The quest for labour rights and social justice

Work in a changing world

Edited by
Marco Mocella, Elena Sychenko

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

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The process of integration, triggered by globalisation of financial and capital markets, has led labour law to rethink its values and its legal foundations. The increasing integration between national and supranational legal systems, on the one hand, and the emergence of new transnational relations, on the other, needs to be identified, understood and regulated through binding and non-binding legal instruments.

Within this innovative framework, we propose a new edition of the prestigious book series on labour law, formerly directed by the late Professor Giuseppe Pera. This series is now open to contributions elaborating on national and transnational regulatory developments, including those premised on law and economics analyses and on impact assessment methodologies. The editors encourage a correct use of the comparative method, opened to the analysis and the understanding of the socio-economic, cultural, and anthropological context.

The multinational and multidisciplinary composition of the Scientific Board seeks to reflect the intellectual aspirations and interest of the series which should promote a dialogue between labour law and other legal disciplines in order to understand its conceptual development in a European and global context.

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.

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

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

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

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

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

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.

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.

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

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

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.

[*] 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

[*] Spanish version.

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

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.

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,

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

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,

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.

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,

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

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

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*

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.

 ISBN 9788835167532

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.

[1] Rector Universitas Mercatorum.

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.

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.

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.

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.

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.

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.

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*).

"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

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.

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).

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 and 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.

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.

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.

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,

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.

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 "calificador 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.

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.

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

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.*

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*.

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).

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.

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-

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[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).

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.

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),

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).

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.

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).

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.

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.

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

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.

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).

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

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

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.

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

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

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.

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.

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

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.

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.

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*.

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.

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),

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.

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,

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*

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.

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.

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.

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

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.

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.

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

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

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

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.

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.

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*.

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.

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

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*.

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

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;

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

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-

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.

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.

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

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.

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.

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

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

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

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).

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,

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).

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

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

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

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).

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[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.

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.

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).

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*).

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).

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).

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.

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.

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,

[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).

social 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).

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.

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.

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

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

[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.

first introduced, old-age as a social risk was based on the presumption of 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,

[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).

might be perceived more as an active employment measure (AEM) and not a '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

[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.

or losses). With NDC schemes a mixture of public and private schemes is 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.).

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.

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.

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.

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.

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

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.

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.

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.

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.

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*.

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.*,

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).

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, also following 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 the Constitution.

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

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).

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 ofthe 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.

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.

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

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.

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

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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.

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

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,

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.

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).

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.

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.

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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Part 4
Occupational health issues

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Suicidio vinculado al trabajo: ¿una realidad en cuarto creciente?

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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.

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.

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

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.

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) núm. 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 "faute 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.

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.

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.

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 físico 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/*.

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.

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.

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.

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.

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.

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.

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.

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.

"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.

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.

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.

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.

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.

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.

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.

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

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*.

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*.

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

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

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.

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

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 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).

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).

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

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

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

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

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

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.

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

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.

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

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.

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

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.

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.

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.

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.

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:

– *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

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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El derecho laboral en las plataformas digitales de trabajo

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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.

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.

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

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).

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

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).

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] la 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

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.

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 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

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

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

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.

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.

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*.

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 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:

[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.

1) The third category of economically dependent work have been regulated 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.

[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.

4) The universal application of certain employee rights to non-employees 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.

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.

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.

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".

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

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

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).

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 –

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

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!

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

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

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.

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

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 review

[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).

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).

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

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

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

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

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

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

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.

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.

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.

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].

[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.

However, 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.

Table 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.

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).

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.

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.

Table 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.

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.

Table 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.

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*[1]

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.

[1] Based on: Krathwohl, *A Revision of Bloom's Taxon*omy, cit., p. 214, table 2.

Textbox 2: *Structure of the cognitive process dimension*[1]

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

Table 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 outcomes; 2) structure classroom activities; and 3) assess student's learning

[1] 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).

progress[2]. 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.
2) The quiz enables students to refresh their memories and recollect their knowledge.

[2] *Bloom's Taxonomy: The Ultimate Guide*, cit., p. 9-11.

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.

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[3]. These courses are all set up with short videos followed by questions with instant feedback on the answers to the questions. Most of

[3] 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).

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

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[4], 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[5]. Like with

[4] See for more details on the website of the Institute for Experiential Learning: *experientiallearninginstitute.org/what-is-experiential-learning/* (accessed 11 July 2024).

[5] 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).

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[6]. 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

[6] 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).

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

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.

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.

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).

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

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

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.

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.

(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

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.

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<?> 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<?> are exempt from ordinary working hour regulations, on the condition that a labor-management committee<?> 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<?> 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*

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.

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).

(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.

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*.

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.

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).

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).

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

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.

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.

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.

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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