Litoral.

[26] Coppoletta S. (2023), "*¿A quién protege el principio protectorio? Parte II*", *Revista de Derecho Laboral Actualidad*.

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marked by the worker's entry and exit from the workplace, is lost due to the lack of need to attend a specific place.

However, Argentine legislation remains attached to the classical paradigm and has not enacted specific legislation on the regulation of working time that responds to the new productive reality in the digital economy. An example of this is the specific legislation on telework, Law 27.555, enacted during the Covid-19 pandemic, which stipulates that the workday must be agreed upon in writing between the employer and the worker. This solution not only misaligns with the protective principle but is also quite foreign to the Argentine legal system, where an indefinite-term employment contract does not require a written form, and regulation avoids leaving the matter to be regulated to the parties' consent due to the evident disparity in their negotiating power.

Furthermore, the regulatory framework for telework (Law 27.555) regulates the right to digital disconnection with a prohibitive nature[27], expressly stipulating that the employer cannot require the worker to perform tasks or send them communications. However, there is no similar regulation governing the situation of digital contact between the employer and the worker after the end of the physical workday.

In conclusion, the Argentine economy adopts the trend of digitalizing productive processes, which directly and immediately affects the way people work, resulting in the delocalization of work provision. The only regulation addressing this issue so far is the telework law, which is limited to this contractual modality, insufficient to address the problem where the physical boundaries of the workplace disappear or become blurred. This directly relates to working time, making the reconciliation of work life and personal life conflictive, as work activities can invade the individual's private sphere through technological communication.

The absence of specific legislation on working time in digital environments already creates situations where specific individuals require special protection due to their particular vulnerability, which the general regulation cannot provide as it responds to a different productive paradigm. This is evident in relation to at least two subjects.

First, platform workers, as the digital environment in which they interact with the platform offers a kind of freedom in regulating working time. However, it actually exposes the worker to excessive work time requirements from the employer that the worker cannot resist. In this regard, Héctor García observes that:

[27] Benítez O. (2024), *Derechos Digitales en el mundo del Trabajo: Una categoría para hablar…Microjuris*, MJ-DOC-17728-AR; *aldiaargentina.microjuris.com/2024/07/03/doctrina-derechos-digitales-en-el-mundo-del-trabajo-una-categoria-para-hablar/*.

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The use of high-tech devices, such as smartphones and the applications downloaded on them, adds to the fact that the service is broken down into microtasks, that is, individual short-duration tasks requiring minimal qualification (at most, a license to drive cars or motorcycles). This level of work fragmentation, while reducing the time of effective service provision (active work), at the same time, the discontinuous occupation at irregular intervals prevents the provider-worker from freeing up useful time, as they are obliged to remain available to the platform – that is, "active" or connected to the application waiting to receive new assignments – for an indeterminate time. This obligation has a dual cause: on the one hand, economic, to generate income for the worker's subsistence, and on the other, contractual, whose regular compliance is a condition for the platform not to block the worker's access to the application, that is, to keep them in its network of providers. The minimum time the worker must remain available will be determined by the platform as it finds it useful for its business project according to the supply and demand of services in a specific area, territory, or market. This availability time is not remunerated, with exceptions such as the recent regulation enacted in Italy, which establishes a minimum hourly wage, conditional on accepting at least one service request in that period. The supposed considerable margin of autonomy for the provider regarding work time is, then, a true fiction, to use an oxymoron. The worker does not connect and disconnect from the platform at will but driven by a need for sustenance[28].

A second vulnerable group unprotected by the absence of specific regulation comprises individuals performing care and assistance tasks for others, the majority of whom are women. Therefore, it can be directly stated that women are the affected group. Digital communications between the employer and the working woman who also assumes care tasks (typically within the family group) allow for the extension of work time over care time, as work tasks are required attention at the same time as care tasks are being performed. Thus, women are exposed simultaneously to the requirements of work subordination and the fulfillment of care tasks imposed by gender in a patriarchal social structure, a situation that generates a state of vulnerability requiring a protective legal framework. In this special case, the severity of the absence of domestic legal norms is at least mitigated by Argentina's ratification (Law 23.451) of ILO Convention No. 156 – Convention on Equal Opportunities and Treatment for Men and Women Workers: Workers with Family Responsibilities. Recognizing that women are the majority affected by this situation as they are the ones who assume care tasks, it should not be

[28] García H. (2021), "El servicio de entregas a domicilio mediante plataformas digitales y el problema de su calificación jurídica: ¿trabajo autónomo, dependiente o de ambos tipos a la vez?", in Aa.Vv. (Garcia H., Caparrós L., coord.), *El trabajo en la economía de plataformas.* Editorial Ediar.

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overlooked that this possibility of invasion of work time over private time (dedicated in this case to care) would also affect any person, regardless of gender, who must assume care tasks while being under the requirement of subordinate work.

7.1.2. Workers' statute, employment contract, and modern forms of work (platforms)

The difficulty of separating virtual reality from the physical presence entails the unavoidable duty to analyze and evaluate the system of sources as a whole to achieve equitable solutions in the different scenarios these modalities present.

Within this reality, platform work directed by an algorithmic system also integrates into the labor world of Argentina. Similar to other regions, it emerges as an alternative to direct hiring of personnel, attempting on the one hand to avoid the status of the employer, while also giving the business intervention the character of a mere intermediary in service provision or even limiting its participation to the role of a simple owner of a virtual organization.

In this context, it is necessary to highlight that Argentina does not have special regulation for platform work. Thus, if these relationships were considered labor relations, the regulation would be through common and general norms (Employment Contract Law No. 20.744).

Regarding the legal nature of platform work, Argentine doctrine has predominantly argued for the dependent nature of these, considering that the service provider integrates into an external business organization that determines the work conditions without having control over the characteristics of the product transported, as they must comply with the company's rules[29]. Additionally, the worker is subject to strict controls both by the company and the consumers, who rate their performance through the application, which clearly indicates the labor relationship in this type of service. In summary, the majority Argentine doctrinal stance holds that

> the combination of the local execution of work, the specific sector of the economy in which the analyzed digital platforms operate, and the type of control these specific digital platforms exert over service providers (much more intense and at least similar to the control exerted by the classical company over its dependents, albeit

[29] Litterio L. (2020), *Trabajadores plataforma-dependientes en la Argentina y en el mundo*, T.R. La Ley, p. 216 ff.

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using certainly novel tools), seem to reproduce many of the characteristic features (indicators) of dependent work[30].

In the same vein, the judiciary has consolidated an interpretation recognizing the dependent labor relationship in services provided through digital platforms, expressing as a rationale of this trend that

> It is well known that in the globalized world, new technologies have altered the way in which the subjects of a labor relationship interact. But even in these new scenarios, the substantive remains despite the changes. A deep analysis of the new relationships reveals the existence of what characterizes (and defines) a labor relationship: personal work directed by another[31].

In this context, in litigation against Cabify[32], the judge considered that once the service provision by the defendant was recognized, the presumption of the existence of an employment contract (Article 23 LCT) was triggered, which Cabify S.A. failed to rebut, upon whom lay the burden of proving that the service provider had their own business organization. It is worth noting that the judgment considered that the vehicle used by the plaintiff is not indicative of economic autonomy nor does it place them on an equal footing with the company Cabify, as it is merely a work tool (similar to the truck of a driver or the bicycle of a delivery person), and that what determines economic dependence is the fact that the worker depends on the employer's decision to be hired for a trip and receive the corresponding remuneration.

In a ruling against the company Rappi, the judge determined the existence of an employment relationship with particular characteristics in which, through the general terms and conditions of the Rappi Arg S.A.S. platform, the connection was made by the plaintiff's adherence to a contract that established a series of requirements to be met, without any negotiating capacity. Among other considerations, the judge took into account certain ratings given to the plaintiff as "incentives", as well as the controls the company exercised over the plaintiff's connection time or order acceptance level, which determined the continuity or not of the relationship. These

[30] Mugnolo J., Golcman M., Caparrós L. (2019) *Análisis jurídico sobre las relaciones de trabajo en los servicios de entrega de productos a domicilio a través de plataformas digitales en la Argentina. Primera parte*. Derecho del Trabajo 2019 (mayo), 1069. Cita Online: AR/DOC/909/2019. Ed. La Ley.

[31] Juzgado Nacional del Trabajo n. 77.02/sept/21. *Scornavache Victor c/ Minieri Saint Beat Guillermo.*

[32] Juzgado Nacional de primera instancia del Trabajo n. 21. 31/Agosto/21. *Bolzan, Jose c. Minieri Saint Beat Guillermo.*

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circumstances led her to detect the typical characteristics of legal and economic subordination and she decided that the relationship between the parties "*falls within the terms established in the LCT as piecework and the presumption of Article 23 of the LCT*"[33].

More recently, in a ruling against the company Glovo, the acting judge acknowledged the employment relationship between the worker and the company, noting that the defendant claimed that the service provision was motivated by other circumstances, relationships, or causes unrelated to an employment contract, thereby dismantling the presumption of Article 23 LCT. However, they did not manage to prove any of the exceptions contemplated by the norm, "*unless it is shown by the circumstances, relationships, or causes that motivated it to be otherwise*" or "*as long as the circumstances do not qualify the service provider as an entrepreneur*". With none of these extremes being proven, the judge determined the existence of an employment contract between the parties[34]. He emphasized the false illusion of utilizing work time for one's benefit when in reality, the algorithm system forces the worker to submit to primitive "piecework".

Beyond the cases where individual claims have been processed, it is also important to mention that the courts have upheld administrative decisions that classified as labor relationships those between various platform companies and their delivery service providers, exercising state labor policing power. For example, in the rulings "Kadabra SAS v. Ministry of Labor"[35] and "Ministry of Labor v. Rappi Argentina S.A."[36], the fines imposed by the Ministry of Labor of the Province of Buenos Aires on the delivery companies Glovo and Rappi were confirmed. In the first case, the court upheld the Ministry's authority to declare the existence of the employment relationship and, validating the administrative decision, ruled that the inspections revealed that the involved couriers integrate into an external organization through the digital platform, making it clear that Kadabra prioritizes, values, and appreciates the speed of delivery and good behavior of the couriers, to whom it can assign trips and vary the intensity of assignments, even block or cancel them arbitrarily. Consequently, Kadabra SA cannot deny its role as an entrepreneur-organizer, through its digital platform, of personal, material, and immaterial resources for economic purposes or benefits (Article 5 of the

[33] Juzgado Nacional de Primera Instancia del Trabajo n. 57. 25/sept/23. *Rodríguez, Jonathan c. Rappi Arg S.A.S.*

[34] Juzgado Nacional del Trabajo n. 41. 09/Abril/24. *González Esteves, Carlos José c. Kadabra SA.*

[35] Tribunal del Trabajo Nro. 4 de La Plata; 09/Sept/21.

[36] Tribunal del Trabajo Nro. 2 de La Plata; 29/Sept/21.

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LCT). Similarly, the ruling against Rappi Argentina SA confirmed the fine imposed by the provincial Ministry of Labor and stated that in such companies, the establishment (understood in technical-legal terms as "*the technical or execution unit aimed at achieving the company's purposes*", Article 6 of the LCT) is not a physical place but the very digital platform through which all exchanges and relationships between the service provider and the company owner occur. These platforms are, ultimately, virtual establishments that fit the definition of Article 6 of the Employment Contract Law (a norm with a forward-looking vision that captures labor modalities invented almost half a century after its enactment). Regarding the presumption of employment, the Court, according to Article 23 LCT, judged that:

> In this case, having to bear the burden of proof regarding the non-employment nature of the relationship, the appellant company failed to disprove the mentioned presumption of employment that arose from the recognition of service provision. Indeed, as already noted, even when given the opportunity, the company did not produce the evidence it offered in the administrative stage, thus logically failing to disprove the presumption of employment that arose from the application of Article 23 of the Employment Contract Law.

It is noteworthy that:

> it is evident that the couriers provide a personal service and risk their bodies every day by distributing (usually on motorcycles or bicycles) the products the company entrusts to them through the application. The non-substitutable nature of the service is demonstrated by the documentation provided by the company itself, as the "terms and conditions" that, as an adhesion contract, they are required to sign when they start providing services (and which are "mandatory and binding", as established therein) show that the personal account assigned to each "rappitendero" to connect to the application and carry out delivery tasks is "personal, unique, and non-transferable", and each courier can only have one account that cannot be transferred or delegated to third parties, otherwise the account is disabled or canceled (see clause one, point 1.4 of the document titled "Terms and Conditions for Rappitenderos").

Similarly, the administrative action of the State in the Province of Santa Fe has been validated, with the Labor Appeals Chamber of the city of Santa Fe confirming the provincial Ministry of Labor's classification of the relationship with the company Pedidos Ya as an employment relationship[37].

[37] Cámara de Apelación en lo Laboral de Santa Fe, Sala II. 12/mayo/22. *Pedidos Ya S.A. c. Ministerio de Trabajo y Seguridad Social*. *bdjcamara.justiciasantafe.gov.ar/index.php?pg=bus&m=busqueda&c=busqueda&a=get&id=17593*.

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In conclusion, the employment nature of the relationships of individuals providing services through digital platforms is, so far, a consistent criterion in various jurisdictional bodies in the country. Despite these decisions, the need for regulation that provides protection to individuals immersed in these new work modalities is irrefutable.

7.1.3. Effects of digitalization on the collective representation of workers' interests

The digital production process leads to changes in the spatial and temporal conditions of work performance. From a production structure concentrated on performing tasks in a specific place, where attendance to work and physical entry and exit also represented the temporal determination of service provision, the performance of tasks in digital environments leads to the possibility of working anytime and anywhere. This individual modification of working conditions has a direct and serious implication on collective labor relations. The necessary collective bargaining at this level is hindered among people who, even though they perform tasks covered by the same union representation, do not have contact with each other because they do not meet in time and space to perform their respective tasks.

In terms of promoting and legally protecting collective bargaining, Article 14 Bis of the Constitution of the Argentine Republic recognizes the right of unions to collective bargaining; and likewise, Argentina has ratified the ILO Conventions on freedom of association and collective bargaining (Nos. 87, 98, 135, 144, 151, and 154). At the domestic legislation level, the structure of the union representation system for workers (Law 23.551) and the collective bargaining process (Law 14.250) are regulated.

And while it can be stated that certain productive sectors in the Argentine economy face a digitalization process, in general terms it should be noted that the Argentine economy has persistent and severe development problems, with frequent periods of crisis, so – always in general terms – collective bargaining primarily focuses on maintaining jobs and trying to preserve the purchasing power of wages. This implies that the discussion about the problems posed by the digitalization of production processes does not occupy a central place in general union concerns[38], and in those sectors where this issue appears as a subject of negotiation, it usually involves multinational

[38] Ramírez L. (2019), "La libertad sindical y el futuro del trabajo", in: Aa.Vv. (C. Arese, dir.), *Nuevas tecnologías. Presente y futuro del Derecho del Trabajo*, Editorial Rubinzal Culzoni.

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companies that import their own conventional labor regulations from their parent companies.

Furthermore, the Argentine economic crisis means that technological renewal in companies does not reach the same level as in economies that, while still classified as "developing", do not present the structural problems that the Argentine economy has suffered from for at least the last 40 years (democratic period).

In the specific field of platform work[39], it is important to highlight the experiences of the formation of two unions in the delivery activity: the Association of Platform Workers (APP) and the Motorcycle Riders, Messengers, and Services Union (ASIMM). These associations are in the process of formation, striving to achieve recognition as unions and to produce specific regulations through collective bargaining[40].

Finally, it is interesting to highlight a sector of the digital economy that, although present in the Argentine productive sector, has not generated either its own protective labor regulations or union interest in its representation, such as people who provide purely digital services. This sector involves various particular situations that completely escape the classical productive paradigm (industrial) on which Labor Law is based: a strong delocalization of the workplace, allowing these people to work anywhere in the world (they are even called "digital nomads"), work related to fulfilling a specific object or project (e.g., developing software for a particular use), and the provision of intellectual services for different clients who utilize them. This implies that even though signs of employment can be detected in the provision of these digital services, most people do not recognize themselves as subjects covered by labor regulations nor require a protective system, resulting in an effect known as the flight from Labor Law. Consequently, the absence of a union in this area is explained by the lack of interest in unionization by those providing services in this particular sector of the economy. This has led the Argentine tax collection agency (AFIP) to create a special tax regime for people who export digital services[41].

[39] Goldín A. (2020), *Los trabajadores de plataforma y su regulación en la Argentina*. Documentos de Proyectos (LC/TS.2020/44), Comisión Económica para América Latina y el Caribe (CEPAL).

[40] Arias C., Diana Menéndez N., Haidar J. (2020), "*¿Sindicalismo 4.0? La organización de trabajadores de plataformas en Argentina*", *Sociología del Trabajo*, 97, pp. 59-69.

[41] *www.afip.gob.ar/economia-digital/default.asp*.

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7.2. National Report Chile (by Roberto Padilla Parga)

7.2.1. Context data

The model that Chile has maintained since the time of the labor plan of the 1970s is characterized by being heteronomous, giving the law and administrative authority the role of main regulator of labor relations[42]. Autonomous regulation coming from the parties to the labor relationship itself occupies a secondary role and is of diminished relevance in comparison. Despite a reform in 2016[43], which sought to alter the landscape of this labor model, and what was included in the rejected draft of the new constitution of 2022, the pillars of the labor relations regime in force since 1978 to date remain in force.

According to data from the administrative labor authority itself, the percentage of companies with an active union is only 6.3%. This number rises above 10% only in companies engaged in certain economic activities. This low number of active unions is associated with a unionization coverage of 20.8% of the dependent working population. At the same time, collective bargaining coverage is also low. Only 6% of companies have a collective bargaining instrument in force, binding 22% of workers[44].

Although the report adduces, among other reasons, reasons related to the perception of workers regarding union activity as explanations for these figures, it also offers explanations consistent with what the national labor doctrine points to explain the phenomenon, i.e., the design of the labor relations model. Beyond this, given the squalor of the numbers, it is not surprising that jurisprudence has gradually become the main vehicle for the progression of workers' claims.

In terms of working hours, according to OECD reports, by 2020 Chile had the sixth longest working day among the countries that make up the organization[45]. Of the total number of working people, in 2018, 89% would correspond to a full-time regime while the balance would work in some other of the working time regimes established in the national labor legislation.

However, various initiatives have been put forward to promote flexible working hours, either under the argument of reconciling family and working life for workers or to stimulate the employment market, but no major legislative agreements have been reached on the subject. On this

[42] ROJAS (2007) pp. 195-221.
[43] Ley 20.940, de 2016.
[44] ENCLA (2019) pp. 145-181.
[45] OCDE (2020).

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point, and with regard to the subject of this report, perhaps the most noteworthy example is the reform that, on the occasion of the Covid19 health crisis, modified the rules of the Labor Code regarding telecommuting and teleworking[46]. This is without prejudice to the reform of the ordinary working day regime, which will progressively reduce it from 45 hours to 40 hours per week[47].

To conclude the presentation of the national context as far as this report is concerned, in terms of automation, the ENCLA 2019 includes in its report a section on the subject[48]. Of the total number of national companies surveyed, only 15.3% of them reported having implemented some automation system in their main activity, reaching 24.9% of large companies. Of the total number of companies that implemented one of these systems, 77.9% of them stated that there was no need to replace people as a result of their implementation. Of the remaining companies, none reported having replaced more than 50% of their personnel and only 2.3% reported having replaced more than 25% of their workers.

As the report on the results of the survey conducted in 2023 is still pending, we cannot yet determine the level of progression of the automation of production processes in the country and how it has impacted the lives of working people.

However, at the regulatory level, some legislative reforms have been verified that show the concern that the digital revolution entails, in general terms and, in particular, in its effects on labor and employment, which will be referred to below in the 3 sections of this report, as appropriate.

Without prejudice to the foregoing, as a preliminary, mention should be made of the constitutional reform of 2020, which incorporates a new final clause to numeral 1° of article 19°[49]. Even though the purpose of its incorporation is due to the concerns arising from the development of neurotechnologies, and is inspired by the demands regarding the recognition and guarantee of neuro-rights to protect aspects of the brain integrity of people, it declares in its positive text that scientific and technological development will be at the service of people and will be carried out with respect for their life and physical and psychological integrity. It also contains a mandate to the legislator to ensure that it regulates the requirements, conditions and restrictions for the use of scientific and technological advances in people.

[46] Ley 21.220, de 2020.
[47] Ley 21.561, de 2023.
[48] ENCLA (2019) pp. 59-62.
[49] Political Constitution of the Republic of Chile, 1980.

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Hence, perhaps it can be understood as a starting point by virtue of which there is in the constitutional text a filter from which current and future legal rules can be viewed. Especially, in the interpretation and application of these rules to concrete cases resulting from the interaction between technology and people and the conflicts that this relationship generates. This should necessarily include labor and employment.

7.2.2. Digitalization and working time

The reform that seeks to progressively reduce the ordinary working day in Chile, from 45 hours per week to 40, is located somewhere within a Cartesian plane in which one of its axes corresponds to following ILO recommendations on reducing working time and the other is about following the demand for greater internal flexibility in Chilean labor legislation. Although it is intended in the promotion of reconciliation between work and family life, it incorporates rules that complement what is included in the 2016 reform on adaptability pacts.

Although this reform is not specifically aimed at regulating the impact of the digitalization of work on working hours, its implementation and effects may eventually condition the way in which the challenges posed by this phenomenon are faced.

In other regulatory aspects, there are two recent legal reforms to the Labor Code that should be highlighted in this report. Firstly, the one that contains the current regulation of the telecommuting and teleworking work contract[50] and, secondly, the one that creates the work contract for workers of digital service platform companies[51]. Both, by the way, lack rules of general application and their scopes of application are limited to the cases of remote work indicated by one and to the cases of work on platforms indicated by the other.

Before the first reform referred to, what existed in the matter of remote work and telework was a mention in the Code of the branch that allowed to understand that the employment contracts that agreed services in one of these modalities were an exception to the rules of the ordinary working day. For everything else, therefore, the general contractual regime of the Code was in force, as applicable. It was on the occasion of the Coronavirus pandemic that this reform to the labor legislation was processed and approved, in an unusually short period of time, which incorporated a new chapter to the Code

[50] Law 21.220, of 2020.
[51] Law 21.431, of 2022.

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called "*of the contract of telecommuting and teleworking*" and modified the rules previously mentioned[52].

The modification in question included, notoriously, as a change with respect to the previous version, to change telecommuting and teleworking from being exceptions to the limitations of ordinary working hours to being included within them. However, this can be modified by means of the agreement in which the work modality was agreed, on an individual basis.

In addition, one of the main novelties of this regulation is the incorporation of the right to digital disconnection, being one of the first legislations in the world to enshrine something like this[53]. Inspired by the French model, it enshrines a liberal-type power for workers to refuse to respond to work-related communications outside their working hours. However, in a legal system such as the Chilean one, it omits certain things that make it a rule of complicated effectiveness. On the one hand, it does not regulate the exercise of the negative dimension of freedom and, on the other hand, it does not incorporate workers' representatives or collective bargaining in the exercise and application of this right. In fact, together with the two aforementioned matters, a significant number of the conditions of this type of contract are left to individual negotiation.

On the other hand, with regard to the reform that includes rules to the Labor Code in order to regulate the contract of persons who provide services for digital service platform companies, it should be mentioned that prior to it, and as occurred in other parts of the planet, the main concern of the doctrine and jurisprudence was the determination of the legal regime applicable to this form of organizing work. Except for some doctrine that sought to observe other aspects of the phenomenon beyond the labor aspect[54], this was the main concern of both doctrine and jurisdiction. Even so, not much could be observed judicially in this regard and only a couple of lawsuits reached the sentencing stage, with mixed results[55].

The regulations contained in the respective law cannot be said to provide a definitive solution in this respect. What the law does is to create a special contractual figure for the provision of services in this type of platform companies, distinguishing between dependent or independent workers, depending on whether the requirements of the Labor Code are met to qualify the existence of an employment contract. Thus, the option remains open for

[52] Padilla (2020, pp. 571-584).

[53] Padilla (2020); Camos, Sierra (2020); Ponce (2022).

[54] Herrera (2022) on discrimination; Padilla (2022) on transparency; Ugarte (2020) on working times.

[55] Palavecino (2022, pp. 85-87).

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such a contract, entered into as independent, to be considered as a dependent by means of a judicial resolution, if it is considered that the legal requirements are met.

It is necessary to mention the one that seems to be more appropriate for the following section, since it applies to the rules that regulate working time. In this way, a distinction must be made between the treatment given to dependent platform workers and their independent peers. For the latter, a right to temporary digital disconnection is also included, in slightly more categorical terms, since the rule speaks of an obligation to disconnect. This duty is imposed on the digital service platform company, which in no case can be used as a reprisal against the worker[56].

For the dependent worker, on the other hand, the general labor rules regarding working hours are applicable. On this point, the contract must indicate the form of distribution of working time, leaving its determination to individual negotiation, since no mention in the regulations contemplates the intervention of the union or collective bargaining for such purposes.

Both for telecommuting or teleworking contracts and for the contracts of dependent or independent workers of digital service platform companies, the regulation results in a regulation whose effective enforcement depends on the adequate supervision of the labor administrative body. This is because in neither of the two reforms was a role given to the union as an overseer, nor to collective bargaining as a regulatory authority for the implementation and enforcement of these rules. The problem with this is that in a scenario in which workplaces multiply and disperse as a result of the use of technology, the supervisory task, carried out by an administrative body with limited resources, becomes more difficult to perform satisfactorily.

Another weakness that can be perceived in this regulation is the narrow perspective with which the impact of ICTs and algorithmic management technologies on work is understood. These are not only limited to the proliferation of remote work or digital service platforms, respectively, but also have an impact on traditional forms of work, whether subordinate, parasubordinate, public or private, which are outside the scope of application of rules such as those referring to the right to digital disconnection.

Workers who provide their services in these other ways are also affected in terms of their privacy by the invasion of their work life into their personal and family life due to the use of these technologies and the naturalization of the connected worker. For them, who are not covered by the regulations, the only applicable idea would be the one contained in administrative and judicial case law that these communications outside the working day may

[56] Jofre (2022, pp. 115-116).

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constitute evidence of harassment at work or resort to the idea of the right to rest, bringing it up to date[57].

7.2.3. Workers' statutes, employment contracts and modern forms of employment

One of the unexpected effects of the phenomenon of the digitalization of work, at least in Chile, has been the emergence of new categories and types of employment contracts under the name of special contracts. In other words, the legislator has not approached the matter with an integrative spirit but has developed specific solutions for the different assumptions it affects.

This implies then the emergence of differentiated categories of workers and the dispersion of the idea of the working person into different types according to the form of organization of the work and the manner in which they render their services.

This does not seem to be negative per se, if adequate protective standards are met. However, it does merit certain critical observations, in the case that is the subject of this report. For example, if the material conditions to ensure compliance with the regulations, referred to the growing geographical dispersion of workplaces, make it difficult for the state entity, as the main subject in charge of it, to achieve its supervisory purpose, it does not seem to be helpful to have a proliferation of different statutes whose regulations are subject to oversight in the midst of this scenario of atomization.

On the other hand, something already covered in this text, the impacts of the digital revolution have pretensions that encompass the organization, management and control of all forms of service provision, even beyond those traditionally subject to regulation by labor law.

While it is understood that the technological manifestations applied to the productive process are of different nature, and that this often manifests itself in differences regarding the impact of technology on the legal goods protected by the legal system, different regulatory standards promote conflicts of coherence and integrity in the same. Thus, for example, as mentioned with respect to the right to disconnection, with different rules in the case of telecommuting, teleworking and self-employment for digital service platform companies. Despite protecting legal rights that are affected for all workers, even those regulated by non-labor statutes, there is a large group that are excluded and exposed to be affected by technology with respect to those same legal rights.

[57] Santibañez (2023).

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In any case, there are certain novelties contained in these reforms that can be highlighted. Especially in the case of the regulation of the employment contract of digital service platform companies. For example, the regulation of algorithmic labor management and the prohibition of algorithmic discrimination, including a mention of indirect discrimination as prohibited conduct[58].

Algorithmic work management involves the use of algorithmic software to manage work or large groups of workers in line with the interests of the one who has control over its operation or who benefits from its operation. This is one of the phenomena that is likely to affect the largest number of workers among the various expressions of the digital revolution. It gives the employer increased powers as a result of the greater capacity of technology to perform tasks compared to the capabilities of the human person. It also gives him high levels of direction and control over the work and its organization, which he can even carry out without the need for human intervention[59].

In other words, the employer can use these mechanisms to exercise the powers that the law recognizes him as the owner of the productive resources, that is to say, the powers that correspond to him as an employer[60].

In contrast to the increase in corporate powers, workers must contend with the fear of technological replacement, the standardization of work and its division into quantifiable units – which promote the risks of replacement by becoming routine and devalue wages[61] –, subjection to permanent control, the difficulty of knowing the motivations behind corporate decisions due to the inherent opacity of these systems, among others. In short, their possibilities of exercising effective counter-powers in the face of corporate prerogatives are even more diminished than in traditional forms of work[62].

The link between this form of work organization and digital platform companies is direct and probably original because it is in the scheme of the organization of work performed by digital service platforms known as geolocation that we begin to talk about it and verify its expansion to other forms of work[63].

It is therefore not surprising that it is in the new Chapter X of the book on special contracts contained in the Chilean Labor Code that the first rules are

[58] Coddou (2022, pp. 178-182).
[59] Noponen *et al*. (2023); Adams-Prassl *et al*. (2023).
[60] Aloisi y De Stefano (2022).
[61] Todolí (2021, pp. 58-68).
[62] Padilla (2024).
[63] Coddu (2022); Contreras (2022).

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contained that seek to govern the effects that this technology has insofar as they may jeopardize the rights of workers affected by it.

For the literature, these risks are related to the affectation of the private life and intimacy of workers, as well as the loss of their agency, as a result of the exacerbated capacity of surveillance and control that this technology entails[64].

Therefore, in accordance with the regulatory impulses verifiable in other latitudes, this regulation includes novelties such as the obligation of the digital service platform company to inform the worker of certain conditions related to the provision of the service. Likewise, it also establishes rules on algorithmic transparency and related information obligations, although of an individual and limited nature[65].

This last rule also enshrines the duty of the digital employer to protect the data of workers and restricts the possibilities of the latter to use them for purposes other than the services covered by the contract. In this regard, it is necessary to mention that the general rule of data protection in Chile is questioned by the interested doctrine[66]. This would be motivated by the fact that such regulation is outdated with respect to the progress of technology and in comparison to international standards. In the case of the regulation on work for platform companies, rights are enshrined for workers in these platforms in the sense of being able to protect and access their personal data[67].

Another issue to be reported by the company will be the mechanisms and procedures used to avoid cases of algorithmic discrimination, a rule that complements the prohibition of discrimination as a result of the use of automated decision-making systems. In this section it is necessary to point out that for the first time a positive regulatory text in Chile expressly contemplates the prohibition of indirect discrimination.

However, the absence of suitable mechanisms that would allow workers to alleviate the burden of proof of having to prove that they have been subject to algorithmic discrimination, both directly and indirectly, may be surprising in this last point, although the contribution of enshrining this manifestation of the right to non-discrimination is appreciated.

Finally, this norm is concerned with incorporating regulations regarding the employer's compliance with the employer's safety obligation.

[64] Noponen *et al*. (2023).
[65] Contreras (2022); Jofre (2022).
[66] Contreras (2020).
[67] Contreras (2022).

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7.2.4. Effects of digitalisation on the collective representation of workers

Beyond the determination of the employment status of digital platform workers, what happens with regard to the collective organisation of digital platform workers has also been a matter of concern in the field. Of course, in the first place, this seemed to be an issue to be addressed after resolving the relevant issues about the applicable regime.

However, until before the reform of the Labour Code regulating this type of employment contract, the efforts of these workers to provide better working conditions led them to autonomous action by resorting to special formulas of collective organisation in order to be able to unite and make demands on behalf of their constituents[68].

This is not an isolated case, nor is it particular to the Chilean experience in this area. On the contrary, it has been a recurrent resource present in the experiences of other regulatory systems[69]. In this sense, it has been the way in which, in different latitudes, it has been possible to bring protection to workers who work in this type of organisation, as well as to agree on better working conditions and remuneration for them.

It is difficult in this sense not to draw a parallel with the emergence of the Taylorist forms of work in the industrial revolution, where workers resorted to legal formulas such as societies, mutual societies, insurance companies, among others, in order to be able to join together and make demands on their employers at that time.

On the other hand, the reforms, already discussed in the previous sections, recognise the exercise of collective labour rights by the workers to whom their rules are addressed. In the case of telecommuting and teleworking, it will be the employer's duty to inform of the existence of trade unions in his organisation and to allow membership. In the case of the contract of workers of digital service platform companies, it recognises the right of workers to form and join trade unions, as well as the right to bargain collectively.

Without prejudice to the foregoing, it is necessary to point out what has already been advanced in the previous sections, since beyond this recognition of the collective rights of remote or platform workers, the determination of the conditions of the employment contract in each case is a matter for individual negotiation between the worker and the employer or digital company.

This is due to the fact that the collective labour rules in the country, as mentioned in the context data, correspond to those of a heteronomous model,

[68] Palomo, Villavicencio (2022).

[69] Aloisi y De Stefano (2021, pp. 155-164).

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whose design, based on the labour plan of the dictatorship, sought to restrict the actions of the collective subject in labour matters, in accordance with the prevailing economic ideology that inspired the reforms of that time.

One of the consequences of this regulation is the limitation of the scope of operation of collective rights to the company level and, in substantive terms, the restriction to certain matters related to common working conditions and remuneration. Thus, provisions allowing agreement on specific working conditions between the parties to the special contract in question are understood as individual and not as the subject of a collective bargaining procedure.

This is particularly striking because it runs counter to what happens in other legal systems with regard to similar matters, such as the right to digital disconnection or the right to information about the algorithm, where the development of these rights in the employment relationship is left to collective bargaining, just as their enforcement is left to the trade union.

Furthermore, it is not difficult to imagine that in this type of work, individual bargaining is fertile ground for one party to impose on the other the conditions that are most convenient for them.

7.2.5. Conclusions

The digitalization of work as a result of the proliferation of ICT and algorithmic systems at work can bring benefits in terms of increased productivity, improved working conditions, greater effectiveness in complying with regulations, among others. However, they also show a flip side in which their effects may be related to the verification of new risks, or of some already known but modified if not increased, on the interests and rights of workers.

The law is one of those called upon to use its tools to ensure that these risks are avoided and to guarantee those rights, providing concrete rules or, at least, guidelines to reconcile technological development with respect for the rights of workers who are exposed to these new forms of work organization.

The Chilean labor law is not absent from this phenomenon, and has sought to address the issue, within its context and resources. Although these reforms involve the incorporation of new legal institutions into labor legislation that are consistent with what is being discussed in other parts of the world, there are some aspects that offer opportunities for improvement for this incipient legislation.

In the first place, the growing appearance of new contractual labor figures and the dispersion of the regulation as it takes on particular cases. At this

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point we do not necessarily advocate a general rule on the subject, nor do we discuss the option of a set of sectoral rules. What is missing in this case is the presence of an integrating criterion or rule.

The technologies that these regulations deal with are not predictable of only specific forms of labor contracting, depending on whether it appears in a more or less particular case. Their application is expansive and their claim is to be present in the organization of any form of work.

General or sectoral rules may be chosen, but in both cases integrating criteria are required to make the rules applicable in their own legal contexts and to make the various regulatory institutions extensively applicable even to forms of work not originally included in the rule.

What has so far occurred in Chilean labor legislation is the appearance of specifically regional rules and strict scopes of application that exclude other workers potentially affected by the same technologies in the same legal assets.

Secondly, the need to give more operating space to the collective organization of workers and their representatives. This ties in with what is a permanent challenge of national labor legislation, even before the labor plan, regarding the strengthening of collective labor law in our country.

However, it is also necessary, in view of the growing asymmetries of power involved in the digitalization and algorithmization of labor, to seriously involve the original counter-power mechanisms of labor law, providing them with the necessary regulatory conditions to efficiently and effectively exercise their function in the face of opaque algorithmic systems that are difficult to understand.

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*7.3. **National Report Germany/EU** (by Prof. Dr. Daniel Ulber, Maike von Restorff)*

In general, it can be stated that legislation and case law on labour and social law in Germany and in the European Union are reacting to the changes in the working environment caused by automation and digitalization with increasing speed. This is not only demonstrated by "major" legal acts at European Union level, such as the General Data Protection Regulation or the Platform Work Directive. Rather, legal practitioners have been confronted with significantly changed case material over the last 20 years, creating new problems of interpretation for all existing law. For example, the question of the employee status of platform workers and their status under social security law is the subject of an intense debate. Working time law is generating a large number of as yet unresolved legal issues as work is becoming more mobile and remote. The upheavals are also clearly noticeable in the area of collective labor law. Workplace co-determination without a company, labor disputes in the virtual space – all of this is new territory. For this reason, this country report is intended more as a summary of the many issues currently under discussion as well as highlights. Solutions are going to be presented to a lesser extent.

7.3.1. Digitalization and working time

Digitalization has brought profound changes to the world of work. It enables new forms of working time recording, which is increasingly done electronically. The use of digital systems can enable precise and transparent recording of working hours, but the design of the respective systems is crucial. Such systems also present risks, particularly with regard to employee data protection. Digitalization is accompanied by a considerable upswing in flexibility with regard to working models, too. For instance, the expansion of home office arrangements means that working hours can be better adapted to the needs of employees. However, this also entails the risk of blurring the line between working time and leisure time. In this context, the right to be unavailable is becoming more important.

a) Electronic working time recording

The digitalization of the world of work is partly reflected in the growing introduction and use of electronic working time recording systems. Depending on the design, this has the advantage that working time can be

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documented precisely, efficiently and tamper-proof. Such a system can also raise the transparency of the hours worked by employees and make it easier for the responsible authorities to monitor compliance with legal regulations. This way, the risk of (self-)exploitation can be countered, particularly in a working world that is becoming more flexible. Nevertheless, the introduction of such systems also poses risks, especially in relation to data protection concerns and the danger of excessive monitoring of employees.

Since the decision of the Federal Labor Court (BAG) of September 13, 2022[70], in which a general obligation for employers to introduce a system that records the entire working time of employees was established in response to the case law of the European Court of Justice (ECJ)[71], a new legal regulation has been awaited in Germany. In particular, there were uncertainties regarding the requirements for the design of such a time recording system.

The Federal Ministry of Labor and Social Affairs (BMAS) has now presented an initial draft bill[72]. § 16 (2) ArbZG is to be amended to make the electronic recording of the start, end and duration of daily working hours mandatory. Electronic recording is justified on the grounds of easier handling due to better legibility and the possibility of IT-supported evaluation of the documents and the resulting reinforced guarantee of accuracy compared to analog systems[73]. The draft does not provide for a specific form of electronic recording. In addition to the time recording systems already in use, the explanatory memorandum to the draft states that the use of apps and Excel spreadsheets should also be possible[74], Regarding the potential for subsequent manipulation of such Excel spreadsheets, there are concerns as to whether this recording meets the ECJ's requirements for an "objective and reliable" system[75]. It should also be possible to collectively record working time by evaluating electronic shift schedules. Nonetheless, this form can hardly counteract the risk of undocumented overruns of the times shown in the shift plan[76].

b) Right to non-accessibility

In the constantly digitalizing world of work, the topic of the "right to be unavailable" is becoming more important. This is particularly relevant due to the increased use of the option to work from home and remotely. Apart

[70] BAG of 13.09.2022 – 1 ABR 22/21, NZA 2022, 1616.
[71] ECJ of 14.05.2019 – C-55/18, NZA 2019, 683.
[72] RefE of the BMAS of 18.04.2023.
[73] Ivi, p. 12.
[74] *Ibidem*.
[75] *Ulber*, BB 2023, 1588, 1589.
[76] *Greiner/Kalle*, NZA 2023, 547, 549.

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from this, the progressive networking and availability of communication technologies is also accompanied by a persistent blurring of the line between working time and leisure time. As a result, employees often have to be available outside of regular working hours, which can affect their mental health. The right to be unavailable is therefore being discussed as a necessary protective mechanism to ensure the separation of professional and private obligations[77].

In January 2021, the European Parliament passed a resolution calling on the European Commission to propose a directive on the right to disconnect. This should ensure that employees throughout the EU have the right to be unavailable outside of working hours[78]. A political agreement has yet to be reached.

With regard to the legal situation in Germany, the labor courts probably assume that a right not to be available outside of working hours can already be derived from occupational health and safety regulations without explicit codification[79]. This is the only way to ensure the health protection of employees by guaranteeing sufficient rest periods (Section 5 (1) ArbZG) and to protect their personal rights. Still, this does not apply where there is an obligation to take note of an instruction within certain periods of time in order to be able to know when to start work the next day[80].

c) On-call duty

The classification of various on-call times under working time law is still closely linked to this topic. While the classification as working time has been clarified for standby duty and on-call duty, during which employees must remain at the place of work in order to take up their duties either immediately or after being requested to do so, this is less clear for on-call duty, during which employees are permitted to leave the workplace. The case law of the ECJ on the Working Time Directive provides strong impetus for this question. The ECJ assumes a dichotomy between working time and free time and therefore does not recognize any special status for on-call times. For this reason, the decisive factor is whether there are sufficient opportunities

[77] See *Dohrmann*, BB 2022, 2228.

[78] Parliament: Right to disconnect to become a fundamental right in the EU, press release of 21.1.2021, *www.europarl.europa.eu/news/de/press-room/20210114IPR95618/parlament-recht-auf-nichterreichbarkeit-soll-in-der-eu-grundrecht-werden* (accessed: 26.6.2024).

[79] For example, LAG Schleswig-Holstein of 27.9.2022 – 1 Sa 39 öD/22, BeckRS 2022, 30089; in this direction also LAG Thuringia, judgment of 16.5.2018 – 6 Sa 442/17, ZD 2018, 540.

[80] BAG of 23.8.2023 – 5 AZR 349/22, NZA 2023, 1607.

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to pursue one's own interests freely and without ties during on-call duty, or whether employees are prevented from pursuing their own affairs according to their own ideas in terms of space, time or other requirements.

7.3.2. Employee status, employment contract and modern forms of work (platforms)

The issue of working conditions and legal protection for platform workers is also growing more important in the context of the digitalization of the world of work. Often classified as solo self-employed, many people working in the platform economy have similar protection needs to traditional employees. Although they are often not directly bound by instructions, platform operators regularly dictate the contractual conditions unilaterally by means of general terms and conditions, influence the execution of contracts and regulate the interaction between platform workers. The special features of the business model reinforce this heteronomy, as platform workers outside the platform often have no or only limited access to the market for the goods and services offered[81]. In response, there is a growing tendency to improve the working conditions and legal protection of these platform workers.

a) EU Directive on platform work

A directive to improve working conditions in platform work was recently adopted at European level[82]. This is based on the recognition that platform work requires additional specific measures, as it poses new challenges and risks for the people working there that cannot be adequately covered by existing EU legislation. The directive that has now been issued aims to improve working conditions in platform work and to better protect the personal data of platform workers (Art. 1 (1) of the directive).

To this end, measures are to be introduced to facilitate the correct determination of the employment status of persons performing platform work (Art. 1 (1) (a) Directive). This is justified by experience from court proceedings in several Member States, which have shown that the employment status is regularly incorrectly classified. However, this bogus self-employment has

[81] BMAS, Key points of the BMAS, Fair work in the platform economy, 27.11.2020, *www.bmas.de/DE/Service/Presse/Pressemitteilungen/2020/eckpunkte-plattformoekonomie.html* (accessed: 3.7.2024).

[82] *www.europarl.europa.eu/news/de/press-room/20240419IPR20584/parlament-nimmt-richtlinie-uber-plattformarbeit-an* (accessed: 24.06.2024).

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considerable negative consequences: it impairs platform workers' access to existing labor and social rights and creates unfair competitive conditions for those companies that classify their employees correctly[83]. Article 5 of the directive therefore stipulates that member states should establish a legal presumption in favor of an employment relationship (as opposed to self-employment). Accordingly, a contractual relationship between a digital work platform and a person working via this platform is considered to be an employment relationship if there is evidence of control and direction. If the platform wishes to refute this assumption, it must prove that the contractual relationship is not an employment relationship.

The Directive also contains provisions on the algorithmic management of platform work in order to promote transparency, fairness, human oversight, security and accountability in this context (Art. 1 (1) (b) of the Directive). Rules are therefore introduced to better protect the data of platform workers. This is based on the assumption that consent to the processing of personal data can often not be regarded as voluntary consent in view of existing power asymmetries[84]. In this sense, Art. 7 of the Directive restricts the processing of certain personal data by means of automated monitoring and decision-making systems. For example, the processing of data on the emotional or mental state of the person working in platform work and the use of data for the purpose of predicting the exercise of fundamental rights, including the freedom of association, the right to collective bargaining and collective action, or to draw conclusions about the existence of grounds for discrimination, is prohibited.

Algorithmic management should also become more transparent for platform operators, their representatives and national authorities. Art. 9 of the Directive therefore contains transparency and information obligations in relation to automated monitoring systems and automated systems used to make decisions that affect platform workers, including their working conditions. This refers to algorithmic decisions affecting access to work assignments, earnings, health and safety, working time, promotion or equivalent measures, as well as contractual status, including the restriction, suspension or termination of the platform worker's account[85]. In this context, human oversight of automated systems is also provided for in accordance with Art. 10 of the Directive. Furthermore, according to Art. 11 para. 1 subpara. 1 of the Directive, platform operators should in future

[83] Recitals 6 and 7 of the Directive on improving working conditions in platform work (Directive).

[84] Recital 39 f. of the Directive.

[85] Recital 45 of the Directive.

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be able to receive a transparent and comprehensible explanation for each automated decision. According to subsection (2), they should be able to receive an explanation no later than the date on which a decision that has a direct impact on the employment or other contractual relationship – such as the restriction, suspension or termination of the account – takes effect.

In view of the often transnational organization of platforms, their transparency in cross-border situations should be improved (Art. 1 (1) (c) of the Directive). In this respect, notification obligations for platform operators (Art. 16) and information requirements for authorities and representatives of platform operators (Art. 17) are provided for.

b) Legislative projects in Germany

In Germany, efforts have been underway for several years to regulate work in the platform economy and to improve the working conditions of platform workers by clarifying labor and social law issues. The current German government's coalition agreement on digital platforms also includes the statement that they should be seen as an enrichment for the world of work and that good and fair working conditions are therefore important[86]. Yet, there are no concrete legislative plans up to now.

In November 2020, the Federal Ministry of Labor and Social Affairs (BMAS) published an initial key issues paper on working in the platform economy[87]. In line with the recently adopted EU Directive on platform work, the key issues paper provides for a simplification of the clarification of status under employment law by reversing the burden of proof in favor of platform workers. Some of the BMAS's other proposals go beyond the minimum requirements of the European Directive. The BMAS proposes that the solo self-employed, who are mostly employed in the platform economy, should be included in the statutory pension insurance scheme with the financial participation of the platform operators, provided they are in comparable need of protection to employees. For other branches of social insurance, such as health and accident insurance, as well as for statutory occupational health and safety, inclusion with the participation of platform operators should be examined. The common practice of so-called "digital

[86] Mehr Fortschritt wagen, Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit, Koalitionsvertrag 2021-2025 zwischen der Sozialdemokratischen Partei Deutschland (SPD), Bündnis 90 / Die Grünen und den Freien Demokraten (FDP), p. 57, *www.spd.de/fileadmin/Dokumente/Koalitionsvertrag/Koalitionsvertrag_2021-2025.pdf* (accessed: 25.6.2024).

[87] BMAS, Key points of the BMAS, Fair work in the platform economy, 27.11.2020, *www.bmas.de/DE/Service/Presse/Pressemitteilungen/2020/eckpunkte-plattformoekonomie.html*.

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termination" is to be countered by establishing minimum notice periods depending on the duration of activity on the platform. Protection through other labor law regulations such as continued remuneration in the event of illness, maternity protection and vacation entitlement is also planned.

c) Federal labor court on the employee status of a so-called "crowdworker"

Experience from the cases heard in the member states, which indicate a systematic misclassification of platform workers, was the main reason for the reversal of the burden of proof now contained in the directive. Such a misclassification was also the basis of a ruling by the BAG on December 1, 2020[88]. This concerned the question of whether the plaintiff, who worked as a so-called "crowdworker", was to be regarded as an employee, contrary to the express contractual agreements made with the defendant, a so-called "crowdsourcing company".

The defendant's business model consisted of operating a digital platform through which it divided its customers' orders into a large number of individual micro-jobs and placed them with so-called "crowdworkers" in return for payment. The agreement concluded between the parties expressly stipulated that the contractual relationship between them did not constitute an employment relationship and that there was no obligation to follow instructions.

However, the designation in the contract is irrelevant in any case when determining the status under German law (Section 611a (1) sentence 6 BGB). Rather, it depends on an overall consideration of all relevant circumstances of the individual case. Based on such an overall assessment, the BAG came to the conclusion that the plaintiff performed work that was subject to instructions and determined by others in a manner typical of an employee in the context of the actual execution of the contract. The decisive factors in this context were that the plaintiff was obliged to provide the service personally, that the nature of the work owed was simple and its execution was predetermined in terms of content and that the specific use of the app acted as a means of external control in the awarding of the contract. The special features of the platform economy and the specific structure of the working relationship between the parties were therefore relevant on the one hand with regard to the criterion of personal dependence and on the other hand with regard to external determination.

The BAG considered the obligation to personally provide services to be proven. According to the contractual agreement, the crowdworkers were

[88] BAG, judgment of. 1.12.2020, 9 AZR 102/29, NZA 2021, 552.

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generally entitled to use third parties to fulfill their orders. In practice, the fulfillment of orders was only possible via the app and the individual user account linked to it. Transferring the user account was not permitted and was even considered an attempt at fraud by the platform operator. De facto, it was therefore not possible to execute orders using third parties.

Furthermore, the BAG assumed that the defendant was able to control the plaintiff's usage behavior by tailoring and combining the orders according to its employment needs without the need for specific instructions. From this, the BAG derived the external determination of the activity. Instead of the issuance of specific instructions, there are actual constraints due to an organizational structure created by the client in the form of an incentive system, which is suitable to induce the employees to behave as desired. In the present case, this behavior consisted of the continuous acceptance of work orders and the completion of these within a certain time frame according to precise specifications. The managing director of the platform operator explicitly referred to this as the "gamification part" of the app.

7.3.3. Effects of digitalization on the collective representation of employees' interests

Advancing digitalization is also having a decisive influence on the collective representation of employees' interests. At company level, this has a particular impact on works council work. They must adapt to the increasing dissolution of the workplace as the central location of their activities due to working from home, platform work and remote work. In addition, the digitalization of companies is giving rise to new areas of responsibility, in some of which questions of co-determination at the workplace will have to be renegotiated. The digitalization of trade union work and, in particular, the question of its communication options, for example for the purpose of recruiting new members, will also become relevant in digitalized work contexts.

a) Co-determination in the company

Workplace co-determination is facing new challenges as a result of digitalization and the transformation of the world of work.

(1) Co-determination in companies without a permanent establishment

The increase in platform work and working from home goes hand in hand with the loss of importance of the workplace as a physical location

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and central point of co-determination. Some companies are even dispensing with the provision of offices altogether and allowing employees to work remotely from anywhere. The advantage for companies is that they save on rental costs, including all ancillary costs. For employees, these models can go hand in hand with a considerable flexibilization of their working hours. However, from the perspective of co-determination at the workplace, these developments are problematic in view of their focus on "the company", which traditionally also implied a spatial connection between employees.

Two constellations in particular come into consideration here. Firstly, one in which some of the employees work entirely or partially from home, which means that although physically existing workplaces can be reduced, there is ultimately still a permanent establishment. Secondly, the situation in which there are no longer any business premises at all, apart from any administrative centers that may still exist, meaning that employees can work from anywhere at any time.

The concept of an establishment within the meaning of the Works Constitution Court is understood in the established case law of the Federal Labour Court "*as an organizational unit within which the employer, together with the employees it employs, continues to pursue certain work-related purposes*"[89]. The spatial connection is therefore generally considered necessary in order to ensure the organization of the cooperation of the employees to achieve a common work result, but it should not be a characteristic constituting an establishment. Rather, the concept of a business is to be defined functionally[90]. Based on this, working from home does not change the length of service of employees even if the workplace is located outside the business premises. Such employees are already integrated into the work-related organization of the company due to the communication connection that is usually required and pursue the work-related purposes of the company from the home office together with other employees[91].

This raises the question of how the length of service is to be assessed if there is no longer a physical establishment because all employees work from anywhere. In this context, it is important to note that the complete renunciation of a physically existing place of business must not lead to a complete exclusion of co-determination under the Works Constitution Act[92].

[89] Cf. only BAG of 17.5.2017 – 7 ABR 21/15, NZA 2017, 1282.

[90] *Maschmann* in: Richardi BetrVG, Section 1 para. 32 ff. with further references.

[91] Müller, Homeoffice in der arbeitsrechtlichen Praxis, para. 533 ff. with further references.

[92] *Behder*, AiB issue 3/2023.

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(2) Co-determination in digital matters

As digitalization progresses, new fields of activity relevant to co-determination are also emerging for works councils.

In some cases, the existing elements of mandatory employee co-determination apply. For example, the introduction of new software falls under the co-determination provisions of Section 87 (1) No. 6 BetrVG due to its objective suitability for monitoring the behavior and performance of employees[93]. When electronic time recording systems are introduced, the works council has a right of co-determination with regard to their design in accordance with Section 87 (1) No. 7 BetrVG in conjunction with Section 3 (2) No. 1 BetrVG. § Section 3 (2) No. 1 ArbSchG[94].

The Works Council Modernization Act of 14 June 2021[95] also added new powers adapted to the needs of the digitalization of the world of work. Works councils now also have an explicit right of co-determination in the organization of mobile work. However, there is generally no right of co-determination with regard to the introduction of mobile working (i.e. the "obs"). The law also responds to the increasing use of AI, particularly in personnel selection, in the form of algorithmic decision making systems (ADM systems)[96]. The use of such systems was made dependent on the consent of the works council.

b) Digital works council work

Digitalization is also having an impact on practical works council work. For some time now, there have been calls for works council meetings and works assemblies to be held in digital form.

At least for works council meetings, this has now been made possible by the Works Council Modernization Act, which is intended to contribute to the digitalization of works council activities[97]. Under certain circumstances, works council meetings can now be held by video or teleconference. In spite of that priority is still given to face-to-face meetings (section 30 (2) (b) no. 1 BetrVG). The employer is therefore still obliged to provide suitable premises in this respect and, if the company is managed purely digitally, for instance, and does not have any office space, to rent it at its own expense if necessary.

[93] See *Ludwig*, NZA 2023, 321.
[94] BAG of 13.09.2022 – 1 ABR 22/21, NZA 2022, 1616.
[95] Federal Law Gazette 2021 I No. 32.
[96] BT-Drs. 19/28899, p. 15.
[97] BT-Drs. 19/28899, p. 2.

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During the coronavirus pandemic, a special regulation was introduced in Section 129 BetrVG, which also allowed meetings of the entire workforce of a company to be held entirely digitally or in hybrid form using audiovisual equipment. This regulation finally expired on April 7, 2023 and was not extended again. Works meetings are therefore once again only possible in person. The expiry of the regulation has been criticized in view of a workforce that is sometimes spread across the entire country (or even beyond).

c) Digital access for trade unions

Traditionally, trade union representatives in Germany have the right of access to the company. On the one hand, this is enshrined in ordinary law and also arises directly from the constitution for their coalition-specific activities, namely the freedom of association under Article 9 (3) of the Basic Law. However, this right of access is not tailored to an increasingly digitalized world of work, in which the company as a physically existing unit is increasingly disappearing. For example, there are courier services that, apart from administrative headquarters, no longer have any business premises at all. The traditional forms of communication used by trade unions, such as posting notices on notice boards or distributing leaflets, are therefore hardly possible any more. But even in those companies that still have a local branch, communication is shifting to the digital realm due to the use of home office arrangements and modern communication technology.

A digital right of access for trade union members or external trade union representatives for works council elections and for the purpose of general recruitment of new members is therefore being discussed[98]. The demands range from a right for trade unions to be granted access to the intranet of the respective company to an obligation for the employer to pass on all company e-mail addresses of employees to the trade unions. The coalition agreement of the current German government also provides for a "*contemporary right for trade unions to digital access to companies that corresponds to their analog rights*"[99] to be created. There are not yet any concrete legislative plans in Germany.

So far, the issue has mainly been dealt with in case law. With regard to communication by email, the Federal Labor Court has granted trade unions the right to send emails to employees' company email addresses for advertising purposes, even without the employer's consent and without

[98] See *Göpfert*, NZA 2021, 1209; *Hjort/Mamerow*, NZA 2021, 1758.
[99] Coalition agreement, p. 56.

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being requested to do so by the employees[100]. Regardless, this case concerned email addresses that were already known to the trade union as they were its own members. However, the extent to which communication for the purpose of recruiting new members can take place with those employees whose email addresses are not yet known to the union has not been conclusively clarified by the highest court. The Bonn Labor Court recently rejected a claim by the trade union to forward an email pre-formulated by the trade union to all of its employees[101]. The court considered it sufficient that the employee association was given the opportunity to provide information to all employees via the company's intranet. In a decision by the Nuremberg Higher Labor Court, a trade union's right to access and use the employer's electronic communication channels and to receive a complete list of the email addresses of all employees working in a company was rejected[102].

7.3.4. Other relevant developments/legislation/court rulings etc. regarding "digitalization, AI and employment"

Data protection is also of crucial importance in the context of digitalization. This is largely regulated within the European Union by the General Data Protection Regulation. For employee data protection, Art. 88 of the regulation offers member states the option of issuing "more specific" regulations.

Germany has made use of this option. However, not all regulations in national law are specific enough. A central area of application of data protection law is the right of termination. Case law has formulated the principle here: Data protection is not protection in fact. Employers can therefore introduce evidence collected in breach of data protection law in court if they can use it to prove that employees have breached the law or their duties. Especially in the context of the possibilities of using AI for data analysis, protection against data collection by the employer is also an issue that should not be neglected. In Germany, this issue is currently dealt with primarily by the fact that the operation of technical equipment with which data can be collected is subject to co-determination by the works council.

[100] BAG of January 20, 2009 – 1 AZR 515/08, NZA 2009, 615.
[101] At least in the case of: ArbG Bonn v. 11.5.2022 – 2 Ca 93/22, NZA-RR 2022, 351.
[102] LAG Nuremberg v. 26.9.2023 – 7 Sa 344/22.

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*7.4. **National Report Italy** (by Stefano Bellomo, Dario Calderara, Antonella Gravinese, Carla Spinelli[103])*

7.4.1. Digitalisation and working time

a) The uncertain determination of work time and personal time in digital work

The identification of the boundaries between working time and personal time is increasingly blurred and complex in the light of technological progress that has involved the organisation of work[104].

All this entails the need to reinterpret the classic bipartition between "working time" and "rest period"[105].

In fact, the legislation solely differentiates between working time, defined as the period during which the worker is at work, at the employer's disposal and in the exercise of his activity or duties, and rest time, defined as any period that is not part of working time[106].

Recent technological developments and the consequent evolution of work organisation, however, have led to the need to rethink and redefine these concepts, particularly in view of the growing difficulties in qualifying certain situations in the light of the overcoming of the traditional spatio-temporal boundaries of the working activity, which entail application problems due to the difficulty of finding in concrete cases the following elements: the presence at work, the fact of being at the employer's disposal and the exercise of the work activity[107]. The process of digitisation of work, therefore, has increasingly allowed work to be performed remotely, resulting in an intensification and extension of working time[108].

[103] Stefano Bellomo (Full professor of Labour Law, Univ. Sapienza of Rome) and Dario Calderara (Researcher in Labour Law, Univ. Sapienza of Rome) wrote Sec. 1 and Sec 2, par. 1; Carla Spinelli (Full Professor of Labour Law, Univ. Aldo Moro of Bari) e Antonella Gravinese (Ph.D. Student in Labour Law, Univ. Aldo Moro of Bari) wrote Sec. 2, par. 2 and Sec 3.

[104] Bellomo S. (2022), "Forme di occupazione 'digitale' e disciplina dell'orario di lavoro", *Federalismi*, n. 19, p. 168.

[105] Cf. on the subject of working time and rest time Occhino A. (2010), *Il tempo libero nel diritto del lavoro*, Torino: Giappichelli.

[106] Article 1, paragraph 1, lett. a) and b), Legislative Decree No. 66/2003 and article 2, No. 1 and 2, directive 2003/88/CE.

[107] Monaco P.M. (2005), "Aspetti dell'organizzazione dell'orario di lavoro nella normativa comunitaria di riferimento", in Aa.Vv., *Orari e tempi di lavoro: le nuove regole, I saggi di NGL*, n. 6, p. 20.

[108] Calderara D. (2022), "La dis-connessione: evoluzioni e prospettive", *Massimario di Giurisprudenza del Lavoro*, n. 2, p. 261 ff.

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While aiming, at least abstractly, to improve work-life balance, allowing for childcare, reducing commuting time and leading to increased work autonomy and better use of working time[109], remote work can increase the pressure on workers to always be available or to work in their free time, resulting in isolation and a blurring of the boundaries between work and leisure[110]. The hyper-connectedness to which these workers are exposed often results in increased stress due to the difficulty of discerning between work and private life[111].

That said, the rise of agile working has certainly had a considerable impact on working conditions[112]. In particular, it has been found that for only one third of agile workers working during their free time represents a reorganisation of working time rather than an extension of the working day, while for the remaining two thirds it means working longer than expected[113].

The need to rethink and redefine the two concepts in light of the increasing difficulty of qualifying, among others, the worker's periods of availability[114] and on-call time[115] has led the Court of Justice of the European Union to pronounce on the notion of working time. The jurisprudence[116], through the flexible use of the constituent elements of this notion, (being at work, at the employer's disposal and in the exercise of his activity or duties[117], with the aim of guaranteeing the effectiveness of the principle pursued by the European regulations on the protection of workers' health and safety[118]),

[109] Eurofound (2022), *Aumento del telelavoro: impatto sulle condizioni di lavoro e sulla regolamentazione, Sintesi*.

[110] Cf. Eurofound (2022), *Working conditions: The rise in telework: Impact on working conditions and regulations*, Research Report.

[111] Cataudella M.C. (2010), "Tempo di lavoro e tempo di disconnessione", *Massimario di Giurisprudenza del Lavoro*, n. 4, p. 854-855.

[112] Eurofound (2022), *Working conditions: The rise in telework: Impact on working conditions and regulations*, Research Report, pp. 61-62.

[113] Eurofound (221), *Workers want to telework but long working hours, isolation and inadequate equipment must be tackled*, Article, 6 September 2021.

[114] Bernardini P. (2011), "La reperibilità del funzionario europeo al vaglio dei giudici di Lussemburgo", *Rivista Italiana di Diritto del Lavoro*, n. 4, p. 1241 ff.

[115] Ferraresi M. (2008), "Disponibilità e reperibilità del lavoratore: il tertium genus dell'orario di lavoro", *Rivista Italiana di Diritto del Lavoro*, n. 1, p. 93 ff.

[116] CJEU, 3 October 2000, Case C-303/98; CJEU, 9 September 2003, Case C-151/02; CJEU, 5 October 2004, Joined cases C-397/01 to C-403/01; CJEU, 1 December 2005., Case C-14/04; CJEU, 10 September 2015, Case C-266/14; CJEU, 21 February 2018, Case C-518/15.

[117] Magagnoli S. (2021), "Diritto alla disconnessione e tempi di lavoro", *Labour & Law Issues*, n. 2, pp. 98-99.

[118] Mazzanti C. (2019), "I tempi intermedi nella nozione binaria di tempo di lavoro", *Argomenti di Diritto del Lavoro*, n. 2, p. 221 ff.; Russo M. (2023), "Teleologia dei tempi di

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has also included in certain cases the so-called "grey times". In the Matzak judgment[119], the Court included within the concept of working time even those cases in which the employee is at the employer's disposal, even if at home, considering that the employee's availability to the employer means that such intermediate time in any case satisfies the latter's organisational interest[120], not allowing him to achieve the psychological relaxation of the normal rest period[121].

Nowadays, the demarcation line between situations and temporal segments attributable to the concept of "working time" and those forms of fulfilling work obligations that fall outside of it has been effectively delineated by the case law of the Court of Justice, which has repeatedly clarified that the distinguishing criterion is found in the intensity of the constraints imposed on the worker during periods of readiness. This underscores that the national judge must assess whether the worker has been subjected to constraints so pervasive that they objectively and significantly impact the worker's ability to freely manage the scheduling of time when their professional services are not required.

Hence the conclusion that

> a period of stand-by time according to a stand-by system, during which the worker is required only to be contactable by telephone and able to return to his or her workplace, if necessary, within a time limit of one hour, while being able to stay in service accommodation made available to him or her by his or her employer at that workplace, without being required to remain there, does not constitute, in its entirety, working time within the meaning of that provision, unless an overall assessment of all the facts of the case, including the consequences of that time limit and, if appropriate, the average frequency of activity during that period, establishes that the constraints imposed on that worker during that period are such as to affect, objectively and very significantly, the latter's ability freely to manage, during the same period, the time during which his or her professional services are not required and to devote that time to his or her own interest[122].

riposo nella giurisprudenza della corte di giustizia", *Rivista Giuridica del Lavoro*, n. 3, p. 360 ff.

[119] CJEU, 21 February 2018, Case C-518/15.

[120] Putaturo Donati F.M. (2011), "Orario di lavoro, riposi e tempi sociali. Artt. 2107, 2108, 2109 cod. civ.", in Pessi R. (ed.), *Codice commentato del lavoro*, Utet, p. 528; Bavaro V. (2008), *Il tempo nel contratto di lavoro*, Cacucci, p. 225; Giuliani A. (2003), "La nuova nozione di orario di lavoro nel d.lgs. n. 66/2003 e il 'vecchio' criterio della 'effettività'", *Argomenti di Diritto del Lavoro*, p. 775.

[121] Mazzanti C. (2019), "I tempi intermedi nella nozione binaria di tempo di lavoro", *Argomenti di Diritto del Lavoro*, n. 2, p. 225.

[122] CJEU, 9 March 2021, Case C-344/19, paragraph 66 of the reasoning.

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The Court explicitly identifies today, therefore, the intensity of such constraints as the parameter on which the interpreter must focus for the purpose of distinguishing between working hours and rest periods. It is indeed the degree of pervasiveness of these constraints that allows for the qualification of certain time segments as either working hours or rest periods.

To facilitate this assessment, the Court of Justice outlines some "indicative markers" of intensity, that is, the parameters to be considered for an objective evaluation. Specifically, based on this reconstruction, the most recent judgments consider the significance of the following: the time period available to the worker to resume work from the moment the employer requests it; the frequency of tasks performed during the on-call period; and the "non-negligible" duration of interventions carried out, which limit the possibility of freely managing one's time during the worker's inactive periods.

This possibility, which can be recognized as existing, was most recently emphasized by the Court in the judgment of November 11, 2021, C-214/20, *Dublin City Council*. Even when faced with the imposition of a very short response time, the worker can enjoy freedom of movement, retain the discretion to respond to calls or not, and is permitted to carry out another professional activity (in this case, that of a taxi driver) and devote a significant portion of the time when not engaged in duties as an on-call firefighter[123].

b) The need to establish an objective system for measuring the duration of daily working hours

Strictly connected to the determination of working times and personal times in digital work is the issue of how to measure working hours.

Owing to certain matters recently brought to the attention of the jurisprudence of the Court of Justice of the European Union, focus has been directed towards the measurement of working hours, particularly with the judgment *Federación de Servicios de Comisiones Obreras (CCOO) v. Deutsche Bank*[124].

In particular, the Court of Justice deems it appropriate that, "*in order to ensure the effectiveness of those rights provided for in Directive 2003/88 and of the fundamental right enshrined in article 31, paragraph 2, of the Charter, the Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each*

[123] Paragraph 66 of the reasoning.

[124] CJEU, 14 May 2019, Case C-55/18. Previously in the case *Worten v. Autoridade para as Condições de Trabalho*, CJEU, 30 May 2013, Case C-342/12.

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day by each worker to be measured"[125]. This principle does not appear to be explicitly provided either in Article 31 of the Charter of Fundamental Rights, which in paragraph 2 guarantees every worker "*the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave*", nor in the 2003 Directive.

In light of the ECJ case law, the system for measuring working hours appears indispensable to ensure with absolute certainty that every worker enjoys daily and weekly rest periods, annual paid leave, and the right to a limitation of maximum working hours.

However, the time measurement tool must be objective, reliable, and accessible, and may fall under the general obligation for Member States and employers, as outlined in article 4, paragraph 1, and article 6, paragraph 1, of Directive 89/391, to establish an organization and the necessary means to protect workers' safety and health. This system permits worker representatives with health and safety functions, pursuant to Directive 89/391, to exercise their right to request the employer to take appropriate measures and to make proposals aimed at reducing any risk to workers and/or eliminating the causes of danger.

The innovative feature of this system is its ability to enable employers, workers, and inspection bodies to verify and demonstrate – in an impartial, reliable, and objective manner – the correct enjoyment of the rights provided by the Charter and the directive. In the absence of such a tool, the current recourse is to the means of proof admitted by the legal system[126], which, in the opinion of the Court of Justice, "*do not enable the number of hours the worker worked each day and each week to be objectively and reliably established*"[127].

According to the Court's jurisprudence, particular doubt should be cast on testimonial evidence due to the so-called *metus prestatoris*, or the position of subordination in which the worker finds themselves. This condition implies recognizing the worker as the weaker party in the relationship, which could deter workers from testifying against their employer to avoid potential retaliation that could negatively impact the employment relationship. For these reasons, testimonial evidence cannot, by itself, be considered an effective means of proof capable of ensuring the effective respect of the rights provided by the Charter and the directive.

The most significant aspect, some years after the Court's ruling, concerns identifying the tools our legal system has adopted to comply with the Court's principles.

[125] CJEU, 14 May 2019, C-55/18, *cit.*, paragraph 60 of the reasoning.
[126] As, for example, the testimony.
[127] CJEU, 14 May 2019, Case C-55/18, cit., paragraph 54 of the reasoning.

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The Court has already observed that it is up to the Member States, within the exercise of discretionary power, to define the concrete modalities for implementing the time measurement system, considering the specificities of different sectors of activity and the particularities of some enterprises, regarding their size.

According to initial reconstructions, paper registers[128] or electronic badges might be accepted, provided that the system adopted is suitable for ensuring the effectiveness of the rights enshrined by the Court[129].

The issue of measuring working hours is a topic that much of the legal doctrine has examined. Among the many points of reflection, one of the added values provided by the Court of Justice lies in qualifying the measurement system as "objective, reliable, and accessible", which is why systems that might prescribe superficial or approximate annotations of working hours by the employer do not seem appropriate.

With specific reference to internal legislation, it should first be noted that there is no explicit implementation of the principle established by the Court of Justice. However, it is possible to examine Legislative Decree No. 104 of 2022, the so-called "transparency decree" implementing Directive 1152 of 2019, to examine some convergence profiles.

Given the faithful, almost always literal, transposition of the directive's provisions, this discussion will refer, by way of example, directly to the internal regulations.

The provisions introduced under the so-called "transparency decree" also have significant implications for the issue of working hours.

It is appropriate to recall the main objectives of the Directive, to understand the motivations that led the European legislator to introduce regulations on working hours.

Indeed, several of the recitals of the directive highlight the more specific objectives considered by the EU legislator, which are then directly concretized by the regulations.

For example, pursuant to considerando No. 19, information on working hours should include "*information on breaks, daily and weekly rest periods and the amount of paid leave, thereby ensuring the protection of the safety and health of workers*".

[128] As it happens in Spain, where article 34.9 of the Workers' Statute, as amended by Royal Decree-Law No. 8 of 8 March 2019, establishes the obligation to keep a daily timekeeping register. This register must specify the actual start and end times of each worker's workday, without prejudice to flexible scheduling. The register must be accessible to employees, their legal representatives, and labor inspectors for a period of four years.

[129] Leccese V.S. (2022), "La misurazione dell'orario di lavoro e le sue sfide", *Labour & Law Issues*, vol. 8, n. 1, p. 6.

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The recurring reference to safety protection needs in EU working hours legislation helps clarify the legislator's objectives.

Additionally, considerando No. 21 states that

> if it is not possible to indicate a fixed work schedule because of the nature of the employment, such as in the case of an on-demand contract, employers should inform workers how their working time is to be established, including the time slots in which they may be called to work and the minimum notice period that they are to receive before the start of a work assignment.

To meet this identified need, a detailed set of informational obligations has been established.

Of particular importance is the reference, in considerando No. 1, to article 31, paragraph 2, of the Charter of Fundamental Rights of the European Union, emphasizing the guarantee of workers' rest and the limitation of maximum working hours.

Article 4 of the legislative decree, amending article 1 of Legislative Decree No. 152/1997, has regulated specific informational obligations concerning aspects related to working hours.

According to the mentioned article 1, as rephrased by the transparency decree, the employer, whether public or private, is required to inform the worker of

> the schedule of normal working hours and any conditions related to overtime work and its remuneration, as well as any conditions for shift changes, if the employment contract provides for an organization of working hours that is entirely or largely predictable (letter o).

Furthermore,

> if the employment relationship, characterized by largely or entirely unpredictable organizational methods, does not provide for a scheduled normal working time, the employer shall inform the worker about: 1) the variability of the work schedule, the minimum amount of guaranteed paid hours, and the remuneration for work performed in addition to the guaranteed hours; 2) the reference hours and days within which the worker is required to perform work tasks; 3) the minimum notice period to which the worker is entitled before the start of a work assignment and, if permitted by the contractual type in use and agreed upon, the deadline by which the employer can cancel the assignment (letter p).

These two provisions are evidently complementary and provide for two different obligations for the employer, who must comply in one way

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or another depending on the predictability of the organization of working hours[130]. In broad terms, it is appropriate to clarify what is meant by an "entirely or largely predictable" organization of working hours, and an employment relationship characterized by largely or entirely unpredictable organizational methods.

The notion of "predictability" of working hours is elusive and appears to be characterized by aspects of opacity[131]. It should be clarified that the predictability of the temporal placement of the work performance should be assessed not with reference to the type of employment contract but to the organization itself. In other words, this derives from the exercise of the organizational powers of the employer to determine the scheduling of activities according to the working hours chosen by the employer, such as through shift work, and not from the type of individual agreement concluded with the worker[132].

The unpredictability of work activity, on the other hand, manifests when it is not possible to establish a work schedule and, thus, to determine ex ante the temporal placement of the performance[133].

The principle established by the Court of Justice regarding the measurement of working hours is framed and compatible with the legal framework of the transparency decree, concerning the information on working hours provided by letters o) and p) mentioned previously. This assertion could be supported by the objectives of the decree itself, as stated in the recitals of the directive implemented, which seem to establish, in addition to an adequate level of transparency and predictability for working conditions, also indirectly, a verification of the implementation of the information's content.

For instance, to ensure the protection of workers' safety and health, it

[130] Garofalo D., Tiraboschi M. (2023), "Prime riflessioni sul decreto trasparenza (d.lgs.104/2022) modificato dal decreto 'lavoro' (d.l. 48/2023)", *Argomenti di Diritto del Lavoro*, n. 4, 2023, p. 667.

[131] Tursi A. (2023), "'Trasparenza' e 'diritti minimi' dei lavoratori nel decreto trasparenza", *Diritto delle Relazioni Industriali*, n. 1, pp. 18, 20.

[132] Also, Proia G. (2022), "Trasparenza, prevedibilità e poteri dell'impresa", *Labor*, 6, p. 647. Moreover, it is noteworthy that the same decree defines, echoing a provision of the Directive, the organization of work as "the form of organizing working time and its distribution in accordance with a specific arrangement established by the employer" (article 2, paragraph 1, letter c).

[133] In any case, employment relationships falling under an unpredictable organization may include those of intermittent subordinate work (articles 13 and following of Legislative Decree No. 81/2015), given the specific organizational function of the contract itself, designed so that the employer can utilize the service "on request". These scenarios may also encompass cases where collective bargaining provides, as may occur in the case of remote work, for goal-oriented work without predetermined working hours.

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can be inferred, indirectly from the content of the transparency decree, that the employer, in addition to complying with the previously mentioned informational obligations regarding working hours, is also directly responsible for implementing the content of the information. Thus, in this sense, the information becomes a prerequisite for ensuring compliance with a specific right[134].

In this context, an extensive interpretation of article 13 of the decree could be useful, understanding the worker's complaint as aimed at obtaining the correct information and ensuring the implementation of the information's content. This assertion would allow us to maintain that the worker cannot be treated unfavorably for the violation of the informational obligations, and for those related to working hours, it can be argued that the necessity to measure working hours is inherent to ensure compliance with the rights and objectives set out in the 2019 directive's considerando.

The issue of measuring working hours has been recently addressed, from a *de iure condendo* perspective, by the European Parliament Resolution of 21 January 2021, with recommendations to the Commission on the right to disconnect (2019/2181(INL))[135].

Article 3, paragraph 2, provides the obligation for Member States to ensure that "*employers set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured, in accordance with workers' right to privacy and to the protection of their personal data. Workers shall have the possibility to request and obtain the record of their working times*". The principle established by the Court of Justice in the case *Federación de Servicios de Comisiones Obreras (CCOO) v. Deutsche Bank*, combined with the context of the proposed directive, aims to protect the effectiveness of the right to disconnect, both substantively and dynamically. As a matter of fact, the proposal stipulates that workers can request and obtain the record of their working hours[136].

Additionally, according to article 4, paragraph 1, letter b), the system

[134] Executed by anyone in the sense of CJEU, 14 May 2019, Case C-55/18, cit., paragraph 56 of the reasoning: "*by contrast, a system enabling the time worked by workers each day to be measured offers those workers a particularly effective means of easily accessing objective and reliable data as regards the duration of time actually worked by them and is thus capable of facilitating both the proof by those workers of a breach of the rights conferred on them by Articles 3 and 5 and 6(b) of Directive 2003/88, which give specific form to the fundamental right enshrined in Article 31(2) of the Charter, and also the verification by the competent authorities and national courts of the actual observance of those rights*".

[135] The resolution with recommendations has not yet been adopted today.

[136] Fenoglio A. (2021), "Una veste digitale per il diritto al riposo: il diritto alla disconnessione", *Lavoro Diritti Europa*, n. 4, p. 13.

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for measuring working hours falls within the working conditions that must be guaranteed by Member States. It seems appropriate to consider that this article should also be read considering article 7, paragraph 1, letter b), regarding informational obligations, according to which Member States are required to ensure that employers provide each worker with clear, sufficient, and adequate information in writing about the right to disconnect, particularly with specific reference to the system of measuring working hours.

This latter provision seems to align perfectly with the previously interpreted transparency decree currently implemented in domestic law.

Considering the foregoing part of the doctrine has pointed out that, although the obligation to establish a certain and objective system for measuring working hours is crucial for the effective enjoyment of the right to disconnect, particular attention must also be paid when the work is performed in an agile manner, especially in the absence of precise time constraints[137].

In such cases, one of the desirable solutions could be the establishment of alert mechanisms, managed by algorithms or artificial intelligence, which could simplify the measurement of remote work performance, as already provided for by collective bargaining, particularly at the company level[138].

c) The reinterpretation of European jurisprudence's principles on working hours in relation to remote work: potential implications for agile work hours

In light of the significant efforts undertaken by EU jurisprudence in recent years[139] to adapt the notion of working time by extending the strict definitions outlined in article 1, paragraph 2, letter a) of Legislative Decree No. 66 of 2003, it is appropriate to consider whether legislative intervention is necessary to modify the regulation of working hours in view of the rapid and radical changes in the world of work.

[137] Leccese V.S. (2019), "Se il lavoro iperconnesso diventa l'occasione per scaricare sull'uomo il rischio di impresa", *Guida Lavoro*, 39, X; Biasi M. (2022), "Individuale e collettivo nel diritto alla disconnessione: spunti comparatistici", *Diritto delle relazioni industriali*, n. 2, p. 403.

[138] In this regard, the virtuous example of the Campari Agreement must be reported. See Dagnino E. (2021), "Il diritto alla disconnessione nell'esperienza contrattual-collettiva", *Lavoro Diritti Europa*, n. 4, p. 6, note 25, with reference to tools "*for managing the reporting of attendance/absences* […] *which will generate an alert related to exceeding working hours as well as possible warning messages suggesting disconnection once the normal working hours are reached*".

[139] See CJEU, 3 October 2000, Case C-303/98; CJEU, 9 September 2003, Case C-151/02; CJEU, 5 October 2004, Cases C-397/01 and C- 403/01; CJEU, 7 September 2006, Case C-484/04; CJEU, 17 November 2016, Case C-216/15; CJEU, 21 February 2018, Case C-518/15.

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It is also necessary to consider the current level of potential absorption of the principles established by the jurisprudence of the Court of Justice, with specific reference to digital work, which currently finds its point of emergence and connection with positive law in the form of agile work.

First and foremost, it should be noted that agile work, as it stands, cannot a priori be considered as a free zone from the application of restrictive regulations on working time, especially due to the evident lack, in most cases, of the conditions of self-determination defined by article 17, paragraph 1, of Directive 2003/88/EC on working time and article 17, paragraph 5, of Legislative Decree No. 66 of 2003[140].

Unless one is dealing with a specific situation where the worker could maintain an autonomous decision-making power regarding when and how much to work because they are not subject to "*precise time constraints*"[141], all other situations appear to fall within the scope of European working time regulations and the national transposition thereof. In the former consideration, it is likely that the elements outlined in the directive cannot be easily identified in remote work execution modes, characterized by spatial-temporal fluidity and the free self-determination and self-organization of work activities regarding when and how much to work.

From the considerations made thus far, it emerges that the most recent jurisprudence of the Court of Justice supports the position that the applicability of "*only the maximum duration limits of daily and weekly working hours deriving from law and collective bargaining*" pursuant to article 18, paragraph 1[142], cannot be generally extended to all agile workers.

The extension of such regulation is evaluated concerning some agile workers who, due to the result-oriented nature of their collaboration, are not obliged to comply with a "working schedule"[143], both concerning the EU-derived limits and those sourced from domestic law.

For these reasons, reflection on the current relevance of the notion and concept of working time is more pertinent than ever and probably requires reconsideration. Despite the diminished need for spatial-temporal

[140] On the problematic coordination, see Proia G. (2018), "L'accordo individuale e le modalità di esecuzione e di cessazione della prestazione", Fiorillo L., Perulli A. (eds.), *Il Jobs act del lavoro autonomo e del lavoro agile*, Torino.

[141] In other words, when not involved in situations involving the coexistence of the three elements identified in Article 1, paragraph 2, letter a) of Legislative Decree No. 66 of 2003.

[142] Razzolini O. (2022), *Lavoro agile e orario di lavoro*, in *Diritto delle Relazioni Industriali*, n. 2, p. 383 ff.

[143] Bellomo S. (2020), "Orario di lavoro, riposi, ferie: i principi costituzionali, la normativa europea ed il quadro regolativo definito dal d.lgs. 8 aprile 2003 n. 66", Santoro-Passarelli G. (ed.), *Diritto e processo del lavoro e della previdenza sociale*, Milano, p. 1205 ff.

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coordination of work performance, there is now a perspective of broadening the concept of working time, tied to new principles arising from the evolution of living law.

The new notion of working time should consider, above all, flexible work organization, exceeding, in certain situations, the paradigm of the relevance of time and emphasizing organization linked to a program. This is a consequence of the changes in both the space and time of subordination in digital work.

d) The containment of work time and the guarantee of undisturbed enjoyment of non-work time: the role of disconnection

It is no coincidence that the national legislator began, as early as 2017, to focus on the issue of the "new" overlap between work and non-work time, with particular reference to digital work. Indeed, to attempt to contain work time and prevent it from encroaching on non-work time[144], the legislator introduced the right to disconnect into our legal system, inextricably linking it to remote work as a measure to protect workers[145] and improve work-life balance[146]. Simultaneously, the legislator's intent was to allow workers to enjoy their free time without intrusion into their private lives outside working hours.

The protection of the right to disconnect for remote workers thus addresses the specific needs arising from the nature of work in the digital era, which heavily relies on technological tools. Actually, there is no clear definition of disconnection provided by law in our legal system.

The only legislative acts mentioning disconnection date to[147]: the first one to 2017, Law No. 81, article 19, and the second one to 2021, Law No. 61, converting Decree-Law No. 30 of 2021, article 2, paragraph 1-*ter*.

[144] Thus avoiding the interference of work in non-work time called "time porosity". See Genin E. (2016), "Proposal for a Theoretical Framework for the Analysis of Time Porosity", *International Journal of Comparative Labour Law and Industrial Relations*, n. 3, p. 281 ff.; Weiss M. (2016), "Digitalizzazione: sfide e prospettive per il diritto del lavoro", *Diritto delle Relazioni Industriali*, n. 3, p. 657 ff.

[145] Spinelli C. (2018), *Tecnologie digitali e lavoro agile*, Cacucci, p. 153.

[146] Krause R. (2018), "'Always-on': The Collapse of the Work-Life Separation in Recent Developments, Deficits and Counter-Strategies", in Ales E., Curzi Y., Fabbri T., Rymkevich O., Senatori I., Solinas G. (eds.), *Working in Digital and Smart Organizations*, Palgrave Macmillan, p. 223 ff.

[147] Before the introduction of Law No. 81 of 2017, agile working was regulated through agreements under collective bargaining, such as the Nestlé Agreement of October 12, 2012, the Barilla Agreement of March 2, 2015, the Zurich Agreement of September 23, 2015, the Snam Agreement of November 26, 2015, the Euler Hermes Agreement of January 15, 2016, the Axa Agreement of April 12, 2016, and the Eni Agreement of February 6, 2017.

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Regarding Law No. 81 of 2017, an interpretative reading of article 19, while not providing a definition of disconnection, indirectly leads legal practitioners to consider it related particularly to non-work time[148].

Based on the content of article 19, it can be argued that it is necessary to identify specific technical and organizational measures within the remote work agreement to ensure the separation of workers from technological tools[149].

Article 2, paragraph 1-*ter*, does not offer additional insights into the notion of disconnection, except for formally qualifying it as a right and respecting any agreed periods of availability[150].

From a contractual perspective, besides the multiple regulations provided by collective bargaining agreements, the National Protocol on Agile Work of December 7, 2021[151], attempts to outline a "new normal" for post-pandemic agile work and is worth examining to identify a definition of disconnection.

For a more precise definition of disconnection, it is currently necessary to refer to the European Parliament's Resolution of January 21, 2021, with recommendations to the Commission on the right to disconnect. Article 2 of this resolution states that "*disconnect means not to engage in work-related activities or communications by means of digital tools, directly or indirectly, outside working time*".

The notion of the right to disconnect is found in considerando No. 10 of the draft directive, which defines it as "workers' right not to engage in work-related activities or communications outside working time, by means of digital tools, such as phone calls, emails, or other messages. The right to disconnect should entitle workers to switch off work-related tools and not to respond to employers' requests outside working time, with no risk of adverse consequences, such as dismissal or other retaliatory measures. Conversely, employers should not require workers to work outside working time. Employers should not promote an "always on" work culture

[148] Timellini C. (2019), "La disconnessione bussa alla porta del legislatore", *Variazioni su temi di Diritto del Lavoro*, n. 1, p. 332.

[149] Ales E. (2022), "Il lavoro in modalità agile e l'adeguamento funzionale della subordinazione: un processo indolore?", *Federalismi*, n. 34, p. 183.

[150] Fenoglio A. (2021), "Una veste digitale per il diritto al riposo: il diritto alla disconnessione", *Lavoro Diritti Europa*, n. 4, p. 10.

[151] Article 3, National Protocol on Smart Working of December 7, 2021, available at: *www.lavoro.gov.it/notizie/Documents/PROTOCOLLO-NAZIONALE-LAVOROAGILE-07122021*. See Albi P. (2022), "Introduzione: il Protocollo nazionale sul lavoro agile tra dialogo sociale e superamento della stagione pandemica", *Lavoro Diritti Europa*, n. 1, p. 1 ff.; Zoppoli L. (2022), "Il protocollo sul lavoro agile nel settore privato e gli 'altri'", *Lavoro Diritti Euro*pa, n. 1, p. 1 ff.

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in which workers who waive their right to disconnect are clearly favoured over those who do not. Workers reporting situations of non-compliance with the right to disconnect in the workplace should not be penalised". In practice, disconnection can be achieved by turning off company phones during non-working periods, setting devices to offline mode to signal "unavailability"[152], or prohibiting work-related communications during disconnection periods[153]. It can also involve allowing employers to send communications if workers do not receive them during their disconnection period.

Therefore, the right to disconnect is crucial in a digitalized context to allow workers to reclaim their free time[154], a right increasingly recognized by both national[155] and European jurisprudence[156].

The blurred boundaries of the regulation, which does not specify a precise time frame but only requires it to be adequate to ensure respect for workers' personal lives, necessarily raise questions about its placement and effectiveness.

Thus, this provision does not represent a regulatory endpoint as it is currently explicitly addressed only to some remote workers, specifically agile workers. It is undoubtedly desirable for both European[157] and Italian legislators to intervene to broaden the scope of such protection and better define its boundaries, particularly concerning the measurement of working hours and implementation methods.

The mentioned European resolution envisions a commendable combination of recognizing the right to disconnect and requiring companies to adopt "*an objective, reliable, and accessible system that allows for the measurement of the duration of the daily working hours performed by each worker*", in line with the Court of Justice's earlier ruling in the Grand Chamber judgment

[152] Timellini C. (2021), "Il diritto alla disconnessione nella normativa italiana sul lavoro agile e nella legislazione emergenziale", *Lavoro Diritti Europa*, n. 4, p. 9.

[153] Magagnoli S. (2021), "Diritto alla disconnessione e tempi di lavoro", *Labour & Law Issues*, n. 2, p. 95 ff.

[154] Nicolosi M. (2022), "La disconnessione nel patto di agilità tra legge, contrattazione collettiva e diritto europeo", *Lavoro nelle Pubbliche Amministrazioni*, n. 4, p. 695 ff.

[155] See Cass. 21 May 2008, n. 12962, in *Rivista italiana di diritto del lavoro*, 2008, II, p. 825 ff., with note by G. Bolego, *Sul potere del datore di lavoro di variare la collocazione dell'orario nel full time*.

[156] See CJEU, 21 February 2018, Case C-518/15; CJEU, 9 March 2021, Cases C-344/19 and C-580/19.

[157] Recently, consultations have been initiated under Article 154 of the Treaty on the Functioning of the European Union (TFEU) to gather opinions on the possible direction of EU action aimed at ensuring fair telework and the right to disconnect (first phase started on April 30, 2024, and concluded on June 11, 2024 – C(2024) 2990 final).

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of May 14, 2019, C-55/2018. This approach reinforces the belief that the containment of working hours and the guarantee of undisturbed enjoyment of non-working time are complementary and essential guarantees, neither interchangeable nor substitutable.

7.4.2. legal issues on platform work

a) Italian legislation on platform work

The issue of qualifying the employment relationship of platform workers in Italy has been the subject of initially conflicting positions.

Indeed, the Italian debate mainly focused on the riders, as major disputes involved these workers. There has never been any doubt that the rider worked with companies operating through digital platforms. In other words, no ruling has recognised the platforms' function as mere intermediaries. Furthermore, there are no known cases in which platforms involving riders have identified themselves as intermediaries.

The debated issue has been the nature of the employment relationship, namely whether the relationship between the rider and the digital platform was an autonomous or subordinate employment relationship. Like many other continental legal systems, the Italian legal system distinguishes between subordinate workers (employees) and autonomous workers (self-employed) and applies different protections to each category.

Initially, platforms classified the working relationships with riders as autonomous, sometimes in the form of coordinated and continuous collaborations. This form of autonomous work involves coordination by the commissioning company and is subject to some special, sometimes more protective, regulations.

Disputes over the classification did not take long to arise. The most well-known case, at least initially, was the Foodora case, in which judges ruled in three different ways in the three levels of judgment. The autonomous workers sought recognition of the subordinate nature of the relationship or at least its hetero-organized nature.

At this point, it is necessary to introduce a peculiarity of Italian legislation to explain what has just been said. There is a norm, Article 2 of Legislative Decree No. 81 of 2015, which provides that hetero-organized collaborations, identified as those continuous, predominantly personal collaborations organised by the commissioning party, are subject to the regulations of subordinate work, with some exceptions.

Italian scholars have long debated the systematic meaning of this rule,

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particularly whether it regulated subordinate or autonomous work[158]. It is not relevant to deepening the issue here. Suffice it to say that in the early years of disputes over the classification of riders' relationships, the rule's application on hetero-organized collaborations became the most common way to apply subordinate work regulations.

In fact, in the context of the Foodora case, as early as the appeal judgment in 2018[159], the application of the norm on hetero-organized collaboration to riders was admitted. This choice was confirmed by the Italian Supreme Court (Corte di Cassazione) ruling of January 24, 2020[160], which also deemed applicable to riders some regulations that the appellate court had denied (for example, dismissal regulations).

The growing importance of the norm regarding collaborations organised by heterosexual individuals in categorising riders can likely be explained by the concept that this rule enabled the implementation of subordinate work regulations to relationships that may not fit the usual subordinate model.

The path chosen by the judges was also supported by the Italian government, which, by amending the same norm on hetero-organized collaborations with Decree-Law No. 101 of 2019, specified, perhaps unnecessarily[161], that it should also apply "*when the methods of performance are organized through platforms, including digital ones*".

By explicitly mentioning digital platforms in the norm, the intention was to suggest the applicability of the rule to riders. However, it should be noted that, as will be seen in the analysis of case law on platform work, there has been a gradual trend to classify the working relationship of platform workers directly as subordinate, without going through the norm on hetero-organized collaborations.

As a consequence, some digital platforms have begun to classify riders as subordinate workers from the outset, even through the signing of collective agreements[162].

[158] *Ex multis*: Santoro-Passarelli G. (2020), "Ancora su eterodirezione, etero-organizzazione, su coloro che operano mediante piattaforme digitali, i riders e il ragionevole equilibrio della cassazione n. 1663/2020", *Massimario di Giurisprudenza del Lavoro*, numero straordinario, p. 203 ff.; Maresca A. (2020), "La disciplina del lavoro subordinato applicabile alle collaborazioni etero-organizzate", *Diritto delle Relazioni Industriali*, n. 1, p. 146 ff.; Pisani C. (2019), "Le nuove collaborazioni etero-organizzate, il lavoro tramite piattaforme digitali e gli indici presuntivi della subordinazione, *Argomenti di Diritto del Lavoro*, n. 6, p. 1191 ff.; Zoppoli A. (2016), "La collaborazione eterorganizzata: fattispecie e disciplina", *Diritti Lavori Mercati*, n. 1, p. 33 ff.

[159] App. Turin, 4 February 2019, n. 26.

[160] Cass. 20 January 2020, n. 1663.

[161] Pisani, *Le nuove collaborazioni etero-organizzate*, cit., p. 1201; D'Ascola S. (2020), "La collaborazione organizzata cinque anni dopo", *Lavoro e diritto*, n. 1, p. 11.

[162] Collective agreement of 29 March 2021, signed by Just Eat and Italian trade unions (FILT-CGIL, FIT-CISL, UIL).

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However, it should be noted that the aforementioned Decree-Law No. 101 of 2019 also introduced regulations exclusively aimed at self-employed riders (located in Articles 47-bis ff. of Legislative Decree No. 81 of 2015). These regulations apply obviously in cases where the norm on hetero-organized collaborations can't be applied because there's not a hetero-organization by the digital platform. It is worth emphasizing that these regulations apply specifically to riders and not to other platform workers.

To apply these regulations, digital platforms are considered "*the programs and computer procedures used by the commissioning party that, regardless of the place of establishment, are instrumental to delivery activities, setting the compensation and determining the methods of performance*" (Article 47-*bis*). The definition, by providing that the digital platform determines the compensation and methods of performance, seems to contrast, as some scholars have argued[163], with the autonomous nature of the riders' work to which the regulations should apply.

The rules provide more protective measures than those normally applicable to autonomous workers, due to the riders' weakness in the market, even when they are autonomous and not subordinate workers. There are obligations of information and the stipulation of a written contract. These obligations are sanctioned through compensatory indemnities (Article 47-*ter*).

Regarding the compensation for autonomous riders (Article 47-*quarter*), it is provided that:

- The compensation is determined according to the criteria established by collective agreements signed by the most representative national trade unions and employer organizations;
- If collective agreements are not signed, riders can't be paid based on deliveries made, and they must be guaranteed a minimum hourly wage in accordance with the provisions of national collective agreements of similar or equivalent sectors signed by the most representative national trade unions and employer organizations.

Based on these provisions, a collective agreement signed by an insufficiently representative organization[164] was considered not capable of providing a specific regulation on matters reserved for collective agreements

[163] See, for example, Perulli A. (2020), "Il diritto del lavoro 'oltre la subordinazione': le collaborazioni etero-organizzate e le tutele minime per i riders autonomi", *WP CSDLE "Massimo D'Antona".it*, n. 410, p. 59.

[164] Collective agreement of 9 september 2020, signed by AssoDelivery and UGL Riders.

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signed by the most representative trade unions[165]. Moreover, the Ministry of Labour intervened with a note[166], specifying that even the collective agreements signed by the most representative organizations could not provide for compensation based solely on deliveries made.

Additionally, riders must be guaranteed a supplementary indemnity of no less than 10 per cent for work performed at night, during bank holidays, or in adverse weather conditions. The amount of these indemnities is determined by the aforementioned collective agreements or, if there are not, by a decree of the Minister of Labour and Social Policies.

Furthermore, the law extends to autonomous riders the anti-discrimination regulations and protections of workers' freedom and dignity provided for subordinate workers. In relation to this, it is specified that exclusion from the platform and reductions in work opportunities attributable to the non-acceptance of performance are prohibited (Article 47-inquires).

Finally, it is worth noting the provision of Article 47-species, which extends to riders' insurance coverage against accidents and regulations on workplace safety[167].

b) Italian case law on platform work

As reminded above, the Italian Supreme Court (Corte di Cassazione) ruling of January 24, 2020, has significantly clarified important aspects regarding the kind of collaborations regulated by Article 2, paragraph 1, Legislative Decree No. 81/2015. This ruling thoroughly examines the interpretative approaches of this norm emerged in literature and case law. Essentially, four theories have been developed:

1) The first theory follows the so-called "qualifying method" and pursues to fully recognise the nature of subordination for services provided by workers, such as those on digital platforms, which exhibit characteristics prohibited by Article 2.
2) The second theory, proposed by the Turin Court of Appeal in ruling No. 26/2019, suggests an intermediate classification between autonomy and subordination. The classification is characterised by hetero-organization as per Article 2, paragraph 1, and is referred to as the tertium genus. It should constitute a new contractual type (however, prohibited by the

[165] Trib. Bologna, 12 January 2023.

[166] Note of 17 September 2020 by the legislative office of the Italian Ministry of Labour.

[167] Pascucci P. (2019), "Note sul futuro del lavoro salubre e sicuro… e sulle norme sulla sicurezza di rider & co.", *Diritto della Sicurezza sul Lavoro*, n. 1, p. 48.

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principles of delegation enshrined in Law No. 183/2014) within the legal system, recognising certain protections derived from the contract of employment regulations.

3) The third theory suggests to create a sub-category within autonomous work, where the identifying models are significantly differentiated, falling within the broad notion of para-subordination.
4) The fourth theory refers to the "remedial approach", which bases itself on certain regulatory indicators to provide "strengthened" protection for workers who are particularly vulnerable as contracting parties, such as riders, extending the protections of subordinate work to them.

The theory embraced by the Supreme Court is the last one: it maintains workers' autonomy in performing their activities while acknowledging a strengthening of protections equivalent to those granted to subordinate workers. The Court of Turin's approach, deemed incorrect by the Supreme Court, did not consider a generalised extension of the rules on subordination feasible but chose a selective path, limiting protection to certain aspects.

The "remedial" position supported by the legitimacy judges of the Supreme Court leads to a significant consequence: when hetero-organization is identified, there is no automatic reclassification of the contractual relationship. Instead, the employer must recognise to the hetero-organised workers the same economic and regulatory treatment applied to employees engaged in similar or related tasks. It is a disciplinary rule that does not create a new legal paradigm. In other words, according to an anti-fraud perspective, the lawmaker has merely established the "*application of the contract of employment regulations to continuous, predominantly personal collaborations organised by the commissioning party*". As a consequence, there would be no incentive for the employer to classify a worker as either hetero-organized or employee, since the applicable regulatory framework would remain the same in both cases. The judge is not precluded from further investigating the facts, potentially leading to the full recognition of subordination with all the resulting consequences (as seen in Trib. Palermo, November 24, 2020; Trib. Torino, November 18, 2021; Trib. Torino, November 15, 2022).

This approach aligns with the general principle that it is the judge's responsibility to determine the nature of an employment relationship, thereby fitting the specific case into the appropriate legal category by considering the characteristics of the activity deduced and carried out within the particular relationship[168].

[168] *Ex plurimis*, Cass. 24.8.2021, n. 23324; see Carinci F., De Luca Tamajo R., Tosi P., Treu T. (2019), *Diritto del lavoro, Il rapporto di lavoro subordinato*, X ed., Torino, p. 49 ff.

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In this regard, the decision of the Court of Palermo on November 24, 2020, was the first Italian ruling to classify a rider's work performance as subordinate. This ruling was subsequently supported by the Court of Turin and the Court of Milan, which adopted similar reasoning[169].

The three courts examined the nature of the employment relationships of riders hired by three different multinational food delivery companies (Foodinho/Glovo, Uber, and Deliveroo), all of which employed relatively similar work organisational models.

The platforms' main argument against a subordinate employment relationship was that: "*there is no obligation to perform the service as the plaintiff is always free not to accept or cancel delivery proposals and work for other principals or cancel delivery proposals and work for other principals*".

It is well known that this argument was reflected in the initial judgments that excluded the subordination of riders[170]. To establish subordination, these rulings immediately focused on the executive phase of the relationship, aiming to demonstrate the absence of actual freedom and, consequently, the presence of features of subordinate employment. The courts affirmed that the entire performance of the riders was directed, conditioned, and regulated by the platform. This began with the system of access to booking slots, which was influenced by the rider's reputational ranking. The allocation of delivery proposals was determined by an algorithm based on criteria entirely unrelated "*to the preferences and choices of the worker*". Additionally, the performance of the assignments was pervasively controlled through geolocation.

At this point, it is important to stress whether recognising subordination in case law is now a "non-issue". This is because the jurisprudence interpretative approach, according to which all the protections of subordination apply to hetero-organized workers, is now well established.

Recently, the Court of Milan (October 19, 2023) extended the employment protections recognised to hetero-organized workers on the basis of the Italian Supreme Court (Corte di Cassazione) ruling of 2020, which determined that when the conditions set out in Article 2 are met, the entire discipline of subordination must apply. Based on this precedent, the Court of Milan decision affirmed the applicability of all trade union rights and, for the first time, the applicability of social security protection. Thus, in the final analysis,

[169] Trib. Milano, 20 April 2022, commented by Bellavista A. (2022), "Riders e subordinazione: a proposito di una recente sentenza", *Lavoro Diritti Europa*, n. 2.

[170] See Trib. Milano 10.9.2018, in *RGL*, 2019, II, p. 82 ff., commented by C. Spinelli, *Riders: anche il Tribunale di Milano esclude il vincolo di subordinazione nel rapporto lavorativo*; Corte App. Torino 4.2.2019, quoting Trib. Torino 7.5.2018, in *RIDL*, 2018, II, p. 283 ff., commented by P. Ichino, *Subordinazione, autonomia e protezione del lavoro nella gig economy.*

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any difference in the standard of protections between hetero-organised and subordinate workers has been overcome through the rulings of the Courts.

7.4.3. The impact of digitalization on the industrial relations system

a) Workplace digitalisation and trade unions strategies

The growing use of technology in the workplace, qualified as the "Fourth Industrial Revolution – Industry 4.0"[171], has profoundly impacted the labour market and work performance paradigms. The advent of a new digital era has facilitated the execution of work entirely or partially outside conventional workplaces. Additionally, processes such as recruitment, task assignment, training and performance management have been delegated to automated systems, a phenomenon referred to as the "algorithmic management".

In this context, trade unions face many challenges in two main areas: unions action modalities and collective rights exercise.

Technology enables new ways of conducting union activities, allowing a broader interaction, aggregation and discussion spaces than traditional ones. This includes using social media to promote collective initiatives, company mailing lists and new dynamics of union conflict[172]. However, the lack of physical interaction complicates the construction of "collective action"[173], adding individualistic tendencies of online workers to the already known crises in union representation mechanisms in the digital ecosystem[174].

[171] On this topic, see Seghezzi F. (2017), *La nuova grande trasformazione. Lavoro e persona nella quarta rivoluzione industriale*, Bergamo; Schwab K. (2016), *La quarta rivoluzione industriale*, Milano; Del Punta R. (2018), "Un diritto per il lavoro 4.0", in Cipriani A., Gramolati A., Mari G. (eds.), *Il lavoro 4.0*, Firenze, pp. 225 ff.

[172] The net strike and the union Twitter storm are significant examples. Although these actions cannot be classified under the right to strike as defined by Article 40 of the Constitution due to the absence of work abstention, they represent new forms of self-protection for collective interests. A union net strike is a coordinated and collective action by a group of workers who, after consultation and proclamation, organise a simultaneous, invasive, but non-predatory cyber-attack. This involves multiplying concurrent connections to the employer's target website to slow down or prevent its activity or accessibility. Conversely, a union Twitter storm (tweet bombing or Twitter bomb) is a planned and orchestrated attack on a company's social media account. It uses dedicated hashtags and retweets to spread across a social media platform where the employer has an active profile.

[173] Gargiulo U., Saracini P. (2023), "Riflettendo su parti sociali e innovazione tecnologica", *Quad. Diritti, lavori, mercati*, p. 9 ff.

[174] Tullini P. (2018), "L'economia digitale alla prova dell'interesse collettivo", *Labour Law Issues*, 1 ff.

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This scenario has led the three major Italian Confederations to recognise the need for a deep renewal process to counteract the so-called union disintermediation[175] and manage the digitalisation of production processes.

In this sense, the CGIL[176], with the motto "Let's Negotiate the Algorithm!" or also "Let's Negotiate Digital Innovation", has created an online collaborative platform ("Idea-diffusa") to provide the necessary tools to "*interpret the ongoing changes and envision the union's role as an actor participating in the governance of these processes*"[177].

Similarly, the CISL[178], oriented towards direct participation of workers, has started since 2017 the "Industry 4.0 Laboratory", which involves experts from the Polytechnic of Milan and maintains a "*permanent working group to help the union find an adequate perspective on innovation*"[179]. The Metallurgical Federation Fim-Cisl, with the programmatic motto "Smart Union to Drive Change", has promoted a "digital trade union card" and a "digital check-off" process based on blockchain technology.

In 2021, the UIL[180] created a digital trade union platform called "Terzo Millennio", designed for the sharing of projects, training paths and common claims, described as a "*revolution in the way of being and doing unionism, which adds to the traditional and consolidated communication tools while strengthening the statutory organisational structure*". In line with this project, the Tertiary Federation of the Uil has established "Net-worker", an online trade union platform, similar to the "Terzo Millennio" platform, but targeted to web professionals and ICT workers. Noteworthy, in this context, is also the recent initiative (July 2024) involving the University of Foggia, UIL and Sicurform Italia Group, aimed at providing digital training courses for unemployed and underemployed individuals in the regions of Basilicata, Campania, Molise, Puglia and Sicily.

All these initiatives shed the light and give evidence to the divergences among the three Confederations – particularly between CGIL and CISL – regarding the approach to technological innovation. While UIL's initiatives, with the exception of the recent project mentioned, seem geared towards "digitising the union" and thus reshaping its future role, the approaches of CGIL and CISL appear driven by a desire to project their respective visions

[175] Saccoia G. (2019), "Il sindacato al tempo della rivoluzione digitale", *Ec. e soc. reg*., 1, p. 79 ff.

[176] General Italian Confederation of Labour.

[177] Maiolini C., De Luca A. (2021), *IA: lavorare con l'intelligenza artificiale*, Ediesse.

[178] Italian Confederation of Workers' Unions.

[179] Campagna L., Pero L., Ponzellini A.M. (2017), *Le leve dell'innovazione. Lean, partecipazione e smartworking nell'era 4.0*, Guerini Next.

[180] Italian Labour Union.

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and formulate trade union policies and strategies to address the evolving social and labour realities. CISL appears to interpret digitalisation as an opportunity to modernise labour relations and organisational structures. Conversely, CGIL adopts a more cautious stance, reflecting on the possibility of involving workers in corporate decisions through their representatives and advocating for actions to mitigate potential abuses.

Nevertheless, there are some jointly undertaken initiatives such as the document published in March 2017, *An Italian Way to Industry 4.0 Looking at the Most Virtuous European Models*. In this document, the three main Confederations agreed in highlighting the lack of awareness regarding the new skills necessary to accompany and support Industry 4.0 processes, whose full implementation is "*an essential condition for enhancing the quality and competitiveness of production, economy and labour in our country*".

b) Workers' participation vs. collective bargaining: still there?

The growing role of Artificial Intelligence in production processes has reawaken the historical debate on ethics, industrial democracy and workers' participation. Given that the "industrial conflict" has historically found its "material basis" – its "real substrate or structure" – in the "prominent position" employers gain from decision-making power over production organisation[181], it is also evident that the algorithmic management of working conditions and the centralisation of decision-making powers within ICT systems have enhanced the imbalance of powers between the contracting parties in the employment relationship. This shift has led to a more pronounced form of "technological subordination" of workers.

More precisely, the lack of knowledge about the data processing methods and the operational modalities of complex automated monitoring and decision-making systems impacting employment relationships produces asymmetries of information between the employers and the employee. Since such asymmetries accentuate the imbalance of powers between the contracting parties in the employment relationship, providing for information and consultation rights to the employees and their representatives may be considered as adequate protection tools. Such an approach is consistent with the international and supranational legal framework, which indicates the inappropriateness of relying solely on individual protection in situations where a power imbalance may manifest (see the ILO Code of Practice on the Protection of Workers' Personal Data, sections 5.8, 5.11, and 12.2; the EU Regulation 2016/679 (GDPR), Recital 43). In this sense, in recent years, managerial practices –

[181] Giugni G. (2014), *Il diritto sindacale*, Bari: Cacucci.

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where workers and their representative organisations' involvement often meant mere adherence to corporate restructuring programs and technology bargaining was marginal in the trade unions agendas – are being abandoned in favour of both more transparent working conditions and more effective procedures for informing and consulting employees and their representatives.

Aware of these changes, in 2016 CGIL, CISL, UIL signed a document with the aim to outline *A Modern System of Industrial Relations*, where social dialogue and workers' participation through information and consultation rights are indicated as a guiding criterion for the "*permanent technological and digital revolution*". Social partners believe that supporting trade unions involvement in relevant matters concerning digitalisation as an antidote to digital changes side effects on workers would restore the confederate unionism "*natural vocation as a driving force for economic and social development*", allowing a response to the "*crisis of representation with a bold and discontinuous choice towards innovation, transparency and democracy*".

Since the adoption of the Constitutional Charter (1948), the Italian industrial relations system has been centred on the conflict-collective bargaining binomial. As a consequence, industrial democracy as a mode of governance of the employment relationship has historically held a secondary position. Article 46 of the Constitution, which recognises the workers' right to participate in the company management "*in the manners and within the limits established by law*", has remained substantially unimplemented.

However, the recent changes described seem to have settled favourable conditions for a revival of the industrial democracy method, not in opposition but in coordination with the classic negotiating approach.

The link between digitalisation, technology and industrial democracy is also emphasised in the agreement "Contents and guidelines of industrial relations and collective bargaining", also known as the "Factory Pact", signed on 2018, 9th March by Confindustria, CGIL, CISL, UIL. The signatory parties "*consider that a more effective and participatory system of industrial relations is necessary to qualify and implement the processes of transformation and digitalisation in manufacturing and innovative, technological, and industry-support services*". The Pact further addresses this issue in a specific section (6. g), where trade unions involvement in organisational issues are described as essential for fostering a "*different relationship between enterprises and workers*", necessitated by economic, productive and technological changes, achievable through the interventions of company-level and national level collective bargaining. The task assigned to collective bargaining is to "*enhance, in the various sectoral contexts, the most suitable paths for organisational participation*". This Inter-sectoral Agreement, signed just a few days before the Italian political elections, sent

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a clear message to the incoming government, underscoring the importance of industrial democracy and collective bargaining in the digital transition. Notably, the CGIL has highlighted the significance of this agreement by emphasising the enhanced industrial democracy achievable through its regulations. On the other hand, the CISL underscored the consensual foundation from which these regulations originate[182].

Finally, the implementation of the industrial democracy in the digitalised workplace is also witnessed by recent trends in collective bargaining at national level.

The issue of involving trade unions and workers' representatives in several aspects of digitalisation, data management and the understanding of digital systems has been addressed in the proposal presented on January 29, 2024, by Slc-Cgil, Fistel-Cisl, and Uil-Com for the renewal of the National Collective Agreement for Telecommunications 2023-2025. The proposal states:

> the pervasiveness of algorithmic systems requires that trade unions receive the maximum amount of information on the digital systems used and the processing of data deriving from these systems. "Negotiating the algorithm" is not a self-fulfilling prophecy. There is a need for real, daily involvement of workers' representatives in understanding AI-based systems.

In the same vein, the draft national collective agreement for Metalworkers 2024-2027, which is under negotiation among Federmeccanica-Assistal, CGIL, CISL, UIL, expresses the parties' hope for

> the establishment of adequate regulations to prevent distorted uses leading to abuses or violations of laws and/or collective agreements, to encourage participation in defining the processing of data (e.g., data protection, data retention, information rights, etc.) and to mitigate the negative impact of algorithms while sharing the benefits of artificial intelligence. Digital transformation must align with and respect workers' rights and collective bargaining.

c) Enforcing trade union rights through legislation

The Italian legal framework concerning collective rights to information and consultation mainly stems from the implementation of European law.

According to the Legislative Decree No. 25 of 2007 (art. 4, par. 3, lett.

[182] Gasparri S., Tassinari A. (2020), *Relazioni industriali "intelligenti" in divenire? Approfondimenti dall'analisi delle risposte sindacali alla digitalizzazione in Italia*, Erudit, Département des relations industrielles, Université Laval.

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c), implementing Directive 2002/14/CE, information and consultation rights entail, firstly, communications to workers' representatives by the employer on matters of business interest, such as decisions likely to bring significant changes in work organisation, and secondly, the exchange of opinions on these matters between the parties.

Recently, Article 4 of the Legislative Decree No. 104/2022, implementing Directive 2019/1152/EU on transparent and predictable working conditions in the European Union, and amending Article 1 of the Legislative Decree No. 152/1997, has introduced information rights to the benefit of workers and trade unions. According to this provision, employers or public and private clients must inform workers about the use of automated decision-making or monitoring systems relevant to hiring, task assignment, work performance, and contractual obligations. More precisely, the required information includes:

- aspects of the employment relationship affected by automated decision-making or monitoring systems;
- purposes and goals of those systems;
- logic and functioning of those systems;
- categories of data and main parameters used to program or train those systems, including performance evaluation mechanisms;
- control measures on automated decisions, revision processes and the quality management system;
- the level of accuracy, robustness and cybersecurity of those systems, metrics used to measure these parameters and potential discriminatory impacts of these metrics.

For the first time in Italy, the law foresees information rights on the use of automated decision-making or monitoring systems, which are granted not only to individual workers – who can also exercise them through works councils or territorial trade unions – but also directly to the workers' representatives[183].

The introduction of such information rights grounds the workers' representatives power of control on algorithmic management; thus, their violation can be sanctioned as "anti-union conduct" under Article 28 of the Workers' Statute[184]. Trade unions can file a lawsuit in response to harmful

[183] According to paragraph 6, information rights shall be provided "to the works councils or to the territorial unit of the trade unions that are comparatively more representative at the national level.

[184] The so called Workers' Statute, Law n. 300/1970, is the fundamental regulation in Italy which support trade union activities in the workplace providing for trade union rights.

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behaviours adopted by companies aimed at preventing and/or limiting the exercise of trade union rights. The judge will issue an order for the employer to provide the necessary information[185].

This was the case with the ruling of the Tribunal of Palermo, decree of April 3, 2023, which clarified that if information can be requested "also" by trade unions, they hold an additional right besides those granted to each worker. This judgement aligns with the Italian Courts rulings on platform work[186], which have contributed to improving working conditions and recognising platform workers' rights as a consequence of the litigation strategies pursued by trade unions and CGIL in particular[187].

Article 4 of the Legislative Decree No.104/2022 has then been modified by the Legislative Decree No. 48 of May 4, 2023 (the so-called "Labor Decree"), which amended Article 1-bis of the Legislative Decree No. 152/1997. Article 26 of the Labor Decree added the word "fully" to identify the automated decision-making and monitoring systems which are the object of the rights to information; it also rewrote paragraph 8, excluding any obligations with respect to those systems covered by secrets under industrial or trade law. Regarding the first amendment, the norm shall be interpreted in the light of the Ministry of Labour Administrative Guidelines No. 19 of September 20, 2022, clarifying that providing information is mandatory not only regarding fully automated decisions making system, but also with respect to those which imply human intervention, even if merely accessory. As for the second amendment, as clarified by case law[188], industrial and trade secrets cannot be considered an obstacle to provide information about the operational procedures of algorithmic management systems, since they can only cover the mathematical formulas used.

d) Digital trade union rights

As mentioned, the digital revolution impact extends beyond new union action methods and emerging industrial democracy needs, involving the way to practice trade union rights.

The absence of a traditional physical space where to perform their activity, named the "*exit of work from the traditional factory physical space*", which

[185] Recchia G.A. (2023), "Condizioni di lavoro trasparenti, prevedibili e giustiziabili", *Labour and Law Issues*.

[186] See above Sec. 2, par. 2.

[187] For further readings on this topic, see at least Senatori I., Spinelli C. (2022), *Litigation (Collective) Strategies to Protect Gig Workers' Rights: A Comparative Perspective*, Torino: Giappichelli.

[188] Trib. Palermo, 20th June 2023.

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affects nowadays many categories of workers, implies concerns regarding how to carry on the traditional trade union rights foreseen under Title III of the Workers' Statute. It is a "polycentric" regulation providing for protections to the worker as a party of the employment relationship and support to the role of trade unions at company level in hindering the employer's power[189].

Technological workplaces and the transcendence of the "materiality" of places, envisaged by Law No. 300 of 1970 for the exercise of certain codified trade union rights, require rethinking the modalities to exercise those rights, to ensure that the "new working spaces" become a vehicle for expanding collective rights, instead of contributing to their emptying.

An important tool for trade union activity is the notice board, which, under Article 25 of the Workers' Statute, must be made available by the employer in locations accessible to all workers within the production unit, allowing workers' representatives to post publications, texts, and communications related to trade union and working conditions matters. Article 26 recognises the workers' rights to collect contributions and engage in proselitism for their unions within workplaces without undermining normal business operations. Article 26 protects various active legal situations concerning proselytism, propaganda, and collecting contributions. Dissemination through the notice board, proselytism, and collection of contributions are closely linked together by a logical necessity, whereby collecting memberships and contributions for union enrolment could not occur without "promotional propaganda" of the benefits deriving from union participation. The objectives and aims pursued by Articles 25 and 26 have led the social partners to regulate the virtual bulletin board through collective bargaining.

More structured collective agreements focus on the right to assembly and the activation of tools that enable remote interaction among workers and their representatives. According to Article 20 of the Workers' Statute, meetings are held at the company premises and serve as a means of workers' direct participation in union and labour interest issues. Article 20 allows collective bargaining, also at company level, to define "additional modalities" for the exercise of this right, which has thus also been regulated by collective bargaining in its online version. Commonly, is on the company to ensure entitled workers' representatives having electronic notice boards and suitable IT "places" for conducting remote union meetings[190]. The web platform for

[189] See Ventura L. (1970), "Lo Statuto dei lavoratori: appunti per una ricerca", *Rivista Giuridica del Lavoro*, I, p. 531.

[190] See, for example, the following company agreements: TIM S.p.A. 04.08.2020; ABI 21.12.2020; Gromart S.r.l. 04.01.2021; Engie Italia S.p.A. 15.01.2021; WindTre, WindTre Italia, WindTre Retail 03.02.2021; SNAM S.p.A. 05.03.2021; Benetton Group

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exercising the online assembly right is less frequently provided by company trade unions[191].

Case law is also moving towards the "digitalization" of classic trade union rights, including the use of email for unions communication. The first ruling in this area dates back to the mid-1990s, when the Tribunal of Milan established that "*the FIOM-FIM-UILM representatives at company level have the right, under Article 25 of the Workers' Statute, to use an electronic notice board to communicate with the workers identical to the IT tool used by the company with the same aim*". Recently, the Supreme Court[192] stated that "*the evolution of remote communication methods and the greater effectiveness achieved through reaching the workers via their email box shall be considered a necessary update of the transmission methods of information and communication to ensure the real effectiveness of trade union activity*". Therefore, the Court has recognised that the distribution of union communications by email falls under the proselytism activity provided for and protected by Article 26 of the Workers' Statute and is thus permitted, whenever it does not undermine productive activity at company level.

*7.5. **National Report Spain** (by María Sepúlveda[193])*

7.5.1. Context

The level of digitization of Spain in the European Union as a whole is high, ranking seventh out of 27, according to the Digital Economy and Society Index 2022[194], which includes four indicators: human capital, connectivity, integration of digital technology, and digital public services. In 2023 it generally upholds its digitization index, having experienced a remarkable rise in the use of big data and cloud by Spanish companies[195].

CIA 09.09.2021; ENI S.p.A. 28.10.2021; Poste Italiane S.p.A 01.03.2022; Comdata S.p.A. 17.03.2022; Leonardo 08.03.2022; ENEL 21.03.2022; Fastweb S.p.A. and Fastweb Air S.r.l. 18.05.2022. See also Intesa Sanpaolo S.p.A. Protocol on *Principles and Guidelines for New Agile Work in the Telecommunications Supply Chain* 30.07.2020; Guidelines for agile work in the insurance and insurance/assistance sector 24.02.2021; National Collective Agreement for Laundries and Dry Cleaners – Industry Artisanship 28.02.2022 in *Osservatorio sulla digitalizzazione delle relazioni industriali*, Report 2023.

[191] Assolavoro, *Memorandum of understanding* of 24.11.2020.

[192] S.C. Cass. n. 35643 of 22 December 2022 e n. 35644/2022.

[193] University of Sevilla, Spain.

[194] *digital-strategy.ec.europa.eu/es/policies/desi-spain*.

[195] *digital-strategy.ec.europa.eu/en/library/2023-report-state-digital-decade*.

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In contrast, the use of artificial intelligence (AI) by Spanish companies is still low: the percentage of Spanish firms of more than 10 employees that use AI have reached 7.7% in 2021. In contrast, it has been 11.8% in 2022 and 9.6% in 2023, therefore experiencing a noticeable decrease in 2023 compared to the previous year. The percentage is lower for companies with less than 10 employees, which is 5.7% in 2022 and 5.8% in 2023.

It is large companies (more than 250 employees) that use the most AI technology (40.64%)[196]. However, it should be borne in mind that despite the fact that in Spain the number of large enterprises is very small, compared to 99.6% of micro, small and medium-sized enterprises, however the big enterprises give employment to 42% of the total of workers/s by foreign account (15.612.161 in December 2023)[197].

As for the purposes for which Spanish companies use AI, it is highlighted with difference its use for workflow automation or machine learning, or for decision-making assistance, which in the field of work acquires special importance due to the replacement of labor that it can involve. The second most widely used technology by large companies is data-analysis AI, and the third most commonly used AI technology by big companies is that which recognizes objects or people based on images or videos.

Companies that do not use AI at work express as the main reasons for this:

1) there is a lack of relevant specialized knowledge in the company (78,5%);
2) their cost is too high (68 per cent), especially for small (72 per cent);
3) due to difficulties with the availability or quality of the required data (47.11%);
4) lack of clarity on the legal consequences of its use (43.7%).

The use of AI is likely to have a major deployment from the adoption of the European IA Regulation, and when supply and demand cause IA systems to lower their cost. The public impetus of the digital transformation that the Government of Spain is carrying out is very prominent, and it has a remarkable funding[198], and a Strategy of AI 2024[199].

[196] Instituto Nacional de Estadísticas: Las TIC en las empresas (primer trimestre de 2023). *www.ine.es/dynt3/inebase/es/index.htm?padre=9944*.

[197] Ministerio de Trabajo y Economía Social: *www.mites.gob.es/estadisticas/Emp/Emp23-Dic/Resumen de resultados Diciembre 2023.pdf*.

[198] The Spanish Recovery and Resilience Plan, with a total budget of up to EUR 69.5 billion in transfers, contains an ambitious set of digital reforms and investments and allocates 28.2 per cent of the allocation to digital (EUR 19.6 billion), including EUR 18.8 billion to help meet the goals of the Digital Decade.

[199] *portal.mineco.gob.es/RecursosNoticia/mineco/prensa/noticias/2024/Estrategia_IA_2024.pdf*.

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7.5.2. Working time

Working time is one of the working conditions undergoing the most changes in the organization, execution, and control of work, among other reasons due to the digital transformation of companies and society. It is a working condition that directly affects health at work, influences work-life balance, determines salary, and impacts employment. Various aspects of working time have always been the subject of research by doctrine and also the subject of litigation and union action. However, in recent years, working time has undergone significant changes facilitated by digitalization, leading to regulatory interventions which can be systematized and summarized as follows:

1) right to digital disconnection;
2) remote work and telework;
3) daily recording of working hours;
4) expansion of managerial control through the use of digital work monitoring devices.

Before proceeding, it is worth noting that currently, negotiations are underway between the Ministry of Labor and Social Economy at the social dialogue table with trade unions and employers to reduce the working week from 40 to 37.5 hours by 2025 without reducing wages. According to Minister Ms. Díaz, both scientific evidence and international examples indicate that reducing working time has positive effects on productivity. She also argues that effective governance of technological changes such as robotics and artificial intelligence will not only ensure workers' rights but also promote "*sharing the gains to prevent digital monopolies from taking everything*" (MTES Communication Office, June 5, 2024[200]).

a) Right to digital disconnection

In Spain, this right was recognized before the widespread adoption of teleworking largely due to the Covid-19 pandemic, through the Organic Law 3/2018 of December 5, on the Protection of Personal Data and Guarantee of Digital Rights[201]. Its purpose has been to incorporate into national law the provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016, on the protection of individuals with regard to

[200] Gabinete de comunicación del MTES,

[201] Ley orgánica 3/2018, de 5 de diciembre, de protección de datos personales y garantía de los derechos digitales.

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the processing of personal data and on the free movement of such data, and to articulate the authorizations that such Regulation directs to the Member States. Additionally, this Law includes Title X on "Guarantees of Digital Rights" (articles 77 to 97), which includes four provisions dedicated to the labor sphere: Article 87: Right to privacy and use of digital devices in the workplace. Article 88: Right to digital disconnection in the workplace. Article 89: Right to privacy regarding the use of video surveillance devices and sound recording in the workplace. Article 90: Right to privacy in the use of geolocation systems in the workplace. And Article 91: Digital rights in collective bargaining.

In reality, the right to digital disconnection is the only digital labor right recognized in this non-labor Law. It is a right recognized for both workers and public employees, aimed at ensuring respect for their rest time, leave, holidays, as well as personal and family privacy outside legally or conventionally established working hours.

Regarding the exercise of this right, the Law refers to "*what is established in collective bargaining or, failing that, what is agreed between the company and the worker representatives*". However, the law grants employers, after consulting worker representatives, the authority to

> develop an internal policy aimed at workers, including those in managerial positions, in which they will define the modalities for exercising the right to digital disconnection and actions for training and raising awareness among staff about the reasonable use of technological tools to avoid the risk of digital fatigue. In particular, the right to digital disconnection will be preserved in cases of total or partial performance of remote work, as well as in the employee's home linked to the use of technological tools for work purposes.

Therefore, without the need for negotiation, the employer will only consult worker representatives on their internal policy regarding modalities for exercising the right to digital disconnection, subject to what is established in collective agreements or company agreements, while promoting work-life balance and personal and family life.

Increasingly, collective agreements are addressing the right to digital disconnection, even before the enactment of Law 3/2018. However, some agreements establish exceptions to this right such as force majeure or urgent reasons, without clearly defining these situations.

It is possible that regulation of the right to digital disconnection in collective bargaining will improve following the signing of the V Agreement for Employment and Collective Bargaining (V AENC)[202], published by

[202] V Acuerdo para el Empleo y la Negociación Colectiva.

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Resolution of May 19, 2023, resulting from bipartite social dialogue between employer organizations (CEOE and CEPYME) and trade unions (CCOO and UGT), which establishes criteria for collective bargaining on several matters, including the right to digital disconnection. It stipulates, among other things, that "*the right to digital disconnection will be guaranteed both to employees who work their hours in person and to those who provide services through new forms of work organization (remote work, flexible hours, or others), adapting to the nature and characteristics of each job or function*".

Violation of the rules and legal or agreed limits regarding working hours, night work, overtime, complementary hours, breaks, vacations, leaves, daily working hour recording, and, in general, working time, are considered serious infractions under Royal Legislative Decree 5/2000, of August 4, approving the revised text of the Law on Infringements and Sanctions in the Social Order (art. 7.5)[203], which entails administrative fines ranging from a minimum of 751 to 1,500 euros, a medium range of 1,501 to 3,750 euros, and a maximum range of 3,751 to 7,500 euros (art. 40).

b) Remote work and teleworking, as forms of remote work

Remote work and teleworking, as forms of remote work, have been meticulously regulated in Spain through Law 10/2021, dated July 9, on remote work[204]. Previously, the Government approved Royal Decree-Law 8/2020, dated March 17, on urgent extraordinary measures to address the economic and social impact of Covid-19, which established the preferential nature of remote work over other measures related to employment. After the initial stage of the pandemic, a tripartite social dialogue agreement was reached among the Government, unions, and employers at the national level in September 2020, the contents of which were incorporated into Royal Decree-Law 28/2020 and subsequently into Law 10/2021.

It's a regulation that applies only to the private sector, not to public employment, and for its application, it requires that remote work be performed, in a reference period of three months, for a minimum of thirty percent of the working day, or the equivalent proportional percentage based on the duration of the employment contract.

Law 10/2021, despite having a basic yet comprehensive regulation of remote work, refers certain aspects to the autonomy of the individual will of

[203] Real Decreto Legislativo 5/2000, de 4 de agosto, por el que se aprueba el texto refundido de la Ley sobre Infracciones y Sanciones en el Orden Social.

[204] Ley 10/2021, de 9 de julio, de trabajo a distancia.

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the parties, and makes up to thirteen references to collective bargaining to define certain matters, such as the regulation of terms for exercising the right of reversibility: the decision to work remotely from an on-site work modality will be reversible for the employer and the employee. The exercise of this reversibility may be carried out under the terms established in collective bargaining or, failing that, those set forth in the (individual) agreement for remote work. Or, for example, it also refers to collective agreements or collective pacts for establishing mechanisms and criteria by which a person engaged in on-site work can switch to remote work or vice versa, as well as preferences linked to certain circumstances, such as those related to training, promotion, and job stability for individuals with disabilities or specific risks, the existence of multiple jobs or activities, or the concurrence of certain personal or family circumstances, as well as the ordering of priorities established in this Law.

Regarding working time, the norm recognizes the right of remote workers to a flexible schedule, although it must be exercised within what is agreed upon in the remote work agreement and collective bargaining, respecting mandatory availability times and regulations on working time and rest. We understand that if collective agreements establish guidelines on the exercise of flexible hours, the individual agreement cannot establish criteria that may contradict what is established in the collective agreement.

In terms of daily recordkeeping of working hours for remote work, the Law refers to what is established in the Workers' Statute[205], which in turn establishes that the organization and documentation of this work hour record shall be done through collective bargaining or company agreement or, failing that, the employer's decision, after consultation with the legal representatives of the workers in the company. However, the remote work law requires that the time record must faithfully reflect the time that the remote worker dedicates to work activities, without prejudice to flexible hours, and must include, among other things, the start and end times of the workday.

Except for some collective agreements in large companies and some sectors that fully develop remote work, many other agreements limit themselves to reiterating what is established in the Law. It is possible that from the aforementioned Fifth Agreement for Employment and Collective Bargaining[206], collective bargaining will follow the guidelines that this Agreement provides on matters to be negotiated, such as: identifying the jobs and functions suitable for remote work; conditions for access to and development of remote work activities; maximum duration of remote work; minimum in-person workday;

[205] Estatuto de los Trabajadores.

[206] V Acuerdo para el Empleo y la Negociación Colectiva.

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percentage of workday or reference period for remote work; additional contents to those foreseen by legal regulation for the individual agreement; terms for exercising reversibility. Likewise, we understand that new groups must take into account the criteria established in the Fifth Agreement, which establishes as a criterion to follow in the design of mechanisms for the transition from on-site to remote work or vice versa, the avoidance of perpetuating gender roles and stereotypes and promoting shared responsibility between women and men, when collective bargaining designs mechanisms and criteria for the transition from on-site to remote work or vice versa.

In the context of public employment, Royal Decree-Law 29/2020, dated September 29, on urgent measures regarding teleworking in Public Administrations[207], establishes a basic regulatory framework so that all public administrations can develop their own regulatory instruments governing teleworking. This regulation, amending the Basic Statute of Public Employees[208], consolidated text approved by Legislative Royal Decree 5/2015, dated October 30, introduces a new article 47 bis that regulates the provision of services remotely through teleworking in the public sector, applicable to both labor and civil servants. It is a minimum regulation, so as not to empty the possible legislation developed by the Autonomous Communities of its content.

c) Daily registration of working time

The regulation for the first time of the employer's obligation to record the daily, ordinary, and extraordinary hours of each worker has been a significant normative advancement. Shortly before the judgment of the CJEU (Grand Chamber) of May 14, 2019, case CCOO, C-55/18, the Spanish Government amended the Workers' Statute[209] through Royal Decree-Law 8/2019, of March 8, on urgent social protection measures and the fight against labor precariousness in the workday[210], which includes the obligation for companies to ensure daily registration of the workday, including the specific start and end times of each worker's shift, with companies required to keep these records for at least four years, accessible not only to the Labor

[207] Real Decreto-ley 29/2020, de 29 de septiembre, sobre medidas urgentes en materia de teletrabajo en las Administraciones Públicas.

[208] Ley del Estatuto Básico del Empleado Público.

[209] Estatuto de los Trabajadores.

[210] Real Decreto-ley 8/2019, de 8 de marzo, de medidas urgentes de protección social y de lucha contra la precariedad laboral en la jornada de trabajo.

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Inspectorate but also to the workers and their legal representatives. The regulation leaves the organization and documentation of this registration to agreement or, failing that, to the company's decision after consulting with the workers' legal representatives.

The main purpose of this measure has been to prevent companies from surreptitiously performing overtime without proper remuneration and, in some cases, without social security contributions. This issue had long been a union demand to eradicate the illegal extension of the workday, especially in part-time contracts, and it also became a political goal due to the significant lost revenue in public funds, among other reasons. The matter also sparked a controversial judicial debate in our domestic jurisdiction because labor law only required recording the number of overtime hours worked by each employee. However, this data did not allow for monitoring the effective extension of the regular workday, hence the need to register the start and end times of the regular workday. According to the CJEU, in accordance with Directive 2003/88, Member States must also ensure that the effective use of these rights is fully guaranteed, ensuring that workers effectively benefit from minimum daily and weekly rest periods and the maximum limit on average weekly working time established in this Directive, and this situation of circumvention would occur if workers were exposed to company measures that adversely affect their working conditions, "given that position of weakness" of the worker in the employment relationship.

Since the new regulation, incorporated into the Workers' Statute, the business practice of using daily workday registration as a system for monitoring hours, breaks, absences from the workplace has been observed, even though the regulation only requires recording the start and end of the workday, although collective agreements can expand the scope of registration. Regarding the use of biometric control for daily workday registration, the Spanish Data Protection Agency has stated that compliance solely based on the European Data Protection Regulation is not sufficient:

> if the lifting of the prohibition on additional processing of biometric data is based on what is set out in Article 9.2.b) of the GDPR, there must be a law with the rank of law that supports this exception and, therefore, this rule will encompass the legality of the processing in accordance with Article 6.1.c). It has already been mentioned previously that, for the purposes of lifting the prohibition of Article 9.2.b) of the GDPR, the current aforementioned regulations are not sufficient under the terms provided in the GDPR (Guide on treatments for presence control through biometric systems, November 2023[211]).

[211] Guía sobre sobre tratamientos de control de presencia mediante sistemas biométricos.

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The corporate control function for compliance with effective working hours has a broader scope when implemented through digital workday registration systems, especially for remote workers and those with an arrangement of freely available working time or whose contractual obligations include full availability for the proper fulfillment of their professional duties. For the Ministry of Labor and Social Economy, as a general rule, under the premise that these modalities do not conceal situations of abuse of rights, the daily workday of these workers must be subject to registration, without prejudice to the accreditation of their working time through the agreement on availability hours, interpreting that the remuneration received by the worker already adequately compensates for this increased demand in working time.

The protection of personal data of workers, as well as their right to privacy at work, coupled with the complexity of data protection regulation that applies to all areas and is not specifically labor-related, necessitates specific regulation for the labor sphere, which is currently lacking. Collective bargaining cannot address this task, which we consider falls under the legislator's responsibility. Currently, the Ministry of Labor and Social Economy is in the process of drafting a new Labor Statute, expected to incorporate regulation in line with the digitized reality of work and the rights at stake, including digital rights.

d) Expansion of management authority through the use of digital work monitoring devices

Law 3/2018, on data protection and guarantee of digital rights, has given legal status to the business use of digital devices and geolocation in the execution and monitoring of work, respecting the privacy rights of both employees and civil servants. It explicitly includes this within the scope of the companies' authority for direction and control over workers, as per the Workers' Statute (article 20 bis), and also as rights of workers regarding privacy in relation to the digital environment and disconnection, as stated in the Basic Statute of the Public Employee (article 14. J. bis). However, it is known that this usage can affect not only the right to privacy but also the right to personal data protection, one's own image, non-discrimination, equality, and dignity, among others.

The use of digital devices by companies for these purposes is not new, but it now acquires a different scope for several reasons: it is expressly regulated by law, respecting only one fundamental right as a condition, the right to privacy, without incorporating any criteria from established constitutional doctrine concerning this matter and fundamental rights; it presents greater

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potential due to the use of new digital technologies, including AI, which can more significantly compromise these rights.

This work monitoring includes time management, whether through monitoring presence at the workplace or remotely when work is performed outside the workplace, including geolocation systems. As mentioned earlier, Law 3/2018 is not specific to the labor sphere and only provides succinct parameters regarding the use of digital devices in the workplace. For example, while it recognizes the company's authority to process personal data obtained through video surveillance systems, it imposes the obligation to inform workers or public employees in advance, explicitly, clearly, and concisely, and their representatives, if applicable, about this measure, except in cases where the flagrant commission of an illicit act by workers or public employees has been captured, in which case the duty to inform will be considered fulfilled if there is at least the device referred to in article 22.4 of this organic law (informative device in a sufficiently visible place identifying, at least, the existence of the treatment).

This regulation aims to facilitate digital control of workers, with limited explicit provision for the participation of workers' representatives and defers to collective agreements the possibility of establishing additional guarantees for the rights and freedoms related to the processing of workers' personal data and the safeguarding of digital rights in the workplace.

As we pointed out earlier, there is a clear need for specific labor regulation that comprehensively regulates the subject matter and the rights and obligations of the parties, as well as measures to protect fundamental rights. This is not the task of collective bargaining.

7.5.3. Digital platforms

When we talk about work through a digital platform, we refer to a specific type of platform that supports an activity, which is carried out by a paid worker. In Spain, as in other countries, this new form of employment is and continues to be the subject of discussion, even judicial, about the legal qualification of the relationship between the worker and the platform, especially in the case of home distribution. They start operating in Spain in the form of a collaborative economy, presenting themselves as something that is not work, but collaboration. And it emerges in different activities, with exponential growth during the pandemic, especially delivery platforms, with riders, as the platform itself called them, avoiding the use of the term worker. The recruitment has been done under the formula of self-employed work and, in some cases, as dependent independent worker (TRADE), which

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brings flexibility to the company, being a figure very close to a false self-employee. Employment through self-employment allows the platform to transfer production costs to the worker.

In order to avoid classifying the relationship as labor, distribution platforms have allowed the distributor to reject an assignment, which has caused confusion to qualify the relation as labour, and even that the distributors can sign up on more than one platform, which have used the platforms as an argument to prove that the work is autonomous. In addition, the platforms used strategically in their favour to hire under the self-employed formula, a public incentive consisting of a "flat rate" of the social security quota for self-employees starting their first activity, for two years. The measure had another purpose, to support entrepreneurs, but it benefited from the use of self-employment as the preferred formula for platforms.

The large number of workers in this type of employment, which in Spain is the only source of employment of the distributor, and the precarious working conditions they have, has made these workers have organized themselves, first through associations, and then through the large trade union confederations for the defense and protection of the rights of these workers. Even before the adoption of the Rider Law of 2021, to which we will now refer, the most representative trade unions and employers' organizations at the state level have included these workers in their scope of application in the State-wide Labour Agreement for the Hospitality Sector of 2019.

After several years of judicialization, the Supreme Court of Spain, through the judgment in unification of doctrine, of 25 September 2020, found that the existing legal relationship between the GLOVO distributor and the platform was a working relationship. But the chronic delay in the courts to resolve the disputes that continue to arise around the ratings of the relationship has meant a strategy of the platforms to take advantage of the times, even assuming the cost of the possible fines of the Labour Inspection. They do not provide security measures in the distribution, nor uniforms, nor means of transport, nor media, to avoid their qualification as a worker.

In order to deal with this situation, and as a political objective of the Government, the so-called Rider Law, Law 12/2021, of 28 September[212], has been adopted to guarantee the labour rights of people engaged in the distribution in the field of digital platforms, which has its origin in a tripartite agreement of social dialogue, and subsequent Royal Decree-Law 9/2021 of 11 May. It is a rule that limits its scope to distribution platforms.

[212] Ley 12/2021, de 28 de septiembre, para garantizar los derechos laborales de las personas dedicadas al reparto en el ámbito de plataformas digitales.

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It was a pioneering law, one of the first in Europe, and in a way inspired the proposal for a directive on digital platforms. But this rule actually regulates two different measures: the presumption of employment of workers on digital platforms –riders – when certain requirements are met, and on the other hand the recognition of the right of algorithmic information to workers' representatives, in all sectors, not just on digital plates.

But this law has shortcomings: it has a very limited scope of application, because it applies only to the distribution platforms; it does not have a regulation of this form of work; it fails to address the collective aspects of work. It is joined by the fact that the platforms resist to implement it, continue to refuse to recognize the employment status of the distributors, so that they do not negotiate collective agreements by considering them self-employed. Others have been recruited by means of a form of employment, although with precarious working conditions because they lack workers' representatives and therefore do not have collective agreements, except for some exceptions. There is, therefore, a dual model of work, through employment and through self-employed work.

This resistance to the recognition of rights and employment of work on platforms is widespread in Europe's digital platforms, which explains the delay in the adoption of the Platform Directive, which aims to improve working conditions on the digital platform and regulate the use of algorithms by these platforms. It has recently been passed by the EU Council of Ministers, so it seems that its adoption is near.

7.5.4. Collective labour relations

Collective labour relations are also being affected by the effects of the digitization of production, labour and the economy in general. This impact can be very unequal between the different systems of labour relations, depending on the degree of development of social actors and collective bargaining, as well as trade union action. This is also influenced by the national legal system of collective relations in each country.

In this regard, it is worrying that the regulation of the labour aspects of the digitalisation of work, and particularly the use of AI, is being referred by the regulatory public authorities to collective bargaining, starting with the EU itself and, in this case, Spain. The problem is that the models of collective bargaining in the different EU Member States are different, as are trade unionism, membership and representation of workers. So, while AI will have a single regulation throughout the EU, without prejudice to the adoption of agreed national regulations, instead the construction of the legal

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framework of labour rights and trade union participation in the digitisation of work is referred to collective bargaining.

As an example, the European Parliament's amendments to the proposal for a European IA Regulation of June 2023 included the requirement for AI implementers to consult workers' representatives in order to reach an agreement, in accordance with Directive 2002/14/EU, prior to the commissioning or use of a high-risk IA system in the workplace, as well as to inform affected employees that they will be exposed to the system (art. 29.5 bis (new)). This obligation of companies implementing AI at work has been removed from the text after its adoption by the Council. Another proof of what is being said is the EU's impetus to the European social dialogue for the adoption of a European agreement on digitalisation, which gave rise early to the 22 June 2020 European Framework Agreement on Digitalisation[213]. In spite of the differences, the trend is similar in Spain, although an advanced right of algorithmic information of workers' representatives has been recognized by law, as will be stated later. But the road map of the Spanish Government on digitization, embodied in the so-called "Charter of Digital Rights"[214], of 14 July 2021, despite the fact that it provides for significant progress in the involvement of workers' representatives in the implementation of digitization, has not yet been carried out.

This policy of public authorities can result in the participation of workers and their representatives in the digital transformation of work being very unequal in each country, at least in the EU, and taking different paths, with serious inequalities in terms of workers ' digital rights. On the contrary, it can be argued that collective relations are different in each country and, therefore, collective bargaining and trade union action are different, and that the EU has no competence in this area. And it must continue to be so, for the sake of respect for trade union traditions. It is not intended that the EU should regulate trade union action or collective bargaining. Nor should national labour legal systems fully regulate labour relations, which would be contrary to collective autonomy. What is intended to be made clear is that the construction of the framework of digital rights of workers, and of the participation of workers' representatives in digitization must be done by public standards, in parallel with the regulation of digitization. From this symmetrical and balanced regulatory framework of the technology/workers binomium, trade unions and employers will be able to conduct a collective bargaining adapted to the work centres and sectors, and to the economic and social context of each moment.

[213] Acuerdo Marco Europeo sobre Digitalización.
[214] Carta de Derechos Digitales.

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It is not being done at the moment, or to a very small extent. In Spain, the public standard/conventional standard relationship follows a traditional model, which conceives the pacted standard either as an improvement of what is provided in the public norm, or as a specification or development of the public rule of those subjects that it indicates. While the public rule regulates in detail the mechanisms of internal and external flexibility for business reasons, the participation of representatives in changes that may lead to flexibility measures shines by its absence, as it is considered a specific area of management power. The rights of information and consultation are limited to that, without providing for modalities for the exercise of these rights which are different or more participatory than those laid down in Directive 2002/14/EC.

Therefore, two speeds are observed in the production of digitization standards: public standards that quickly drive, facilitate and finance the digital transformation of companies, in a geopolitical competition to lead digitization against other powers and make their companies more productive, and on the other hand, an individual and collective labour normative framework of the past, designed under other former Fordist models of production, whose legal-labour institutions can hardly be applied, or at least not without disadvantages and problems, to the new digitized work contexts.

The regulation of enterprise restructuring procedures, which today contain large amounts of flexibility for enterprises, does not allow the participation of workers' representative bodies in enterprise changes in advance. At a time when employment is beginning to be seriously compromised by the replacement of jobs and jobs by AI systems. Labour representation bodies designed for companies of the 1980s, which cannot be constituted in many workplaces due to the dispersion and segmentation of companies and workers. Despite the trade union efforts to get to all the jobs, for example, with formulas like the digital trade union delegate.

Therefore, some of the main problems, or challenges, in today's euphemistic language, faced by collective labour relations, at least in Spain, can be summarized as follows, without the urge to be exhaustive:

- Inadequacy of the current regulatory frameworks to the digitization of work: the need for a new legal regulation and the renewal of the collective legal and labour institutions.
- The collective bargaining of working conditions in digitized working contexts: The need for a redefinition of rules, contents and functions.
- The need for a new delimitation of the boundaries between collective bargaining and corporate leadership: Imposing algorithms/negotiating algorithms.

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– Trade unions and representative bodies in the enterprise: The need to reformulate new spaces, new functions, and new ways of exercising trade union action.
– The lack of interaction between working persons due to the relocation of the workplace, the increasing tendency to telework, as well as the difficulty of the trade union sector to interact with a human person representing the employer sector.

However, it is worth mentioning a significant regulatory breakthrough in the field of collective relations and digitization through the legal recognition of a new right of information to the representative bodies of the people working in the enterprise: *the right of algorithmic information*, consisting in the duty of all companies (which have one of these bodies: committee of enterprise, or staff delegates, and trade union delegates) to inform such bodies "*of the parameters, rules and instructions on which the algorithms or systems of artificial intelligence are based that affect the decision-making that may affect working conditions, access and maintenance of employment, including profiling*". It has been approved in the aforementioned Rider Law, Law 12/2021, of 28 September[215], to guarantee the labour rights of the people dedicated to the distribution in the field of digital platforms, but it is a law applicable to all areas and sectors, not just to the digital distribution platforms.

This right is inserted in the catalogue of rights of information contained in the Statute of Workers to the bodies of representation of workers. It is not a right of participation, nor the negotiation of algorithms, only the right of information on algorithms, although the preamble of the norm justifies its recognition in that: "*Algorithms deserve our attention and analysis, for the changes they are introducing in the management of the services and business activities, in all aspects of the working conditions and, above all, because such alterations are taking place in a way alien to the traditional scheme of the participation of workers in the company*". As you can see, participation is conceived only through information, without going any further.

Information should be provided about the type of algorithm used, its operation or logic, and the consequences for workers, their working conditions and employment. For your understanding, the Ministry of Labour and Social Economy has provided a Guide on algorithmic information in the workplace[216].

[215] Ley 12/2021, de 28 de septiembre, para garantizar los derechos laborales de las personas dedicadas al reparto en el ámbito de plataformas digitales.

[216] Guía sobre Información algorítmica en el ámbito laboral.

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Finally, in the area of negotiations, it is worth mentioning the Fifth Agreement for Employment and Collective Negotiation, published by Resolution of 19 May 2023[217], the result of the bipartite social dialogue between business organizations (CEOE and CEPYME) and trade unions (CCOO and UGT), which establishes criteria aimed at collective negotiation in all fields and levels, or as expressed in the text itself: *it collects commitments and agreements that will have to be developed in thousands of bargaining processes in thousand different areas, sector and business*.

The V AENC addresses for the first time – at the level of an inter-professional agreement for collective bargaining – commitments on artificial intelligence, in addition to remote work (chapter X) and digital disconnection (Chapter XI). A specific chapter is devoted to "Technological, digital and ecological transition" (chapter XVI), which is developed in four paragraphs: 1. Technological and digital transition. 2. European Framework Agreement on Digitalisation. 3. Artificial intelligence (AI) and guarantee of human control and right to information on algorithms. And 4. Ecological transition.

With regard to the involvement of working people's representative bodies and trade unions in the field of AI, although it is addressed in a dispersed manner, the mandate for collective bargaining is of particular interest in the sense that collective agreements between the sector and the enterprise must promote and drive digital transformation in the workplace through participatory processes, although the scope of such participative processes is not specifically defined.

It will be necessary to observe the evolution of collective bargaining to see whether the negotiators include forms of real participation in the digital transformation, and awaiting a regulatory change accompanied by the current context of labour relations and work.

*7.6. **Latinamerican Report** (by Sebastián Coppoletta[218])*

7.6.1. Digitization and working time

Latin American legislation adheres to the classic capitalist paradigm that emerged after the second industrial revolution, based on production in a centralized location where factors of production converge (including labor, or more precisely, the working individual) to be organized under the authority of the company. As Carlos de Buen Unna argues (2021, p. 185):

[217] V Acuerdo para el Empleo y la Negociación Colectiva.

[218] National University of the Litoral, Argentina.

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The labor law arises from the need to establish protective rules and principles that safeguard workers in the new forms of production brought about by the Industrial Revolution, which civil law was unable to address with its rules and principles based on autonomy of will.

Under this concept, various national regulations have historically governed limited working hours, typically linked to the worker's presence at the production center. For instance, in Mexico, the Federal Labor Law defines the workday as "*the time during which the worker is at the disposal of the employer to provide their services*" (art. 58), establishing an 8-hour limit for the daytime workday (art. 61). This model is followed by the majority of domestic legislation across Latin America.

However, the digitalization of the production process challenges this geospatial work paradigm, allowing workers to provide services within their employer's production process at any time and from anywhere. The primary effect of this paradigm shift is the loss of spatial and temporal boundaries in work, as service provision is no longer contingent upon physical presence at the production center. Currently, there is a lack of labor regulations addressing working hours in digital business environments that do not require physical presence, potentially leading to work encroaching into non-working time (leisure, social, free time, etc.).

Analyzing the situation in Peru, which is applicable across Latin America, Sonia Quiñonez (2021) highlights the harmful effects of new Information and Communication Technologies (ICTs) on workers' health in the absence of legal regulations limiting employer control through these technologies: hyperinformation and hyperconnectivity. In this context, Quiñonez raises concerns regarding

> the adequacy of traditional labor law institutions to protect workers from potential abusive uses of these technological tools. The constant connectivity facilitated by ICTs enables employers to reach employees at any time, send work-related emails outside of working hours, and even have employees perform tasks beyond their designated work hours.

Quiñonez emphasizes the right to rest as a fundamental human right protecting other constitutional rights, including:

1) the right to free development of personality, safeguarding individual decision-making autonomy;
2) the right to safety and health of the working individual;
3) the right to privacy, protecting the individual's private sphere and rejecting intrusion into personal or family life by third parties.

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In the context where new technologies expand employer power into individuals' private time, alongside regulations tethering working hours to physical workplaces, the Covid-19 pandemic has forced the legal regulation of non-presential work situations. Consequently, many Latin American countries have enacted laws regulating teleworking. These laws have addressed the issue of working hours tangentially, with varying approaches. For instance, Argentine Law No. 27,555 stipulates that working hours are determined by mutual agreement between parties. Similarly, Article 12 inc. d) of Peruvian Law No. 31,572 requires parties to define how the teleworking schedule is distributed. In a slightly different vein, Article 152 quáter J of Chile's Labor Code allows "*parties to agree that the worker freely distributes their work hours according to their needs*", implying that while an agreement is needed to regulate work time, once established, the worker's time distribution may not require the employer's ongoing consent.

Furthermore, within the framework of telework regulation, the right to digital disconnection has been recognized. In Mexico, Article 68° bis of the Federal Labor Law establishes the individual's right to digital disconnection to ensure respect for rest time, permits, vacations, as well as personal and family privacy. Argentina's Telework Law No. 27,555 imposes on employers the obligation to refrain from requiring work from employees and communicating with them outside of working hours. Similarly, Article 152-*quáter* J of Chile's Labor Code regulates the employer's obligation to refrain from contacting employees outside of their working hours, especially for remote work scenarios where the schedule is agreed upon or for teleworkers exempted from the work hour limitation. Employers must respect their right to disconnection, ensuring that employees are not obliged to respond to communications, orders, or other requirements for at least twelve continuous hours within a twenty-four-hour period. Moreover, employers are prohibited from establishing communications, issuing orders, or making other requests on rest days, permits, or annual holidays of workers. Ecuador also regulates teleworkers' right to disconnection after their workday, stipulating a minimum of twelve continuous hours of disconnection within a twenty-four-hour period (Molina Rubio, Silva Barrera, 2024).

Lastly, there is a noticeable trend in Latin America towards reducing the workweek. While in many parts of the region the standard workweek is 48 hours, Ecuador and Chile have already regulated a weekly limit of 40 hours. In Colombia, a gradual reduction of the workweek has begun, aiming to progressively decrease work hours to 42 hours per week by 2026 without reducing salary values. In Costa Rica, Article 9 section d) of Law No. 9738, the Telework Regulation Law, recognizes the right of individuals working under this modality to digital disconnection outside of established working hours.

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7.6.2. Employment law, employment contract and modern forms of work (platforms)

While global digital platforms providing services (Glovo, Rappi, Uber, Cabify, Kadabra, etc.) are present in different Latin American countries, there is no specific legislation regulating platform work. The exception to this may be the Chilean case, as the Labor Code regulates work through digital service platforms in its Chapter X.

The rest of the countries have not created specific regulations in this area. As Juan Pablo Mugnolo (2022) argues,

> A scarce, almost nonexistent, state labor regulation of services provided through platforms is a fact of Latin American reality, even though the most well-known and developed multinational companies in the world have found early local roots. This absence of regulation has redirected protective action directly to the jurisdictional sphere where labor conflicts are settled, appealing to the classic protection techniques contained in the heteronymous labor norm and traversing the dichotomous path of autonomy/dependency, typical of the judicial debate in the field of platform work as it has been raised in the regional context.

Consequently, with respect to work through digital platforms, the legal systems of Latin American countries have issued rulings that recognize the person's status as a dependent worker, i.e., individual claims, but no specific legislation has been advanced in this area. This implies that the new problems presented by work through digital platforms are being addressed with the old categories of Labor Law designed for factory work, with a dubious protective effect. Returning to Mugnolo's academic work, the Argentine professor explains this lack of interest in legislative regulation of this sector of the economy by stating that

> Another regional fact that also explains an early and relatively conflict-free implantation of digital platforms is directly linked to the particularities of the labor market in Latin America, where the regional unemployment rate and structural informal employment have encouraged a "migration" of people from the "traditional" market of classic jobs to digital platforms, since the standard of precariousness does not differ too much between the two types of services.

In short, digital platforms have served in Latin America as a means of work precarization, without any legislative response to it, at least as a trend in the region.

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7.6.3. Effects of digitalization on collective representation of workers' interests

Although regarding the specific case of work through digital platforms, the jurisprudence of Latin American countries has recognized the labor nature of the service provided by the person linked to the platform, this solution given to different cases of individual claims has not generated a union movement that constitutes a collective subject that generates specific legislation. On this last point, there are nascent cases of union activity in Argentina (Association of Platform Personnel – APP), Colombia (Union of Platform Workers – Unidapp) and Ecuador (Front of Digital Platform Workers of Ecuador – Frenapp), with the formation of union entities that seek recognition as a valid interlocutor with companies and the generation of specific labor regulations.

The reasons for this lack of unionization are multiple, but Miguel Canessa Montejo (2021) points out some of them:

> First, the high mobility of providers hinders their organization and the election of representatives, explainable by the very business model of the platforms.
>
> Second, providers may have divergent interests that undermine unionization or the functioning of the union. For example, there is a differentiated interest between providers who have the platform as their main source of income and those for whom it only represents a supplement because they have a stable job outside the platform. Also, the geographically dispersed distribution of crowdwork platform providers.
>
> Third, the lack of contact between providers weakens their ties and the confidence of collective action. The provision of services is eminently individual, isolated from other providers.
>
> Fourth, the business model of the platforms fosters competition between providers, as is the case with crowdwork platforms. The open offer of the platform turns providers into rivals.
>
> Fifth, there are legal restrictions in some national legal systems that prevent self-employed workers from grouping together with wage earners in a union organization.

And beyond the specific case of work through platforms, the digital economy, in general, poses challenges to union organization in its original format, as work is no longer concentrated in a single place and at a common time, but is atomized, giving individuals the possibility of choosing the place and time they work.

Finally, it is not insignificant to note the serious problems that many Latin American countries face in terms of violence against union activity. This, coupled with the precarious conditions of labor relations, means that regional

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unionism normally has more pressing and overwhelming problems to deal with before the process of digitization of certain sectors of the economy in some Latin American countries.

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Part I
The ways to achieve social justice in the world of work: current trends

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SUSTAINABLE VIRTUAL WORK: THE REAPPROPRIATION OF HUMAN DIGNITY

Introduction

The United Nation has released the 2030 Agenda with the purpose to further Sustainable Development through a global effort to ensure a future of peace and prosperity. Among the goals established by the Agenda, Goal 8 stands out as a commitment to decent work and economic growth. In the last decade, the rise of digitalization and artificial intelligence has brought significant changes to the work force — including the Brazilian context, particularly regarding deregulationon labor legislation. In fact, in the current Brazilian scenario, technological advancement has led to social decline, perpetuating income inequality, unemployment, and precarious work. The capitalist system has positioned human beings merely as a means to achieve technologica ldevelopment, moving away from the Kantian ethical concept of human dignity.

Objective

This study aims to revisit the social pact and the worker's humanity itself, by analyzing their progressive degradation to the condition of "commodity".

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Methodology

The research method is the investigation of social phenomena by the method of bibliographic compilation, and the analysis of the guidelines provided by the United Nations and the International Labour Organization.

Analysis

The issue at hand is the commodification or reitification of the worker, and their subjugation to the objectives of technological advancement itself, resulting in profit and power concentration increasingly held by Big Tech companies. Thus, human beings began to serve technology, not the other way around.

Conclusion

The relevance of this research lies with in the concern for the international community, the promotion of decent work in times of new technological advancements, and the reduction of rights that have been historically acquired for the defense of workers in order to preserve the model of Democracy and the Rule of Law. The expected conclusive assumption is that there is no sustainable development without the assurance of decent work, and that neglecting the objectives of sustainable development results in risks for the very existence of humanity, which requires efforts from international government to protect the civilized conquests obtained through out History and its social movements.

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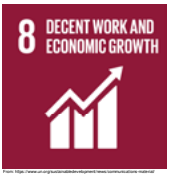
Decent work and Global Production Chains

Giulia Giaimis – Ph.D student – University of Brescia, Italy

Current situation

Too many workers, all over the world along the Global Production Chains (GPCs), find themselves faced with the choice to lose their dignity or be able to survive. The very same concern has been raised by the United Nations, which have intervened over the years to encompass decent work conditions and social upgrading in the broader definition of sustainability, as framed in 2030 Agenda. Nevertheless, the participation in the GPCs represents an important source of employment and a great opportunity especially for developing countries.

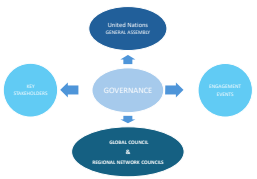
Unfortunately, though, the need for lower prices wins over advocating for other people's labour and human rights, thus an opportunity is transformed into a curse for too many workers.



From: https://www.un.org/sustainabledevelopment/news/communications-material/

SUSTAINABLE DEVELOPMENT GOAL 8 AIMS TO

"*promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all*" [UN]



Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

Article 29b

Sustainability reporting standards:

"[omissis] *(b) specify the information that undertakings are to disclose about the following social and human rights factors:*

(i) equal treatment and opportunities for all, including gender equality and equal pay for work of equal value, training and skills development, the employment and inclusion of people with disabilities, measures against violence and harassment in the workplace, and diversity;

(ii) working conditions, including secure employment, working time, adequate wages, social dialogue, freedom of association, existence of works councils, collective bargaining, including the proportion of workers covered by collective agreements, the information, consultation and participation rights of workers, work-life balance, and health and safety;

(iii) respect for the human rights, fundamental freedoms, democratic principles and standards established in the International Bill of Human Rights and other core UN human rights conventions, including the UN Convention on the Rights of Persons with Disabilities, the UN Declaration on the Rights of Indigenous Peoples, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work and the fundamental conventions of the International Labour Organization, the European Convention for the protection of Human Rights and Fundamental Freedoms, the European Social Charter, and the Charter of Fundamental Rights of the European Union;... [omissis]".

From inspiring principles to duties

As a matter of fact, the UN Guiding Principles on Business and Human Rights (UNGPs) do not have binding effects. In fact, these principles are not contained in any normative act.

However, some of the concepts incorporated in the UN Guiding Principles can be traced down in normative acts, that aim at protecting employees, in those countries where Trade Unions movements have contributed to establish self-awareness in the working class. There, through the centuries, Trade Unions have obliged governments to put in force laws which guarantee rights to all employees.

Alternatives to the present capitalism

The current way of consuming is no longer sustainable. Its linearity is exploiting the soil, the sea, the air and all the Earth's inhabitants, the humankind included.

Social sustainability is what makes the difference between surviving and living. As a global society we are caged by markets' dynamics, forgetting who created the market itself, we did. Markets are losing competitiveness also because States' economic wealth depends on them so deeply that governments are afraid to fail; as the State was an enterprise, which it is in certain respects. In order to chase economics rules' accomplishment, States seem to have forgotten the power they have in shaping society. Democratic systems work on shared values' scales, on which governments rely in order to realise the political goals they have been elected for. Hence, preferring to spoil economics' dynamics rather than utilising the Law, means forgetting the willingness of citizens, who have voted to see their beliefs realised, not to please the market.

Against this complex backdrop, a solution appears to be possible: the progressive capitalism, theorised by Professor Stiglitz. Progressive capitalism, paraphrasing Stiglitz's words, consists in getting rich by adding a slice to the nation's economic pie, instead of getting richer by grabbing a larger piece of the pie by exploiting others. Stiglitz's proposal of a "*market economy that offers the promise of a prosperous economy in a just, free and inclusive society*" should be embraced, if we want to live on this planet any longer.

However, realising such a challenging switch requires a proper modification of the *status quo*, since deregulation in sectors such as the job sector is dangerous for the safety and dignity of workers, who are, before anything else, people.

"progressive capitalism can be the evolution of the present capitalism"
Stiglitz (2023)

According to the first guiding principle, "*States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication*", thus the territory's borders represent the limit to the State's duty. Hence, unless all developing countries commit to the UNGPs, the workers along the GPCs will not be protected, because they usually fall out of the jurisdiction of the States where the final product is sold or where the company is located. Pursuant to principle number 10, member States of a multilateral institution "*encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising*". Therefore, those institutions can make people aware of the abuses committed by enterprises, displaying them through the tool of reporting.

The EU Corporate Sustainability Reporting Directive (CSRD) embodies the opportunity of showing the real corporations' behaviours related to sustainability, despite their narrative nor their charity initiatives. Working conditions, declined at different levels, such as for instance, working time and adequate wages, represent one of the required parameters in order to trace the *Sustainability reporting standards*. Introducing international standards would allow the European Union, and its Member States, to include them in normative acts as precise criterions to which companies shall conform, in the near future.

Shifting the obligation from the State to the company, permits to the policy makers to overcome the territory limitation, imposed by the sovereignty principle, which is remarked by the UNGPs too. In fact, thanks to this type of reporting, companies, multinational companies included, are accountable for their actions happening along the whole production chain, regardless of where its segments are allocated.

Moreover, sustainability has been recently included, interpreted in different ways and protected at different depths, in several national constitutional charts, giving the opportunity to workers to ask for their right before international courts for human rights. As sustainability becomes an international principle to be globally pursued, decent work will be recognised as a basic right of each and every human being.

New tools of governance

In the post-Fordist era, a variety of governance theories have emerged, focusing on different elements which compose or affect a company. As the legitimacy of the Corporate Social Responsibility (CSR) theories increased, upgrading of workers' conditions became easier to be pursued, and be achieved, even from an economic perspective. As the definition of stakeholders, taken from Freeman's theory is stretched, its application along the GPCs expands exponentially. In fact, recognising a role to stakeholders, entitles them to ask for a change. Under these conditions, in 2005 the United Nations created the Global Compact, whose initiatives are not binding for the participants. However, networking corporations which understand the importance of sustainability is pivotal to put a spotlight on what happens along the production chains.

A large part of a brand's value is represented by its image, how people perceive the brand. Therefore, transparency is becoming a key part of brands' narrative. Through the traceability, corporations allow consumers to enter their GPCs, and give them a reason to the product's price. In this respect, the 2023 Global Compact's report *Business leadership in times of crisis* stated that "*CEOs are committing to a living wage*", and some of them are pursuing the same result for all the strategic suppliers, expanding the right of a decent life beyond companies HQs' national borders.

Seen as an opportunity, GPCs' traceability becomes a resource to link and lock the relationship between a company, the State where the final product is sold and the consumers, thus guaranteeing the company's future profitability and survival.



Voluntary based agreements

Systems such as the UN Global Compact show how powerful voluntary based initiatives can be. In fact, tools like collective bargaining agreements can be useful in those countries where Trade Unions have got the power and the capability to influence the Government. Even in developed countries, though, the bargaining dumping phenomenon has grown exponentially, since the number of people seeking a job at any condition is increasing lately.

According to principle number 12 "*the responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work*". In particular, the *International Covenant on Civil and Political Rights*, which is part of the *International Bill of Human Rights* has been ratified to date by 173 countries all over the world. Therefore, collective bargaining agreements in those countries can embed or incorporate by reference the Covenant, to be applied in the employer-employee relationship as it is recognised by the State as binding.

Through a reference mechanism, collective bargaining has the power to shape equal conditions for all the workers involved in the production chain, since it is anchored to the job sector laws and, in the European countries those laws cannot contradict EU regulation.



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Decarbonization and occupational health: a symbiotic relationship

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Proyecto "Retos y oportunidades de la descarbonización para el sistema de protección social y prevención de riesgos laborales", PID2022-139922NB-C22 financiado por MCIN/AEI/10.13039/501100011033 / FEDER, UE)

Introduction and objectives

The processes of 'decarbonisation' refer to the creation of jobs and the transformation of environmentally friendly production systems. The transition to decarbonisation not only does not eliminate risks, but can also be a source of emerging risks associated with the technologies that support green jobs, as well as with new professional requirements and qualifications and the organisation of work and the environment in which it is carried out. It is necessary to analyse these repercussions, together with the regulations and preventive measures to be adopted.

Results

Risks derived from climate change

From the ambient temperature of the workplace: extreme heat and cold, comfort and thermal stress.
Vectors (disease transmission)
UV radiation
Pollution

Occupational risks of sustainable work

Emerging risks: new materials, new technologies, new chemicals...
Specific risks by sector arising from improved energy efficiency: transportation, construction, alternative energy sources, new substitute materials.
Risks arising from waste treatment

Regulations

Paris Agreement, 12 December 2015
Agenda 2030 (70th UN General Assembly, 25 September 2015).
Communication 11 December 2019 European Green Pact.
R. (EU) 2021/1119, 30 June 2021.
Spain: Act 7/2021 on climate change and energy transition.

Occupational Health and Safety Measures

- Art. 14 LPRL. General safety obligation.
- Risk assessment: prior to the introduction of changes and approach to environmental conditions, tasks, systems and people.
- Collaboration with Public Agencies (AEMET, Meteoalerta, etc).
- Development of action guides for new risks and technical standards.
- Revision of health surveillance protocols and detection of new especially sensitive workers.
- Information and training for workers and preventive managers

Conclusions

- Both climate change and actions to create sustainable work methods and systems generate occupational risks.
- It is necessary to focus preventive obligations to avoid or reduce occupational risks.
- It is essential to carry out a correct risk assessment, identifying new preventive needs through adequate planning, management and verification of the measures to be adopted.
- Training is a fundamental axis to be developed within the regulatory framework of decarbonization. Adapted to the new risks and the generation of a new preventive culture.
- It is imperative to make regulatory adjustments in accordance with the precautionary principle, in a context of rapid evolution of technology and science.
- All this to contribute to the goal of the transition towards decent and dignified jobs in terms of safety.

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In-work poverty
The contributions of the notion of 'decent work' in international and EU legislation

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IN-WORK POVERTY
Poverty affects an increasing number of people in the world. This situation is accompanied by a transformation in the demographic of those at risk of social exclusion. The 'working poor' are men and women who, despite having a job, find themselves without enough income to cover basic living expenses.

CAUSES
This situation is due primarily to structural aspects that have affected the economic system and the entire social context: from the financial crisis, which began in the 1980s, to the environmental and health crises.

WHEN THE WAGES ARE LOW
In-work poverty concerns not only the economic value attributed to the performance of work but also the conditions of the contractual relationship (intermittent or fixed-term employment, undeclared or irregular work, gig work, self-employment).

NOT ONLY THE YOUNG
Although in-work poverty affects all types of people, it mainly affects young people. In addition to age, individual characteristics that increase the chance of falling into working poverty include gender, nationality and educational qualification.

JOB ROLE
The risk of persistence of in-work poverty is more present in low-skilled jobs within the productive sector and is found across the various types of work in this sector.

DECENT WORK IN SUPRANATIONAL AND EUROPEAN LEGAL SOURCES
'Decent work' is a concept based on the universal values of human dignity and work. It does not set thresholds or ceilings, but rather guarantees minimum rights, including fair remuneration, adequate social protection and healthy and safe working conditions.

OBJECT AND SCOPE OF INTERVENTION
The concept of decent work goes beyond the employment relationship in terms of its object and scope. It reflects the way in which work and business stand in the global economy better than traditional categories, and it suggests the need for new regulation in order to ensure decent work for all.

DECENT WORK AGAINST IN-WORK POVERTY
The concept of decent work expresses the idea that the balance between economic growth and social justice is necessary to fight poverty and to ensure sustainable development. The potential of decent work consists precisely in its challenge to poverty as it looks towards a better world.

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Part II
Social protection systems: lessons learned and new ideas

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Agata Grochowska, Garrigues Warsaw

Working through digital platforms. Challenges and implications for labor law. Comparative perspective: Poland, Spain and the European Union.

- Working through digital platforms poses a challenge for both national employers and international institutions. In this model of work, which makes extensive use of modern technologies and algorithms, the roles of 'employer' and 'employee' are blurring, so that the classic definition of the employment relationship is no longer sufficient.

- The research addresses the important current issue of the position of people working in the sharing economy via digital platforms. Often, the legal and factual position of these individuals is precarious, as they are usually not employed under an employment contract but are self-employed or enter into various contracts of a civil law nature. Meanwhile, according to analyses, often the relationship of the so-called 'riders' with the platform exhausts the prerequisites of an employment relationship. This raises the fundamental question of whether the definition of the employment relationship should be modified in relation to changing working conditions or whether new forms of employment should be covered by the legal arrangements already in place.

- The research uses a comparative perspective; Spain (which has recently introduced the widely commented "Ley riders" law) and Poland are analyzed as examples of regulations applied in the subject. The legislation of the above-mentioned countries is placed in an international context, i.e. the EU legislation, because, due to the special position of the European Union, its legislative initiative (as well as the CJEU jurisprudence) is often crucial for lawmaking in the Community countries.

EU Directive

Ley Riders

Polish labor law

Agata Grochowska

Polish perspective

Legal doubts

In relation to some sharing economy service models, there are claims that people providing services through sharing economy services should be treated as employees. Such views arise in particular in relation to drivers providing services via platforms offering services similar to taxi passenger transport. It is pointed out that their subordination to the platform is sometimes very high, bringing this factual situation closer to an employment relationship. In such a case, an employment contract would be concluded between the service operator and the service provider, and the providers would be entitled to rights under the Polish Labor Code. Such entitlements would include, inter alia, the right to paid holidays, parental entitlements, the application of working time restrictions. However, in Poland, organizers of sharing economy services are far from adopting this way of doing business.

Practice

In practice, exercising the principle of freedom of contract, online platforms use a variety of types of contracts to regulate a legal relationship with those providing services (work?) to them. Various types of civil law contracts are used, and the establishment of sole proprietorships is also encouraged. The conclusion of employment contracts in collaborative economy model is extremely rare. Polish labor law does not presume the existence of an employment relationship. Therefore, each case must be examined separately. It is possible to take a case to court to establish the existence of an employment relationship - for example, in a case where the contractor disputes the contract of mandate and claims that he/she is in fact an employee. In practice, however, this type of situation in the sharing economy does not generally happen. To date, there is no trend for drivers and other persons cooperating with digital platforms to challenge the legal relationship that binds them to these platforms. Furthermore, it is common practice among online platforms to sign contracts where the applicable law is different from Polish law (e.g. Dutch or some US state). Additionally, this makes it difficult to apply the Polish Labor Code and other regulations in such cases.

Legislative ideas

At the moment, the Polish legislator has not introduced legal solutions designed strictly for employment in the sharing economy. However, this does not mean that it does not see the impact of this type of economy on employment and social security. The requirement for a taxi license for drivers of digital platforms was already introduced a few years ago. In addition, a requirement for a Polish driving license was introduced in June this year. These solutions, however, are intended to level the playing field between traditional carriers (taxis) and online applications/platforms (i.e. the aim is to remove excessive competition), not to change the employment structure. With regard to changes in labor law in general, there are calls for the introduction of a presumption of an employment relationship, as well as for the National Labor Inspectorate to be able to order the transformation of a civil law contract into an employment contract in situations where the legal relationship between the parties fulfils the prerequisites of an employment relationship. However, these are only ideas for the time being and it is unclear if and what shape they may take in the future. Undoubtedly, EU legislation, including in particular the dedicated directive, will have a major impact on the Polish employment legislation in the collaborative economy.

Spanish perspective

The status of persons cooperating with sharing economy platforms (the so-called *mensajeros, repartidores*, riders) has been already regulated in Spain. The effect of the Spanish legislative work is assessed differently, however, undoubtedly, other countries, including Poland, may benefit from the experience of the Spanish legislator, who tackled an exceptionally difficult matter.

Employee versus economically dependent self-employed

Due to the development of the sharing economy in Spain, the question has arisen as to whether people who are, for example, food delivery drivers or transport drivers are in an employment relationship or self-employed. At this point, it is worth recalling the definition of employment relationship from the Spanish Labor Code (*El Estatuto de los Trabajadores*). According to the Code, workers are persons who "voluntarily provide services for remuneration, for someone else's account, under the direction of another person, natural or legal, called the employer". However, this definition seems insufficient in relation to the new economic model of the sharing economy. Indeed, it is emphasized that in this case the elements of primarily management (subordination) and work for someone else's account are largely limited. For this reason, *mensajeros* were usually treated as economically dependent self-employed (*trabajador autónomo economicamente dependiente*). They were not bound by the provisions of the Labor Code, but by the Self-Employment Statute (*El Estatuto del trabajo autónomo*). It is worth noting that the institution of the economically dependent self-employed was introduced into Spanish law in 2009, so it represents a newer type of self-employment. Unlike 'traditional' self-employment, el *trabajador autónomo económicamente dependiente* works primarily with a single client and, among other things, does not employ his or her own employees, has his or her own resources to perform the service, or determines the workflow himself or herself. Sharing economy work escapes the traditional definition of an employment relationship. On the other hand, however, the 'bond' between the provider and the platform is often high and for this reason the institution of economically dependent self-employment is not appropriate. For this reason, *mensajeros* have come to be referred to as 'false self-employed' (*falsos autónomos*), whose legal status (self-employment) and factual situation (actual employment relationship) do not harmonize. Doubts about the appropriate classification of those cooperating with sharing platforms have become a challenge for Spanish jurisprudence, as well as for the legislator.

Jurisprudence of the Spanish courts

The Spanish courts have represented 2 main lines of jurisprudence (one that sees riders as employees, and another more traditional one that does not recognize the existence of an employment relationship in this context) . The discussion in this area was de facto concluded by the Supreme Court in its judgment of 25 September 2020.

Spanish Supreme Court judgment of 25 September 2020

The Supreme Court has adopted a pro-worker perspective and made reference to the CJEU's jurisprudence, including judgment C-434/15 Asociación Profesional Elite Taxi, which referred to a dispute between the Barcelona taxi corporation and Uber. In this ruling, the CJEU noted the strong influence that the platform exerted on drivers and therefore rejected Uber's argument that the drivers were operating a fully independent business. The Supreme Court also recalled its own case law, including the judgment of 16 November 2017 in the case of translators working through the Ofilingua electronic platform. Referring directly to the factual situation of riders, the Spanish Supreme Court noted that the existence of an employment relationship between the platform and the *mensajero*.

Ley Riders

On 12 August 2021, the so-called Ley Riders came into force which was intended as a response to the increasingly pressing need to regulate the status of persons cooperating with digital platforms. The legislator adopted in this act a point of view that coincides with the position expressed by the Supreme Court in the previously discussed judgment.

- Presumption of an employment relationship existing between the provider and the platform-employer.
- High expectations and reality.

Summary

The example of Spain shows how difficult it is to regulate employment issues within the sharing economy. The idea of the Spanish legislator was to include those cooperating with sharing platforms within the framework of labor law, which seemed to be correct, taking into account the jurisprudence that had previously emerged. However, it seems that the regulations introduced did not fully meet the intended purpose. Or to put it another way: reality turned out to be a bit more complicated and the introduction of legal norms did not completely solve the problems of thousands of suppliers and drivers.

EU perspective

Soft law

- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'European Agenda for the Sharing Economy' of 2 June 2016: definition of the collaborative economy.
- European Parliament resolution of 15 June 2017 on a European Agenda for the collaborative economy.
- „A European framework for regulatory responses to the collaborative economy" of the Committee of the Regions.

CJEU jurisprudence

- Nature and function of the digital platform: judgment of Asociación Profesional Elite Taxi v Uber Systems Spain SL.
- Definition of worker: the Lawrie-Blum, Bosman, Steymann, Levin and some other judgements show that persons working as suppliers or drivers on digital platforms fulfil the conditions to be considered employees under EU law.

Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work

On 24 April 2024, the European Parliament adopted a directive on improving working conditions through online platforms. The new rules are intended to improve the situation of persons employed through digital labor platforms in the European Union.

- Presumption of an employment relationship if the work is characterized by the control and direction of the digital platform.
- Better protection for platform employees against dismissal.
- Protection of personal data, information obligations.
- Implementation by Member States.

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THE GENDER BIAS IN ARTIFICIAL INTELLIGENCE AND ALGORITHMS

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Introduction

The use of artificial intelligence systems and computer algorithms in the scope of the power that the entrepreneur holds has recently been established by the introduction of industry 4.0. On principle, those tools are considered to be neutral since their working does not harbour possible biases and stereotypes that on occasions may lead to discriminatory conduct. However, the possibility exists that they do cause discrimination by sex, age, racial background, amongst others, at different moments of the working relationship.

The problem lies in the fact that equality in the use of those tools may be contaminated, given that they learn and are trained on the models that they are given; if the information that they are provided with is contaminated by pre-existing stereotypes (biased or discriminatory data) then the artificial intelligence and the algorithms will repeat them. If additionally, they are used in personnel selection, job creation or professional promotion processes then they support prejudices and gender inequality so that they would be reinforcing a vicious circle with unpredictable results.

Objective

To determine if the use of algorithms and artificial intelligence systems in the implantation of industry 4.0 produces a gender bias in working relationships.

Method

The methodology used for the materialisation of this poster was a doctrinal review of the subject, the study of reports, statistics and legislation in order to determine whether the implementation of artificial intelligence and algorithms produces discrimination against women.

Results

- Algorithmic discrimination is discrimination that arises when an individual or collective receives arbitrary treatment as a consequence of automated decision making.
- The current and real risk is that management by algorithms coupled with artificial intelligence systems in the workplace, far from giving neutral results and reducing discrimination, could in fact be increasing discriminatory practices, especially towards women.
- Artificial intelligence brings new challenges, given that it enables machines to learn and take decisions and execute them without human intervention.
- Decisions adopted by means of algorithms may give incomplete, and therefore unreliable, data which may be manipulated by cyberattacks, producing bias or even just be simply wrong.

Conclusions

- The use of unbiased data to create algorithms. The task of increasing transparency in decision-making processes of algorithms.
- Build more diverse and inclusive programming teams who help to identify and prevent gender, age, and racial bias in the data used.
- Increase the presence of women who are specialists in programming and software development.
- Carrying out audits of the algorithms with the aim of decoding the assumptions on which they base their conclusions and the legislation in matters of discrimination, gender equality and human rights to regulate their working and coding.
- Accountability and the establishment of ethical frameworks to regulate the algorithms.
- Training in gender perspectives of ICT professionals.

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Want to know more information or get more details? Scan the QR code

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Scope of algorithmic workers emotions recognition systems in the light of the Artificial Intelligence Regulations

Topic: Digitalization, IA and employment
Subtopic: Labour law implications of digitalization and IA

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Among the different methods of applying artificial intelligence - AI - are those that consist of analyzing people for a specific result; identifying them from their biometric data, but also predicting traits of their personality, their mood or even their effectiveness to perform their job better or worse. We're talking about emotional recognition through AI. The starting point is the design and training of computer programs to automatically detect personality traits to determine how a person feels; typically these programs are used to observe facial expressions and to examine the tone and tone of the voice. From here, the people who operate these systems can make decisions based on what they see or, do it the computer program itself directly. What decisions are these? In the workplace, for example, to decide whether a person is fit for a job based on a video interview; to assess the worker's mental state to adjust the time and pace of work and rest and increase productivity; or to take measures to prevent psychosocial risks; or also to identify stress or fatigue in certain professionals to avoid hazardous situations. The usefulness of emotional recognition systems in the workplace is justified by the advantages provided by these AI tools to combat stress, fatigue, depression, psychological disorders of the work environment or to adopt appropriate solutions for prevention of psychosocial risks. Behind these commendable wishes can be hidden other more despicable utilities such as unjustly penalising or inhumanly optimizing the performance of the worker. The content of Labour Law is not prepared to address the challenges posed by the use of AI systems in the workplace.

Methods: analysis of the Artificial Intelligence Regulation (European Parliament legislative resolution of 13 June 2024) - RIA-

The RIA states that biometric data can allow the recognition of emotions of individuals. That AI systems designed to deduce the emotions of a natural person from their biometric data do not include physical states to detect the worker's pain or fatigue in order to avoid accidents. Classifies high-risk AI systems intended to be used for biometric categorization according to protected sensitive attributes ex art. 9.1 of Regulation 2016/679 and emotion recognition AI systems. It prohibits the use of AI systems to infer the emotions of an individual in the workplace, but does not prohibit them for staff selection processes, and leaves the door open for their use when the emotion recognition system is intended to be installed for medical or security reasons.

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ANALYSIS AND COMPARATIVE STUDY OF THE CHALLENGES OF APPLYING AI TO LABOR INTERMEDIATION PROCESSES

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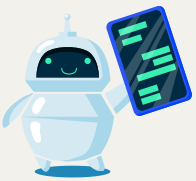
HIGHLIGHTED FACTORS

1) Importance of data
2) Technology in the public sector
3) The need for definition
4) Legislation

IMPACT OF THE USE OF AI IN PUBLIC EMPLOYMENT SYSTEMS

Main potentiality to facilitate of an adequate match between the skills required in the available vacancies and those possessed by job seekers.

>>> RULES



EU: REGULATION ESTABLISHING HARMONISED STANDARDS ON AI

- considers AI systems "intended to be used for the recruitment or selection of natural persons, in particular to publish specific job advertisements, analyse and filter job applications and assess candidates" to be high risk.

SPAIN: "RIDERS LAW"

- obliges companies to inform workers' representatives of the "parameters, rules and instructions on which AI systems may affect working conditions, access to and maintenance of employment



EMPLOYMENT SERVICES APPLYING



SOUTH-KOREA: the Flemish VDAB or the South-Korean KEIS have recently introduced Artificial Intelligence support for competence-based matching, where the actual skills ofjob seekers, independent from their official and certified qualifications, are automatically and bias-free matched with the best available job or task.

In **INDIA**, AI was applied to build end-to-end business solutions so as to solve problems of youthunemployment.

In **MALAYSIA**, The idea is to use AI and data analytics to match employers and employees more efficiently. AI algorithms learn to identify what different jobs require and which candidates would be most suitable for the position.

FRANCE: Pôle emploi uses artificial intelligence in its second-most popular service, which aims at identifying companies with a high potential for recruitment before they publish jobannouncements.

CHALLENGES OF USING AI IN LABOR INTERMEDIATION PROCESSES

- Privacy
- Discrimination and exclusion
- Biases in the algorithms
- Neurorights protection
- Insufficient data or imperfection

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DIGITALIZATION, DISMISSAL, AND TRAINING OF EMPLOYEES SPANISH LAW

Technology can imply a reduction in jobs within the company for various reasons, according to the Workers' Statute

(Royal Legislative Decree 2/2015, of October 23rd)

In all of them, training can be useful and play a role.

1 Lack of adaptation of the employees to the technical modifications of their job position. Art. 52.b) WS.

Previously, the employer must offer the employee a course for adaptation to the changes made… The termination cannot be agreed upon until at least two months have passed since the modification or since the training was completed (HJC Galicia 2-05-13 or HJC Madrid 09-01-14).

2 Objective dismissal for technical/organizational reasons Art. 52.c) WS.

Due to the disappearance of the job position because of the implementation of new technologies.

Jurisprudential doctrine understands that judicial control over the adopted measure extends both to the concurrence of the cause and to the reasonableness of the termination decision… in order to avoid an abusive use of the granted power [HCJ Cantabria 31-10-18 or HCJ Madrid 7-10-19 or STJUE 18-01-24 (Ca Na Negreta) among others].

Is it possible to declare the dismissal unfair if the employee could have been reassigned through training?

3 Collective dismissal for technical/organizational reasons. Art. 51 WS.

It must be preceded by a consultation period with the legal representatives of the employees, which must cover, at a minimum, the possibilities of avoiding or reducing dismissals and mitigating their consequences through measures such as reassignment or training or professional retraining actions (HCJ País Vasco 11-12-12, JSC 23-09-14).

Lara Munín Sánchez. Profesora Ayudante doctora. USC.

Proyecto AEI *"Aprendizaje a lo largo de la vida en una sociedad digital: formación y recualificación para las nuevas profesiones del mercado de trabajo global"* (PID2020-113151RB-I00,). Dir. Profª. Lourdes Mella Méndez & Consuelo Ferreiro Regueiro.

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FROM DATA TO DECISION: PROTECTING EMPLOYEES FROM UNJUST INFERENCES IN THE ERA OF AI



Dr. Olgu Özdemir Ertürk - Antalya Bilim University, Faculty of Law, Türkiye

MOTIVATION OF RESEARCH

- Today's technological tools lead to constant surveillance, monitoring and tracking of employees' activities. As a result, certain inferences are made and used as human resources data.
- In line with these data, many things are determined such as the employee's duties, working hours, whether he/she will be promoted or not, and how disciplinary practices will be carried out.
- So, the decisions about employees are outcomes of these inferences. Inferences are results of statistical analytics. Statistical analytics would lead to correlations rather than causations. Yet, the new "insights" will be effective to influence employment decisions.
- Do we have enough legal safeguards to protect the employee from the unjust inferences?



HOW INFERENCES ARE DRAWN? - PEOPLE ANALYTICS

Data analytics is a tool to understand the statistical patterns between data and draw inferences. A significant portion of people analytics applications are designed to extract mathematical data from these behaviours and make statistical inferences.



PROMISES OF PEOPLE ANALYTICS:

- Boosting performance metrics
- Create better teams
- Decreasing decision-making time
- Preventing human-bias
- Serving employee well-being

IN REALITY:

- Constant surveillance
- Data aggregation
- Data mining
- Inferential analytics

RESULTING:

- Self-fulfilling prophecies
- Bias
- Lack of causality
- Undermining the personal aspect of labour relation

PREDICTIVE (INFERENTIAL) ANALYTICS

In predictive modelling, the objective is to identify the relationship between dependent and independent variables, without making any assumptions about the underlying causal structure. This is a common feature of many machine learning applications.

- Prediction = assumption; however the outcome will be treated as if the employee has the condition.



The correlations can be made about any data. An example shown on the left, the data about butter consumption and ticket prices at North American movie theaters. Furthermore, *explanations* can be generated via Generative AI.

Image credit: https://www.tylervigen.com/spurious-correlations

CHECK IT OUT

INFERENCE = EMPLOYEE ?

- **The training data set comprises information pertaining to individuals employed at an external organization,** albeit in an anonymized format.
- **The more analytical tools are used, the more one may find an error or a pattern.** This, even in the case of so-called "human-in-the-loop", would not be easy to disregard as the inferences are drawn out of the profile that is created automatically by data analysis.
- **The perception of the employer causes decisions** about the employee that have *legal effect* or *similar significant affect* on him/her.



- **It is unclear whether the inferential profile is an accurate representation of the employee.** Furthermore, it raises the question of whose data is being used to make these decisions.

REGULATORY RESPONSES AND CONSTRAINTS

DATA COLLECTION

- Inferences are in most cases not protected by GDPR.
- No clear classification as personal data by CJEU.
- Pseudonymised and anonymised data used to create inferences to avoid the regulation.
- The applicability of anti-discrimination law is very limited.

DATA PROCESSING

Data subject rights -

- Right to explanation = No assurance of an explanation of how the inference was made - grants no causational explanation.
- Right to access = The inferences may be characterised as the employer's 'trade secret' or a discretionary right within the scope of its managerial prerogative.

Profiling:

- Group profiling - groups are not only traditional groups, but also "ad hoc" groups.

AUTOMATED / SEMI-AUTOMATED DECISION- MAKING

- Not-"solely" algorithmic decision-making falls out of the scope of Art. 22.
- Proposal of Platform Work Directive = conventional workplaces and non-platform work are not in the scope of improved regulations.



A transatlantic approach: 2020 California Consumer Privacy Act:

- Targeting vulnerable group of consumers
- "Personal information" referring to "*Inferences drawn from any of the information identified in this subdivision to create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes.*"

FINDINGS

- Inferences are not employee data themselves. Yet, they have great influence of the novel decision-making processes in the contemporary employment relations.
- Inferential HR tools has a transformative effect on labour relations. Human intervention doesn't prevent the inference from creating 'confirmation bias'.
- Inferences are not perceived as "personal data", therefore no effective protection until there is a "decision" according to GDPR Art. 22 - which requires a "solely" automatic decision.
- The inferences are to be explicitly protected in the employment context.



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Part III
The new trends in the collective labour law

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The right to disconnect in Spain: Conclusions on the role played by collective agreements

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Introduction

The Organic Law 3/2018, of December 5, on Personal Data Protection and guarantee of digital rights, proclaimed that workers will have the right to disconnect and established that "The modalities of exercise of this right (…) will be subject to what is established in collective bargaining or, failing that, to what is agreed between the company and the workers' representatives" (article 88.2).

In this line, Law 10/2021, of July 9, promotes that collective agreements establish the means and measures to guarantee the effective exercise of the right to disconnect in remote work and the adequate organization of working time in a way that is compatible with the guarantee of rest times (article 18).

A milestone in collective governance on the matter has been the V Agreement for Employment and Collective Bargaining, signed on May 10, 2023, by the employers' associations (CEOE, CEPYME) and the trade union confederations CCOO and UGT, which has dedicated its Chapter XI to Digital Disconnection. The V AENC includes commitments that will have to be developed in thousand of negotiating processes.

Research objective

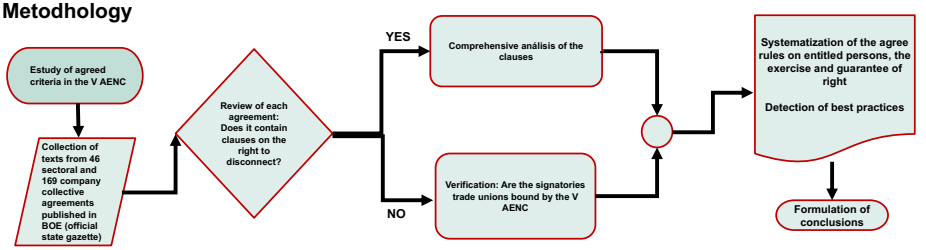
To determine if the V AENC is having an effective impact on collective bargaining published from June 2023 to August 2024.

Scan this QR code to access a full report about the research results



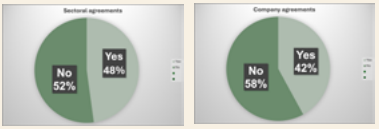
This research has been developed in the frame of the Project NEGOCIA2 "Collective bargaining and social dialogue for a sustainable work management (Ref.: PID2022-137853NB-I00)
financied by MCIN/AEI/10.13039/501100011033/ FEDER, UE

Metodhology



Results

Percentage of collective agreements that regulate the right to disconnect



Some agreements only mention the right, referring to legal provisions. Others simply state that it will be regulated by a joint committee of the management and employee representatives. A significant number refer to company policy or a protocol agreed upon with employee representatives.

Most collective agreements link the right to digital disconnection with the aim of ensuring the limits of working time, and some with respect to other rights such as leave or sick leave. To a lesser extent, it is presented as a contribution to an effective work-life balance.

There are very few agreements that regulate this right to reduce technological fatigue or stress, improving the work environment and the quality of work, even though the V AENC highlights that dimension of the right.

Although most agreements recognize the right for all workers, there is still a tendency to regulate the matter only within the clauses dedicated to remote work. Some of them stablish that the right will be not applied to personnel subject to special availability or similar situations.

Collective agreements specify the V AENC's reference to the right not to attend to digital devices and tools that could extend the working day beyond its limits, mentioning phones, emails, corporate mobile applications, company chat, and any type of messaging.

While the V AENC establishes as a limit the concurrence of justified "force majeure" (circumstances that may pose a serious risk to people or a potential business detriment requiring urgent and immediate measures), many collective agreements avoid this concept. Some exemplify the concept: urgent need to cover a job position due to illness or accident of the person who usually covers it or of a dependent needing assistance or any unforeseen events; significant maintenance incidents at workplace that imply changes in the daily course of activity; the closure of the workplace for any reason.

At the moment, there are few agreements that include the good practices proposed by the V AENC; that is, the programming of automatic responses during absence periods and the use of delayed sending of communications to be made within the recipient's working hours.

It is noted that some agreements stipulate that attendance at meetings, both in-person and telematic, will be within working hours and that their call will indicate the end time to avoid prolongation. Some others forbid communications from 7:00 PM to 8:00 AM the next day.

There are few agreements that include the guarantees of the AENC, stating that exercising the right will not entail sanctions or prejudice in the evaluation of performance or promotion of the worker.

Conclusions

1. The right to digital disconnection is not yet among the topics to which employee and employer's representatives give the greatest relevance in collective bargaining.
2. In a significant number of sectors and companies, the legal mandate to agree on the regulation of this right has been fulfilled, but in some agreements, it has been done insufficiently. They refer the determination of basic aspects to other instruments outside the agreement, making it difficult to determine if it has been achieved and, in any case, providing it with less transparency and guarantee.
3. Although many collective agreements show that the criteria of the V AENC have served as a guide to establish the legal regime of the right, it would be desirable for all to more faithfully reproduce its provisions, offering detailed regulation and adopting the good practices proposed by social dialogue.
4. The results of collective bargaining reveal that there is still insufficient training and awareness about the connection between the right to digital disconnection and the prevention of psychosocial occupational risks.

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NEW TRENDS IN COLLECTIVE LABOR LAW: challenges and collective negotiations

Prof. Dr. Paulo Campanha Santana
Kamilla Mendonça Mota

ABSTRACT

Objective

Decent work on new trends in collective labor law regarding challenges and collective bargaining has given importance to the analysis of problems, especially in a context of freedom of association and the fragmentation of unions brought about by the Labor Reform - Law 13,467/2017, such as loss of autonomy, reduction of revenue and base strength, with systemic differences in union revenue between 2015 and 2022.

With the transformations in the economic scenario and labor relations, significant challenges arise that demand careful analysis and effective strategies to protect workers' rights.

Methods

The methods used, since the union has representation and procedural substitution, we explore collective bargaining strategies to face these challenges, as well as case studies, interviews in unions comparing annual revenue, standards, books and scientific articles, concluding with a significant financial reduction, of more than 45% of the net received by the union before the reform.

Conclusion

It is concluded that the precariousness of unions, given the lack of mandatory contributions, affected their entry into court, as this financial impact was accompanied by spending cuts and, as a result, a decrease in the entry of the class entity into court, given its precariousness, due to legal costs, with a 45% reduction in actions and, consequently, collective agreements according to the Global Rights Index.

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Occupational welfare for workers' well-being

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#GreatResignation #CollectiveBargaining #OccupationalWelfare #WellBeing

Research question
The "**Great Resignation**" affecting the post-pandemic global labour market shows that **workers' interests and expectations have radically changed**. This phenomenon has not been characterized by a mere (albeit significant) increase in resignations, but rather by an **occupational transition**, which involved large flows of workers moving from one job to another one, looking for **more fulfilling working conditions**, not only in terms of wages. It follows that the "Great Resignation" represented the outcome of the change in workers' ways of understanding the **meaning of work**, under the banner of a **new employment exchange**, with respect to which the question arises as to **which factors** have proved **crucial**. The matter did not only concern workers, but also **employers**, who have addressed an unprecedented **crisis of attractiveness**.

Methodology
Focusing on the **Italian case**, empirical surveys have highlighted an **increasing attention of workers** to the issue of **occupational well-being**. To understand which instruments may affect this aspect of the employment relationship, the research was carried out on the **collective agreements with increasing application rates**, checking the **solutions** that were **most frequently included therein** to respond to new need of workers.

First findings
This investigation has led to the enhancement of **occupational welfare measures** designed by social partners. The reference is to the set of benefits, with a social purpose, provided through a **collective agreement**, and offered to the whole of the workers in the plant. These social benefits move from the **professional training** area to the **social security and health** one, even including **care services** for workers' relatives (with a disability or older), and **parenting support tools**. Moreover, welfare measures may concern tools which are characterized by a more economic (than social) function, such as **leisure services** or **vouchers to sustain workers' income**. In addition to this, they can even include **working flexibility** tools, oriented towards a better **work-life balance** (i.e., teleworking), and actions to implement **health and safety protection** in workplaces. By this, occupational welfare has responded to **new demands for workers' well-being**, and it has proved to be an effective employer **lever of attraction and retention** of human resources. For these reasons, even in the future, it seems to fully fit into the new labour exchange between employers and workers, enhancing the role of **collective bargaining**.

Problems and perspectives
In Italy, **occupational welfare** is linked to the activity of the **social partners** within **different sectors**. This aspect contributes to the creation of **dualisms** (both between insiders and outsiders in the labour market, and) between **workers belonging to different companies**, where second-level collective bargaining is developed. The **unifying function** of **national collective agreements** could mitigate this risk of differentiation in well-being promotion, and the **sharing of best practices** (across sectors) could reduce employment transitions. What is certain is that **the time is now**: it has become crucial to **invest in occupational welfare**, even for a **widespread well-being**.

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All quiet on the Northern Front?

Challenges to autonomous collective bargaining and wage-setting in Sweden after the adoption of the EU Directive on adequate minimum wages

Andrea Iossa (Kristianstad University)*

Wage-setting in Sweden

Swedish wage-setting is grounded on **"organised decentralisation".**
Sectoral collective agreements set wage levels and, in sectors with decentralised wage-setting, the scope and mandate for company-level collective bargaining and rules for individual negotiations.
An **"industry norm"** negotiated in the export industry ensure cross-sectoral wage-setting coordination and anchors wage raises to inflation. The system is steady due a **shared consensus** on its effectiveness in securing adequate wages and a **high level of collective agreement coverage** (88%).

The debate on the EU Minimum Wage Directive

During the entire legislative path, Swedish social partners have been very vocally opposing the adoption of the Directive – **"cyanide"** for the Swedish model in the words of the trade union confederation LO. They criticise the Directive for going beyond the EU competences and **"assaulting" the Swedish model**. This opposition stems from two roots: i) **a solid belief in the principle of collective autonomy as regulatory tool for the labour market** and ii) **a fear of EU intervention into Swedish wage-setting**.

The implementation

A governmental inquiry issued in June 2023 suggests that **no measures need to be taken** to implement the Directive, except for the tasks of the National Mediation Office which will be responsible to collect and report data on wage levels and collective agreement coverage. The Swedish system already ensure the objectives of the Directive. **Social partners, of course, welcomed this minimalistic interpretation.**

But is it actually all quiet on the Northern front?

Sectorial perspectives and challenges I - *Public healthcare*

With **100% collective agreement coverage and high trade union density**, public healthcare has an organised decentralised wage-setting. "**Figure-less collective agreements"** and **individual negotiations based on competences** are the norm. Trade unions at workplace monitor the compliance with procedures and rules set by sectoral collective agreements. **Budget cuts** and **labour shortages** have though shifted the attention from adequate wages to workloads and **working time.** The sector has lately seen **social tensions** and **strikes.**

Sectorial perspectives and challenges II – *Construction*

Despite a massive presence of **small companies**, collective agreement coverage is not seen as an issue by the parties in the construction sector.
A centralised wage-setting with no company-level negotiations ensures adequate wage levels. Yet **low trade union density, migrant workforce** and **long chains of subcontracting** affect monitoring and sanctioning violations. **Joint initiatives from social partners** and **conflictual strategies from autonomous unions** coexist to monitor the application of collective agreement and fight against **wage theft**.

* I am thankful to the Institute for Evaluation of Labour Market and Education Policy (IFAU) for generously funding my research.

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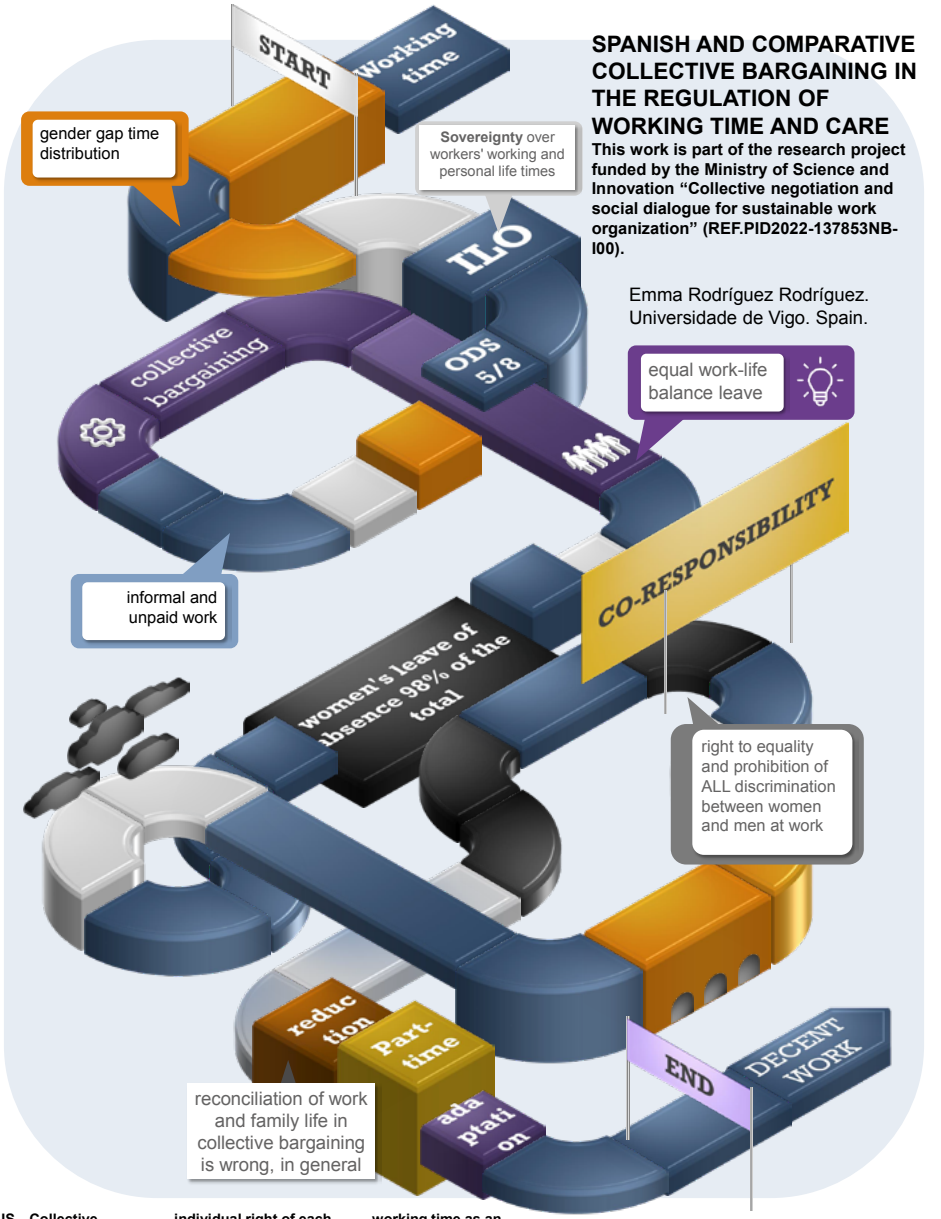
THE CHALLENGES OF SOCIAL PARTNERS IN DIGITAL WORK AND THE AGE OF ARTIFICIAL INTELLIGENCE





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SPANISH AND COMPARATIVE COLLECTIVE BARGAINING IN THE REGULATION OF WORKING TIME AND CARE

This work is part of the research project funded by the Ministry of Science and Innovation "Collective negotiation and social dialogue for sustainable work organization" (REF.PID2022-137853NB-I00).

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PLUS…Collective bargaining must regulate new measures to rebalance equality in employment, aimed at reconciliation as an individual right of each worker and at family co-responsibility, while at the same time guaranteeing new rights such as 'digital disconnection'. We need working time as an "adaptative" right.

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About this topic link:
lhttps://conciliacioncorresponsable.ccoo.es/9abd2abf6d20e626b934ab36fbe4b5f5000001.pdf

ISLSSL Rome XXIV World Congress
Rome, 17 - 20 September 2024

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COLLECTIVE BARGAINING CHALLENGES FOR ADDRESSING AGE MANAGEMENT IN THE COMPANY

Mariola Serrano. Deusto University

01

Ageing of the population

✱More than 9.4 million people in Spain aged over 65 in 2024.



02

Ageing workforce

Take advantage of work and experience. Take care of older workers.

Pension deficit / Retirement/ Challenge for the State

- Work more years.
- Make Compatible work and pension.
- Incentives

Problems, Solutions and Challenges

Ageism → Prejudices and stereotypes with older women

Lookism --> Especially with older women



COLLECTIVE BARGAINING

Age blindness

Specially changing the way we retire

- European Social Partner Framework. Agreement on Active Ageing and Inter-generational Approach-)(2017)
- V Employment and Collective Bargaining Agreement (2023-2025)

Corporate Social Responsibility → **Age Management** / **Diversity Management**

It is committed to: partial and flexible retirement and occupational health.

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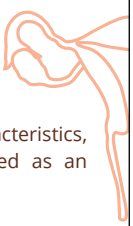
Part IV
Occupational health issues

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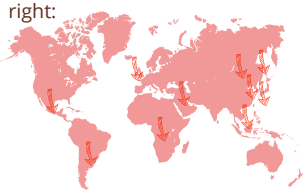
MENSTRUAL HEALTH AS AN OCCUPATIONAL RISK

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Bernadett Solymosi-Szekeres (Miskolc University)



Among all the disadvantages women face in the labor market due to their biological characteristics, the burden of menstruation is not taken into account in public policies or recognized as an occupational risk

Only 10 states or regions recognize menstrual leave as a right:



Japan (1947)
Taiwan (2002)
Indonesia (2003)
South Korea (2007)
Zambia (2015)
Part or Argentina (2014)
Part of Mexico (2017)
Part of China (?)
United Arab Emirates (?)
Spain (2023)

Inadequate facilities, restrictive work systems, and limited access to menstrual products contribute to women of menstrual age dropping out of school and the labor market.

Occupational risk prevention policies have not taken menstruation and its implications on women's working lives into account.

Every month, around 1.8 billion people menstruate worldwide, and although it is a natural process, it can affect their daily life and work, so it needs to be addressed in the workplace

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Regulating the heat health of employees:

A case study of South African public schools



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Key words: occupational health and safety – climate change — heat stress – public schools – educators – labour legislation – collective bargaining

1 OVERVIEW

Workplaces must adapt to the impact of climate change and rising global temperature levels. Africa is particularly vulnerable to heat stress due to its high exposure to heat and existing challenges reducing its adaptive capacity. This research highlights that South African public schools are already experiencing high temperatures and that a regulatory response is urgently needed to protect the heat health of educators and learners. I argue that existing mechanisms in labour legislation hold the most expedient solution to this problem.

2 LEGISLATIVE FRAMEWORK

- ***Constitution of the Republic of South Africa, 1996:*** *Protects environmental rights.*
- ***Occupational Health and Safety Act 85 of 1993:*** *Obligation on employer to provide a safe working environment.*
- ***Labour Relations Act 66 of 1995:*** *Framework for collective bargaining and the establishment of bargaining councils.*
- ***Employment of Educators Act 76 of 1998 and its regulations:*** *Conditions of service of educators.*
- ***Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure, 2013:*** *Government to provide basic infrastructure to public schools.*
- ***Climate Change Act 22 of 2024 (not yet in operation):*** *Promotes climate change response, ensuring decent work.*

Department of Basic Education = Employer

- **405 626** Educators
- **22 589** schools (workplaces)
- **Spread across 1.2 million km²**
- **Decentralised into 9 provincial departments**



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3 SOUTH AFRICAN PUBLIC SCHOOL CONTEXT

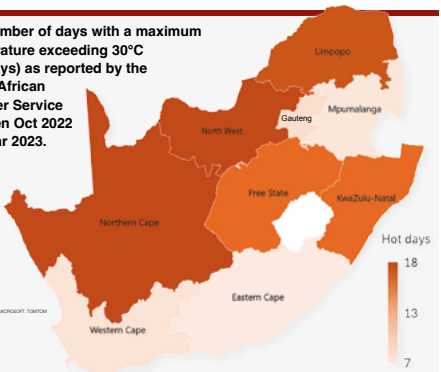
SOUTH AFRICA'S CLIMATE:
- Water scarce country
- Diverse climate, both subtropical and temperate
- Wet and cool climate in some provinces and a warm, desert climate in others
- 50% of the country considered arid or semi-arid.

RISING TEMPERATURES:
- **1.14°C** increase between 1901 and 2020
- **30.32°C** = average summer maximum temperature between 1991 and 2020

IMPACT ON LABOUR PRODUCTIVITY
- Labour productivity decreases at **24—26°C**
- **50%** of work capacity is lost when temperatures reach **33—34°C.**
- Optimum temperature for productive work and concentration: **16°C—24°C.**

The impact of heat on schools differs across provinces depending on the resources available to schools and the relevant climate in the area. This requires a flexible and context specific regulatory response to heat.

The number of days with a maximum temperature exceeding 30°C (hot days) as reported by the South African Weather Service between Oct 2022 and Mar 2023.



Three main insights emerge by comparing the above statistics with the school calendar, which illustrate the experience of heat by schools.

1. **PROLONGED IMPACT OF HEAT ON SCHOOLS:** Hottest months = Oct, Nov and Jan. Hot days are also experienced outside of summer months
2. **AVERAGE PERCENTAGE OF HOT DAYS:** 68% for inland provinces; 64% for coastal provinces
3. **HEAT AFFECTS SOME PROVINCES MORE:** Limpopo, North West, and the Northern Cape experienced more hot days than school days during Oct, Dec and Jan

SOURCES:
- **ILO** "Working on a warmer planet: The impact of heat stress on labour productivity and decent work" (2019) and "Heat at work: Implications for Safety and Health" (2024).
- **World Bank** "Climate Risk Country Profile South Africa" (2021).
- **South African Weather Service** "Climate Summary" (2023).
- **DBE** "School Realities" (2022).
- **National Education Union** "Hot weather and classroom temperature" (2023).
- **Equal Education** "School Infrastructure" (2019)
- **Wills** "South African teacher shortages as revealed through class sizes and learner-educator ratios" (2023)

4 FACTORS THAT EXACERBATE HEAT HEALTH RISKS

4.1 POOR INFRASTRUCTURE:
- Vast resource disparity between public schools
- Government slow in providing/ maintaining infrastructure
- Many schools without water and/or electricity supply (heightens risk for heat related illnesses)
- Some classrooms constructed from mud, prefabricated materials or shipping containers (poor heat resistance and inadequate ventilation)
- Temperature not regulated in most schools

4.2 OVERCROWDED CLASSROOMS:
- Regulations criticised for being insufficient.
- High educator-learner ratio
- Eg: **49%** of Grade 3 learners in classes greater than **40**.

5 INTERVENTION

Issue unlikely to be addressed through enforcement of education rights and climate litigation (past failure by Department to adhere to infrastructure regulations).

However, existing mechanisms in labour legislation, such as collective bargaining, has not yet been explored and may provide an expedient solution for the following reasons:
- Strong labour rights and labour protection for educators
- Highly unionised sector supports collective bargaining
- Centralised bargaining through a bargaining council in the sector: Education Labour Relations Council
- Potential for a collective agreement to promote the heat health of educators
- May be the catalyst for collective agreements in other sectors
- Foundation for a future formal regulatory response

A collective agreement will promote the heat health of educators and indirectly protect the health of learners as children (a risk category for heat stress)

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Harassment and violence at work through ICT (information and communication technologies). Psychosocial risks, occupational health and safety management.
A study from the application of the ILC 190

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WORK IN A CHANGING WORLD
THE QUEST FOR LABOUR RIGHTS
AND SOCIAL JUSTICE
17-20 September 2024
, Auditorium Parco della Musica

OBJECT OF STUDY

This study focuses on the guarantees of compliance with protective regulations through institutional policies (public and private) and business prevention policies, as a brake on the violation of fundamental rights in their approach from the management of health and safety at work, considering the psychosocial risks that may be caused in the worker in cases of harassment and violence at work through ICT.

CROSS-SECTIONAL STUDIES OF THE RESEARCH

*Limits on the employer's management power: The contractualist conception has been overcome, passing first the assessment of the fundamental rights of the worker entering into conflict with the employer's power of control.-

*Digital rights are centered on protection of the person in the workplace. *Private life of the worker: concept that extends to social relationships with other company workers. *Right to disconnect. Within the day labor. Psychosocial risks: visual and auditory fatigue, stress under pressure for quick responses. The prior duty is imposed on the employer to information that will protect the worker against intrusions into your private sphere.Training on rights protection fundamentals, prevention of harassment and violence in the work will be an effective starting point

CONCLUSIONS

Uruguay: first country to ratify CIT 190: Bases for its application: Tripartite collective bargaining: The State through the Ministry of Labor must promote sector agreements with digital rights guarantee clauses of the workers. Labor Inspection with prevention powers: (Art. 10 lit h CIT 190 and ILO Recommendation 206); training workers, organizations workers; companies and groups of companies; with intimidation powers of the constitution of bipartite occupational health and safety agreements that address harassment and violence in work carried out through ICT and the associated psychosocial risks; with powers of sanction, interruption of work activity and closure of the establishment

CONCEPTS ANALYZED

Harassment and violence at work through ICT.

¿Is it an extension of the same concept of harassment and violence? ¿Or should we think of a different concept?

The concept of harassment and violence at work in ICT in a different:

***The damage is greater considering the time elapsed and the circumstances in which it occurred.**

***The same video, recording, photograph or digital documentation can be repeated by countless people with different intentions and outside the border of residence of the victim.**

***The victim of harassment or violence in the workplace is exposed to their image, video, recording, or other data such as union affiliation, policy, opinion, is disclosed in any stage of your work or personal life.**

***The disclosure of an intimate video or recording of a worker by your co-worker or employers or the threat of disclosure constitutes a conduct of harassment and violence at work that must have regulations that contemplate: the danger of content distribution, the psychosocial risks associated with behavior and prevention policies.**

***The personal data of a worker contained in an electronic database of the company must have regulatory treatment that ensures control of your data, the right to information about the purpose for which they will be used and their duration in the company files.**

***The hyperconnectivity generated in some jobs due to the demand for a response immediate, geolocation, attention to numerous screens, are new ways of exercising violence at work.**

***New manifestations of workplace violence appear: invisible surveillance that lasts in time; omission in the face of evidence of psychosocial risks; diffuse manifestations that they occur in areas where their verification is imperceptible, that is, workplace violence in the digital age it is mutating.**

***These new manifestations of harassment and violence make the task of the legal operator difficult that seeks material truth to dispense justice**

State guarantees for compliance with regulations:

Institutional policies (public and private)

The role of the State in prevention: positive actions

The State must preserve the areas of dialogue between the social parts, faced with the loss of collective spheres and communities generated by new technologies. There is an absence of social cohesion even in the era of hyperconnectivity

The State must promote bipartite health and safety at work, in the public and private sector, which consider the psychosocial risks associated with harassment and violence through ICT. (CIT 155 and 190)

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THE CHALLENGES OF PREVENTING VIOLENCE AT WORK

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CONTEXT:

Definition:

"*The term «violence and harassment» in the world of work refers to a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment*". ILO Convention No. 190 concerning the Elimination of Violence and Harassment in the World of Work of 2019.

More information in the link and in the QR https://www.insst.es/documentacion/material-tecnico/documentos-tecnicos/encuesta-europea-de-condiciones-de-trabajo-2021-datos-espana-2023

Statistical data:

According to data provided by the European Working Conditions Survey 2021 (Spain Data - Year 2023), 6.6% of respondents reported having been subjected to verbal offenses or threats, and 0.3% to unwanted sexual attention. Gender is a determining factor in being subjected to violent behavior, as 8.5% of women suffer from it compared to 4.8% of men, and furthermore, all victims of unwanted sexual attention were women.

More information in the link and in the QR https://normlex.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID,P12100_LANG_CODE:3999810,en

Types of violence in the workplace:

Based on the individuals involved and the type of relationship between them [California Division of Occupational Health and Safety (Cal/OSHA)]:

- **Type I External:** *The aggressor has no legitimate relationship of interaction with the victim. There is no commercial or user relationship between the aggressor and the victim. The most common cases refer to actions with the intent of robbery.*
- **Type II External:** *There is some type of professional relationship between the aggressor and the victim, but not an employment one, meaning the aggressor is a client, a patient, a consumer, etc., and the violence is usually exerted while the service is being provided.*
- **Type III Internal:** *There is some type of employment involvement between the aggressor and the victim with the affected place or with a specific worker of the place.*

Based on the form of manifestation of violence:

- **Physical Violence:** *Includes hitting, pushing, aggression with objects or weapons, and any other form of intentional physical harm against a person in the workplace.*
- **Sexual Harassment:** *Any sexual behavior or behavior based on a person's sex that is unwanted and may affect the dignity of individuals at work. Includes unwanted sexual attention and suggestive behavior.*
- **Psychological Harassment or Mobbing:** *Includes intimidation, threats, humiliation, discrediting, isolation, and other behaviors that affect the psychological and emotional health of the worker.*
- **Moral Harassment or Bullying:** *Refers to actions or words that seek to discredit, belittle, or isolate an individual or group, creating a hostile environment and affecting morale.*
- **Verbal Violence:** *Includes insults, shouting, offensive or derogatory comments, and other forms of verbal aggression.*
- **Discrimination:** *Unequal or unfair treatment based on personal characteristics, such as gender, age, race, religion, sexual orientation, disability, etc.*
- **Cyberbullying:** *Use of information technology to harass, intimidate, or defame a worker.*

REGULATORY FRAMEWORK:

- ILO Convention No. 190 on the Elimination of Violence and Harassment in the World of Work of 2019.
- Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation.
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.
- Royal Legislative Decree 2/2015, of 23 October, approving the consolidated text of the Workers' Statute Law.
- Law 31/1995, of 8 November, on the Prevention of Occupational Risks.
- Organic Law 3/2007, of 22 March, for the effective equality of women and men.
- Royal Legislative Decree 5/2000, of 4 August, approving the consolidated text of the Law on Offences and Sanctions in the Social Order.
- Organic Law 10/1995, of 23 November, of the Penal Code.
- Collective agreements.
- Codes of conduct, plans, and company policies.

THEORETICAL FRAMEWORK:

Workplace violence can constitute a violation of human rights such as the right to dignity, to physical and moral integrity, and the right to equality and non-discrimination. In employment relationships that are subordinate and dependent, the employer is the responsible party for ensuring a safe working environment.

OBJECTIVES:

To examine the main challenges posed by the prevention of workplace violence and to find solutions.

METHODOLOGY:

The aim is to provide real, practical, and relevant solutions for the prevention of workplace violence through a combination of dogmatic methodology, based on qualitative research, with realistic methodology, characterized by quantitative research.

RESULTS:

Main challenges of workplace violence prevention:

Identification of violence:	•Difficulties in defining workplace violence. •Different definitions in national and international regulations. •Various classifications. •Underreporting and lack of incident reporting.
Prevention:	•The need to impact the legal obligations of employers to prevent workplace violence. •Lack of clear prevention policies and training. •Absence of standard procedures to address incidents.
Protection:	•Determining the responsibility of employers and employees. •Complications in cases involving third parties (customers, patients, the general public). •Difficulties in assuming responsibilities when violence is perpetrated against self-employed workers. •Limitations in compensation and support for victims.

CONCLUSIONS AND RECOMMENDATIONS FOR FUTURE LEGISLATION:

- Spanish legislation should offer a concept of workplace violence in line with ILO Convention No. 190.
- Spanish legislation should provide a typology of workplace violence.
- Training should be emphasized as one of the employer's obligations in the field of occupational risk prevention.
- Public policies for training and awareness are needed.
- The establishment of protocols against workplace violence is necessary.
- Prevention and protection against violence in new work environments, as well as in self-employment, domestic work, care work, and all those where violence can be exercised by a third party, should be enhanced.
- A system of responsibilities should be created with a greater emphasis on compensation and reparation of damage.

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REASONABLE ACCOMMODATION FOR PERSONS WITH DISABILITIES - THE MATTER OF EQUAL TREATMENT IN EMPLOYMENT OR THE INSTRUMENT OF HEALTH AND SAFETY AT WORK?

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1. Reasonable accommodation v. accessibility

Accessibility - a general concept, ex ante duty to provide universal design or assistive technologies.

Reasonable accommodation - ex nunc duty**,** shall be adopted where needed in a particular case (individual's needs in a particular workplace at a particular employer). An employee requires the access to non accessible workplace or working conditions.

2. Reasonable accommodation - part of equality law (EU law, UN Convention of Rights of Persons with Disabilities, national laws - e. g. *the Czech national law defines the refusal or denial to provide reasonable accommodation as a form of indirect discrimination based on disability).*

3. **Examples of reasonable accommodation:**

- Adaption of the employer's premises or workplace,
- Adaption of working equipment,
- Adaption of patterns of working time (distribution of shifts, length of working hours including their reduction),
- Adaption of distribution of working tasks,
- Providing a special training (including training on health and safety at work),

4. **Close connection to health and safety** – denial or refusal to provide reasonable accommodation increase possible risks at work, may cause deterioration of an employee's impairment and reduction of working capacity.

5. **Conclusions -** reasonable accommodation should be incorporated into national laws regulating health and safety at work. Employees with disabilities should be entitled to reasonable accommodation when assessing possible risks at work. Denial or refusal to adjust working conditions to an employee's with a disability, where needed to ensure health and safety at work, should be treated as a breach of the employer's duty in the field of health and safety at work.

MUNI LAW

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Spanish viewpoint

THE PREVENTION AND MANAGEMENT OF PSICHOSOCIAL RISKS IN TELEWORK

BACKGROUND

Psychosocial risks are common across all sectors, activities and leads of work. However, these occupational risks are particularly prevalent in teleworking. According to an ILO report (Healthy and safe telework), the main adverse effects of teleworking are stress, social isolation and work-family conflicts. These effects can lead to increased feelings of loneliness, irritability and guilt, with the perception of not having devoted enough time and attention to both professional and family responsibilities. In this regard, it makes no difference which type of remote work is involved, as any of these psychosocial risks can be present in any of these models. So, in these circumstances, the prevention and the management of psychosocial risk is essential in telework.

In the Spanish legal system, this issue is regulated, principally, in :

- Act 31/1995 *on the prevention of occupational risks*
- Act 10/2021 *on telework ing* (LTD)

Criteria for the the evaluation and diagnosis of psycosocial risks

According to Art. 15 LTD **the risk assessment and the planning of preventive activity in telework must consider psychosocial factors**, paying attention to five considerations:

- The assessment of psychosocial risks must be initial -at the moment of implementation of teleworking-, rather than on demand or *a posteriori* when any of these risks materialise.
- The assessment must take into account the particular conditions under which telework is implemented: 1) whether it is online or offline (type of telework); 2) whether it is 100% remote or combined with face-to-face work; or 3) whether it is carried out from the worker's home or from a satellite centre or telecentre.
- The assessment should be updated when the teleworker's working conditions change (e.g., change in the number of days on which the teleworker works remotely).
- The assessment should be carried out using methodologies that are of demonstrable quality and reliability (e.g., ISTAS 21 method).
- Assessment should be carried out by competent personnel, rejecting the idea of 'SELF-ASSESSMENT' by the teleworker.

Psychosocial risk factors:

- **Working time management**: excessive autonomy and flexibility in the organisation of work schedule by the teleworker; constant availability of the teleworker; unequal distribution of working time between remote work and on-site service.
- **Work content:** monotonous and repetitive content of tasks, facilitating dispersion; continuous demands of dealing with people or public which may lead to repressed emotions or feelings; fragmented or meaningless work cycles; excessive or insufficient workload; time pressure; strict or imposed deadlines.
- **Job performance**: imprecise definition of objectives to be achieved; inconsistent, contradictory or incompatible job demands; assignment of functions that do not correspond to the job performed.
- **Personal development**: poor job evaluation by the company; job insecurity; inadequate pay; lack of or excessive career advancement.
- **Personal relationships:** poor communication between colleagues and superiors; lack of social support for the teleworker; conflicts; tolerance of inappropriate behaviour.
- **Participation and control**: lack of participation of teleworkers in decision-making (e.g. work rhythms or working hours); increased control through keyloggers.
- **Work-home interaction**: problems of dual presence; work-life balance problems.
- **Personal and professional characteristics of the teleworker:** personality; age; gender; professional skills for the development of remote tasks.

CONCLUSIONS

- **The conditions under which teleworking takes place [1) delocalisation of the worker; 2) organisational autonomy of the worker; and 3) ICT as a working tool] make it the 'ideal combination' for the emergence of psychosocial risks.**
- **The occurrence of psychosocial risks will depend on the particular conditions under which telework is implemented.**
- **The subjective element of psychosocial risks (personality or family situation of the teleworker) complicates their diagnosis. Faced with the same factor, one teleworker may act in one way and another teleworker in a different way.**
- **In Spain, mental disorders are difficult to classify as occupational diseases.**

Psychosocial- prevention measures:

- **Training on occupational risk prevention** for teleworkers and middle management, with the aim of enabling them to: 1) identify psychosocial risk factors; and 2) know how to respond to them.
- **Organisational measures** to ensure social interaction and avoid isolation (e.g., requiring the teleworker's regular presence at the workplace or holding regular meetings).
- **Policies of digital disconnection and working time control** (through time recording systems) are essential in telework, given the ease with which teleworkers can intensify,extend working hours and make working time more flexible.
- **Monitoring the workers' health**, promoting the quantity and quality of medical examinations on the mental health of teleworkers for the purpose of prevention and early detection of possible work-related psychological disorders.

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Psychosocial disorders are the disease of the future. They can affect any worker and can occur in any form of work, including telework

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ECOLOGICAL TRANSITION AND PSYCHOSOCIAL RISKS IN AGRICULTURE

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I. PSYCHOSOCIAL RISK FACTORS (Samples)

1.-**Agricultural transition or reconversion**: lifelong learning needs; insecurity; growth of monotonous and repetitive tasks;

2.-**Vulnerability to climate change:** increasing unpredictability; extreme weather events (growing psychological pressure); sustainability;

3.- **Unmet expectations and financial insecurity:** including economic losses

4.-**Size of farms and precariousness of work:** self-employment, temporary, informal, migrants and women;

5.-**The working conditions themselves:** hard and arduous tasks; long working days; time pressure; isolation; risks associated with heat and radiation;

II. MEASURES TO BE TAKEN (MAESST 2021-2027/DM - revision? -/ILO Convention 184 and Recommendation 192) (Most important)

Training, awareness raising on OSH standards

Promotion of fair and safe working conditions;

Assessment of risks arising from high temperatures; intense or sustained physical and mental strain, work-related stress...

Adaptation of technology to climatic conditions, work organisation;

Adequate and simplified tools for preventive management, aids and incentives for the promotion of OSH -including mental health- and promotion of participation and specific collective bargaining.

Gender approach

Overcoming the view of OSH as an economic cost/bureaucratic burden.

Rotation, alternation of tasks and other measures against heat.

Specific, adequate and quality health monitoring



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DECARBONIZATION AND PARTICIPATION IN OCCUPATIONAL RISK PREVENTION IN SPAIN AND FRANCE: A COMPARATIVE STUDY

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Proyecto "Retos y oportunidades de la descarbonización para el sistema de protección social y prevención de riesgos laborales", PID2022-39922NB-C22 financiado por MCIN/ AEI /10.13039/501100011033 / FEDER, UE).

INTRODUCTION

The need to decarbonize the activities of companies has repercussions in the field of occupational risk prevention as it entails different transformations. It is essential to pay special attention to the mechanisms of worker representation and participation in the company as a way of involving them in the objectives of a safe and healthy occupation, based on the fact that they cannot be guaranteed without the environmental objectives running in parallel and concordant, and vice versa.

OBJECTIVES

- To analyse the treatment of worker participation in occupational risk prevention and environmental matters in Spain and France, as a pioneer country in the latter.
- To determine whether they can contribute to achieving climate neutrality of production activities and, in turn, to ensure occupational health and safety.

RESULTS

Spain (Ley de Prevención de Riesgos Laborales, Estatuto de los Trabajadores, Ley Orgánica de Libertad sindical).

- The workers' representatives for the prevention of occupational risks are the *Prevention Delegates.*
  - They must be consulted on the impact of environmental factors at the workplace and are empowered to accompany technicians on preventive assessments of the working environment.
- *Works Councils, Personnel Delegates* and *trade union representatives* are responsible for defending workers' interests in the prevention of occupational risks*;*
  - *Works Councils and Personnel Delegates* are informed of the company's environmental actions only if they have a direct impact on employment, and collaborate with the company to achieve environmental sustainability if this is agreed in the collective bargaining agreement.
- In collective bargaining: assignment of environmental competencies; creation of joint bodies with competencies in both matters, and of the environmental delegate.

France (Code du travail)

- *Social and Economic Council (*replaces and merges the previous representative instances).
  - They must be informed and consulted on the environmental consequences of issues relating to the organisation, management and general operation of the company. During consultations on the company's strategic orientations, its economic and financial situation, its social policy and on working and employment conditions, *Social and Economic Council* shall be informed about the environmental consequences of the company's activity.
  - Right of warning: products or manufacturing processes used or implemented by the company pose a serious risk to public health or the environment.
  - Training course for members of the *Social and Economic Council* on the environmental consequences of business activity. With limitations. Not compulsory.
- Relevance of collective bargaining: Accord National Interprofessionnel du 11 abril 2023 á la transition écologique et au dialogue social.

CONCLUSIONS

- In France, an important role in environmental matters is attributed to the Social and Economic Council.
  - Occupational risk prevention is linked to the environment: consultations allow proposals to be formulated to reduce environmental impact and to ensure health and safety. Regulations could be reviewed, restrictions removed, their involvement increased and training made compulsory.
- In Spain, the legislator should increase the powers of workers' representatives in environmental matters, based on the French regulations, the hourly credit, and establish compulsory training in this area.
  - The figure of the Prevention and Environment Delegate could be created, bringing together the prevention and environmental perspectives in a joint approach.
- In this way, worker participation through their representatives can contribute to achieving the objective of climate neutrality in production activities and to safeguarding their health and safety.

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EUROPEAN DISABILITY AND THE RIGHT TO JOB PRESERVATION IN CASE OF ILLNESS ABSENCES

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The dismissal due to exceeding **the period of job retention in cases of employee absences due to illness** (so-called "comporto") is a highly topical issue. This is particularly relevant when the worker, regardless of recognition of disability under l. n. 68/99 or the benefits of l. n. 104/92, is affected by a disability according to the interpretation that permeates anti-discrimination law derived from the European Union.

This interpretation is significant in relational terms, as it considers the exclusion processes determined by various external barriers. This perspective is based on the application of the **bio-psycho-social model** adopted by the United Nations Convention on the Rights of Persons with Disabilities in 2006, which was ratified by the European Union in 2009 and referenced by the European Court of Justice when interpreting Directive 2000/78.

A notable ruling in this regard is the **HK Danmark case** (CGUE April 11, 2013, C-335/11), where the Court attributed the subjective factor of disability to a pathological condition that has caused a long-term illness, even if curable and temporary, but nonetheless limiting full and effective participation in work.

In this context, **disability is to be understood as a dynamic and evolving process**, no longer measurable a priori but exclusively ex post, considering the relationship with the environment in which the person with functional impairments is placed (Cass. n. 17629/2023).

This is a broad concept, suggesting that the job retention period in case of illness-related absence should not be the same as for other able-bodied workers. Additionally, absences related to the state of disability should not be counted towards this period (CGUE January 18, 2018, Ruiz Conejero, C-270/16).

Of the two principles affirmed by the Court of Justice, the first has been endorsed by the Court of Cassation, which established that applying the standard job retention period, as provided by the collective agreement, to a disabled worker in case of illness-related absences **constitutes indirect discrimination**. This operates objectively, making the subjective intent irrelevant, as well as the knowledge of conditions that lead to detrimental treatment, and thus also the worker's inclusion in the protected category (Cass. n. 9095/2023).

This requires, in order to preserve the legitimacy of the dismissal, the preventive adoption by the employer of adequate measures to avoid the disadvantages caused by protection norms (art. 2 and 5, Directive 2000/78/EC).

The reference is to so-called reasonable accommodations (art. 3, co. 3-bis, d.lgs. n. 216/2003), such as, for example, extending the "comporto" period or excluding illness periods related to the disability from its calculation (Cass. n. 11731/2024), constant monitoring of job suitability, or reducing working hours (CdA Naples, January 17, 2023), suspension without pay, pursuant to Article 10 of Law 68/99, for the entire duration of the illness that is incompatible with the job (CdA Genova, June 9, 2021).

Other examples include redistributing staff tasks to assign the employee duties compatible with their condition (Rome Tribunal, May 8, 2018), granting smart-working (Trib. Rovereto, November 30, 2023), notifying the employee of the impending expiration of the "comporto" period (CdA Trento, March 9, 2023), and assigning the worker to lower-level tasks without compromising their dignity, provided there are compatible positions available that only require a different modulation of work shifts (Trib. Lodi, February 9, 2023).

These solutions must be carefully considered before deciding on dismissal, whether the disability was knowingly ignored or could have been identified with ordinary diligence (Cass. n. 14316/2024).

However, their adoption requires evidence of a prior request for information regarding whether the illness-related absences are connected to a state of disability, which the worker cannot obstruct, as the process of identifying reasonable accommodations cannot proceed without dialogue and consultation between the parties. This is also in light of the proactive role recognized for the employee, who is entitled to make proposals in seeking the optimal solution to safeguard their job (art. 5-bis, l. n. 104/1992).

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A particularly important principle of European Union social law.
Entitlement to paid annual leave is a substantial *(inter alia)* from these points of view:

- Stress Reduction
- Energy Renewal
- Improvement of Mental Health (Protection against Psychosocial Risks)
- Prevention of Long-Term Health Issues
- Support for Work-Life Balance
- **HEALTH AND SAFETY**

- Workers receive their normal remuneration throughout that period of rest and relaxation (C-131/04 and C-257/04) so they can rest and hence prevent risks at work and personal life. This entitlement cannot be lost even upon termination of the employment by worker's death (C-118/13).

- The entitlement to paid annual leave cannot be lost (at least in the form of an allowance in lieu of leave) even if the employment relationship is terminated by the death of the worker (C-118/13).

- Also, upon the death of the worker, the right to paid annual leave acquired under those provisions and not taken by the worker before his death cannot lapse without being transferred to an allowance in lieu of that leave which is transferable to the employee's legal heirs by inheritance (C-569/16 and C-570/16)

- A worker who has been unlawfully dismissed from his employment and then reinstated in accordance with national law following a judicial decision annulling his dismissal is entitled to paid annual leave for the period from the date of his dismissal until the date of his reinstatement on the ground that he did not actually work for the employer during that period (C-762/18 and C-37/19, C-57/22). Exception: the worker, who was in other employment between the date of his unlawful dismissal and the date on which he was reinstated in his first employment, cannot claim annual leave entitlements against his first employer in respect of the period during which he was in other employment.

A worker may not be deprived of their right to paid annual leave as a result of an employer's fault in unlawfully dismissing a worker. This underlines the importance of paid annual leave as a tool of protection against psychosocial risks.

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New approach to the prevention of psychosocial risks: new professions and vulnerable groups.

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INTRODUCTION

Mental health is the unresolved issue in terms of risk prevention, largely due to the absence of social awareness (although there is growing concern in this respect) that gives these health problems the value they really have.

Currently, the massive use of the Internet and new technologies, as well as their application to the world of work, has led to the appearance of new psychosocial risk factors, which have meant that certain professions that until recently were considered safe and exempt from classic risks (physical, biological, chemical, etc.) are now presented as professions with a high psychosocial risk. In this context, we are going to focus especially on the impact that reviews and surveys on the Internet as a mechanism for evaluating workers can have on their mental health, and which configure them as a new psychosocial risk factor.

NEW VULNERABLE GROUPS AND PROFESSIONS

The three types of surveys that can constitute a major psychosocial risk factor are:

- **Anonymous third-party public**: This occurs mainly in the service sector, especially in the hospitality industry, health sector, public administration. Reviews are often public on the internet. Anonymous criticism can damage the reputation of the company and its employees, affecting their stress levels and mental health.
- **Anonymous private third party**: The most paradigmatic example is that of university professors. Surveys have a significant impact on teachers' academic and professional lives, affecting their promotion, contract renewal, course assignments, participation in research projects, and general perceptions within the academic community. The enormous weight of the surveys can generate high levels of stress and anxiety in teachers, especially in those who are in a situation of job instability. In addition to the demotivation caused by false, biased reviews which, being anonymous, do not allow the teacher to defend him/herself.
- **Anonymous private surveys of other workers in the company**: These surveys can occur in any company and their anonymity can lead to false accusations against a worker, which can have repercussions on their professional career, their prestige and their mental health.

ANONYMOUS SURVEYS AND REVIEWS

Nowadays, new technologies have introduced a new mechanism for work evaluation, consisting of online ratings or reviews, some of them derived from surveys. These evaluations of a job or service can be public (e.g. Google reviews, or reviews on a website) or internal to the company. Within the latter, reviews can come from third parties (customers, patients, students) or from other company staff, and can be anonymous or identifiable.

EMPLOYER'S REACTION

Different ratings require different actions by the employer:

- **Public assessments**: in those that occur on the internet or other media, whether websites or social networks, the service provider should be responsible for the verification and control of the content; however, if the assessment is about workers in relation to their work, the employer must be able to request the provider to remove them if they are not truthful or if they contain hostile content.
- **Internal or private assessments**: the employer is responsible for checking the accuracy of the assessments and that they do not violate the law. In addition, the employee must be offered the right of reply and/or defence.

CONCLUSION

There is a need for greater protection of workers from anonymous reviews, which can seriously affect not only their careers but also their mental health, and can in some cases constitute harassment. It is therefore necessary to establish mechanisms such as: avoiding qualitative surveys (only numerical) or avoiding anonymity.

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Work-related psycho-physical risks: impact on fitness for work and countermeasures

Mental health protection:

1) Mental health is one of the universal human rights and

2) **It results from the obligation to provide employees with safe and hygienic working conditions**

CONCEPT

The concept of psychosocial risk is a type of interaction between the content of work, work organization, management system and the competencies, needs and individual characteristics of the employee (ILO).

EXAMPLES PSYCHOSOCIAL RISKS

Excessive workload, lack of influence on the way work is performed, job insecurity, ineffective communication, bullying, discrimination, harassment, shift work, unusual working hours can cause stress, anxiety, burnout.

NEW TYPES OF PSYCHOSOCIAL RISKS

1) People working via online platforms

2) Remote work

3) Algorithmic management

4) Climate change

PSYCHOSOCIAL RISKS

LEGAL REGULATIONS

1) Directive 89/391/EEC on the introduction of measures to encourage improvements of safety and health of workers at workplace.

2) Resolution 2021/2098 on mental health in the digital world of work.

3) Resolution 2021/2165 on a new EU strategic framework on health and safety at work after 2020.

IMPACT ON WORK CAPACITY

Decreased quality and efficiency of work, depression and burnout can cause inability to work, leading to accidents at work. Burnout was included by the WHO in the International Classification of Diseases in 2019 as a syndrome resulting from chronic stress in the workplace.

RESEARCH

27% of employees experience stress, anxiety or depression caused by work or made worse by work (EU-OSHA, 2022). In Poland, the number of sick leave certificates issued due to mental and behavioural disorders increased by 8.7% in 2023, compared to a 2022. Accounting for 60% of sick leave.

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Part V
Digitalization, AI and employment

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DECARBONIZATION AND THE CHALLENGE OF PROTECTING PRIME-AGE WORKERS

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PROYECTO: *"RETOS Y OPORTUNIDADES DE LA DESCARBONIZACIÓN PARA EL SISTEMA DE PROTECCIÓN SOCIAL Y PREVENCIÓN DE RIESGOS LABORALES"*, PID2022-139922NB-C22 financiado por MCIN/AEI/10.13039/501100011033/FEDER, UE

INTRODUCTION

The decarbonization process consists of a transformation of the productive system that this will entail a deep reestructuring of many sectors, as well as the need for their reconversion in accordance with the new energy paradigms

OBJECTIVES

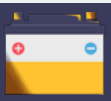


1.- To analyze the role of social protection systems as ancillary instruments of employment policies and as an accompaniment to business decisions.

2.- Specifically, analyzing the regulations of the retirement pension in restructuring or workforce rejuvenation plans.

RESULTS

On the one hand, the massive elimination (or at least the essential transformation) of numerous jobs, depending on the sector, with the consequent expulsion of certain workers (of mature age and low qualification) from the labor market.



On the other hand, the reconstruction or reinvention of such sectors for which the current labor qualifications will have to be replaced by new ones. Professional retraining not always possible in the group of older workers.

CONCLUSIONS

-The problem of granting workers of mature age a dignified exit by favoring early retirement.

-Reformulate the current requirements for access to retirement at the ordinary age, as well as the determination of the amount of the pension itself, in order to prevent the energy transition from implying the lack of protection.

- Promote the possibility of making retirement pensions compatible with the performance of a professional activity and with the protection offered by the unemployment protection system will be addressed.

- Make a prior selection of the activities and sectors in order to avoid social engineering operations with the purpose of rejuvenating the workforce by shifting the cost to the Social Security system.

-Address the current situation of incentives for mature workers or workers over retirement age to check their efficiency in the new production scenario.

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PLATFORM WORKERS: CHALLENGES IN REGULATION FOR SOCIAL SECURITY

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Factual Situation



- In the EU, over 28m. workers are currently employed via a digital platform; approx. **43m. in 2025**.
- Primarily in passenger transportation and food delivery.
- Strong upward trend.
- The solo self-employed (freelancers) are a particular focus of attention, as they in particular are deployed by way of platform employment.
- **Increasing Gigworking and Crowdworking, need for social protection**.

Legal Situation: Missing definition of worker, no regulation on EU Level



- **Upcoming EU Platform Work Directive**: employment relationship can be assumed if, in accordance with national legislation, collective agreements or the practices of the Member States and taking into account EU case law, **facts are established which indicate control and direction**.
- Art. 153 TFEU: basis for an **autonomous definition to be developed from EU law**.
- But: The ECJ has not yet defined "worker" within the meaning of Art. 153 TFEU.
- According to the ECJ, it follows that the status of 'worker' within the meaning of EU law is not affected by the fact that a person has been **hired as a self-employed person under national law, for tax, administrative or organizational reasons**, as long as that persons acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work ([…]), does not share in the employer's commercial risks ([…]), and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking ([…]). (ECJ 4.12.2014 - C-413/13 para. 36, FNV Kunsten).
- **Also "false self-employed persons", situation comparable to that of employees** (ECJ 4.12.2014 - C-413/13 para. 42, FNV Kunsten).

No existing regulation; not applicable for Platform Worker:



- The Modernized Coordination Regulation (EC) No. 883/2004 & Implementing Regulation (EC) No. 987/2009 applies throughout the EU, also Switzerland and the EEA:
  - usually link to the (one) Member State in which the activity is carried out;
  - working periods in several Member States with a certain regularity over the next 12 calendar months: overall assessment of all the facts.
- Directive (EU) 2018/957 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

Potential Legal Basis on EU Level



- Purpose of **Art. 153 TFEU**: to grant the EU competences in the field of social policy, closely linked to the objectives set out in Art. 151 TFEU.
- **Self-employed persons are also the subject of social policy measures** - namely if they prove to be in need of protection from this point of view. This may be the case in particular for persons who are economically dependent on a client and are therefore **comparable to an employee.**

Suggestions for Solutions



- **Art. 153 para. 1 TFEU: only minimum harmonizing directives, but not regulations.**
- **Exception: Art. 153 para. 1 lit. c TFEU authorizes the regulation of substantive social law.**
- **Minimum requirements for Platform Worker would be a start in the further development of the law.**
- **Creation of a minimum level: based on average income.**
- **General compulsory insurance for all kinds of employees -> pay-as-you-go system ensures stability (e.g. Switzerland).**
- **Recommendation: also include Platform Worker in general compulsory insurance solutions;** overall assessment of all the facts (seat of the platform, place of performance, residence of the Platform Worker).
- **3-pillar system for retirement provision: state pension, occupational and private provision (e.g. The Netherlands).**

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The concept of subordination as a criterion for determining the status of an employee in the light of case law of the Court of Justice and polish experience.

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INTRODUCTION

Despite the spread of flexible forms of employment, subordination is still a condition for the existence of an employment relationship.

OBJECTIVE

Analysis of the concept of employee subordination as a determinant of employee status within the meaning of secondary European law.

Identification of the criteria determining employee status in Polish labour law.

METHODOLOGY

Analysis of judgments of the Court of Justice explaining the concept of employee in the context of fulfilling the condition of performing subordinate work.

Analysis of provisions of the Directive (EU) 2019/1152 and the Directive 2023/970 in terms of how they define their subjective scope.

Analysis of Polish court judgments regarding the criterion of subordination in employment relationships and in non-employee forms of work.

Analysis of provisions implementing selected EU directives into Polish law in order to verify consistency with the personal scope of the directives.

RESULTS/FINDINGS

According to Polish regulations and practice, a certain degree of subordination may occur in legal relationships other than employment relationships. If the nature of this legal relationship is maintained, establishing the existence of an employment relationship will be impossible.

It is not so much the formal legal basis of employment that is important, but the economic dependence on those who decide on the form of work provision.

CONCLUSION

Differences in the scope of determining employee status translate into the subjective scope of workers covered by the provisions of national law implemented on the basis of the directives.

In the Polish legal system, it is necessary to extend the concept of worker. If not, some people performing work will not be covered by the provisions of European labour law due to the fact that the definition of an employee in national regulations does not coincide with the definition resulting from the case law of the Court of Justice

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NEW DEVELOPMENTS IN TAIWAN'S LABOR OCCUPATIONAL ACCIDENT INSURANCE SYSTEM

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Introduction

In May 2022, Taiwan's Labor Occupational Accident Insurance and Protection Act was enacted by merging the workers' occupational accident insurance benefit provisions of Labor Insurance Act and the Act for Protecting Worker of Occupational Accidents, which provides minimal assistance to workers who do not enter workers' accident insurance and a separate benefit to those insured by workers' accident insurance. With this law's implementation, a comprehensive legal framework was established to address prevention, compensation, rehabilitation, and workplace reintegration for occupational accidents.

Problems with the system before

(1) The entire system has a multi-layered application structure, and the burden of proof differs depending on the legal basis of the claims of the parties,
(2) There were some workers who were not obliged to join the insurance system, such as those working in small-sized enterprises employing less than five workers,
(3) If an employer does not report to the Occupational Insurance Bureau that a worker is newly insured, the worker will not be covered by the Occupational Insurance, and in the event of an occupational accident, the worker will have no choice but to claim compensation from the employer.

Features of Taiwan's Labor Occupational Accident Insurance and Protection Act

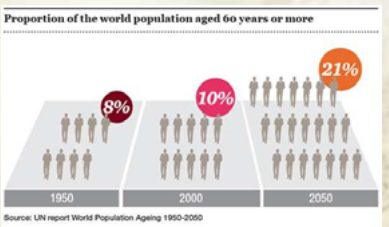
(1) The coverage of insurance has been expanded, and those who were previously considered voluntary, such as those working in small-sized enterprises with less than five workers, are now obliged to join the insurance. In addition, the complex multi-layered application structure of insurance and protection provisions has been unified.
(2) In cases where there is an obligation to enroll in insurance, regardless of whether or not the employer has completed the declaration procedures, in principle, the workers' compensation insurance relationship begins on the day the worker enters the employment.
(3) In addition to compulsory enrollment and enrollment through occupational unions, a new “special enrollment” system was established for platform workers and others who do not want to pay union dues, participate in union activities, or enroll in ordinary accident insurance, but wish to enroll in workers' accident insurance.

Platform Workers' Accident Compensation Insurance

After the establishment of the special enrollment system, the means for platform workers to enroll in occupational accident compensation insurance will be as follows. If the platform worker has an employment relationship with the platformer, he/she will be compulsorily enrolled in insurance with the platformer as the insurance enrollment unit. If no employment relationship with the platformer is established, the platform worker may join a occupational union as a self-employed person and enroll in insurance through the union. In this case, the insured person pays 60% of the premiums for the insurance, and the central government subsidizes the remaining 40%. Platform workers who are not members of an occupational union may purchase insurance on their own through the special enrollment system. In this case, the premiums for insurance would be fully paid by the Platform workers.

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La passione per le conoscenze

The world has changed significantly in the time passed since the last ISLSSL World Congress held in Turin in 2018. Covid, wars and political crises suffered by different countries had a strong impact on the world of work. Digitalization and globalization are the factors which still reshape regulations and challenge the social justice all over the world. The World Congress in Rome has set the objective to discuss those trends within five broad topics covering both individual and collective labour and the social security issues. In this volume we have collected the papers of the keynote speakers of the Congress considering different aspects of the modern quest for labour rights and social justice.

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