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focus on Best practices in labour law comparativism

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Negotiating telework: thinking outside the comfort zone

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1. *Introduction*

The European social partners have made new attempts to find an updated agreement on telework. Labour markets experienced a rapid rise of telework worldwide since the Covid-19 pandemic. During the sanitary crisis, it was central to the many measures taken by governments and companies alike. In this context, telework became even a general rule for many situations of work, either recommended, or mandatory. Yet, telework is not a novelty. Teleworking has long been on the policy and labour law agenda. In 2002, the European social partners concluded a European framework agreement on teleworking. It is also a fact that telework is here to stay. Recently, European-wide negotiations started in the framework of European social dialogue to update the rules on telework, including the role of working time and the right to disconnect. The negotiations have not yet led to a final agreement. Negotiating telework requires a real effort. The Covid pandemic taught us that telework presents many challenges, especially given its almost inevitably specific and rather disruptive dimensions of time and location. Those challenges are also legal in nature. This editorial contribution aims to foster the discussion and proposes that a negotiated instrument on telework will have to take on a number of novelties and will need to fit within a new paradigm shift related to work and employment relations. The focus will be on discussions related to working time law in light of telework.

2. *Telework: a solution for which problem?*

The rise of new ways of working, with the use of digital technologies, is irreversible. Whereas telework, in many cases also known as "hybrid working", a combination of telework and "office work", became a necessity during the pandemic, it now has become structurally embedded in our labour markets. Organising telework is, however, a real challenge. Many organisations have embraced telework as a regular feature of the new way of working. But there is also reluctance, with some work organisations even falling back to older ways of working, with more office work, in order to avoid various downsides connected to telework.

What telework has taught us during the pandemic is that it brings new concerns. For example, teleworkers run the risk of missing information and/or lacking communication. Notwithstanding the positive sides of working remotely, the value of physical presence and (often informal) information and communication in person should not be underestimated. Another issue with working remotely is the danger of real "social" distance, in its social and mental sense. Being connected to work, to a job, also implies being connected to the organization, and establishing relations with others. This identification with the work environment is less evident in a physically distant world. These issues do not make telework impossible, they are rather points of attention which can be overcome, for example with the right leadership and with appropriate training. At the same time, telework also requires a response to very practical questions. What tasks can be undertaken with telework? Can a teleworker choose his/her own place of work and determine his/her own working time? How will telework be monitored and who bears the costs of telework? These are all justified questions.

The European social partners have responded to some of these questions in the European Framework Agreement on Telework of 16 July 2002. Their actual initiative to start a new round of negotiations on telework, departs from their wider work programme and relies on their earlier response to the digitalisation agenda with the adoption of the "European framework agreement on digitalisation" of 22 June 2020. This 2020 agreement addresses different aspects of the digital agenda for work, including work content, modalities of connecting and disconnecting, the role of Artificial Intelligence (AI) and surveillance. For telework, the aim is to take learnings from the use of telework during the pandemic, hybrid work, the right to disconnect, the

organisation of work, the issue of working time, work-life balance, privacy and data protection.

These are, of course, important issues. But as issues for social dialogue, they pose a number of challenges. The workplace is not a one-size-fits all place anymore. In addition to this, telework, or hybrid working, is not necessarily a "one-size" story itself. Furthermore, the telework discussion goes to the essence of the regulation of work. How do we understand the employment relationship of a teleworker and how is this different from a more traditional employment relationship? The relevant question is to know what solutions telework regulations will be for which kind of problems. Looking into telework, and negotiating telework, requires to be open for a mental shift.

3. *From a classic model to a mental shift*

Telework is an issue that should be seen in the context of a broader development, namely the growing interaction between technology and labour and the shaping of new forms of work on the labour market.

With the idea of the Fourth Industrial Revolution, a fundamental shift in the way we work and live has been announced. The "fourth" industrial revolution draws comparisons with other great strides made in technological progress over time. This fourth revolution concept builds on the growing digitalisation, but is also fundamentally different as a further merging of technologies and the blending of the physical and digital worlds brings new challenges[1].

The core of the problem is that we need to fundamentally rethink how we view an employment relationship. Contemporary labour law is still predominantly based on the view that the employment relationship is a hierarchical relationship in which the employee is "subordinate" to the authority of the employer. As a result, this implies different powers and rights for the employer: the employer's right to direct, to organise work, to give orders and instructions, to exercise control. Hierarchy, like subordination, is not just

[1] SCHWAB, *The fourth industrial revolution: what it means and how to respond*, in *WEF*, January 14, 2016; SCHWAB, *The Fourth Industrial revolution*, New York, Random House Usa Inc., 2017; NEUFREIND, O'REILLY, RANFT, *Work in the digital age, challenges of the fourth industrial revolution*, London, Rowman & Littlefield International, 2018.

a legal construct. It responds to a (distant) past, when people still spoke of "Fordism", but it also responds to a certain need. A classic labour law model has become the result of it. In many labour organisations, such as a factory or even an office, those classical approaches still largely work. But the evolution of the labour market shows that this is only partly so. The standard work situation and ditto employee (full-time, long-term employed, fixed hours, fixed place of work) is giving way to other models. In the final decades of the 20th Century, deviations from the standard form of work have been sought and adapted arrangements such as fixed-term, part-time, temporary work have been implemented. Hence the debate on flexibility and the rise of all kinds of new forms of work.

However, we are entering a phase where our labour relations are evolving at a more fundamental level. A common element is that this is accompanied by new technologies. The "platform economy" is a good example. But telework, or the "virtual" workplace, is another example. Telework is a new way of working. Instead of subordination, autonomy is becoming more essential, as the teleworker is not on the employer's premises and will primarily organise the work him/herself. The teleworker is an autonomous worker. This raises new questions. How can an employer exercise authority over this situation of work, or how can he control the work? The answer is not to be blinded by the legal reasoning that subordination is an initial condition of any employment contract. The prior question is what subordination means and whether it still has a meaning. And perhaps we should move away from a one-size-fits-all narrative. We will have to move to a different definition of the employment relationship. In this way, we can address responses to the right challenges.

4. *The autonomous work relationship and working time*

In an autonomous working relationship, some form of authority will still exist, but it will be based on trust rather than direct control and thus relying more on personal responsibility than on hierarchy. The 2002 European Telework Framework Agreement points at this different way of looking at the employment relationship. In the "general considerations" of the agreement, it is stated that teleworkers are given "greater autonomy in the accomplishment of their tasks". This seems to suggest that teleworkers have

more job-related autonomy in terms of determining how they perform their tasks and define their goals. It may, furthermore, be understood as giving larger degrees of discretion to the worker as to when and how tasks are performed. In section 9 of the Agreement, it is provided that "the teleworker manages the organisation of his/her working time". This implies that the organisation of telework is not bound by the confines and structures of regular and fixed working time arrangements.

This view stands somewhat in contrast with the existing European legal framework. It also may stand in opposition to the practices and needs of work organisations. There remain plenty of telework situations where tasks, performed as telework, will require regular or strict working hours. The labour market's "total" shift to full autonomous work is, most likely, not realistic, and perhaps not desirable in a number of cases. In other cases, however, working hours may simply have no relevance. Autonomy, if present, will refer to increased flexibility in the worker's advantage (such as organising personal time in combination with working time), and the absence of direct control from the employer. In other instances, a teleworker will have no fixed working hours, but will be left completely free. The telework context, indeed, is diverse in itself. The question is whether European Union law currently facilitates this diversity.

5. *The working time definition*

As is well-known, the European Working Time Directive[2] was adopted in 1993[3] and, since then, the world of work has seen many new developments[4]. Revisions of the European Directive, such as the one in 2003[5], have not introduced significantly new elements. It is relevant to note that the legal basis for the European standards are founded in article 153 (1) (a) TFEU (the original basis of article 118a of the EEC Treaty), in other words, it is a mea-

[2] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, *OJ* L 299, 18.11.2003.

[3] OJ [1993] L307/18.

[4] Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time (2017/C 165/01), p. 4.

[5] OJ [2003] L299/9.

sure of health and safety. It implies that remuneration is left to the competence of the member state[6], an excluded area from the EU's regulatory competences.

It may be wondered to what extent European working time concept takes recent labour market views or trends into account. There is an increasing amount of case law from the CJEU which interprets the notion of working time in an autonomous manner, in light of new developments on the labour market. Most of the attention goes to both the idea of time and place. In the famous case of *Matzak*, stand-by time performed at home with a duty to actively respond to work calls within a very short time (eight minutes) and to be prepared for physical presence at a place determined by the employer, was qualified as working time. The Court took into account that this duty imposed limitations on the worker's enjoyment of his free time. The case may seem to give an interesting link with telework, but the differences with telework are also important. The *Matzak*-case concerns "time spent at home" by the worker, with an obligation to be available both in time and space. The connection with the employer's physical location was relevant. Furthermore, the *Matzak*-case does not cover a situation where workers themselves organise their own work and decide themselves when to perform their work.

The relevance of the "workplace" concept, as a location, comes to the fore in the *Stadt Offenbach am Main*-case[7]. Here, the CJEU held a broad view of a "workplace" including "any place where the worker is required to exercise an activity on the employer's instruction, including where that place is not the place where he or she usually carries out his or her professional duties"[8]. The case gives some more relevant aspects of assessing the qualification of working time, such as the consequences of the worker's response time and the significant constraints imposed on the worker's ability to freely manage his/her time and to devote that time to his or her own interests.

Not only is it a relevant aspect to assess the impact on the worker's personal life and the freedom to organise one's own (free) time. It also to be

[6] CJEU, Order of 11 January 2007, *Jan Vorel v Nemocnice Český Krumlov*, C-437/05, ECLI:EU:C:2007:23, para. 32-35; CJEU, Judgement of 21 February 2018, *Ville de Nivelles v Rudy Matzak*, Case C-518/15, ECLI:EU:C:2018:82, para. 49.

[7] CJEU, Judgement (Grand Chamber) of 9 March 2021, *RJ v Stadt Offenbach am Main*, Case C-580/19, ECLI:EU:C:2021:183.

[8] Para. 35.

found evident that, in a telework context, the concept of workplace is not limited to the workplace "owned" by the employer.

The impact of work obligations on personal life also comes through in the *Radiotelevizija Slovenija*-case[9]. Workers were on a stand-by system and could be contacted by phone with an obligation to be at the place of work within a short period of time. This was not considered as a significant constraint of the possibility to freely manage one's personal time. This stands thus somewhat in contrast with the situations of *Matzak* and *Stadt Offenbach am Main*[10].

It may be wondered why a connection with (and the obligation to return to) the physical workplace of the employer, thus the "traditional" physical workplace as such, is a relevant issue in determining the delineation between working time and "rest" time or "free" time. This "space-bound" requirement also came through in *MG v Dublin City Council*[11], in which the Court considered stand-by periods during which the worker (a firefighter) could still carry out another job (as a taxi driver), while nevertheless under the obligation to reach the employer's premises in case of emergency within ten minutes. The worker's ability to carry out another professional activity during his stand-by time, was nevertheless taken into account to deny the qualification of working time. Interestingly, in the binary division between "working time" and "resting time", such stand-by time, was then falling within the worker's so-called rest period[12].

The question is what lessons can be drawn from this case law for telework. The answer is perhaps: none.

The existing cases concern different settings in which both time and space were relevant benchmarks and workers were under a specific obligation to be available in a rather top-down relation. The question is whether the situation would be different in cases where workers are able to work more autonomously and organise the work (and time and place) themselves. A critical response to this could be that there would never be a situation of full freedom or free choice, as expectations of colleagues, teams, clients, or

[9] CJEU, Judgement of 9 March 2021, *Radiotelevizija Slovenija*, C-344/19, ECLI:EU:C:2021:182.

[10] Para. 47-48.

[11] CJEU, Judgement of 11 November 2021, *MG v Dublin City Council*, Case C-214/20, ECLI:EU:C:2021:909.

[12] Cf. para. 46.

more generally, tasks, deadlines and deliveries, will be present anyway. However, the flexibility on the side of the worker may nevertheless increase and personal life may be better organized. What the case law teaches is that the binary division between working time and rest periods may be too strict and perhaps unlucky in existing non-standard forms of work, let alone in the more complex variety of situations in a telework context. Two other aspects from the case law are: working at home does not exclude working time and the degree of self-organisation of working time and "free" time may influence the working time concept.

The question, then, is how to proceed the discussion. A more refined view on envisaging working time could be useful to advance the working time debate, certainly in relation to telework.

6. *Four modes of telework*

In light of what has been said above, a more nuanced picture of working time law for telework could be envisaged. Hereafter, we propose four different views of telework. It relates to four combinations or patterns of telework, through perspectives or degrees of (more or less) autonomy, as seen in the picture below.

Four modes of telework:

Not organising work one-self	Fixed working hours
Free working hours	**Organising the work one-self**

The first pattern concerns telework in which the worker has limited autonomy. These telework settings obviously still exist. In such cases, the worker does not really organize the work him/herself and there is likely a need, or an agreement, to work according to a fixed working time schedule.

For such cases, the traditional views on the organization of working time will most likely remain highly relevant.

The second pattern relates to telework, where the worker is not organising the work him/herself, but is left free in organising the working hours. This would be a situation where the worker has very specific and pre-determined assignments and tasks to perform, or little room of discretion to set priorities, while the time-frame in which work is performed is less relevant, or at least, the condition to be available within a certain period of time might not be crucial. Freedom over time could thus be an essential feature, although not yet with full task or job autonomy.

The third pattern concerns situations in which workers have a high degree of job autonomy, but rather limited working time autonomy. Both in administrative, managerial or technical functions, task autonomy and the capacity of self-organisation of work may be part of the job, while this may go along with a fixed structure on working time, for example, office hours.

The fourth pattern relates to situations where the highest levels of autonomy are reached. The worker organises the work him/herself in an autonomous way and has full freedom over the organization of "own" working time.

If we take these patterns or telework modes as a "template" to deal with the diversity of telework, it may not only help to conceptualise telework, but it may also assist in negotiating working conditions for a diverse group of teleworkers, with not necessarily a pure one-size-fits all approach. Not every single telework situation will need the same approach to supervision of the work, to the registration of working time, to the same levels of control and monitoring, the same approach to the right to disconnect, or to similar ways of evaluation and rewarding workers. The foundations of the *CCOO*-case law[13] might, for example, not fit cases where workers have large degrees of autonomy in the organization of working time. Overall, a too rigid view on the existing legal frameworks might hamper, instead of develop, telework. Furthermore, it may lead to in-adapted working conditions for teleworkers.

Obviously, if social partners would use such an approach in negotiating telework, the question is whether this still can be compliant with the existing European legal standards. The European Working Time Directive allows for

[13] CJEU, Judgement of 14 May 2019, C-55/18, ECLI:EU:C:2019:402.

deviations from the strict confines of working time rules, under article 17, where specific circumstances and autonomy are valued, but derogations are related to "specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves". The provisions of article 17 are still open for further discussion and interpretation and, of course, they are exceptions to the general rule, and the question remains to what extent telework regimes can be brought under the derogations[14]. At the same time, the purpose of the Working Time Directive is the protection of the worker's health and safety and, while this is a large area if seen in a wide sense, exceptions may also need be tested against broader social policy and employment relations objectives, in order to facilitate alternative – but still protective – ways of regulating autonomy[15]. More clarity would be useful on this point and a revision of the Working Time Directive remains thus desirable.

7. *Functions of working time*

A discussion and assessment of a more diverse regulatory model of telework, also needs to take into account, of course in a critical way, the different roles and functions of working time. Obtaining a view on the role of working time (autonomy) also implies keeping a view on aspects underlying the functions of working time. These functions are:

Rest period: This stems with the objectives of the European Working Time Directive, which is the protection of health and safety. This can in the first place be realized with limiting working time and with providing sufficient rest periods to workers.

Work volume: What the working time provisions perhaps not explicitly regulate, but rather implicitly, is regulating work volume. This is, of course, also a health and safety issue. The limitation of working time and stand-by-time, therefore protecting time "off work", leads to a limitation of work volume or workload. Time and volume are intrinsically connected.

[14] Cf. Huybrechts, *Working time and autonomy: lessons for the new ways of working*, in *ELLJ*, 2023, Vol. 14, 4, pp. 570-587.

[15] Cf. Glowacka, *A little less autonomy? The future of working time flexibility and its limits*, in *ELLJ*, 2021, Vol. 12, 2, pp. 128-131.

Pay: Although beyond (or outside) the purposes and scope of the European Working Time Directive, working time is generally a basis to reward workers. Workers are in most cases hired for a specific amount of time and salary will be connected to the time spent at work, or, at least, spent as working time. This does not take away that also "on call time", even when not qualified as working time, may become "paid time" for workers. But this proofs the point that the underlying goals of working time law need a closer look when discussing the relevance of working time.

Measuring work: Connected with the remuneration of workers, is working time as a way to measure work. Workers are often expected to be at work, to be present, or to be available for work. Work, and even the quality of work, is often evaluated on the basis of the amount of time that a worker has spent at the workplace, or spent on a specific assignment.

Monitoring and control: Time is a unit that can be measured and followed, so working time is used to monitor and control the work and the worker. When the working time "clock" is running, the employer's authority is also activated and workers are more clearly within subordinated time and under control of the employer. With time registration systems, the employer has a tool to monitor and control the presence and availability of the worker.

Private life: Working time also regulates private life. In principle, when limiting working time, workers also have "time off", meaning that they can devote themselves to their "own" personal time and develop their private life outside the work context (this nuance is relevant since private life is, of course, also enjoyed in the work context). Maintaining work-life-balance is perhaps a modern way of looking at this aspect, as it wishes to guarantee a workable combination of working life and private life. The work-life-balance concept is strongly related to the underlying functions of working time.

These underlying functions of working time need to be taken into account when regulating, or negotiating, telework deals. When they are made more explicit in the discussion, it might lead to solutions in which the strict "working time language" can make room for other benchmarks and standards. It will also make some of the discussions more visible. For example, workload and work-related stress may become a more interesting point of departure than working time. Or, leaving the concept of "payment for time" behind may also lead to a more results-oriented deal in employment contracts. This may go against the traditional view of the employment relation-

ship, implying obligations of means rather than results, but it may bring solutions for the rewarding of new types of work, including platform work. It also makes the discussion of work-life balance more clear and the relation between working time and private life. Working life and private life, obviously, are interconnected and not clearly separable. For some workers, a balance will be better found in the self-organisation of work with working time autonomy, while other workers might prefer to rely on fixed and pre-set working time arrangements with clear confines and delineations.

8. *Negotiating future-proof telework deals*

This editorial made an attempt, in an explorative or perhaps experimental way, to point at the complexity of the telework debate. The proposition is that negotiating telework is a real challenge, as it requires a mentality shift towards the employment relationship. Telework is a phenomenon to be seen in light of new ways of working and, in addition, not every telework situation is the same. This makes general rules challenging. Telework discussions will have to take on a number of novelties and perhaps a new paradigm related to work and employment relations.

With an openness of mind, foundations can be laid for forward-looking telework arrangements. This naturally involves customization and addressing numerous aspects of the employment relationship. It also looks like, from the analysis above, that discussions on telework and working time are much broader and complex than, for example, debating the right to disconnect, which, although relevant, was deliberately left out of this contribution (although it is implicitly present). Working time issues represent a broader discussion on how to look at "telework deals". If working time will no longer (solely) serve to delineate or define work, the employment relationship may partly shift to another set of rules related to place and time (independency) of work. Any regulation will have to keep fundamental social rights and foundations in the horizon. Therefore, benchmarks and rights, such as well-being at work, equality, fair remuneration, worker involvement, work-life balance, and privacy will remain crucial.

Stephen Lee

Labor sustainability in Global Supply Chains

1. *Introduction*

As a principle for governance, the concept of sustainability has been most closely linked to the regulation and protection of the environment. The concept is malleable and can support a range of policy objectives[1]. Multiple intellectual traditions also support the concept ranging from cost-benefit analysis commonly associated with neoliberalism to indigenous concepts of self-determination and "planning practices"[2]. At the heart of all of these versions of sustainability is a basic recognition that social, political, and economic decisions today will impact future generations.

Against this backdrop, this paper considers whether the concept of sustainability might be helpful in strategies for fighting coerced and child labor, a problem that exists within labor markets all across the globe. In developing a model for "labor sustainability", I focus on the interests of three sets of stakeholders: consumers, workers, and firms. Obviously, these are not mutu-

[1] See POLLANS, *Eaters, Powerless by Design*, in *Mich. L. Rev*, 2022, 643, pp. 670-672.

[2] See WHYTE, CALDWELL, SCHAEFER, *Indigenous Lessons about Sustainability Are Not Just for "All Humanity"*, in SZE (ed.), *cit.*, p. 152.

ally exclusive categories given that most people and entities engage in behavior that cut across these lines of division. For this reason, I will use this basic framework for much of the paper though I will address the limits of this framework towards the end. At the same time, these identity categories provide a good, basic vocabulary for working through the different social and economic interests that any model of labor sustainability must address.

For any "labor sustainability" model of governance to succeed, any good that is produced and sold within consumer markets must satisfy consumer preferences, provide basic protections for workers, and make a profit for firms. As a starting point, this paper provides three case studies of different governance schemes that attempt to create synergies between consumers and workers. This paper will focus on these issues in the context of U.S.-based food systems, which present sensible markets for examining these issues. The size of the U.S. market for food items means that consumer demands can send ripples through supply chains in a globalized economy. Advocacy efforts aimed at eliminating exploitative work conditions within different parts of the U.S. food system have drawn attention for decades. Moreover, consumers have to make food-related choices everyday, sometimes multiple times in a single day. Thus, the market for food goods presents the opportunity to examine the idea of labor sustainability within a set of economic transactions that reflect ordinary commercial and consumption activity.

Part II of the paper will provide a basic overview of the concept for labor sustainability. Part III will explore the three case studies. Part IV identifies some of the insights that those case studies provide for developing a more broadly, generalizable idea of labor sustainability. Part V then concludes.

2. *An Overview of Labor Sustainability*

As an organizing principle, the concept of sustainability is associated with the various strands that loosely make up what is often referred to as the environmental protection movement[3]. Many different strands of this

[3] See Tai, *The Rise of U.S. Food Sustainability Litigation*, in *SCLR*, 2012, Vol. 85, p. 1076.

movement attempt to define the idea of sustainability and for this reason several models for sustainable governance exist.

One version of this idea reflects a pragmatic and market-based response to the problems of pollution and other forms of environmental degradation. Over the long-term, pollution harms everyone but many firms and stakeholders are unwilling to take action to avoid this harm because of economic and other costs of changing course. In an attempt to balance our collective long-term needs to maintain a habitable environment against the present-day desires of firms to achieve economic prosperity, advocates of sustainable business practices argue that this approach can do both thereby creating a kind of "win-win" path forward. This type of governance strategy gives significant weight to consumer preferences in setting moral limitations on business practices that affect the environment and it assumes that consumers will be willing to pay for goods and services that promote or at least do not worsen environmental integrity. Such an approach is often associated with neoliberal forms of governance, an approach to law that views regulations as raising costs without providing justifiable benefits. Sustainability on these terms means deregulation and permitting firms to sort out in the marketplace how best to protect the environment through investment choices. Corporate law scholars have explored these ideas in the context of "corporate social responsibility" and "environmental, social, and corporate governance" investment strategies[4].

Another version of sustainability draws from indigenous traditions and focuses on economic and development practices reflecting a kind environmental stewardship. To take one example, Menominee tribes developed a sustainable timber practice that "seeks to pay respect to the agency of the forest itself as a living ecosystem that has cultural and spiritual significance for the Menominee people[,]" an approach that pivots away from mooring concepts of sustainability to economic baselines and profit-maximization[5]. Given the long history of displacement and dispossession policies under U.S. settler colonialism, these indigenous notions of sustainability that seek to preserve land reflect, not a lack of vision or ambition for development, but instead a deliberate policy of governing as stewards of the land for the

[4] See POLLMAN, *The Making and Meaning of ESG*, working paper (Oct. 2022), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219857; LUND, *Corporate Finance for Social Good*, in *CLR*, 2021, Vol. 121, No. 5, p. 1617.

[5] See WHYTE, CALDWELL, SCHAEFER, *cit.*, p. 152.

benefit of future generations. Again, the concept of sustainability is no monolith. Many different models for sustainability operate outside of the two examples I have provided. Different social movements and laws attempt to define and leverage the concept of sustainability to achieve broader political and economic goals. At the same time, all of these versions enjoy a degree of conceptual overlap[6]. In the simplest terms, these different versions of sustainability strive to balance present needs against future consequences.

Building on this basic framework, the concept of labor sustainability is one in which firms create working conditions free from coercion and other workplace practices and policies that are dangerous or degrading. On-going discussions of sustainable farming practices have already grappled with how worker interests fit into this model. Among food law and labor law scholars, a persistent critique of sustainability frameworks has been the omission of farmworkers from most discussions of how sustainable food systems create economic and social value for farms, consumers, and society as a whole[7]. Taking a closer look at the example of agriculture, it is clear that there is no reason why the basic framework for sustainability cannot be expanded or adjusted to accommodate the interests of farmworkers. For example, the demand for organic goods has increased steadily over the last several decades, providing opportunities in food markets to incorporate labor-centric measures for protections[8]. Ostensibly, the turn towards organic farming was meant to protect both the environment and consumers against the dangers of toxic pesticides, but such farming practices also improve the safety of the workplace for farmworkers[9]. Such practices foster long-term benefits for workers

[6] See TAI, *cit.*, p. 1078. See also NESTLE, MCINTOSH, *Writing the Food Studies Movement: With a Response by W. Alex Mcintosh of Texas A&M University*, in *FC&S*, 2010, Vol. 13, p. 160 and p. 175.

[7] See LUNA, *The Dominion of Agricultural Sustainability: Invisible Farm Labor*, in *WLR*, 2014, p. 265. Some of this has to do with longstanding exclusions in federal law regarding agricultural workers, which omits this class of workers from major wage and other protections thereby devaluing them. And by remaining silent on farmworker interests, sustainability frameworks effectively reinforce this baseline of protections. See *ID.* at pp. 275-277.

[8] Sales of U.S. organic food products nearly doubled from $26.9 billion in 2010 to $52 billion in 2021. See ECONOMIC RESEARCH SERVICE, USDA (last updated Feb. 23, 2023), at https://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture/).

[9] See SHRECK, GETZ, FEENSTRA, *Social sustainability, farm labor, and organic agriculture: Findings from an exploratory analysis*, in *AHV*, 2006, 23, p. 439.

by reducing the risk of injury or death and improving the life expectancy of the workforce.

Like other forms of sustainable food production, those forms of production incorporating labor sustainability principles require firms to spend more to meet such standards. Such a model requires firms to pass on the added costs to consumers in the form of a premium. Common examples include "fair trade" labels or certificates ensuring ethnical production[10]. A variety of scholars have explored this idea in the context of U.S. food systems specifically. Again, although workers across multiple industries face the problem of coerced labor, the food system is unique in that it forces consumers to consistently grapple with the moral and economic consequences of buying goods produced under exploitative conditions. Unlike other necessities like apparel, for most people food is a good or material that they purchase regularly, sometimes every day. Thus, consumers have a chance to make choices that shape the market for ethical goods on a daily basis.

Finally, it is worth emphasizing that the concept of labor sustainability is not just a topic of interest to academics and scholars. Public enforcement agencies in the United States have begun grappling with how this idea might be incorporated into policies. Most notably, in 2016, the Occupational Safety and Health Administration (OSHA), a federal workplace safety agency, published a white paper expressly calling for more expansive approaches to workplace safety enforcement that incorporates sustainability principles[11].

3. *Legal Controls Over Coerced Labor*

To further develop the idea of labor sustainability, this Part examines how existing legal protections are designed and implemented to deter coerced labor. Because consumer-interests are central to any sustainability model, this Part focuses on coerced labor in the U.S. food system, which, as noted earlier, creates repeated opportunities for consumers to support (and therefore reward) or avoid (and therefore punish) food producers based on their labor and supply chain purchasing practices. It is important to emphasize that for

[10] POLLANS, *cit.*, p. 672; Brown, GETZ, *Towards domestic fair trade? Farm labor, food localism, and the 'family scale' farm*, in *GeoJournal*, 2008, 11.

[11] See OSHA, *Sustainability in the Workplace: A New Approach for Advancing Worker Safety and Health*, Dec. 2016.

American consumers, choices made within most food systems implicate not just local or national economies but also ones that are global in reach[12]. Often, the foods and food materials on a consumer's plate can be traced to other countries throughout the world. Moreover, the set of laws regulating this food system are diverse in character, design, and origin. The economic and legal foundation of the modern food system thus reveals a sprawling and disjointed cluster of entities and relationships, making it unclear whether or how a concept of labor sustainability might operate as an organizing principle for governance. To help focus this discussion, I provide three sets of laws that attempt to deter or disrupt the production of food and food materials through coerced labor. These examples illustrate the scale of the modern food system and highlight the complex set of reasons behind the law's content and purpose.

3.1. Federal Law (Tariff Act of 1930)

Firms and businesses rely on global supply chains to provide goods and services to American consumers. At the same time, these firms reap significant profits by utilizing parts, raw materials, and goods that are made in cheaper labor markets overseas. Many of these markets also rely on coerced labor. The widespread use of coerced labor is closely associated with a number of conditions that make conventional forms of regulation and enforcement practically impossible. Some work, such as mining or deep sea fishing, are inherently dangerous making it hard for regulators to pinpoint who or what was the cause of injury or death. Relatedly, some types of work happen in private settings such as domestic work, which frustrates the ability of officials to identify coerced labor. And the practice of utilizing workers with tenuous legal status, like unauthorized migrants, only compounds these challenges[13].

Against this backdrop, the first case study focuses on a cluster of federal laws that attempt to limit the importation of goods generated by exploitable labor such as child labor or slave labor. Central to this story is the Tariff Act of 1930. After the civil war, slavery was outlawed in the United States with the ratification of the Thirteenth amendment in 1865. In 1890, Congress passed a law prohibiting the importation of goods made by convict labor[14].

[12] See Pollans, Watson, *FDA as Food System Steward*, in *HELR*, 2022, Vol. 46, p. 1.

[13] See Feasley, *Eliminating Corporate Exploitation: Examining Accountability Regimes as Means to Eradicate Forced Labor from Supply Chains*, in *JHT*, 2016, p. 15.

[14] See Section 51 of the McKinley Tariff Act of 1890, 26 Stat. 567. This prohibition was

Recognizing that firms outside of the United States were not bound by U.S. law and thus could continue relying on slave labor, Congress passed the Tariff Act which prohibited the importation of goods and materials produced or manufactured not just through convict labor but also through forced or coerced labor. Although some legislators noted the humanitarian and ethical concerns with permitting importation markets to prop up or be complicit in exploitative labor markets, the overriding concern was expressed in terms of protecting American business interests. The primary purpose of the Tariff Act was to neutralize the unfair "competitive advantage" that firms in other nations enjoyed over American firms[15].

Importantly, the Tariff Act created an exception to this importation ban: federal officials would not enforce the act where domestic supply could not meet consumer demand for a particular product. For decades, global firms like the Nestle Chocolate company continued to import cacao beans into the United States from West Africa despite overwhelming evidence of the use of child labor to harvest the beans. This "consumptive demand" exception provided firms with a huge loophole in the Tariff Act ban, which remained in place until 2015 when Congress finally removed the exception.

The President and other officials within the Executive branch implement the Tariff Act and other trade controls. Agencies like the U.S. Customs and Border Protection (CBP) implement Section 307 of the Tariff Act, which prohibits the importation of "goods ... produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor[.]"[16]. Today, policy concerning the importation of goods made through forced labor is tied up with anti-trafficking policies which aim to stop the movement of people across borders into the United States for the purposes of exploitation[17]. Indeed, the CBP which oversees the implementation of the Tariff Act is the same agency that oversees the admission

eventually incorporated into the Tariff Act of 1930. See 19 U.S.C. § 1307 (prohibiting the importation of goods produced by certain categories of labor including "convict labor"). See generally Congressional Research Service, *Section 307 and Imports Produced by Forced Labor*, updated July 26, 2022.

[15] See Congressional Research Service, *cit.*

[16] See 19 U.S.C. § 1307. The statute defines "forced labor" means "all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily". This includes "forced or indentured child labor".

[17] Cite The Victims of Trafficking and Violence Prevention Act of 2000.

of migrants at ports-of-entry and houses the Border Patrol, which enforces immigration laws at all U.S. borders.

In the trade and importation context, the CBP plays a central role in regulating goods by seizing and inspecting goods[18], but it isn't the only agency with a mission orientation and mandate that focuses on these issues. Federal law empowers a range of agencies to regulate labor exploitation including the Department of Labor (DOL), which issues annual findings on the "worst forms of child labor"[19]. Moreover, governmental agencies routinely partner with private parties or contractors to carry out discrete tasks. Through the exercise of their executive authority, different presidents have enlisted the resources of agencies to fight the use of coerced labor. President Obama prohibited federal agencies from entering into contracts with parties that use coerced labor[20]. In an earlier era, President Clinton required the DOL to publish a list of products including country of origin for which there was a reasonable basis to believe that the goods were produced through coerced or child labor[21].

The Tariff Act and other trade controls reflect the globalized nature of food systems. Today, the "slave labor" ban has become a key part of discussions surrounding U.S.-China relations. With mounting evidence that firms in China target ethnic minorities such as Uyghurs and other Turkic Muslims as forced labor, many stakeholders in the United States have pushed officials to train their attention on restricting goods imported from China[22]. In 2021, Congress passed a law that tweaks the enforcement aspects of the Tariff Act

[18] The CBP uses "withhold release orders" to manage this flow. See 19 C.F.R. § 12.42(a). Where the CBP has reason to believe that inspected goods violate the importation ban, they "withhold release" of the goods with the importer bearing the burden of providing "satisfactory evidence" that the goods were not produced in violation of the Tariff Act. See 19 C.F.R. § 12.42(g).

[19] The DOL's Bureau of International Labor Affairs has issued findings each year as required under the Trade and Development Act of 2000. The Secretary of Homeland Security and the Secretary of State also play key roles in enforcing different provisions of Section 307 of the Tariff Act.

[20] See Strengthening Protections Against Trafficking in Persons in Federal Contracts, Exec. Order No. 13,627, 77 Fed. Reg. 60029 (Sep. 25, 2012).

[21] See Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor, Exec. Order No. 13126, 64 Fed. Reg. 32383 (June 12, 1999).

[22] See LEHR, *Addressing Forced Labor in the Xinjiang Uyghur Autonomous Region Toward a Shared Agenda*, Center for Strategic and International Studies, 2020.

by creating a presumption that all goods imported from the Xinjiang region were created through forced labor[23].

The United States has also entered into multi-national agreements to disrupt coerced labor markets through coordinated enforcement efforts with other countries. For example, the Uyghur Forced Labor Prevention Act (UFLPA) states that a policy objective is to coordinate with Mexico and Canada to prohibit the importation of goods produced through forced labor[24]. Most notably, the United States-Mexico-Canada Agreement also commits parties to prohibit imports produced by forced labor and to cooperate over identifying such goods. This agreement along with the Tariff Act and other examples above reflect the core aim of these laws: to shut down the free flow of goods into the United States and other countries in the region to disrupt the use of coerced labor at the course of production or manufacturing.

3.2. State Laws (California Transparency in Supply Chains Act)

The global nature of coerced labor highlights the limits of public or government enforcement measures in addressing the problem. A second case study focuses on a law that recognizes the limited ability of officials in the U.S. to directly enforce laws against bad actors outside of the United States. For these reasons, lawmakers have attempted to foist some of the burden of deterring the importation of "coerced labor goods" on firms and other mar-

[23] See Uyghur Forced Labor Prevention Act, P.L. 117-78 (Dec. 23, 2021). See also 22 U.S.C. § 7107(b)(3)(B)(iii) (instructing the Secretary of State to consider a pattern of forced labor as "proof of failure to make significant efforts" on the part of a country). See also U.S. Customs and Border Protection Operation Guidance for Importers (June 13, 2022) (describing how customs officials will enforce the rebuttable presumption that goods imported from the Xinjiang region were produced by forced labor). The calls for greater enforcement of the Tariff Act have been offset by disruptions to supply chain issues caused by the pandemic. Lawmakers and officials seem reluctant to press too hard with scrutinizing forced labor goods given a domestic U.S. economy that is still sputtering back to life.

[24] Section 741 of the United States-Mexico-Canada Agreement Implementation Act established the Forced Labor Enforcement Task Force. See P.L. 116-113, 134 Stat. 11 (Jan. 29, 2020) (codified at 19 U.S.C. § 4681). Section 1 of the Uyghur Forced Labor Prevention Act, P.L. 117-78 (Dec. 23, 2021), states that one of the purposes of the act was "to coordinate with Mexico and Canada ... to prohibit the importation of goods produced in whole or in part by forced or compulsory labor, including those goods mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region[.]" See P.L. 117-78, 135 Stat. 1525 (Dec. 23, 2021).

ket actors. Such a model of enforcement both expands the reach of public actors by enlisting the help of private actors as well as utilizes market pressures to nudge firms into making more ethical choices about their sources in a global supply chain. The most significant mandatory disclosure law of this kind has come at the state level, specifically in California. The California Transparency in Supply Chains Act (Supply Chains Act) is an attempt to affect the behavior of these bad actors through indirect means, ones that rely on structuring or limiting the cross-border choices made by large buyers and distributors in the United States[25].

The Supply Chains Act was signed into law in 2010. Under this law, large firms that wish to conduct business in California must disclose efforts it has made to identify and prevent the purchase of good or services from distributors who rely on exploitative labor practices up the supply chain. Large firms doing significant business in California must the actions they have taken to verify that products in their supply chains present risks of "slavery and human trafficking"[26]. The disclosure requirements focus on the firms doing business in California rather than on the other actors in the supply chain[27]. Firms must disclose these efforts on their website[28].

[25] KOEKKOEK ET AL., *Monitoring Forced Labour and Slavery in Global Supply Chains: The Case of the California Act on Transparency in Supply Chains*, in *GPol*, 2017, 8, pp. 522 and 523.

[26] See Senate Bill No. 657

[27] The Supply Chains Act requires firms to "at a minimum, disclose to what extent, if any, that the retail seller or manufacturer does each of the following:

(1) Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure shall specify if the verification was not conducted by a third party.

(2) Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure shall specify if the verification was not an independent unannounced audit.

(3) Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.

(4) Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.

(5) Provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products".

See Senate Bill No. 657 (codified at California Civil Code § 1714.43(c)(1)-(5)).

[28] See California Civil Code § 1714.43(b).

The Supply Chains Act attempts to leverage California's economic power to bend the market choices of large and influential economic actors towards an ethical baseline set by the state. This law does not prevent consumers from purchasing goods that are associated with exploited labor but instead makes relevant information available so that consumers can decide for themselves how best to incorporate moral imperatives into their economic choices.

Scholars and commentators have criticized the Supply Chains Act as an ineffective or potentially harmful intervention into the effort at eradicating coerced labor in global supply chains. The law severely limits the ability of interested parties like consumers from enforcing violations against firms. The law expressly reserves enforcement powers for the state Attorney General. Some have critiqued the Supply Chains Act for this toothless enforcement design. California has some of the most expansive consumer protection laws in the country. Thus, denying consumers the opportunity to act as private attorneys general stands at odd with the general tenor of California consumer protection statutes[29]. In the early years after the passage of the Supply Chains Act, some consumer advocates attempted to use a firm's minimal or vague disclosure under the Supply Chains Act to establish violations under one of several California consumer laws but courts have routinely resisted interpreting the Supply Chains Act in this manner[30].

Others have raised the question of whether the Act might even hurt long-term efforts to eradicate slave labor. Specifically, commentators have noted that the vague and malleable disclosure requirements allow companies to engage in "strategic legitimation," which allows firms to selectively disclose information they want to disclose thereby assuaging investor and consumer concerns without actually providing a meaningful guarantee that it had made a good faith effort to extricate themselves from morally compromised supply chains[31].

[29] See FEASLEY, *cit.*, p. 20.

[30] California's consumer protection laws include the Unfair Competition Law (UCL), the False Advertising Law (FAL), and the California Legal Remedies Act (CLRA), all of which in theory could support a claim based on a company's disclosure requirements. Courts have held that a firm's failure to comply fully with the Supply Chains Act, without more, cannot support a claim under one of the other state statutes. See Sud v. Costco Wholesale Corp., 229 F. Supp. 3d 1075 (N.D. Cal. 2017); Hodson v. Mars, Inc., 891 F.3d 857 (9th Cir. 2018).

[31] See BIRKEY, *Mandated Social Disclosure: An Analysis of the Response to the California Transparency in Supply Chains Act of 2010*, in *JBE*, 2015, 152, p. 827.

3.3. Fair Food Program - Coalition of Immokalee Workers

A third example is the Fair Food Program (FFP), a worker monitoring program created by the Coalition of Immokalee Workers (CIW). Unlike the Tariff Act and the Supply Chains Act, the Fair Food Program was created and continues to be enforced by private, non-state actors. No agency or other public entity is charged with enforcing the terms of the program. Instead, large-scale food buyers like national grocery stores and restaurant groups agree to buy produce specifically tomatoes only from farms that are certified through the FFP, a program that monitors farms for labor abuse.

Of the three case studies covered in this paper, this is the only one that was expressly designed to respond to coerced labor in the agricultural context, a market that has long been synonymous with human misery in the United States. Not only was the slave trade central to growing and producing cotton, one of America's largest agricultural exports in the 19th century[32], even after slavery was formally eradicated with the ratification of the 13th Amendment, many scholars have well-documented that coerced and exploited labor in American agriculture continued well into the 20th century as beyond. Most relevant to this article is the latter-half of the 20th century, when farmers and other agricultural employers especially in the western and Southwestern part of the United States began relying heavily on migrant labor especially from Mexico and Central America. Bracero workers, H-2A temporary visa holders, and unauthorized workers have all figured into this history. For CIW's part, it focuses on farmworkers in the tomato industry[33].

As a political and economic actor, the CIW is not a union or labor organization, concepts that are regulated and constrained by federal laws such as the National Labor Relations Act (NLRA). Although unions do enjoy certain advantages under the law, over the decades, the Supreme Court has interpreted the NLRA in ways that undermine the power that unions have to organize workers. Instead, the CIW has opted to remain a human rights organization, which frees it up to engage in behavior which federal law prohibits for unions, namely secondary boycotts which are political and economic actions that target buyers instead of employers.

[32] See BECKERT, *Empire of Cotton: A Global History*, Knopf, 2014.

[33] See ASBED, HITOV, *Preventing Forced Labor in Corporate Supply Chains: The Fair Food Program and Worker-Driven Social Responsibility*, in *WFLR*, 2017, 52, pp. 497 and 502.

One of CIW's key strategies is to pressure large-scale tomato buyers to participate in the Fair Food Program, which certifies that tomatoes were picked on farms free of exploitation, coercion, and other unlawful labor practices. Employing the motto "Consumer Powered, Worker Certified," the Fair Food Program targets food distributors (or buyers within the supply chain) such as grocery stores to agree to purchasing agricultural products only from growers that are certified by the program as worker friendly.

For this strategy to be effective, CIW focuses on large food buyers with recognizable brands, which might be damaged if the public learned that these buyers contributed to or were complicit in the exploitation of workers. Advocates have successfully used such a strategy in the related context of the fashion and the garment industry, which also relies on global supply chains. Once the public learned that Nike relied of factories in Southeast Asia with inhumane working conditions including child labor, for example, the company quickly took steps to more closely monitor the where and under what conditions their shoes were manufactured[34]. The CIW takes a similar approach targeting food or tomato buyers who have recognizable brands that would be damaged in the marketplace with negative publicity. This includes Walmart, Whole Foods, McDonald's, Burger King, and Aramark[35]. By agreeing to participate in the FFP, these food buyers agree to buy their tomatoes only from farms that also agree to be monitored through the program. This both ensures that the tomatoes that companies like Walmart and Whole Foods are free from exploitation thus preserving their market reputation and puts pressure on other firms to also join the FFP or miss losing out on selling their tomatoes to the food buyers that dominate the market.

Notably, state actors play virtually no role in this scheme. Statutes passed, and agencies created, by federal and state legislatures play only a secondary role in this governance strategy. Instead, growers and buyers effectively enter into a contract, which is an extension of the common law and subject to monitoring by courts. Growers participating in this program agree to submit their workplaces to monitoring by third-parties in exchange for the "fair food" certification. Even first-time violations of workplace protections can lead to decertification and expulsion from the Fair Food Program. This cer-

[34] See Weil, Mallo, *Regulating Labour Standards via Supply Chains: Combining Public/Private Interventions to Improve Workplace Compliance*, in *BJIR*, 2007, 45, pp. 791 and 794.

[35] See https://ciw-online.org/campaign-for-fair-food/#agreements.

tification is valuable because it allows growers to food buyers at a price that more fairly reflects the work performed in picking tomatoes, which in turn allows these buyers to sell these goods to the public with a premium mark-up. At the same time, the FFP differs from other governance measures that fall within the broad umbrella term "corporate social responsibility" (CSR). Many CSR programs use internal measures to hold firms accountable, but for obvious reasons such programs can suffer from problems of selective monitoring and disclosure. The FFP stands apart from these CSR programs in that farms agree to subject themselves to monitoring by a third-party, not a public entity but instead a private set of actors whose investigations and findings can lead to the termination of a farm's relationship with the FFP and with it, access to the most profitable food buyers with a national reach.

4. *Implications*

These three examples – the Tariff Act, the Supply Chains Act, and the Fair Food Program – provide a useful descriptive picture to begin developing a generalizable framework for "labor sustainability". None of these laws are expressly labeled as "sustainability" measures but all of these legal systems revolve around the consumer-worker relationship in one way or another and therefore provide the basic infrastructure for a labor sustainability governance strategy. These examples give rise to several observations.

4.1. Constitutional Parameters

These case studies suggest that developing governance strategies grounded in principles of labor sustainability will likely not emerge from a single set of laws. The global presence of markets defined by coerced labor makes a unified or centralized response challenging. The Tariff Act and the broader set of trade policies demonstrate that it is possible for the federal government to achieve some degree of coordinated policymaking. Existing trade laws implicate a cross-section of federal agencies with distinct missions such as the Department of Labor, Department of Homeland Security, and the Secretary of State, which can promote the consistent enforcement of this principle across many contexts – i.e., labor and trade, domestic and foreign markets, and banal and high security transactions. Moreover, the focus on

coerced labor also implicates broader efforts to fight human trafficking, a policy arena that enjoys a degree of support at least compared to those aimed singularly at coerced labor. For this reason, agency resources and attention can be diverted into the trade context.

At the same time, the complicated and sprawling nature of trade policy makes it hard to imagine using existing legal structures to maintain a continuous set of interventions that disrupts coerced labor abroad. At the very least, trade policy implicates parallel topics of migration and labor protections for domestic workers[36]. Trade policy implicates the interests of multiple stakeholders: native-born workers, migrant workers, domestic firms, and American consumers[37], which means that a change in party affiliation in the White House or of the majority party in Congress can make it hard to maintain a sustained, and long-lasting set of interventions. For example, once President Biden assumed office in 2021, he sought to end or rescind various asylum procedures at the U.S.-Mexico border that originated under his predecessor, President Trump. This rescission invited a legal challenge in *Biden v. Texas*. In ruling that the decision to rescind such a policy belonged to the President, the Supreme Court noted that tying the President's hands on immigration policy at the border was complicating on-going discussions with Mexican officials over a range of other policies[38]. This example illustrates the broad level of deference that courts give to the President and the Executive branch more generally on matters implicating relationships with other nations and over foreign affairs generally.

One way to mitigate the problem of oscillation is to incorporate labor sustainability principles into American law as a broadly applicable principle that applies to all agencies charged with the administration of federal law. Perhaps most relevantly, the National Environmental Policy Act (NEPA) requires agencies to consider the environmental impacts of their actions and decisions, which requires all agencies to include a statement of "the environmental impact" of any federal actions "significantly affecting the quality

[36] See MOTOMURA, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, in *CorLR*, 2020, 105, p. 457. See also CLAUSING, *Open: The Progressive Case for Free Trade, Immigration, and Global Capital*, Harvard University Press, 2019.

[37] Obviously, these identity categories can overlap. For example, native-born workers and migrant workers are both consumers.

[38] See Biden v. Texas, No. 21-954 (decided June 30, 2022).

of the human environment"[39]. This model could easily serve as the basis for incorporating language from the Tariff Act that similarly instructs agencies to consider the impact of their proposed actions on the production or manufacturing of goods by convict labor, forced labor, and indentured labor.

Obviously, many policies would have no meaningful connection to the importation of tainted goods, but the goal of a labor sustainability principle would be to develop an ethos within governance strategies, one in which eradicating forced labor from markets was a baseline principle. This is one of the contributions of NEPA – it required agency officials to at least account for the environmental impact of their actions even when they are carrying out their duties under the leadership of a President or appointed officials who embraces values antagonistic to the enviromental protection. An even clearer example of this "norm setting" is in the rise of neoliberalism and the embrace of efficiency as a core principle for governance. Since the 1980s, agencies have been required to engage in cost-benefit analysis of any major policy promulgated through the notice and comment process. Similar sorts of requirements bind agencies in setting policy involving the collection of information from the public[40]. The purpose of these laws has been to advance a broader shift in governance focused on shrinking the administrative state, lowering costs to taxpayers, and advancing a deregulatory agenda. This approach to governance models point to what might be possible if lawmakers and the President committed to implementing a labor sustainability approach to the administration of laws. In this scenario, every agency – not just those regulating trade – would have to make some effort to identify whether policies implicated forced labor in either the domestic or foreign context.

The Tariff Act model for pursuing labor sustainability goals is the most directive and punitive of the three case studies presented. This federal law enables officials to seize and withhold goods that are imported into the United States, a significant exercise of governmental power that deprives the property interests of importers and directly cuts into their earnings and profits. And with the added layer of anti-trafficking laws, affected parties face the possibility of not just a loss of goods or diminishment of profits but also criminal penalties like prison and public stigma. By comparison, the Supply Chains Act in California embraces a soft, market-based approach that does not outright ban the importation of goods made through forced labor but

[39] See 42 U.S.C. § 4332(C).

[40] See Paperwork Reduction Act of 1995 (codified at 44 U.S.C. 3501(11).

instead creates disclosure requirements that would empower consumers to vote with their dollars in the marketplace.

The soft nature of the Supply Chains Act is consistent with doctrine that courts use to assess the constitutionality of these sorts of laws. As described earlier, *Biden v. Texas* allowed the Supreme Court to reaffirm the historical deference that courts have given to decisions made by the Executive branch – especially by the President as opposed to subordinate officials – in areas concerning foreign affairs, which is a common separation-of-powers justification. But this deference also has implications for the ability of state and other subfederal entities to regulate in domains traditionally left to the President's discretion. If California amended its laws to not only foist a disclosure obligation on firms but also outright banned the importation of goods made through forced labor, such a law might be found unconstitutional or preempted under existing preemption doctrine to the extent it conflicted with the Tariff Act[41].

4.2. Harnessing Market-Based Solutions

The concept of labor sustainability reflects a pragmatic compromise that attempts to reconcile competing interests that can stand in tension with one another. As a result, the concept is malleable and can fit within different frameworks. First, although workers face economic insecurity and exploitation across numerous sectors, the food industry provides an useful starting point for developing notions of labor sustainability. As noted earlier, food is a product that everyone must purchase thereby forcing consumers to regularly grapple with the social consequences of their food choices. Moreover, food production and distribution have obvious environmental consequences, therefore providing an ideal setting for outlining the conditions in which sustainable food practices can advance both environmental and labor goals.

Second, these examples illustrate the range of possibilities for structuring the implementation of sustainability principles. Some of these examples, like the Supply Chains Act, employ soft regulatory tools such as information-gathering and disclosure requirements, which are commonly used in the environmental context. At the same time, examples like the Fair Food Program

[41] See Arizona v. United States, 567 U.S. 387 (2012).

illustrate how information-gathering and disclosure requirement combined with robust monitoring programs can lead to successful results. Moreover, because of the globalized nature of the food market – at least, the agricultural goods market – sustainability schemes created and implemented within the United States can have a global reach as reflected in the Tariff Act example.

The programs discussed above illustrate how different design choices can empower workers and food producers to varying degrees. The Supply Chains Act provides workers with very little power to leverage consumer outrage in setting working conditions. Firms seeking to do business in California need only disclose efforts they have made to identify whether they have utilized goods produced by exploited labor. Such a soft disclosure requirement leaves non-U.S. workers vulnerable. By contrast, the CIW's Fair Food Program empowers workers to play a major role in shaping the kinds of conditions necessary for certification. The Supply Chains Act provides broad coverage with very little impact while the Fair Food Program focuses on narrow economic channels like buying relationships between grocery stores and farms that are subject to significant regulation and monitoring.

At the same time, the labor sustainability framework faces some limitations especially in a moment of widespread economic insecurity. The malleability of the sustainability concept can minimize or erase distinctions that can sometimes matter. Many consumers cannot afford to pay for the premium of purchasing exploitation-free goods. This kind of market can work when focusing on luxury or non-essential goods but faces more challenges when dealing with everyday food items and products.

Even with these shortcomings, the labor sustainability framework is helpful in focusing modern debates about the U.S. economy in a moment when economic insecurity is widespread. The Tariff Act of 1930, which was passed at a moment in American history when the public was vigorously debating interrelated questions related to political, social, and economic life. Front and center in this debate was how to curb the power of large firms within a market that was recovering from the Great Depression which generated widespread economic insecurity. Although the Tariff Act is a law governing international trade, it must be understood within this broader context.

A few years before the Tariff Act, Congress passed the Immigration Act of 1924, which effectively barred migration from Asian countries – an important source of unskilled and cheap labor for firms. Turning off this migration flow empowered white native-born workers who were central to

the effort of passing key legislation a few years after the Tariff Act. In 1935, Congress passed the National Labor Relations Act (NLRA), which created the right of workers to organize and elect a bargaining agent and in 1938, Congress passed the Fair Labor Standards Act (FLSA), creating a minimum wage requirement. Importantly, these protections excluded large classes of workers in industries filled with descendants of former slaves thereby fostering a clear sense that access to "good work" would be limited to white native-born Americans. All of these laws helped create a legal and political culture in which the public began to understand work and workplace protections as key vehicles for achieving economic security. This broader context shows how using workplace protections to stabilize the economy figured into broader questions about race and identity and other social issues.

Today, American society is confronting similar challenges related to immigration as well as to the relationship between firm power and economic inequality. On the topic of immigration, the presence of a large unauthorized immigrant workforce is closely associated with the presence of coerced labor. Thus modern debates about immigration policy could sensibly account for coerced labor as another concern that ought to be factored into lawmaking. Modern immigration policy has focused on coerced labor in terms of fighting trafficking schemes. This activates various enforcement policies, inviting a kind of hammer to be brought down on bad actors who profit off of the transportation and abuse of vulnerable populations. But another way to address coerced labor would be to create opportunities for migrants to regularize their status. Many forms of coerced labor do not appear violent or immediately dangerous, which can frustrate prosecution efforts in the anti-trafficking context. Thus, for less obvious forms of coerced labor, regularization laws could remove the legal condition responsible for the inequality and powerlessness of the migrant, namely the lack of status.

In addition to balancing enforcement policies with regularization opportunities, immigration debates have also wrestled with the degree to which laws should be enforced domestically in the United States or in concert with other countries. For example, Mexico assists the United States in deterring unauthorized migration from Central American countries by enforcing migration laws in Mexico thereby stymeing the flow into the United States. But again, this intensification of enforcement policies can contribute to worsening rather than alleviating the conditions for coerced labor. At the same time, these sorts of bi-lateral or multi-lateral agreements are also proper

settings for coordinating policies against coerced labor. As discussed earlier, the U.S.-Mexico-Canada agreement binds each country to a prohibition on the importation of goods made through coerced labor. At some point, the countries could build on this model to include mobility between the countries, a kind of regionalism loosely based on the European Union model[42]. Such a model would not address the problems of coerced labor only in the bound region. And it would not eliminate so much as simply move flashpoints for potential disagreement. Instead of enforcement policies targeting the U.S.-Mexico border, those policies would likely shift to the U.S.-Guatemala border, for example.

As for firm power and economic inequality, in the 1930s, the public began coalescing around the labor movement and a worker identity as the basis for advancing an agenda of economic equality. The existential threats posed by climate change and environmental disaster invite a broader response and setting for reconfiguring identity-based politics. To meet the inequality defining this part of the twenty-first century, advocates will have to embrace hybrid identities, ones that embrace that people are both consumers and workers who live and transact within the United States and beyond.

5. *Conclusion*

This paper attempts to define and explore how a labor sustainability framework might inform the effort to eradicate coerced labor in global supply chains. This effort would borrow from and build on the different movements that contest the meaning of sustainability in the environmental context. In both instances, the malleability or plasticity of the term helps to erase distinctions, which facilitates the process of generating broadscale support. At the same time, these distinctions can matter in defining the limits of this framework. Using labor sustainability principles to analyze the modern problem of coerced labor also provides the opportunity to link that discussion with broader debates about economic insecurity that affects consumers, workers, and firms alike.

[42] See MOTOMURA, *cit.*, p. 457.

Abstract

The concept of sustainability has been an effective organizing principle in the environmental context, illuminating how firm policies and practices can both protect the environment and grow the economy, thereby creating a kind of "win-win" path forward. This type of governance strategy expressly adopts market-based rationales - that is, it gives significant weight to consumer preferences in setting moral limitations on environmental degradation. Put differently, sustainability models assume that consumers will be willing to pay for goods and services that promote – or at least do not worsen – environmental integrity. Recently, labor advocates and officials in the United States have begun wrestling with whether and how sustainability principles might advance the interests of workers. My primary aim in the paper is to explore how this model of governance might operate in the labor context. A key question will be whether advocates and officials can find areas of agreement between consumers and workers. As a starting point, this paper provides three case studies of different governance schemes that attempt to create synergies between consumers and workers.

Keywords

Labor, Supply chains, Immigration, Agriculture, Trade.

Giulia Colombo

Cooperative work for sustainable development: a Labour law approach to the Seventh Principle of International cooperation

Contents: 1. The cooperative model in the International and European context. **2.** The Seventh Principle of the Statement on the Cooperative Identity. **3.** The participatory model of the cooperatives. **4.** The community cooperatives: the missing piece of the puzzle? Closing remarks.

1. *The cooperative model in the International and European context*

The Covid-19 pandemic emergency and the contingent climate issues have contributed to increasing social, economic, and environmental inequalities[1]. New needs and requirements have emerged, which need to be addressed through a collective change aimed at achieving an overall more sustainable country.

In this context, the Green Transition represents an innovative spirit for the initiation of a "process of systemic transformation"[2], which aims at the sustainable development of the whole community[3]. As is well known, the expression "sustainable development" is divided into three pillars (economic,

[1] Climate change has mainly affected the most vulnerable causing significant inequalities, see GIUDICI, *Sostenibile per chi? Vulnerabilità sociale e transizione ecologica*, in *RIS*, 2023, p. 1 ff.

[2] CASANO, *Ripensare il "sistema" delle politiche attive: l'opportunità (e i rischi) della transizione ecologica*, in *DRI*, 2021, 4, p. 997.

[3] CARACCIOLO, *Transizione verde e transizioni occupazionali. Dinamiche di settore, tutele giuridiche, ruolo della rappresentanza - Transizione ecologica: greening skills to greener jobs*, in *DRI*, 2022, 4, p. 969, which highlights how the Green Transition is at the heart of contemporary policies, which aim to "ferry" the world economy towards sustainability.

environmental, social) which are interdependent of each other: this means that no one can "live" without the other for the realization of a balanced, fair and inclusive growth[4].

The Green Transition can constitute the basis for a new economic and social model, which places the person at the center even before the environment for equity and social cohesion.

The "threefold" concept of sustainability is expressly recognized in the Sustainable Development Goals (SDGs) adopted by the United Nations on 25 September 2015, which introduce, together with the protection of the planet, the eradication of poverty and the guarantee of well-being for all people[5]. In continuity, the European Union, through the financing instrument constituted by the funds of the *Next Generation* EU, to overcome the difficulties imposed by the pandemic, has invested in the Green Transition for a more ecological and inclusive Europe[6].

In this perspective, the Green Transition must be not only "green", but also "just" because is based on equity, in order to guarantee a decent work for all[7]. Labour law, therefore, plays an important role, because it must "take care" above all of those subjects who are in a position of economic and social vulnerability[8]. In this regard, it will be possible to combat inequalities through a virtuous process that includes the weakest actors in the labour market so as not to "leave anyone behind"[9].

We are facing a systemic change comparable to industrial revolutions, which have brought profound changes in the way of living, working and communicating[10].

[4] Brino, *Il raccordo tra lavoro e ambiente nello scenario internazionale*, in *LD*, 2022, 1, p. 102.

[5] See extensively Brino, *cit.*, p. 106.

[6] On this point, see extensively Garofalo D., *Gli interventi sul mercato del lavoro nel prisma del PNRR*, in *DRI*, 2022, 1, p. 114.

[7] Bernardo, *Lavoro e ambiente tra sinergia e conflitto*, in *MGL*, 2020, 4, p. 815, which highlights how in the international context, the ILO in recent years has increased attention to Just Transition for a greener and more sustainable economy. For a recognition of the notion of "decent work" see Biasi, *Il Decent Work tra politica e sistema*, in *LDE*, 2022, 1, p. 2 ff.

[8] Caruso, Del Punta, Treu, *Manifesto per un diritto del lavoro sostenibile*, in *"Massimo D'Antona"*, 2020, p. 11. For a reconstruction of the notion of Just Transition connected to the Labour law see Doorey, *The contested boundaries of just Transitions*in, in *LLE*, 2022; Centamore, *Una Just Transition per il diritto del lavoro*, in *LD*, 2022, 1, p. 129.

[9] The 2030 UN Agenda, to combat poverty and put an end to all forms of discrimination and exclusion, expressly refers to the Leave no one behind (LNOB) principle, see https://unsdg.un.org/2030-agenda/universal-values/leave-no-one-behind.

[10] Miñarro Yanini, *Flexicurity in ambito lavorativo e transizione ecologica giusta: il ricorso agli*

The Green Transition has also stimulated interest in thinking models that question how to reconcile economic activity, social inclusion and sustainable development[11]. The reflections produced by this vision have led to the promotion at International and European level of an *economy* based on the *social* dimension and not purely capitalist.

In this context, the social economy has developed which represents a tool and a vision for achieving a just and sustainable environment, because it aims to reconcile and integrate economic activities, social development and environmental protection[12]. However, it is able to interpret the local contexts and the resources available in order to meet the concrete needs of the community[13]. The social economy provides to civil society the means to meet its own needs, producing goods and services in line with reality, culture and community needs[14]. People and local communities are, indeed, the driving force of the social economy and not capital or profit, but the creation of generative and shared value[15].

It should be noted that recently, in June 2022, the 110th ILO International Conference was called to discuss, for the first time, the theme of "Decent Work and the Social and Solidarity Economy". Broadening our gaze outside the European Union[16], therefore, the social economy acquires a further adjective, as it becomes a social and *solidary* economy. Even at the national level, solidarity has "great legal value" because it finds many references

ERTE e al meccanismo RED nel quadro del Next Generation EU, in *DRI*, 2022, 3, p. 765. To learn more about the changes and new jobs in the green economy see Tiraboschi, *Le prospettive occupazionali della economia verde. Le prospettive occupazionali della green economy tra mito e realtà*, in *DRI*, 2010, 4, p. 931.

[11] Salvatori, *Sull'economia sociale nella dimensione globale*, in *ISoc*, 2022, editoriale, p. 5.

[12] For an initial reconstruction of the social economy see extensively Dagnino, *Diritto del lavoro ed economia sociale: appunti per una ricerca*, in *DRI*, 2021, 4, p. 1058.

[13] Filì, *Il ruolo del welfare privato nel sistema di sicurezza sociale*, in *RDSS*, 2022, 4, p. 598, which stresses that the social economy is of fundamental importance, because it is able to support and replace public protections in those areas not covered by public intervention due to the limited public resources available or the particularity of the needs.

[14] Borzaga C., Salvatori, Bodini, *L'Economia Sociale e Solidale e il Futuro del Lavoro*, ILO, 2019.

[15] Guerini, *Cooperative e lavoro per la ripresa. Investire in un'Europa più sociale e inclusiva*, in *LDE*, 2021, 3, p. 3.

[16] Solidarity in European Union law is already based on the Charter of Fundamental Rights, as it becomes the heading of Title IV, but at the same time new limits arise for social rights, see Zoppoli, *Solidarietà e diritto del lavoro: dissolvenza o polimorfismo?*, *"Massimo D'Antona"*, 2018, pp. 1-20.

already in the Italian Constitution[17]. The theme of solidarity is based on the concept of democracy as a result of collective action by the same citizens.

The importance of the role of the social economy had already been affirmed at European level with the approval in 2021 of the Action Plan for the Social Economy[18] aimed at creating an economy at the service of people.

The relevance of the person is the focus of the Action Plan, because the social economy is an economy "on a human scale" and represents a complementary organizational model capable of integrating the different dimensions: health, society, environment, economy for an inclusive and sustainable global, national and local development[19].

The adoption of the Action Plan shows that dealing with complex issues such as the ecological transition or the (re)generation of decent jobs cannot do it without the contribution of the organizations that make up the social economy sector.

According to the Action Plan, the social economy contributes to the realization of the Green Transition by providing sustainable goods and services. This can be possible through the adoption of participatory and democratic models used by the organizations that make part of it taking into account the needs of the community, workers and stakeholders[20]. With this in mind, the social economy contributes to achieving the 17 Sustainable Development Goals (SDGs) of the UN 2030 Agenda, increasing the employment rate and reducing the number of people at risk of poverty and social exclusion.

At this point it is important to understand which are the subjects that are part of this system and the distinctive characteristics compared to the "traditional" model.

The Action Plan identifies fundamental common principles to these organizations as "the primacy of people, as well as the social and/or environmental purpose, over profit; the reinvestment of most profits and surpluses

[17] See Zoppoli, *cit.*, p. 155.

[18] COM(2021) 778 final (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions).

[19] Di Meglio, Vuuren, *L'Economia Sociale e Solidale: una prospettiva internazionale*, in *ISoc*, 2022, 1, p. 57.

[20] Simonazzi, Review to Caruso, Del Punta, Treu, *Manifesto per un diritto del lavoro sostenibile*, 2020, in *DLRI*, 2020, 168, p. 822.

to carry out activities in the interest of members (collective interest) or society at large (general interest) and democratic and/or participatory governance". These characteristics explain the functioning of the entities that are part of it and highlight the differences, compared to other economic actors, in terms of "economic behavior" and management models[21].

To delineate the perimeter of the social economy, it is also necessary to take note of the pluralism of legal and organizational forms that characterize the various European countries[22].

The definition of "social economy" adopted by the Action Plan includes five categories of entities: cooperatives, mutual benefit societies, associations (including all non-profit organizations), foundations and social enterprises, that produce goods, services and knowledge while pursuing both economic and social ends by promoting solidarity. In these cases, solidarity equals sociality (or social dimension), and it can be a source of workers' rights[23].

Among the considered entities, cooperatives represent a well-established form of business model of the social economy as stated in the Action Plan. They are the "first actors" of the social and solidarity economy, whose aim is to satisfy the common needs of the community. Cooperatives represent an alternative business model capable of tackling economic, social and environmental problems by combining efficiency and productivity with fairness and democracy[24].

It cannot be forgotten that the UN (with its Resolution of 8 December 2009) claimed 2012 as the International Year of Cooperatives with the slogan "Cooperative enterprises build a better world", inviting all Member States to seize this opportunity to promote cooperatives. These realities can make an important contribution to the social and economic development of the country by reducing poverty, increasing employment and promoting social integration[25].

The UN Resolution recognized an important role in cooperation, be-

[21] Borzaga C., Calzaroni, Fontanari, Lori, *L'economia sociale in Italia. Dimensioni, caratteristiche e settori chiave*, ISTAT-EURICS Research Report, 2021, p. 5.

[22] Salvatori, *cit.*, p 11.

[23] Zoppoli, *cit.*, p. 157.

[24] Hoyt, Menzani, *The international cooperative movement: a quiet giant*, Battilani, Schröter (ed.), *The cooperative business movement 1959 to the present*, Cambridge University Press, 2012, p. 57.

[25] Polat, *Key role for cooperatives in poverty reduction efforts*, in *BW*, 2003.

cause it can promote the maximum participation of all people, including women, young people, the elderly, people with disabilities. An *ad hoc* recurrence is therefore established for cooperatives that is unprecedented in other forms of enterprise.

Cooperatives from all over the world are represented and united by the International Cooperative Alliance (ICA). It is an authority, which was founded in 1895 in London on the initiative of the English cooperative movement, which brings together the various unions and cooperative organizations of the various national movements with the aim of creating greater collaboration between them[26].

In 1995, on the 31st World Cooperative Congress of the ICA in Manchester, the *Statement on the Cooperative Identity* was approved, which aims to outline the common identity of all cooperatives. It contains, for the first time, a universal definition of "cooperative" based on the satisfaction of people's common economic, social and cultural needs and aspirations[27]. It also covers a range of cooperative values (such as self-help, self-responsibility, democracy, equality, equity and solidarity) and ethical values (such as honesty, openness, social responsibility and care for others), which are an important complement to the seven cooperative principles such as: *i)* voluntary and open membership; *ii)* democratic members control; *iii)* members economic participation; *iv)* autonomy and independence; *v)* education, training, and information; *vi)* cooperation among cooperatives; *vii)* concern for the community[28]. Values and principles relate to each other and play an important role in defining the legal identity of cooperatives.

The listed cooperative principles "identify a type of business organization characterized by the particular aims pursued and by a particular governance structure", where the purpose (meant as "purpose-end" and

[26] VERRUCOLI, *I "principi" dell'Alleanza Cooperativa Internazionale e la loro applicazione nella legislazione italiana*, in *Rcoop*, 1980, 5, p. 137.

[27] In accordance with the Statement on the Cooperative Identity, the cooperative is "an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise". See MORI, *Economia della cooperazione e del non-profit*, Carocci, 2008, pp. 35 e 36, which, retracing the definition of cooperative, highlights affinities with the character of mutuality typical of italian cooperatives and the democratic principle.

[28] The first cooperative representing the cooperative principles of the Statement on the Cooperative Identity was founded by Rochdale in England in 1844, see BUONOCORE, *Diritto della cooperazione*, il Mulino, 1997, p. 27 ff.

"purpose-means") and governance are determining elements for qualify a company as a cooperative[29].

The analysis of cooperative identity is however very complex in light of the fact that the cooperative phenomenon presents different configurations and disciplines within the individual states[30], but the ability of the cooperative model to be applied in different contexts and for the realization of different activities is significant[31]. The declination of ICA principles, in fact, may depend on the nature and type of cooperative[32].

The cooperative principles have been incorporated into the recommendation of ILO No. 193/2002 on the promotion of cooperatives, which is a source of international public law[33]. For the first time, the universal cooperative standards adopted by the ICA are included in full in the official text of an organization of the United Nations system. The Recommendation contains detailed proposals on how it promotes cooperatives and the designated entities to implement all this[34]. In fact, it governs specifically: scope, definition and objectives; policy framework and role of governments; implementation of public policies for the promotion of cooperatives; role of employers' and workers' organizations and cooperative organizations, and relationships between them; international cooperation. The objective of the Recommendation is to recognize the importance of cooperatives, because they are able to create stronger forms of human solidarity and a fair distribution of wealth.

The ILO has seen cooperatives as an important tool for improving the living and working conditions of both women and men[35]. The Recommen-

[29] Fici, *L'identità delle società cooperative, i Principi dell'Alleanza Cooperativa Internazionale e le legislazioni nazionali europee*, in *RDSociet*, 2012, p. 432.

[30] Hoyt, Menzani, *cit.*, p. 23.

[31] MacPherson, *What Is the End Purpose of It All?: The Centrality of Values for Cooperative Success in the Marketplace*, Battilani, Schröter (ed.), *The Cooperative Business Movement, 1850 to the Present*, Cambridge University Press, 2012, p. 107 ff.

[32] Oczkowski, Krivokapic-Skoko, Plummer, *The meaning, importance and practice of the cooperative principles: Qualitative evidence from the Australian cooperative sector*, in *JCOM*, 2013, p. 1 ff.

[33] Henry, *International Guidelines for Cooperative Policy and Legislation: UN Guidelines and ILO Recommendations 193*, Geneva, 2012, p. 47 ff., which identifies eleven points in support of the view that the ILO Recommendation is a source of public international law.

[34] Henry, *The relevance of ILO Recommendation no. 193 concerning the promotion of cooperatives for cooperative legislation*, 2012, p. 22.

[35] Levin, *ILO Recommendation no. 193 on the promotion of cooperatives*, in *RIES*, 2003.

dation has had an important impact and influence on member states, because they, in some cases, have reviewed the internal discipline on cooperatives and, in others, adopted policies or laws that affect them[36].

Finally, in March 2016, the ICA entered into a partnership with the European Commission (known as #coops4dev) opening a new phase of collaboration to strengthen the cooperative movement. The aim is to strengthen the "voice" of cooperation and in international development programs and policies. The partnership is based on increasing visibility, sharing and strengthening the cooperative development network[37].

The reading of the International and European context shows how the cooperative model represents an important slice for the sustainable (and solidarity) development of the economic and social system worldwide.

2. *The Seventh Principle of the Statement on the Cooperative Identity*

The cooperative model fits perfectly into the Green Transition process to achieve economic, social and environmental sustainability starting from the local context in which the cooperative itself operates. In fact, the attitude of cooperatives to (co)operate for sustainable development finds its highest recognition within the Seventh Principle of the 1995 Statement on the Cooperative Identity, entitled "concern for the community", according to which "cooperatives work for the sustainable development of their communities through policies approved by their members". Before entering into the merits of this principle, it is necessary to retrace the historical evolution that led to the adoption of this (new) principle[38].

The current Statement on the Cooperative Identity of 1995, containing cooperative principles and cooperative and ethical values, is the result of the revision of the two previous formal statements dating from 1937 and 1966[39].

[36] Stirling, *Promoting cooperatives: an information guide to ILO Recommendation No. 193*, ILO, Geneva, 2014, p. 26.

[37] The initiatives promised by the partnership can be consulted online https://coops4dev.coop/en/coops4dev.

[38] The historical evolution, which is proposed below with regard to the adoption of the Seventh Principle, has been drawn from the writings of MacPherson, *Cooperative's concern for the community: from members towards local communities' interest*, Euricse Working Papers, 2012.

[39] Waring, Lange, Chakraborty, *Institutional adaptation in the Evolution of the "cooperative principles"*, in *JEE*, 2022, pp. 340 e 341, which recalls the principles provided for by Statement

In fact, starting from 1980 the need arose to reconsider and renew the principles of 1966 given the changes in the economic and political order at world level. The ICA is therefore called upon to re-evaluate the 1966 principles and to identify useful guidelines for the future. The 1995 Statement on the Cooperative Identity, therefore, reaffirms and expands the principles of 1966 with the aim of guiding the cooperatives of the twenty-first century.

The main novelty introduced by the Statement 1995 is the adoption of the Seventh Principle titled "concern for the community", with the attempt to make the cooperative the engine for economic prosperity.

The first opportunity to reflect on this principle came with the "Cooperatives in the year 2000" project prepared by *Alex Laidlaw* for the Moscow Congress of the International Cooperative Alliance of 1980. For the first time, the need arises to build a "conservative society" to address the environmental issue through the development of communities based on cooperation.

Later, at the Stockholm Congress in 1988, the then president of the ICA *Lars Marcus* invited the international cooperative movement to reflect on the value of "taking care of others"[40], then on how cooperatives relate to the community and if this could be considered a hallmark of this model. The answer was clear, because according to the ICA Committee, chaired by *Sven Åke Böök*, the common concern for communities represents the "cooperative spirit". Indeed, in the subsequent report entitled "Cooperative values in a changing world", written by the same chairman of the Committee and presented at the 1992 ICA Congress in Tokyo, it is stated "the importance of the role of cooperatives in the fight for the social and economic emancipation of people [...] and a greater commitment to social responsibility"[41]. In addition, he highlights how "all fundamental cooperative values are perme-

of 1937, which are: open membership; democratic control; dividend paid based on the activity carried out; limited interest on capital; political and religious neutrality; money trading; promotion of education. Instead, those contemplated in the 1966 Statement are: voluntary membership; democracy; surplus distribution; limited interest on capital; provision for education; cooperation among cooperatives.

[40] For One reconstruction of values cooperatives see MACPHERSON, *What Is the End*, cit., p. 110 ff.

[41] On the subject of social responsibility and sustainable development see SALOMONE, *La responsabilità sociale dell'impresa: riflessioni a margine di una strategia europea sullo sviluppo sostenibile*, in *DRI*, 2004, 2, p. 379.

ated by responsibility for the community as a whole in the perspectives of social and economic justice" and goes on to recognize an important role for cooperatives to achieve a better society, because thanks to their organization they are able to "take care of others" and, therefore, of the community. It should also be noted that the debate on this principle focuses on environmental protection and sustainable development. Some of the contents of the subsequent Statement on the Cooperative Identity can be found in this report.

A few years later, at the Manchester Congress in 1995, the Statement on the Cooperative Identity was adopted, which includes "concern for the community" as one of the cooperative principles. This principle therefore has an autonomous configuration and definition, because before 1995 it was only part of the Sixth Principle "cooperation among cooperatives" of 1966[42].

A first reading of the Seventh Principle brings out the cooperative interest in contributing to a better society, because the members of the cooperative through their policies can meet their own needs and those of the community in which it operates[43]. In fact, the purpose of a cooperative is "to unite and involve its members in an economic and social community"[44]. They have not only a purely entrepreneurial or mutualistic character, but the task of contributing to solving the social and economic problems of the community[45].

The call made to "sustainable development of (their) communities" has connections with the environment even if not expressly mentioned. In fact, the cooperatives have a strong sense of responsibility for environmental protection in the community in which they operate[46]. However, "cooperative sustainability" is not only environmental, but also social and economic. For this reason, cooperatives can be considered an innovative model in the context of the Green Transition. Cooperatives cannot, therefore, ignore the social consequences of their actions so they must be transparent in carrying out

[42] Launio, Sotelo, *"Concern for community": Case of cooperatives in the Cordillera region, Philippines*, in *JCOM*, 2021, p. 9.

[43] Hoyt, *And then there were seven: Cooperative Principles Updated*, in *COOPG*, 1996.

[44] Novkovic, Puusa, Miner, *Cooperative identity and the dual nature: From paradox to complementarities,* in *JCOM,* 2022, p. 10.

[45] Depedri, Turri, *Dalla funzione sociale alla cooperativa di comunità: un caso studio per discutere sul flebile confine*, in *ISoc*, 2015, 5, p. 67.

[46] Oczkowski, Krivokapic-Skoko, Plummer, *cit.*, who highlights as the sustainability environmental strength be included inside of the principle "concern for the community".

their activities and strive to work with others to contribute to the well-being of the community. In fact, the Seventh Principle is based on the cooperative values of "self-help and self-responsibility" and the ethical values of "honesty", "openness", "social responsibility" and "care for others". Moreover, it is the expression of a "way of doing business" which characterizes cooperative entrepreneurship and no other business model[47].

Shifting attention to the last part of the Seventh Principle, the cooperatives develop community projects in accordance with "policies approved by (their) members". This clarification is intended to prevent third parties to the cooperative from distorting its activity to meet its own ends. The aim is to stimulate discussion among members on how to relate to the community for sustainable development.

The members have an important and different role within the cooperative unlike the "traditional" companies because they are linked by a strong feeling of belonging. This translates into participation and desire of the members to be directly involved in the business activity[48]. In fact, the strategy for decision-making and project planning within the cooperative follows a bottom-up logic[49].

Further insights into cooperative principles were offered by the document "Let's examine our cooperative identity", which was prepared for the 33rd ICA World Congress of Cooperatives held in Korea in December 2021. The document has been drafted taking into account the "Guidance Notes on Cooperative Principles" (ICA 2015)[50] and aims to deepen the cooperative identity of the 1995 Statement, to define more clearly the values and cooperative principles.

Let us now see what the salient and most significant features of these documents are limiting the analysis to the Seventh Principle.

In general, cooperatives are concerned with the health and well-being of people within their community, so they must strive to be ethical and socially responsible in the activities they carry out. Cooperatives are able to understand the needs coming from outside and their presence allows the economic and social development of the country.

[47] MacPherson, *Cooperative's concern for the community*, cit.

[48] MacPherson, *Cooperative's concern for the community*, cit.

[49] Borzaga, Salvatori, Bodini, *cit.*

[50] The guidelines are useful for reading the cooperative principle see Waring, Lange, Chakraborty, *cit.*, p. 338.

The formulation of the Seventh Principle emphasizes the concern for the sustainable development of their communities, therefore, first of all the local communities. This principle demonstrates how cooperatives are successful sustainable enterprises that can create benefits not only for their members, who democratically control and own the cooperative, but also for the community where they operate. In fact, they are able to achieve positive "externalities" and, therefore, beneficial effects on the community[51]. Starting from these deep (local) roots, the concern for the sustainable development of the community even extends at national, regional and global levels. The link between concern for sustainable local and global development is clear.

As stated in the guidelines, the reference to the notion of "sustainable development" within the principle stems from the debate that took place during the 1992 United Nations Conference on Environment and Development (known as the Rio de Janeiro Earth Summit). In fact, the Seventh Principle was adopted in 1995, incorporating the interest in environmental protection under the heading "sustainable development".

Another important intervention that reaffirmed the importance of sustainable development in the world is the 2030 Agenda prepared in 2015 by the UN, which includes 17 sustainable development goals. Compared with the activities carried out by cooperatives, these make an important contribution to achieving the eighth objective namely that of "stimulating growth [...] inclusive and sustainable, full and productive employment and decent work for all".

Cooperatives "contribute to sustainable development" in triple form: social, economic and environmental and all three of these profiles have the same value, the same importance and are (inter)dependent on each other.

With regard to the first profile, cooperatives are able to meet economic needs through affordable goods and services and create fair and inclusive jobs. Cooperatives are aware that sustainable social development requires maintaining a harmonious relationship between material growth and response to the immaterial and social needs of the community, such as: culture, art, education, health, social services, assistance, integration of disadvantaged people. Social sustainability is also understood as peace and social justice,

[51] Capo, *Le cooperative di comunità*, in *GCom*, 2021, 4, p. 616 ff. To consult the guidelines in full https://www.ica.coop/en/media/library/research-and-reviews/guidance-notes-cooperative-principles.

protection and respect for the worker who carries out his work and, finally, support and promotion of the youth.

From the point of view of economic development, cooperatives are able to support the communities in which they operate by combating inequalities between rich and poor and the unequal distribution of wealth. This forecast is confirmed by the final report Rio+20 of 2012, which recognized the actual and potential role of cooperatives in contributing to the achievement of sustainable development, poverty reduction and job creation. The concrete implementation of economically sustainable development can take place through the application of ethical values to trade and exchange "Coop2Coop".

No less important is the last part of the Seventh Principle which recalls the "policies approved by their members", which means that policies and programs for the sustainable development of the community must be approved by the general assembly of members. In addition, the latter must ensure the balance between self-interest and concern for the community.

In this perspective, cooperatives have a direct influence on the sustainable development of a country, because the members, through the policies adopted, care for the community and determine the objectives (and priorities) considering the concrete needs of individuals who are part of it.

Understanding the Seventh cooperative Principle means identifying an innovative and sustainable business model capable of facing the changes produced by the pandemic and the climate emergency. The triple bottom line of cooperatives: economic, social and environmental makes the cooperative enterprise fit to meet these challenges.

3. *The participatory model of the cooperatives*

The Seventh Principle established at the international level can be declined in the Italian legal system taking into consideration the model of participatory governance of cooperative members-workers[52].

Maintaining a Labour law approach to the problem, we can analyze the figure of the member-worker in cooperatives, which make use of the work

[52] For a reconstruction of worker cooperatives and associative and employment relationship see Biagi, *Cooperative e rapporti di lavoro*, Franco Angeli, 1983.

of the members themselves (art. 2512, par. 2 C.C.). These are cooperatives in which "the mutual relationship relates to the provision of work activities by the member" (art. 1, par. 1, l. no. 142/2001), for this reason the member is not a member, but a member-*worker*[53].

The second paragraph of the aforementioned rule defines the *status* of the working member by attributing to it a "collaborative stability"[54] because it has the possibility to: participate in the corporate bodies, to define the structure of management and governance of the company, to participate in development programs and decisions relating to strategies, to carry out production processes, to contribute to the formation of social capital, to participate in business risk, results and their destination and, finally, to make available their professional skills.

It can be deduced a participatory governance system where members and workers have an active role in the management of the cooperative, because both participate in business decisions[55]. In fact, cooperatives represent an original model of business, because the ownership belongs directly to the workers involved in the production activity[56]. The participation and involvement of members (and) workers represent in the long term an advantage in terms of quality of the organizational atmosphere and productivity[57].

The third paragraph of art. 1 provides that "the worker-member of the cooperative establishes with his membership or after the establishment of the associative relationship a further employment relationship [subordinate, autonomous, collaboration or other form] with which he contributes to the achievement of social goals". In this regard, the member-worker establishes with the cooperative a working relationship in addition to the associative. The two relationships (associative and labor) are connected because the lack of the labor relationship does not allow the full achievement of the purpose of the cooperative society.

The "specialty" of the relationship of the member-worker in a cooperative has undergone important changes by Law no. 30/2003 (so-called

[53] Vitali, *Il concetto di mutualità alla luce della legge n. 142/2001: profili di diritto societario*, in *VTDL*, 2017, p. 297 ff., which notes how art. 1, par. 1 of Law no. 142/2001 is applicable also for social cooperatives in addition to the worker cooperatives and production cooperatives.

[54] Cavazzuti, *Il socio lavoratore fra disciplina speciale e codice civile*, in *GCom*, 2004, 2, p. 229 ff.

[55] Buonocore, *cit.*, pp. 124 e 125.

[56] Genco, *Rassegna di giurisprudenza società cooperative (2018-2019)*, in *GCom*, 2019, 2, p. 227 ff.

[57] Colloca, *La governance partecipativa nelle imprese cooperative*, il Mulino, 2012, 2, p. 372.

Biagi Law), which amended art. 1, paragraph 3 of Law no. 142/2001 by eliminating the term "distinct". This led to consider the employment relationship instrumental with respect to the corporate relationship, but that keeps its autonomy as shown by the adjective "further". The mutual relationship has an "ancillary" function with respect to the associative one, therefore, the associative relationship takes precedence over the employment relationship[58].

All this has implications, because the termination of the employment relationship does not entail the automatic extinction of the associative relationship, while the termination of this inevitably also involves the extinction of the labour constraint: the cooperative member may no longer be a worker and remain a member, but if he loses the *status* of member he is no longer even a worker (art. 5, par. 2, l. no. 142/2001)[59].

To confirm, the circular of the Ministry of Labour and Social Policies, 18 March 2004, no. 10, precisely following the amendments made by law no. 30/2003, clarified that the associative relationship is considered preeminent with respect to the employment relationship, therefore, when the *status* of member of the cooperative is lost, the *status* of worker is also lost[60]. On the other hand, the situation in which the person no longer carries out work within the cooperative is different, because in this case only the employment relationship and not the corporate one is lost.

The figure of the cooperative worker member connotes a system of participatory governance inclusive and democratic, because "it puts the person in the foreground as a heritage to be protected and safeguarded"[61]. In confirmation, the Civil Code recognizes the democratic participation of the working members in articles: 2516, 2527, 2528 and 2538.

Art. 2516 C.C. provides that the principle of equal treatment must be respected in the establishment and implementation of mutual relationships,

[58] SPEZIALE, *Socio lavoratore: evoluzione normativa e giurisprudenziale*, in *DPL*, 2003, 43, p. 2493.

[59] The rule, as subsequently amended by the l. no. 30/2003, provides that "the employment relationship is extinguished with the resignation or exclusion of the member". The associative relationship prevails, therefore the employment relationship is instrumental. This means that when the associative relationship ceases there is automatic termination of the employment relationship. See Cass. 20 November 2017 no. 27436.

[60] SPEZIALE, *cit.*

[61] COLLOCA, *cit.*, p. 367.

which means that discrimination against the member is prohibited[62]. The constraint of equal treatment in the phase of "establishment" of the mutual relationship for the purpose of choosing the members (i.e. with whom to establish a "further" employment relationship) implies a reduction in the cooperative's discretion (or "controlled" discretion)[63]. In fact, the same instrument of incorporation is required to establish the conditions for the admission of members "according to non-discriminatory criteria consistent with the mutual purpose and the economic activity carried out" (art. 2527, par. 1, C.C.)[64]. However, reference is made to "mutual relationships" excluding from the scope of application of the principle the corporate relationship and the activity carried out by the cooperative with third parties pursuant to art. 2521, par. 2 C.C., with the consequence that the cooperative is not required to equate members with third parties in the activity carried out with the latter[65]. In fact, the instrument of incorporation must provide for the "rules for the development of mutual activity" and may also allow the exercise of activities with third parties, but only if expressly indicated (art. 2521, par. 2 C.C.).

In addition, in order for a cooperative to have an inclusive governance, it is necessary that this is accompanied by the so-called principle of open-door *ex* art. 2528 C.C. (entitled "Admission procedure and open character of the company"). It allows to enter into the cooperatives to all those who are bearers of the same needs and interests[66]. According to the rule, the admission of the member takes place by decision by the board of directors and if this rejects the request, the interested party may request that the shareholders' meeting pronounce on the application[67]. It is a particular procedure not provided for other companies and which is aimed at protecting the person interested in entering the cooperative. The cooperative is therefore "the

[62] On that principle, see extensively CUOMO, *Gestione mutualistica e parità di trattamento nelle cooperative*, in *RDSociet*, 2013, 5, p. 905 ff.

[63] TULLINI, *Mutualità e lavoro nelle recenti riforme della società cooperativa*, in *DRI*, 2005, 3, p. 711 ff.

[64] GENCO, *Il governo dell'impresa cooperativa*, in *GCom*, 2006, 4, p. 603 ff.

[65] BONILINI, CONFORTINI, GRANELLI, *Codice civile commentato*, Utet Giuridica, 2012.

[66] RIVOSECCHI, *Profili di costituzionalità della disciplina delle società cooperative tra diritto interno e diritto dell'Unione europea*, in *RIDPC*, 2004, 1, p. 199.

[67] BUONOCORE, *La società cooperativa riformata: i profili della mutualità*, in *RDC*, 2003, 5, p. 10507.

entrepreneurial instrument with which a community organizes itself to meet its social needs and the open structure of society tends to encourage this function by facilitating the admission to membership of all those subjects who are bearers of these needs"[68].

The corporate structure, which is expressed through the variability of the share capital, is closely connected with the social purposes of the cooperative even outside the structure allowing a continuous comparison with the needs of local communities. In fact, the cooperative does not consider only the interests of the members, but also those of its internal subjects (workers) or external (suppliers, customers, local communities), who are involved (more or less directly) in the entrepreneurial activity and with whom it is necessary to dialogue[69].

The Civil Code also re-enforces the democratic nature of the voting system, whereby each participant expresses a power identical to any other member regardless of the amount of the economic contribution made to the cooperative[70]. This principle is expressed in art. 2538 C.C., which recognizes each member one vote regardless of the value of the share, therefore "one member, one vote"[71]. In this way, the members are given equal decision-making power in spite of the shares of capital subscribed[72].

The Seventh Principle is therefore applied in the Italian system if considering the position of the worker member of a cooperative and the model of participatory governance, which makes the cooperative model sustainable and peculiar with respect to profit enterprises.

[68] Genco, *Note sui principi di corporate governance e sulla riforma del diritto societario nella prospettiva delle società cooperative*, in *GCom*, 2000, 2, p. 277.

[69] Genco, *cit*.

[70] Dell'Utri, *Recesso individuale e potere nei gruppi*, in *GI*, 2018, 8-9, p. 2035; Fici, *La nozione di impresa sociale e le finalità della disciplina*, in *ISoc*, 2006, 3, p. 40.

[71] Salamone, *Cooperative sociali e impresa mutualistica*, in *RVDSOC*, 2007, 2-3, p. 500, which highlights how this principle was already present in the Commercial Code of 1982, which recognized the one member one vote also called "democratic vote".

[72] Depedri, Turri, *cit.*, p. 67.

4. *The community cooperatives: the missing piece of the puzzle? Closing remarks*

The Seventh Principle of the Statement on the Cooperative Identity can be read at national level through the phenomenon of the so-called community cooperatives or public benefit cooperatives[73], whose explicit purpose is the pursuit of the general interest. They support all society, through activities aimed not only at the pursuit of the mutual purpose but also at the satisfaction of the needs of the local community to promote social and economic development[74].

Within cooperatives, it emerges "a new collective consciousness in which people choose to cooperate and share the resources available to improve the well-being of their community"[75]. Community cooperatives must potentially include an entire community, i.e. all those who are potentially interested in the good provided by the cooperative. Therefore, everybody should be allowed to become member, in accordance with the "open door" principle.

Then, community cooperatives are those that meet three requirements: *i)* they are controlled by citizens (communities); *ii)* they offer or manage community goods; *iii)* they guarantee non-discriminatory access to all citizens[76].

From a regulatory point of view, the inertia of the Italian national legislator on the recognition of community cooperatives is well known. In fact, this phenomenon has found concrete expression thanks to the regions that have intervened[77]. There are regional laws which are entirely devoted to the regulation of community cooperatives, while others regulate community co-

[73] Second Mori, *cit.*, p. 37, the application of the Seventh Principle finds legal recognition only for social and community cooperatives while for the generality of the cooperative it remains an ideal goal.

[74] Mori, *Comunità e cooperazione: l'evoluzione delle cooperative verso nuovi modelli di partecipazione democratica dei cittadini alla gestione dei servizi pubblici*, Euricse Working Papers, 2015, 77, p. 8, which highlights how the general interest of the community does not replace the traditional mutualistic purpose, but complements it.

[75] Sforzi, *Quando la cooperazione riscopre la comunità*, C. Borzaga (ed.), *Cooperative da riscoprire. Dieci tesi controcorrente*, Donzelli Editore, 2018, p. 119.

[76] Mori, *Comunità e cooperazione*, cit., p. 15.

[77] Della Croce, *Cooperative di comunità: la legislazione regionale vigente e la prospettiva di una normativa generale*, in *OSSCost*, 2021, 4, pp. 101-106.

operatives within the framework of social cooperation or promote cooperative development.

The first block includes the regional laws by: Liguria[78], Abruzzo[79], Sardegna[80], Sicilia[81], Toscana[82], Umbria[83], Campania[84], Lazio[85], Puglia[86]. The second group, for example, includes Friuli-Venezia Giulia, which, like Emilia-Romagna[87], does not have an *ad hoc* law on community cooperatives. The "Rules on social cooperation" Regional Law no. 20/2006 shows how social cooperation is closely connected to community cooperatives, because "the Region recognizes social cooperation as a form of self-management and direct participation of citizens in the solidarity processes of economic development and growth of the social heritage of the *communities* regional local areas, emancipation and support for the weaker sections of the population, the construction of civic networks and projects and interventions aimed at achieving good governance and the well-being of local *communities*" (art. 1). The term "community" is expressly referred to in the regional law on social cooperatives. In the normative act considered, the discipline of community cooperation tends to be configured as "regulation of a peculiar role assumed by a more general and formal legislation dedicated to social cooperatives"[88].

The motivation that led some regions to regulate community cooperatives within the *species* social cooperatives is inherent in the content of

[78] R.L. 7 April 2015, no. 14, "Regional actions in support of community cooperatives".

[79] R.L. 8 October 2015, no. 25, "Discipline of Community Cooperatives".

[80] R.L. 2 August 2018, no. 35, "General actions in support of community cooperatives".

[81] R.L. 27 December 2018, no. 25, "Rules for the promotion, support and development of community cooperatives in Sicily".

[82] R.L. 14 November 2019, no. 67, "Community cooperation. Amendments to the R.L. 73/2005".

[83] R.L. 11 April 2019, no. 2, "Regulation of community cooperatives".

[84] R.L. 2 March 2020, no. 1, "Provisions on community cooperatives", amended by R.L. 24 June 2020, no. 12, "Amendments to the Regional Law 2 March 2020, n. 1 (Provisions on community cooperatives)".

[85] R.L. 3 March 2021, no. 1, "Provisions on community cooperatives".

[86] R.L. 20 May 2014, no. 23, "Provisions on community cooperatives".

[87] R.L. 17 July 2014, no. 214, "Rules for the promotion and development of social cooperation", which repeals the R.L. 4 February 1994, no. 7 "Rules for the promotion and development of social cooperation, implementation of the L. 8 November 1991, no. 381".

[88] This approach is also found in the regional law of Emilia-Romagna, see Della Croce, *cit.*, p. 108.

Law no. 381/1991[89], which recognizes the latter as an explicit purpose that of "pursuing the general interest of the community in the human promotion and social integration of citizens"[90]. This purpose is implemented through "the management of social, health and educational services, including the activities indicated in article 2, paragraph 1, letters a), b), c), d), l), p) of Legislative Decree n. 112/2017 (type A cooperatives); while carrying out of various activities – agricultural, industrial, commercial or service – aimed at the employment of disadvantaged persons (type B cooperatives)"[91].

Within social cooperatives, therefore, the (mutualistic) interest of the social structure is combined with the pursuit of the more general interest of the community in which they operate[92]. They are defined as "social" because they have positive effects for the society in addition to the advantages procured towards the individual members.

The social benefit produced by social cooperatives derives from externalities and promotion of social justice[93]. For example, educational and social welfare services directly affect the people who benefit from them, but they also have positive external effects on the well-being of society, because they increase productivity and promote social justice. Even the employment of disadvantaged people produces externalities because it promotes the person's professional and personal development within society as well as bringing satisfaction to the person who has an occupation.

In this perspective, social cooperatives can be considered the destination, which led to the transition from the "traditional" model of cooperation to that of "public benefit" or "community"[94]. The question is whether it is really necessary to have a specific law for community cooperatives or it is suf-

[89] Ferluga, *Il lavoro nelle cooperative sociali*, in *VTDL*, 2019, n. straordinario, p. 1711, which recognizes the form of social cooperation as a *species* of the *genus* cooperatives. Bano, *Il lavoro senza mercato*, Il Mulino, 2001, p. 199 ff.

[90] Mori, *Comunità e cooperazione*, *cit.*, p. 9, which states that social cooperatives represent one of the most important examples in the world of public benefit cooperatives. The law on social cooperatives recognized, for the first time in Italian legislation, that the purpose of a cooperative can be the promotion of the interests of community.

[91] See extensively Sartori, *Le cooperative sociali. Profili giuslavoristici*, in *VTDL*, 2017, 2, p. 408 ff.

[92] Capo, *cit.*

[93] Mori, *Comunità e cooperazione*, cit.

[94] Capo, *cit.*

ficient to use the existing legal forms[95]. This is also because the term "community" is often part of the mission of cooperatives, regardless of their status.

On the opposite, however, there is an element of distinction between social cooperatives and community cooperatives: in the first case the cooperative shows "interest in" the community; in the second it is "constituted by" the community[96]. This means that for cooperatives with a social function, the prevailing objective is the well-being of the members and the (indirect) product of the activity is the well-being of the community, while for community cooperatives the primary objective is to respond to the needs of the community.

Although there is no specific reference to "community cooperatives" in national provisions, the relevance of the phenomenon has prompted the national legislator to legislative proposal: no. 28/2018 entitled "Discipline of community cooperatives".

The proposal is structured in only three articles: art. 1, which defines the community cooperatives; art. 2, which gives the regions the task of adopting the relevant implementing rules and establishing the regional register of community cooperatives and their consortia; art. 3, which recognizes economic support measures.

The proposal, therefore, delegates the regions to provide for the detailed discipline, bearing in mind that the regions already in possession of legislation on the subject will only have to comply or adapt to the legislation, while the rest will have to fully transpose the national discipline.

Another regulatory intervention that followed is the draft law no. 1650/2019, whose *ratio* is to assimilate community cooperatives to social enterprise, introducing community social enterprise into the legal system. The proposed interventions, however, to date have not yet become law, even if they show a first openness to this reality on the part of the national legislator.

In light of the above, community cooperatives are an expression of the Seventh Principle of the Statement on the Co-operative Identity, because they contribute to the sustainable development of the community in which they operate and allow the realization of a just and inclusive Green Transition.

[95] See Sforzi, Borzaga C., *Imprese di comunità e riconoscimento giuridico: è davvero necessaria una nuova legge?*, in *ISoc*, 2019, 13, p. 17.

[96] Depedri, Turri, *cit.*, p. 67.

The puzzle of "sustainable" cooperation is then composed of cooperation, social cooperation, and community cooperation, which restore the sense of working together with truly participatory legal instruments.

Abstract

The paper analyses cooperative work for sustainable development as a tool for a just and inclusive Green Transition, deepening the relevance of the Seventh Principle of the Statement on the Cooperative Identity adopted by the ICA in 1995, according to which cooperatives, through policies approved by members, work for the sustainable development of the community. This principle is realized in the Italian system if we consider the participatory, inclusive and democratic governance adopted by the cooperative model and directly involving the member (also) worker. In this regard, community or public benefit cooperatives, which aim to pursue the general interest, fully realize this principle, because they contribute to the sustainable development of the community in which they operate thanks to the work of the members-workers, allowing the realization of a fair and inclusive Green Transition. Cooperatives therefore play a fundamental role both internationally and nationally for the economic, social and environmental sustainability of the country. In this regard, the cooperative model is opposed to the profit enterprise, because it considers as priority the needs of the person and the community.

Keywords

Green Transition, Social economy, Seventh Principle of the Statement on the Cooperative Identity, Participatory governance, Sustainable development, Cooperatives, Community.

Maria Giovannone

Guidelines on collective agreements regarding the solo self-employed persons: another (controversial) immunity to EU competition rules

Contents : 1. Introduction. **2.** Collective dynamism in self-employment: brief remarks on Italy. **3.** EU Commission Guidelines. **3.1.** Collective agreements of individual self-employed workers comparable to employees. **3.2.** The other "tolerated" collective agreements: reflections on social objectives and the fight against social dumping. **4.** The borderline between self-employed worker and small entrepreneur: from the Italian to the Australian case. **5.** Conclusion.

1. *Introduction*

Collective labour market regulation is the subject of much doctrinal debate. On the one hand, hyper-liberal theories conceive collective bargaining as an anti-competitive tax on corporate profits[1]. Conversely, it is argued that by setting protection standards for workers, irrespective of market performance, collective bargaining contributes to a fair, stable, and efficient economic order[2]. According to this view, the labour market is primarily a social space within which collective self-regulation organises forms of redistributive justice[3].

[1] In this sense, HIRSCH, *Sluggish Institutions in a Dynamic World: Can Unions and Industrial Competition Coexist?*, in *JEP*, 2008, 22, 1, p. 153 ff.

[2] CELLA, *Quale futuro per la contrattazione collettiva?*, in *DLRI*, 2016, 150, 2, p. 217 ff.

[3] TANKUS, HERRINE, *Competition Law as Collective Bargaining Law*, in PAUL S., MCCRYSTAL, MCGAUGHEY (eds.), *Cambridge Handbook of Labor in Competition Law*, Cambridge University Press, 2022, pp. 72-95; TIRABOSCHI, *Sulla funzione (e sull'avvenire) del contratto collettivo di lavoro*, in *DRI*, 2022, 3, p. 804; BELLARDI, *Le relazioni industriali in transizione: nodi critici e ipotesi di riforma*, in *DRI*, 2003, 3, pp. 362-407.

The tension between the rules of competition and collective rights is nothing new in European law, where market logic has strongly conditioned the exercise of these rights[4]. One only has to think of the EU Court of Justice rulings known as the "Laval Quartet", with the ultimate aim of protecting and making the Single Market efficient, social (especially collective) rights were compressed in favour of economic freedoms[5], with the effect that the Court restricted the limits of trade union autonomy, interfering in a selective way in worker/company conflict dynamics[6].

However, for some time the Court of Justice has granted a sort of "immunity" to collective bargaining from the competition rules to prevent the application of the prohibition of restrictive agreements (Art. 85 TEC, now Art. 101 TFEU) from jeopardising the effective exercise of the right to collective bargaining (the so-called "Albany exception")[7]. This is a non-automatic exemption, which is triggered by the fulfilment of specific requirements: collective agreements must be negotiated between representative organisations and must have a social policy objective (the improvement of employment and working conditions). Therefore, collective bargaining remains a right conditioned by competition law, granted "by subtraction" from its rules[8].

The issue becomes even more complicated when collective bargaining looks at the self-employed[9]. They are, in fact, included in the European

[4] Among all, Sciarra, *How Social Will Social Europe Be in the 2020s?*, in *GLJ*, 2020, 21, 1, pp. 85-89; Giubboni, *Libertà d'impresa e diritto del lavoro nell'Unione europea*, in *Costituzionalismo.it*, 2016, 3, p. 88 ff.

[5] CJEU, C-438/05, *Viking*; CJEU, C-341/05, *Laval*; CJEU, C-346/06, *Rüffert*; CJEU, C-319/06, *Commission vs Luxembourg*. On topic, *ex multis*, Giovannone, *La tutela dei labour standards nella catena globale del valore*, Aracne editrice, Roma, 2019, p. 39 ff.; Peonovsky, *Evolutions in the Social Case Law of the Court of Justice: The Follow-up Cases of the Laval Quartet: ESA and Regiopost*, in *ELLJ*, 2016, 7, 2, pp. 294-309; Novitz, *The Paradigm of Sustainability in a European Social Context: Collective Participation in Protection of Future Interests?*, in *IJCL*, 2015, 31, 3, pp. 243-262.

[6] Brancati, *Il bilanciamento tra diritti sociali e libertà economiche in Europa. Un'analisi di alcuni importanti casi giurisprudenziali*, Servizio Studi, Corte Costituzionale, 2015, p. 5 ff.

[7] CJEU, C-67/97, *Albany*, in *Il lavoro nella giurisprudenza*, 1, 2000, with a note by Allamprese, pp. 22-38. A short time later, this orientation was consolidated in other judgments: cases CJEU, C-180/98-184/98, *Pavlov* e CJEU, C-222/98, *van der Woude*.

[8] Evju, *Collective Agreements and Competition Law. The Albany Puzzle, and van der Woude*, in *IJCL*, 2001, 17, 2, p. 166.

[9] For a broader reflection on the topic, La Tegola, *Le fonti di determinazione del compenso nel lavoro non subordinato*, Cacucci, Bari, 2022.

Union concept of "undertaking" and, therefore, collective agreements of self-employed workers are prohibited as "agreements between undertakings [...] which have as their object or effect the prevention, restriction or distortion of competition within the internal market" (Art. 101 TFEU)[10]. This conception contrasts with the orientation adopted in several fora at the international level (ILO, ECtHR, ECSR)[11], according to which the right to collective bargaining is recognised for workers regardless of their contractual status.

In rare cases, the Court of Justice has legitimised collective agreements of the self-employed because they pursue a general interest or legitimate objectives[12]. However, since the FNV *Kunsten* case, the Court has ruled that the collective agreements of the self-employed affect free competition and that the organisations representing these workers act as associations of undertakings[13]. Therefore, only collective agreements for the benefit of false self-employed workers, who are comparable to employees, are lawful. In this circumstance, such workers are in a condition of dependence on the client since they act as an auxiliary integrated into the enterprise and do not share any economic and financial risk with the client[14].

The figure of the self-employed worker is thus assimilated to any independent economic operator offering services for remuneration in a given (goods and services) market. Its nature as a natural person exercising work in a personal manner in the (labour) market is totally disregarded[15]. It can

[10] On topic, PAUL S. M., *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, in *LUCLJ*, 2016, 47, 3, p. 977.

[11] ILO CFA, Compilation of Decisions of the Committee on Freedom of Association, 6th edn, Geneva, ILO, 2018; International Labour Conference (ILC), Report of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), 2016, ILO, Geneva, 2016; *Vör ur Ólafsson v Iceland*, ECtHR of 27 April 2010, Application no. 20161/06; *Irish Congress of Trade Unions (ICTU) v Ireland*, ECSR Decision on the merits of 12 September 2018, Complaint No. 123/2016.

[12] In particular, CJEU, C-180/98-C-184/98, *Pavlov*; CJEU, C-309/99, *Wouters*; CJEU, C-1/12, *Ordem dos Técnicos Oficiais de Contas*; CJEU, C-427/16 and C-428/16, *Chez*.

[13] CJEU, C-413/13, *FNV Kunsten*, in *RIDL*, 2015, 2, with note by Ichino, pp. 566-580. See also BABIRAD, *Case comment: FNV Kunsten Informatie en Media v Staat der Nederlanden*, in *ECLR*, 2015, pp. 181-186.

[14] CJEU, C-413/13 FNV, *Kunsten*, cit., par. 33 ff. On the criteria revealing false self-employment, CJEU, C 256/01, *Allonby*.

[15] Rightly speaking of "double nature" ENGBLOM, *Equal Treatment of Employees and Self-Employed Workers*, in *IJCL*, 2001, 17, 2, p. 216.

therefore be deduced that the criterion for imputation of protection continues to be the contractual qualification according to the rigid autonomy-subordination dichotomy, without admitting that *vulnerability* and (economic-organisational) *dependence* are concepts that now also describe self-employment[16].

2. *Collective dynamism in self-employment: brief overview on Italy*

Contrary to the orientation of the ECJ, the trade union's focus on work beyond subordination is motivated by the frequent position of weakness (when not outright dependence) of the self-employed worker *vis-a-vis* the client, as has been noted for decades in the most attentive labour literature[17]. The "factual legal reality"[18] shows that the concept of vulnerability is now extended to a wide range of workers exposed to the risk of in-work poverty due to inadequate social (and contractual) protection. These include economically dependent self-employed workers, who suffer a weak position in the labour market and the employment relationship[19].

In Italy, Article 39(1) of the Constitution, in conjunction with Article 3, broadly protects trade union freedom and the right to collective bargaining in pursuit of substantive equality. The Constitutional Court has repeatedly recognised the collective rights of the economically weak self-employed. Recently, the national legislature has entrusted collective bargaining with regulating hetero-organised self-employment (Art. 2, para. 2, Legislative Decree No. 81/2015). In this area, collective agreements for platform work and outbound call centre[20] activities are relevant. Indeed, the social partners have

[16] On the need to overcome this conceptual dichotomy, Perulli, Treu, *"In tutte le sue forme e applicazioni": per un nuovo Statuto del lavoro*, Giappichelli, 2022.

[17] Among all, Davidov, *Collective Bargaining Laws: Purpose and Scope*, in *IJCL*, 2004, 2, 1, pp. 81-106. For a comment, Perulli, *A Purposive Approach to Labour Law by Guy Davidov: A Comment*, in *DLRI*, 2017, 156, 4, pp. 759-772.

[18] Tiraboschi, *Appunti per una ricerca sulla contrattazione collettiva in Italia: il contributo del giurista del lavoro*, in *DRI*, 2021, 1, p. 599 ff.

[19] Ratti, *In-Work Poverty in Europe: Vulnerable and Under-Represented Persons in a Comparative Perspective*, in *BCLR*, 2022.

[20] Among all, Piglialarmi, *La contrattazione collettiva, il lavoro parasubordinato e i rapporti di collaborazione ex art. 2, comma 2, d.lgs. n. 81/2015*, in *DRI,* 2019, 1, pp. 388-405. On call centres, see also T. Roma 6 maggio 2019 in *RGL*, 2020, 2, pp. 330-335, with note by Giovannone.

long organised representation and bargaining for other forms of self-employment (coordinated and continuous collaborators, agents, etc.)[21]. However, experimentation with representation beyond salaried employment has encountered several obstacles. On the one hand, the unionisation of the self-employed is held back by the difficulty of identifying homogenous interests, sectoral boundaries, and bargaining counterparts. On the other hand, the union still adopts the rigid coordinates of subordinate employment (tasks, vertical organisation, etc.), while the self-employed escape these logics as well as product and sectoral classifications[22]. However, it cannot be denied that trade unions are reinterpreting collective demands inclusively[23]. First, "traditional" collective agreements are progressively extending the field of beneficiaries of protections beyond subordination. Second, trade unions increasingly rely on judicial strategies to protect the new self-employed (especially platform workers), including recourse to class actions[24].

The Italian experience is by no means isolated. On the contrary, the bargaining practice in many European states is broadening the scope of beneficiaries beyond standard workers with the *placet* of national legislators. Suffice it to say that, albeit with different nuances, the right to collective bargaining is recognised for economically dependent self-employed workers in Spain, Germany, and Ireland[25], for self-employed platform workers in

[21] Ferrario, *Rappresentanza, organizzazione e azione sindacale di tutela del lavoro autonomo caratterizzato da debolezza contrattuale ed economica*, in *RGL*, 2009, 1, pp. 47-69; Scarpelli, *Autonomia collettiva e autonomia individuale nella regolazione del rapporto dei lavoratori parasubordinati*, in *LD*, 1999, 4, pp. 553-569; Vettor, *Le ricerche empiriche sul lavoro autonomo coordinato e continuativo e le nuove strutture di rappresentanza sindacale Nidil, Alai e Cpo*, in *LD*, 1999, 4, p. 630.

[22] Centamore, *Sindacato, contrattazione e lavoro non standard*, in *RGL*, 2022, 2, p. 216; Tullini, *L'economia digitale alla prova dell'interesse collettivo*, in *LLI*, 2018, 4, 1, p. 1 ff.; Lassandari, *La tutela collettiva del lavoro nelle piattaforme digitali: gli inizi di un percorso difficile*, in *LLI*, 2018, 4, 1, p. I ff.; Forlivesi, *La sfida della rappresentanza sindacale dei lavoratori 2.0*, in *DRI*, 2016, 3, p. 672 ff.

[23] Caruso, *La rappresentanza delle organizzazioni di interessi tra disintermediazione e intermediazione*, in *ADL*, 2017, 3, p. 563.

[24] Gaudio, *Algorithmic management, sindacato e tutela giurisdizionale*, in *DRI*, 2022, 1, pp. 30-74; Donini, *Condotta antisindacale e collaborazioni autonome: tre decreti a confronto*, in *LLI*, 2022, 1, R.1-R.33; Razzolini, *Azione di classe e legittimazione ad agire del sindacato a prescindere dall'iscrizione nel pubblico elenco: prime considerazioni*, in *LDE*, 2021, 4, pp. 1-12; Recchia, *Il sindacato va al processo: interessi collettivi dei lavoratori e azione di classe*, in *LDE*, 2021, 4, pp. 1-13; Protopapa, *Strategie legali delle organizzazioni sindacali e Statuto dei lavoratori*, in *LD*, 2020, 4, pp. 655-672.

[25] For Spain and Germany, see Gil Y Gil J. L., *Collective Bargaining for the Self-Employed*, in *CLLPJ*, 2021, 42, 2, pp. 327-370; Sorge, *German Law on Dependent Self-Employed Workers: A Comparison to the Current Situation under Spanish Law*, in *CLLPJ*, 2010, 31, 2, pp. 249-252. For

France[26], and, in the Netherlands, for the self-employed who work "side-by-side" with subordinate colleagues or negotiate an adequate wage to safeguard their livelihood[27].

3. *EU Commission Guidelines*

Faced with this scenario that goes against European rules, the EU Commission adopted the "Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons"[28], with which it in fact supports that negotiating dynamism for the benefit of self-employed workers already experienced in many Member States.

This is not a revolutionary act. Indeed, the Commission has adopted a soft law act that does not expressly recognise the (positive and fundamental) right to collective bargaining of the self-employed[29]. Instead, following the precedents of European case law, the Guidelines grant "immunity" from competition law to collective agreements signed by certain categories of individual self-employed workers – in other words, another "exception to the rule" on competition. This is hardly surprising, considering that the initiative was initiated within the framework of the Directorate-General (DG) for Competition[30].

The scope of this soft law is restricted to individual self-employed workers. This decision has been supported by a large part of the literature according to which, albeit with different nuances[31], extending the right to collective

Ireland, Doherty, Franca, *Solving the 'Gig-saw'? Collective Rights and Platform Work*, in *ILJ*, 2020, 49, 3, pp. 352-376.

[26] Cavallini, Avogaro, "*Digital work" in the "platform economy": the last (but not least) stage of precariousness in labour relationships*, in Kenner, Florczak, Otto (eds.), *Precarious Work. The Challenge for Labour Law in Europe*, Elgar, 2019, p. 186 ff.

[27] Monti, *Collective labour agreements and EU competition law: five reconfigurations*, in *ECJ*, 2021, 17, 3, pp. 714-744.

[28] OJEU (C-374/2, 30.9.2022).

[29] Supported by Creighton, Mccrystal, *Who is a ''Worker'' in International Law?*, in *CLLPJ*, 2016, 37, pp. 694-704.

[30] As pointed out by Senatori, *EU law and digitalization of employment relations*, in Gyulavàri, Menegatti (eds.), *Decent Work in the Digital Age. European and Comparative Perspectives*, Hart-Bloomsbury, pp. 57-81.

[31] According to many, the work is predominantly personal and carries strong social de-

bargaining to personal self-employment is functional to guaranteeing the integrity and dignity of the working person[32]. On first reading, the EU Guidelines broaden the immunity in favour of predominantly personal self-employment[33] in which goods and commodities may be used as auxiliary means for personal performance[34]. This clarification makes it possible to include in the field of beneficiaries those self-employed workers who have been denied contractual requalification because they have a micro-organization[35]. Among the positive aspects is the fact that the immunity covers the self-employed worker as such (and not because he is bogus, wrongly qualified) due to his difficulties in influencing working conditions[36]. In the face of an increasingly monopsonistic and oligopsonistic labour market, the Commission has adopted this exemption from competition rules based on the condition of economic-contractual imbalance in the employment relationship[37].

3.1. Collective agreements of individual self-employed workers comparable to employees

The Commission articulates different classes of exemption so that full immunity covers collective agreements concluded by individual self-employed persons comparable to employees. This macro-category brings to-

mands and negotiating weaknesses. Cfr. Piglialarmi, *Lavoro autonomo, pattuizioni collettive e normativa antitrust: dopo il caso FNV Kunsten, quale futuro?*, in *LDE*, 2021, 4, p. 16; Countouris, De Stefano, *The Labour Law Framework: Self-Employed and Their Right to Bargain Collectively*, in Waas, Hiessl (eds.), *Collective Bargaining for Self-Employed Workers in Europe*, Bulletin of Comparative Labour Relations, 2021, 109; Biasi, *"We will all laugh at gilded butterflies". The shadow of antitrust law on the collective negotiation of fair fees for self-employed workers*, in *ELLJ*, 2018, 9, 4, pp. 354-373; Freedland, Kountouris, *Some Reflections on the "Personal Scope" of Collective Labour Law*, in *ILJ*, 2017, 46, 1, pp. 52-71. According to others, this right should be extended to exclusively personal work. Cfr. Engblom, cit., p. 212; Ichino, *Sulla questione del lavoro non subordinato ma sostanzialmente dipendente nel diritto europeo e in quello degli stati membri*, note to the ruling *FNV Kunsten*, in *RIDL*, 2015, 2, p. 579 ff.

[32] Razzolini, *Organizzazione e azione collettiva nei lavori autonomi*, in *PS*, 2021, 1, p. 59.

[33] Point 2, Section. 1 "Introduction" in which the Commission specifies that "'solo self-employed person' means a person who […] relies *primarily* on his or her own personal labour".

[34] Point 18.

[35] CJEU, C-692/19 *Yodel*.

[36] As specified in Point 8, Section 1.

[37] On the role of collective bargaining in the monopsonistic labour market structure Ichino, *Collective Brgaining and Antitrust Laws: an Open Issue*, in *IJCL*, 2001, 17, 2, pp. 185-198.

gether three groups: self-employed workers in situations of economic dependence[38], self-employed workers working "side by side" with employees[39], and self-employed workers on digital platforms[40]. For this class, an *ex-ante* exemption is granted since the collective agreements of these workers fall outside the scope of Article 101 TFEU.

Concerning the first group, a percentage threshold of labour income from a single principal is set to quantify economic dependency, corresponding on average to at least 50 per cent over one or two years, following the example of Spain and Germany. Even though economic dependency is a more measurable element than organisational dependency, it will be difficult for social partners to guarantee the application of a collective agreement only to those workers who comply with this numeric threshold[41]. As suggested in the past by the doctrine, it would have been more useful to introduce an indicative criterion such as *prevailing* dependence on a client[42]. This flexibility, for example, has been adopted in Germany where, as an alternative to the numerical threshold (50%), the criterion of personal activity is set mainly under a mono-client regime[43].

The second group includes agreements signed by self-employed workers in a situation comparable to subordinate workers since they work "side by side" and perform tasks identical or similar to theirs. However, the extension of immunity to this category of workers is severely limited by the elements that identify it: together with the absence of the business risk and organisational autonomy, the managerial power proper to subordination is relevant. In essence, these are the false self-employed workers evoked by the FNV ruling, in relation to which the method of carrying out the work and the personal nature of the activity come into play[44]. It seems clear that this only concerns workers exposed to contractual reclassification by the courts

[38] Section 3.1.

[39] Section 3.2.

[40] Section 3.3.

[41] Similarly, Villa, *Lavoro autonomo, accordi collettivi e diritto della concorrenza dell'Unione europea: prove di dialogo*, in *RGL*, 2022, 2, p. 306.

[42] Treu, *Uno Statuto per un lavoro autonomo*, in *DRI*, 2010, 3, p. 615.

[43] Brameshuber, *(A Fundamental Right to) Collective Bargaining for Economically Dependent, Employee-Like Workers*, in José, Boto, Brameshuber (eds.), *Collective Bargaining and the Gig Economy: A Traditional Tool for New Business Models*, Hart Publishing, Oxford, 2022, p. 248 ff.

[44] Cfr. Romei, *Contratto di Lavoro e Diritto della Concorrenza*, in *Enciclopedia del Diritto*, Voce, *Il contratto di lavoro*, Giuffrè, 2023.

and competent authorities[45]. On the other hand, those self-employed workers bound by contractual forms that entrust a series of commercial risks to the provider and provide varying degrees of autonomy in the performance of the service remain without collective protection[46].

With respect to the third group, self-employed platform workers are *per se* considered to be in a position of dependence comparable to that of employees. In truth, this immunity seems to be posited as a remedial tool with respect to the hypothesis of contractual requalification facilitated by the legal presumption of subordination envisaged by the proposal for a directive on platform workers[47]. In other words, collective bargaining is called upon to protect those platform workers for whom the requalification operation will fail anyway[48].

3.2. The other "tolerated" collective agreements: reflections on social objectives and the fight against social dumping

The broad scope of the Guidelines is found above all in the residual provisions where the European Commission stipulates that it will not intervene against other categories of collective agreements, even if they fall within the scope of Article 101 TFEU[49]. These collective agreements aim to correct an obvious imbalance of bargaining power. In these cases, the counterparties must either represent the entire sector or possess considerable economic strength calculated, again, using numerical thresholds referring to the actual turnover and employees[50]. Therefore, the European Commission decides to "tolerate" collective agreements aimed at correcting the distortions of the labour market generated by its monopsonistic structure, leading to the providers' contractual weakness[51]. The best example of this is the digital

[45] As indicated in Point 26.

[46] In this sense also RAINONE, *Labour Rights Beyond Employment Status: Insights from the Competition Law Guidelines on Collective Bargaining*, in ADDABBO, ALES, CURZI, RYMKEVICH, SENATORI (eds.), *Defining and Protecting Autonomous Work*, Palgrave, 2022, pp. 167-191.

[47] COM(2021) 762 final, Bruxelles, 9.12.2021.

[48] GIOVANNONE, *La proposta di direttiva UE sui* platform workers*: tecniche regolative ed effettività delle tutele per i lavoratori autonomi*, in *Federalismi.it*, 2022, 25, pp. 129-160.

[49] Section 4.

[50] Point 34. Point 35 further specifies that these thresholds may also be deemed to be exceeded in the case of a joint agreement with several counterparties.

[51] ICHINO, *Collective Brgaining and Antitrust Laws: an Open Issue*, cit., p. 186 ff.

economy, where the "big companies" commercial strength and bargaining power are out of proportion[52]. Furthermore, the Commission will not act against those collective agreements concluded under national or EU law that pursue "social objectives [...] to address an imbalance in bargaining power faced by certain categories of sole self-employed persons"[53]. Therefore, collective agreements already concluded under national law now appear to be shielded from competition law.

Concerning the latter sub-class of exemption, the clarification on social objectives calls to mind some of the arguments in the Albany case. Indeed, as mentioned, the Court granted immunity to collective agreements pursuing a "social policy objective" in that case[54]. However, contrary to that decision, these collective agreements must be entered into under national (or European) law and are not legitimised because they pursue the social objective of safeguarding and improving pay/compensation and working conditions. Indeed, this restrictive orientation runs counter to recent European case law – the Court of Justice has only prohibited those collective agreements with the restrictive effect on competition as their only plausible purpose[55]. For this reason, collective agreements that pursue a social objective as a legitimate interest of general scope[56] should be lawful regardless of legislative investiture. The notion of legitimate interest, in fact, should not be limited to the hypotheses contemplated in Art. 36 TFEU (public morality, public order, etc.): this notion should also include social objectives that protect those fundamental (workers') rights enshrined in national constitutions and international treaties and recognised as general principles of EU law under Art. 6(3) TEU[57].

It must also be said that the meeting point between social objectives and the protection of competition is the fight against social dumping. It is hard to see how competition law can stand in the way of collective agreements that attempt to curb social dumping, which is recognised as an unfair

[52] Sanjukta, *Antitrust as Allocator of Coordination Rights*, in *UCLA Law Review*, 2020, 67, pp. 380-431.

[53] Point 36.

[54] Cfr. *supra* § 1.

[55] CJEU, C-307/18, *Generics*; CJEU, C-228/18, *Budapest Bank*.

[56] For similar arguments, CJEU, C-309/99, *Wouters*; CJEU, C-184/13, *API*.

[57] As argued by Donini, Forlivesi, Rota, Tullini, *Towards collective protections for crowdworkers: Italy, Spain and France in the EU context*, in *Transfer*, 2017, 23, 2, p. 213.

competition practice. This objective, by the way, is just as relevant for subordinate employment as it is for self-employment, given that labour cost savings are frequently practised through the use of the disparate types of contract inscribed in the area of autonomy[58]. This line of interpretation is, in fact, known to European jurisprudence. The Court of Justice has recognised the fight against social dumping as an overriding reason of general interest justifying the restriction of fundamental freedoms[59]. Furthermore, the European Court of Justice recalled that safeguarding employment falls within the scope of the objectives that Article 85(3) allows for "as an improvement of the general conditions of production"[60]. Consistently, in the *Albany* case, the Court specified that improving employment conditions may appear as a social policy objective to be pursued through collective bargaining[61]. Therefore, in these circumstances the restriction of competition should be considered lawful to the extent that it is proportionately necessary for the pursuit of the legitimate aim[62].

4. *The borderline between self-employed worker and small entrepreneur: from the Italian to the Australian case*

The most observant doctrine has begun to advance interesting reflections on the appropriateness of recognising the legitimacy of the collective agreements of small entrepreneurs. *A priori*, in fact, many scholars have pointed out the factual assimilation of the small entrepreneur to self-employment, *i.e.*, where the entrepreneurial nature of the organisation moves away from the enterprise's production factors and approaches the minimal and accessory organisation of the self-employed worker[63]. The distinction

[58] Schiavo, *Il dumping contrattuale e le azioni di contrasto*, in *RGL*, 2022, 2, p. 176.

[59] CJEU, C-577/10, *European Commission v Kingdom of Belgium*. Cfr. Schömann, *Collective bargaining and the limits of competition law, Protecting the fundamental labour rights of self-employed workers*, ETUI Policy Brief, 2022, 8.

[60] CJEU, C-42/84, *Remia* recalls the ruling *Metro* (CJEU, C-26/76, *Metro*).

[61] Cfr. *supra* § 2.

[62] Lianos, Countouris, De Stefano, *Re-thinking the competition law/labour law interaction: Promoting a fairer labour market*, in *ELLJ*, 2019, 10, 3, pp. 291-333.

[63] Razzolini, *Piccolo imprenditore e lavoro prevalentemente personale*, Giappichelli, 2012. Also, Putaturo Donati, *Agenti e Jobs Act degli autonomi*, in Zilio Grandi, Biasi (eds), *Commentario Breve allo Statuto del Lavoro Autonomo e del Lavoro Agile*, Padova, 2018, p. 254.

between self-employment and small enterprise is often elusive, especially in the dematerialised enterprise where personal labour becomes preponderant with respect to organisational factors: for example, Uber drivers or Amazon couriers, who equip themselves with an instrumental organisation, are united by economic and organisational dependence on the "super-contractor", whether they are qualified as self-employed or as small entrepreneurs. For this reason, the intervention of collective bargaining should not be excluded a priori[64]. In this perspective, the small individual enterprise is identified with personal labour exposed to the risk of abuse of dependence and, therefore, needs social protection like the self-employed worker[65].

In Italy, there is a codified distinction between a self-employed worker (Article 2222 of the Civil Code), an enterprise (Article 2082 of the Civil Code), and a small entrepreneur (Article 2083 of the Civil Code). The latter is endowed with a minimum organisation that does not conflict with the predominantly personal professional activity. In the past, the Constitutional Court has recognised that small entrepreneurs who perform exclusively personal work are entitled to trade union freedom[66]. To identify the distinction between the self-employed and the small entrepreneur, the most convincing solution so far rests on assessing the entrepreneurial organisation. In essence, the small entrepreneur is endowed with an organisation that exceeds individual work, the problematic assessment of which should be addressed through a judgement of the merits of labour protections (Art. 35 Const.) according to a case-by-case approach[67]. On the contrary, the jurisprudence has

[64] As argued by Biasi, *Ripensando il rapporto tra il diritto della concorrenza e la contrattazione collettiva relativa al lavoro autonomo all'indomani della l. n. 81 del 2017*, "Massimo D'Antona", 358/2018, p. 24.

[65] Perulli, *Un Jobs Act per il lavoro autonomo: verso una nuova disciplina della dipendenza economica?*, in *DRI*, 2015, 1, p. 126 ff.; Freedland, *Application of labour and employment law beyond the contract of employment*, in *ILR*, 2007, 1-2, p. 3 ff.

[66] C. Cost. 17 July 1975 no. 222. It is also recalled that the Constitutional Court ruling no. 880 of 26 July 1988 extended the right to social security to artisans. In contrast, the right to strike was denied to small entrepreneurs with workers in their employ. See Constitutional Court, 24 March 1986, no. 53. Even the most recent statutory protections do not lean towards such assimilation. In fact, Law No. 81/2017 protecting self-employment has excluded entrepreneurs, "including small entrepreneurs referred to in Article 2083 of the Civil Code" from the scope of application (Art. 1, para. 2).

[67] Santoro-Passarelli G., *Il lavoro autonomo non imprenditoriale, il lavoro agile e il telelavoro*, in *RIDL*, 2017, 3, p. 374 ff.

legitimised the use of pure self-employment even in the presence of a business organisation, in the hypothesis in which the work of the obliged person is prevalent with respect to the entrepreneurial organisation[68]. However, such a technically operated distinction acts ineluctably on the level of protection, clashing with the factual reality that shows how small entrepreneurs are, today more than yesterday, in an evident position of weakness in the market when compared to the self-employed.

This issue has also been addressed in other jurisdictions. An interesting case study is that of Australia, where the Antitrust Authority has adopted a class exemption that, as of June 2021, provides immunity from competition law to agreements entered into by small businesses and the self-employed[69]. Thus, small companies may organise limited forms of collective bargaining with larger companies on condition that arrangements improve contractual terms and conditions and reduce information asymmetries[70]. Although this is a progressive approach, it must be emphasised that the trade union is expressly excluded from the list of representatives designated to fulfil the exemption requirements. In effect, these collective agreements are covered by general common law principles on contracts, with no room for the guarantees typical of traditional collective agreements. As in the case of the EU Guidelines, this regulation constitutes an exemption from competition law without adopting the labour law viewpoint envisaged so far[71]. However, it cannot be denied that the Australian experience projects collective negotiation beyond the fence between work and business in all those cases in which, regardless of the *status* of worker or small entrepreneur, a person finds himself in a condition of strong contractual weakness *vis-a-vis* the other party. On the other hand, this exemption from the competition rules starts from situations of the evident disproportion of the negotiating power, in line with the rationale adopted by the European Commission in the new Guidelines.

There is no doubt that, being at the crossroads of labour law and competition law, this model further blurs the boundaries of sectoral disciplines[72].

[68] Cass. 2 September 2010 no. 19014; 29 May 2001 no. 703; 4 June 1999 no. 5451.

[69] Competition and Consumer (Class Exemption – Collective Bargaining) Determination 2020, Australian Competition and Consumer Commission – ACCC.

[70] On this point Mccrystal, *Collective Bargaining by Self-Employed Workers in Australia and the Concept of "Public Benefit"*, in *CLLPJ*, 2021, 42, 2, pp. 253-291.

[71] Mccrystal, Hardy, *Filling the Void? A Critical Analysis of Competition Regulation of Collective Bargaining Amongst Non-employees*, in *IJCL*, 2021, 37, 4, pp. 355-384.

[72] Section 4. Cfr. *supra* § 3.2.

However, if protecting labour means protecting the economic order based on the principles of fairness and fair competition, the objective fact of a global market in which the self-employed and the small entrepreneur can be equally crushed by the economic force of very large corporations is relevant. For this reason, the interpretative effort should focus on the judgement of merits through the lens of labour law that assesses the need for protection in all those hypotheses in which the self-employed, *albeit* with a streamlined organisation, depends on companies with strong bargaining power. Transferring this line of interpretation to the European legal system is a complex operation in the face of the binary labour-enterprise split that has often engulfed self-employed workers in the notion of "enterprise"; imagine trying to avoid this centripetal effect involving the small entrepreneur with a lean organisation! With respect to this issue, the Commission's Guidelines do not provide any particular room for interpretation since they only refer to individual self-employed workers who perform predominantly personal work, possibly with the aid of goods and services. No useful criteria are found for determining the prevalence of personal work and the permissible instrumental baggage within the boundaries of non-entrepreneurial self-employment; nor does the European Commission expressly open up for collective agreements of small entrepreneurs. Therefore, it must be concluded that the Guidelines do not clarify the legitimacy of collective bargaining for a wide range of subjects that can hardly be qualified as self-employed or small entrepreneurs. And yet, collective agreements may represent a valid guarantee against abuses in "hierarchical"[73] inter-entrepreneurial relations, intervening in the imbalance of bargaining power openly opposed by the Guidelines.

5. *Conclusion*

The Guidelines do not represent a radical step change in the relationship between antitrust law and collective bargaining. However, this act of soft law represents the first acknowledgement of the dynamism that collective bargaining is showing in the new challenges of labour, especially platform labour[74]. Indeed, the EU Commission could no longer stall in the face of

[73] PERULLI, *Il lavoro autonomo e il perdurante equivoco del lavoro a progetto*, in *DRI*, 2013, 1, p. 5.

[74] Profusely, CORDELLA, *Il lavoro dei rider: fenomenologia, inquadramento giuridico e diritti sin-*

the lively debate on the need for collective labour protection beyond subordination. The European legislator thus decided to show some openness to the protection of those workers who are in a position of contractual weakness to the detriment of their effective independence in the labour market[75]. Contractual weakness is indeed the root of a series of social risks independent of how the service is performed and can only be countered through the exercise of fundamental rights[76]. These considerations must then be contextualised in digital labour markets. Here, collective bargaining is now legitimised to protect those workers with a high social risk in the new digital markets, where it is easier to engage in downward competition between workers[77]. At the same time, collective bargaining can help limit those obligations and responsibilities of economic operators that result from the transposal of the successful European legislation on the digital economy[78].

Finally, some open questions remain. First of all, the Guidelines do not clarify whether the immunity covers those collective agreements, including those that worsen working conditions, provided for in some jurisdictions (such as Italy)[79]. Moreover, no guidance is provided on agents with negotiating legitimacy. Indeed, it needs to be clarified whether the most recent self-employment organisations are considered trade unions, even though they do not belong to large confederations and have no negotiating tradition. Limiting the field of legitimate agents could constitute a restriction of the freedom of association for the benefit of only the most traditional represen-

dacali, in "Massimo D'Antona", 441/2021; La Tegola, *Il conflitto collettivo nell'era digitale*, in *DRI*, 2020, 3, p. 638 ff.

[75] Tomassetti, *Il lavoro autonomo tra legge e contrattazione collettiva*, in *VTDL*, 2018, 3, p. 717 ff.

[76] Loi, *Il lavoro autonomo tra diritto del lavoro e diritto della concorrenza*, in *DLRI*, 2018, 160, 4, p. 857 ff.

[77] Casiello, *Note a caldo sugli Orientamenti della Commissione UE sull'applicazione del diritto della concorrenza dell'Unione agli accordi collettivi dei lavoratori autonomi individuali*, in *LDE*, 2022, 3, p. 4.

[78] The reference is, in addition to the above-mentioned proposal for a directive on platform workers, Regulation (EU) 2022/2065 on the single market for digital services, Regulation (EU) 2022/868 on data governance and the proposal for a European regulation on artificial intelligence.

[79] These are "accordi ablativi" (art. 2, co. 2, letter a), Legislative Decree no. 81/2015) which regulate working conditions *in pejus*. Cfr. Villa, "*Gli amori difficili": contrattazione collettiva e lavoro autonomo*, in Lassandari, Villa, Zoli (eds.), *Il lavoro povero in Italia: problemi e prospettive*, Variazioni su Temi di Diritto del Lavoro, Giappichelli, Torino, 2022, p. 121.

tative organisations, which, however, scarcely represent the self-employed. This is a complex issue because it calls into question the problematic measurement of the representativeness of the agent-organisation, especially for the new associations that adopt action strategies very far removed from 20th century trade unionism[80]. Without a clear European guideline, it will be up to the Member States to determine the legitimate negotiating agents. In doing so, states should consider that, in supranational contexts, the governance systems that set social standards have adopted a multi-stakeholder participatory model, open to new forms of structured representation such as NGOs[81].

[80] ZUCARO, *Lavoro autonomo. Un modello di rappresentanza per un emergente interesse collettivo*, in *LLI*, 2018, 4, 2, p. 197, who highlights the similarities between these representative associations and entrepreneurial associations.

[81] *Ex multis*, BACCARO, MELE, *Pathology of Path Dependency? The ILO and the Challenge of New Governance*, in *ILR Review*, 2012, 65, 2, pp. 195-224; BOSTRÖM, TAMM HALLSTRÖM, *NGO Power in Global Social and Environmental Standard-Setting*, in *GEP*, 2010, 10, 4, pp. 36-59.

Abstract

The coexistence between collective labour rights and competition rules has always been complex in the European legal order. This tension is exacerbated when collective agreements of self-employed workers, considered restrictive agreements of competition under Article 101 TFEU, come into question. However, factual reality shows that self-employed workers are frequently in a position of significant contractual weakness in the labour market and economic-organisational dependence in the employment relationship. Therefore, promoting the collective dynamism experienced in many Member States, the European Commission adopted the Guidelines granting antitrust immunity to collective agreements signed by certain categories of individual self-employed workers. This act of soft law represents the first important recognition of collective protections beyond subordination. However, there is evidence of critical issues and gaps in content that limit its expansive scope. Finally, reflection is proposed on the appropriateness of legitimising the collective agreements of small entrepreneurs in a situation comparable to the self-employed workers, due to their position of weakness with respect to the negotiating counterpart. The rationale proposed in the commentary is based on the real need for social protection arising from the risk of abuse of dependency in unbalanced inter-private relations.

Keywords

Collective bargaining, EU competition rules, Guidelines, Self-employment, Small entrepreneur.

Joe Atkinson, Hitesh Dhorajiwala

Protecting Casual Workers in British Labour Law: Employment Status and Beyond

1. *Introduction*

The growth of "atypical" forms of work has been one of the defining features of the UK labour market over recent decades, and regulating these evolving working arrangements represents an important challenge for labour law. There is now a considerable body of literature examining the legal treatment of these various atypical work relationships[1], which include fixed-term, part-time and agency workers[2], work performed via personal service companies[3], and casual forms of work. This article focuses on the regulation of this latter category of casual work and argues that the treatment of individ-

[1] See generally, Collins H., *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, in *OJLS*, 1990, p. 353; Fredman, *Labour Law in Flux: The Changing Composition of the Workforce*, in *ILJ*, 1997, p. 26; Fudge, *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*, in *OSLJ*, 2006, 44, p. 609; Prassl, Albin, *Fragmenting Work, Fragmented Regulation: The Contract of Employment as a Driver of Social Exclusion*, in Freedland *et al.* (eds), *The Contract of Employment*, Oxford University Press, 2016.

[2] Davies, *The Implementation of the Directive on Temporary Agency Work in the UK: A Missed Opportunity*, in *ELLJ*, 2010, 1, p. 307.

[3] Ford M., *The Fissured Worker: Personal Service Companies and Employment Rights*, in *ILJ*, 2020, 49, p. 35.

uals' working on a casual basis represents an ongoing and unresolved problem for UK labour law. The failure to adequately regulate casual work is a serious lacuna that has not been addressed by recent developments in common law or statute and requires the attention of the legislature. We further argue that in addressing the issue of casual work, the focus needs to move beyond the issue of workers' employment status and entitlement to existing rights to the question of what additional substantive rights are needed to address the specific vulnerabilities and harms faced by this group.

The article proceeds as follows. Section two briefly sets out the forms and prevalence of casual work in the UK, and its negative impacts for workers. Section three then considers the treatment of casual workers under the orthodox rules of UK employment law. It identifies two distinct failures to adequately regulate casual work, relating to the *protective scope* (i.e., to whom rights apply) and *substantive content* of statutory employment rights (i.e., what rights are actually available). While the question of protective scope and the employment status of casual workers has rightly received much attention, the matter of what substantive rights and protections should be available to this group of precarious workers is equally important but has been comparatively neglected.

Sections four and five then assess the extent to which developments in common law and legislation have advanced the position of casual workers from the orthodox approach. We argue that although the courts have adopted new and innovative approaches which should go some way to extending the *scope* of employment rights to casual workers, they are unable to fashion the *substantive* rights needed to address the risks and harms of casual work. Legislative action is therefore needed to provide this protection. However, the limited statutory interventions that have been made to regulate casual work fail to address either the problem of labour law's scope or substantive content. Nor is there any prospect of further significant reforms under the current Conservative Government. We therefore conclude that more radical and targeted statutory measures are required, and that identifying and introducing new regulatory frameworks to secure decent conditions for casual workers should be a priority for any incoming Labour Government.

2. *Casual work in the UK*

Although casualised forms of work are far from a new phenomenon in the UK's labour market, they have become more politically salient in recent years due to the rise of on-demand and zero hours contracting, and more recently the gig-economy and platform work. All of which have been the subject of extensive scholarly and public debate. However, UK law does not contain any distinct category of "casual work". Rather, all work is classed as performed by an employee, worker, or self-employed individual with different statutory rights attaching to each status. Moreover, as we discuss below, it is at least theoretically possible for casual work to fall into any of these categories.

The label "casual work" therefore lacks any legal content in the UK. Instead, it is an informal term that captures working arrangements where there is no obligation on the employer to offer guaranteed amounts of work or on the employee to make themselves available to perform work. Casual working relationships therefore involve individuals working "on demand", in contrast with traditional employment relationships where there are more stable and ongoing commitments for the provision and performance of work[4]. This understanding of casual work encompasses a wide variety of working arrangement in the UK.

Most notably casual work includes individuals on "zero hours contracts" (ZHCs), who lack any guaranteed hours or promises of future work and are offered work by the company on a (supposedly) *ad hoc* basis. Despite often being thought of as a paradigmatic example of casual work, ZHC arrangements are in fact frequently embodied in formalised written agreements and long term in nature. They nevertheless purport to be "casual" arrangements because they lack any obligation for either party to offer or perform work. In addition to ZHCs, casual work includes work performed on a sporadic, or even one-off, basis where the individual has no overarching agreement in place. Companies often rely on a pool of casual workers that are not guaranteed to be offered any work but who can be called upon as and when additional labour is needed to meet business demand. While this practice is particularly common in the retail, service and construction sectors it exists across all industries. Individuals may similarly be engaged on a casual and *ad*

[4] EUROFOUND, *New Forms of Employment*, in *Publications Office of the European Union*, 2015.

hoc basis to perform domestic work for households such as babysitting, cleaning and gardening.

The category of casual work will also often overlap with other forms of "atypical" work. Individuals working via online platforms, for instance, will generally be casual workers because they lack any guarantee that work will be provided to them, or commitment to continue performing work on/for the platform in future[5]. Other types of atypical work, such as agency work, homeworkers, and those contracting through personal service companies, may be working on either a casual basis or have stable ongoing commitments to perform work.

Casual work represents a small, but still numerically sizeable, portion of the UK labour market. According to the Labour Force Survey conducted by the Office for National Statistics 3.6% of the workforce are on zero hours contracts, amounting to just under 1.2 million people[6]. This represents a more than fivefold increase since the start of the millennium[7], but may well still understate the true number of these arrangements[8]. The ONS also reports there are 770,000 "on call" workers in the UK[9], although it is not clear how many of these are casualised rather than having standard employment contracts, as well as 300,000 temporary casual workers, and over 200,000 temporary agency workers[10]. In addition, a significant proportion of casual work in the UK now consists of individuals performing work on a casual basis via digital platforms. A 2018 study by the Department for Business, Energy and Industrial Strategy suggested around 2.8 million people had worked in the

[5] For discussion of platform workers as zero hours contractors see ROSIN, *The Right of a Platform Worker to Decide Whether and When to Work: An Obstacle to Their Employee Status?*, in *ELLJ,* 2022, 13, p. 530.

[6] ONS, *People in Employment on Zero Hours Contracts*, 2023, available at https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/datasets/emp17peopleinemploymentonzerohourscontracts.

[7] *Ibid*.

[8] The ONS Business Survey put the number at 1.8 million in 2018, representing 6% of all contracts for work, ONS, *Contracts That Do Not Guarantee a Minimum Number of Hours*, available at https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/april2018, 2018.

[9] ONS, *People in Employment on Zero Hours Contracts*, n. 6.

[10] ONS, *Temporary Employees*, 2007, available at https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/datasets/temporaryemployeesemp07.

gig-economy during the previous year[11]. This number has likely increased, however, as more recent research conducted by Trade Union Congress indicated that around 4.4 million people were working on platforms on a weekly basis[12].

Casual work exists throughout the UK labour market, and in both public and private sectors, but is especially prevalent in certain industries and demographic groups. The health and social care, and accommodation and food industries, for example, together account for almost half of all ZHCs[13]. People working in elementary occupations are much more likely to have zero hour contracts than professionals or senior managers[14]. There are also age, gendered and racial dimensions to the distribution of casual work in the UK. Those between the age of 16 and 24 are more than four times as likely as any other group to work under a zero hour contract[15]. A significantly higher proportion of female workers also have ZHCs (4.4%) compared to male (2.9%), with this gap widening in recent years[16], and ethnic minority workers are significantly more likely to be in casual or insecure work[17].

There is nothing new about the presence of casual work in the UK labour market[18]. Indeed, the model of stable and long-term employment is contingent on a 20th Century industrial model and series of assumptions that increasingly no longer hold true[19]. In some sense, therefore, the growth of

[11] Department for Business, Energy and Industrial Strategy, *The Characteristics of Those in the Gig Economy*, 2018, available at https://assets.publishing.service.gov.uk/media/5aa69800e5274a3e391e38fa/The_characteristics_of_those_in_the_gig_economy.pdff.

[12] TDC, *Seven ways platform workers are fighting back*, 2021, available at https://www.tuc.org.uk/sites/default/files/2021-11/Platform%20essays%20with%20polling%20data.pdf.

[13] ONS, *People in Employment on Zero Hours Contracts* (n 6). The data here is limited to zero hours contracts as the ONS does not provide demographic breakdowns for other forms of casual work. See also Adams A., Prassl, *Zero-Hours Work in the United Kingdom*, in *Conditions of Work and Employment Series*, ILO, 2018, n. 101.

[14] *Ibid*.

[15] *Ibid*.

[16] *Ibid*.

[17] Trade Union Congress, *Insecure Work in 2023*, 2023.

[18] Fredman, *Labour Law in Flux*, cit., p.1.

[19] D'Antona M., *Labour Law at Century's End: An Identity Crisis*, in Conaghan, Fischl, Klare (eds), *Labour law in an era of globalization: transformative practices and possibilities*, Oxford University Press, 2004; Fudge, Owens, *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms*, in Fudge, Owens (eds), *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms*, Hart, 2006; Arthurs, *Labour Law After Labour*, in Davidov, Langille, *The Idea of Labour Law*, Oxford University Press, 2011.

casual work can be seen as a return to earlier labour market conditions. However, it does seem clear that casual work has increased in the UK and other developed economies over the past decades, and that standard employment relationships have often been replaced with more casual and precarious arrangements[20]. This is part of a broader trend of labour market fragmentation and fissuring[21], but the increase in casual work has also been facilitated by new technologies that dramatically reduce the transaction costs that have historically incentivised employers to contract for labour on an ongoing basis within the firm[22]. Employers can now more easily adopt casual working arrangements because they have access to systems and algorithmic tools that accurately forecast business needs and match it with contracted labour, and that radically cut the costs of recruiting and deploying casual workers at short notice.

Casual work allows employers to avoid offering guaranteed hours to workers and contract for the minimum amount of labour that is needed to match business demand. This temporal and numerical flexibility clearly has potential cost benefits for employers. There are also some potential downsides for employers, however, such as decreased productivity and increased recruitment and training costs[23], as well as the risk (in tight labour market conditions at least) that there may not be an adequate supply of casual labour available to employers when needed. Despite this, casual work is regarded as an attractive option by UK employers, who view flexibility as vital for their economic competitiveness[24]. Casual arrangements might also sometimes benefit workers, where they are not reliant on stable work to meet their basic needs or do not want to commit to more traditional employment. Over a quarter of ZHC workers in the UK are in full time education, for example, and the

[20] ILO, *Non-Standard Employment around the World: Understanding Challenges, Shaping Prospects*, 2016; Farina, Green, McVicar, *Zero Hours Contracts and Their Growth*, in *BJIR*, 2020, 58, p. 507.

[21] Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, in OJLS, 1990, 10, 3, pp. 353-380; David Weil, *The Fissured Workplace. Why Work Became So Bad for so Many and What Can Be Done to Improve It*, Harvard University Press, 2014.

[22] Coase, *The Nature of the Firm*, in *Economica*, 1937, n. 4, p. 386.

[23] For an overview of the impacts of casual work on businesses see Eurofound, *Casual Work: Characteristics and Implications*, 2019, pp. 25-26. Kamalahmadi, Q. Yu, Y.P. Zhou, *Call to Duty: Just-in-Time Scheduling in a Restaurant Chain*, in *MS*, 2021, 67, 11, p. 6751 ff.

[24] Wood, *Flexible Scheduling, Degradation of Job Quality and Barriers to Collective Voice*, in *HR*, 2016, 69, p. 1989.

flexibility of casual work may help these individuals balance work with their studies[25].

More frequently, however, there are serious risks and harms arising from casual work. Most obvious is instability workers' experience over their time and income due to the unpredictable and fluctuating nature of casual work. The problem is well illustrated by TUC research, which found that 84 per cent of zero hours workers had been offered work with less than 24 hours' notice, and 69 per cent had had work cancelled at less than 24 hours notice[26]. This "just in time" approach to scheduling makes it impossible for workers to make plans and live their lives autonomously: how can someone commit to a mortgage, starting a family, or even smaller day-to-day projects, with this degree of uncertainty over their time and income? Employers' absolute discretion over the amount of work they offer to casual workers also creates an additional means of controlling them, thus heightening their level of subordination. This "flexible despotism"[27], together with the uncertainty and instability inherent in casual work, creates serious psychosocial risks to workers' wellbeing and health, as well as to their family and social relationships[28].

There are also less direct negative effects of casual work. These arrangements tend to have worse conditions than those in standard employment[29], both because casual work is concentrated in low paid sectors and because it is more difficult for casual workers to act collectively[30]. More broadly, casual work disrupts the equitable balance of interests that labour law attempts to strike, as it shifts the economic risk of business fluctuations from capital to workers[31].

[25] ONS, *People in Employment on Zero Hours Contracts*, n. 6.

[26] TUC, *Jobs and recovery monitor - Insecure work*, 11 July 2021.

[27] Wood, *Despotism on Demand: How Power Operates in the Flexible Workplace*, Corner University Press, 2020.

[28] Bender, Theodossiou, *The Unintended Consequences of Flexicurity: The Health Consequences of Flexible Employment*, in *RIW*, 2018, 64, p. 777; Henly, Lambert, *Unpredictable Work Timing in Retail Jobs: Implications for Employee Work-Life Conflict*, in *Ilr Review*, 2014, 67, p. 986; Eurofound, *Casual Work*, cit.

[29] Eurofound, *Casual Work,* cit. One in seven people living in destitution in the UK are in casual or some other form of insecure work, Fitzpatrick *et al.*, *Destitution in the UK 2020*, in *JRF*, 2020.

[30] Trade Union Congress, *Living on the Edge: Experiencing Workplace Insecurity in the UK*, 2018; Eurofound, *Casual Work,* cit., p.6.

[31] Freedland, Prassl, Adams, *Zero-Hours Contracts in the United Kingdom: Regulating Casual Work, or Legitimating Precarity?*, in *University of Oxford Legal Research Paper Series* 19, 2015, n. 00.

Further societal harms include reduced economic performance[32], and the widening of inequalities faced by young, female and ethnic minority workers who are overrepresented in casual worker[33].

In sum, casual workers face distinctive risks and vulnerabilities in addition to those shared with other groups of workers. These acutely precarious arrangements result in social exclusion for workers[34], and undermine the values of stability, dignity, and non-commodification that labour law seeks to embody[35]. It is therefore wrong to view them as a "win-win" situation for workers and employers[36]: unless regulated appropriately casual work will have extensive adverse effects for both workers and society. The goal of labour law must therefore be to regulate casual work in a manner that counteracts its risks and provides secure and decent work to those who want and need it. The remainder of this article assesses the extent to which UK law achieves this.

3. *Orthodox position of casual workers: a failure to protect*

Unlike some other jurisdictions UK labour law contains no specific legal category or regulatory regime for casual and occasional work, such as a voucher payment scheme for these arrangements[37]. Nor are there any specific legal restrictions on when or how casual work arrangements can be used by employers, meaning it is entirely open to them to run their business using only casualised forms of labour should they choose, rather than having any standard employees who have guaranteed hours of work. In the absence of any specific legal frameworks these working relationships are governed by the standard rules of labour law, with the employment rights that casual

[32] Due to its negative impacts on productivity and spending, EUROFOUND, *Casual Work*, cit., p. 6.

[33] See TRADE UNION CONGRESS, *Living on the Edge*, cit., p.7 ; TRADE UNION CONGRESS, *Insecure Work*, cit., p.5.

[34] PRASS, ALBIN, *cit.*, p.1.

[35] FREEDLAND, KOUNTOURIS, *The Legal Construction of Personal Work Relations*, Oxford University Press, 2011, c. 9; SUPIOT, *Governance by Numbers The Making of a Legal Model of Alliance*, Hart, 2017, p. 250.

[36] EUROFOUND, *Casual Work*, cit., p.6.

[37] As is the case, for example, in Italy.

workers are entitled to (broadly) depending on their classification as employees, workers, or self-employed.

Although the focus here is on protection of casual workers by British labour law, the closest equivalent to the voucher schemes that exist in other jurisdictions lies in the field of social security law, in the form of the "Universal Credit" system. Universal Credit is a means-tested benefit that was introduced to replace a wide range of social security payments, and is designed to automatically increase or reduce benefits to take account of any variations in worker income. In theory, the system should therefore benefit casual workers by smoothing over variations in their income resulting from fluctuating hours. This is far from the current reality, however, as universal credit system provides only an extremely low level of benefits, which falls far below what is needed for a decent standard of living[38]. In addition, claimants are required to apply for and accept casual work as a condition of entitlement to the benefit[39]. So rather than protecting casual workers the system forces more people into these precarious arrangements, and may cause people to become trapped in low paid and insecure work. That said, if the level of payments provided through Universal Credit were significantly increased, and the conditionality and sanctioning regime reformed, then the system has the potential to significantly benefit casual workers by providing them with a degree of security and stability over their income.

Turning to labour law, the regulation of casual work depends on the application of standard rules and doctrines regarding the *allocation* and *content* of statutory employment rights. Unfortunately, there are serious shortcomings with both these dimensions under the orthodox approach to casual work. The question of whether casual workers are entitled to statutory employment rights largely turns on their work relationship status[40], with some protections also having qualification periods rather than applying from day one[41]. There were previously two categories of employment status: "employ-

[38] Joseph Rountree Foundation, Trussel Trust, *An Essentials Guarantee: Reforming Universal Credit to Ensure We Can All Afford the Essentials in Hard Times*, 2023.

[39] Dwyer, Wright, *Universal Credit, Ubiquitous Conditionality and Its Implications for Social Citizenship*, in *JPSJ*, 2014, 22, p. 27; Mantouvalou, *Welfare-to-Work, Zero-Hours Contracts and Human Rights*, in *ELLJ*, 2022, 13, p. 431.

[40] We use this term interchangeably with the more common terminology of "employment status".

[41] Such as unfair dismissal and paid maternity leave.

ees" entitled to statutory rights, and self-employed independent contractors who fell outside the scope of employment law. But since 1997 many rights have been extended to an intermediary category of "worker"[42], who are performing work personally other than in the role of running a business[43]. Individuals classified as "workers" are now entitled to basic rights such as the national minimum wage, holiday pay and working time protections, and those related to trade union membership and industrial action. Some important rights remain reserved to "employees", however, such as some maternity and parental rights, and protections of job security provided through minimum notice periods, statutory redundancy pay, and the law of unfair dismissal.

Delineating "workers" from employees is a source of significant complexity in English law. Doctrinally, in English law, a work relationship will be one of employment where it broadly meets the guidance set out in *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance*[44]. In this case, McKenna J identified the three criteria for an employment relationship existing as: a) control; b) mutuality of obligation; and c) no terms of the relationship are inconsistent with the existence of an employment relationship[45]. In the context of "workers", essentially the same criteria are said to apply[46], albeit with a lower "passmark" to determine if a work relationship is one of "worker" status[47]. It is somewhat unclear how such a lower "passmark" can be applied to such questions, creating a risk that the criteria for worker states collapse into those for employee status. For example, it would be difficult to delineate the level of control needed to be a worker, but *not* and employee in any particular work relationship where, on a material level, a meaningful level of control is being exercised by the employer over the person doing work.

[42] Often referred to in short-hand as "limb-b" workers, due to their definition being contained in Employment Rights Act 1996, s 230(3)(b).

[43] Employment Rights Act 1996, s 230(3)(b). There are, however, slight variations in the definition of worker status for the purposes of whistleblowing, equality law, and trade union matters.

[44] 2 QB 497/1968.

[45] *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance*, 2 QB 497, 515/1968.

[46] *Byrne Bros (Formwork) Ltd v Baird*, ICR 667/2002 (EAT).

[47] For a critique of this approach, see: PRASSL, *Who Is a Worker?*, in *LQR*, 2017, n. 133, p. 366.

While much can be said about each of these criteria, the element that creates the greatest difficulty for classifying casual workers as employed is the mutuality of obligation criterion. The case law does not speak with one voice on precisely how mutuality of obligation is characterised, but broadly, it constitutes obligations on the employer to offer/pay for work and a correlative duty upon the putative employee to accept offers of work[48]. Within this, mutuality of obligation can exist as "umbrella" or "global" mutuality, where these obligations exist *between* individual wage-work bargains, or as "simple" mutuality which exists only for the duration of each individual engagement and is more akin to contractual consideration. On an orthodox analysis, the purported lack of ongoing obligations to offer or accept work in casual arrangements means that a casual worker would have great difficulty in establishing that there is a continuous employment relationship with their putative employer. Indeed, the standard contract law view of these arrangements is that they likely lack the mutual promises to constitute an overarching contract of any kind[49], and are instead a series of individual contracts for the performance of work that are entirely independent from each other.

However, the concept of "simple" mutuality of obligation means that casual workers will often have "worker", or even "employee", status for the duration of each *individual engagement*. Provided that there is a commitment to provide work throughout the individual shift or engagement, and the other criteria of control and no contrary contractual terms are satisfied, they may therefore be entitled to statutory employment rights during that period. This means, for example, that a casual worker may be entitled to minimum wage and holiday pay for the duration of each engagement, amongst other things such as a written statement of their conditions. The work relationship status of casual workers during each engagement will depend on their individual circumstances. But casual workers who are integrated into the employers' business and subject to their control in respect of how and when work is performed should generally be classed as workers or employees rather than self-employed. Importantly, however, casual workers who appear to be running their own

[48] *Cotswold Developments Construction Ltd v Williams*, IRLR 181/2006 (EAT).

[49] WYNN, LEIGHTON, *Agency Workers, Employment Rights and the Ebb and Flow of Freedom of Contract*, *MLR*, 2009, 72, p. 91; COLLINS, *Employment Rights of Casual Workers*, in *ILJ*, 2000, n. 29, p. 73.

business, have significant levels of independence and autonomy, or are free to delegate the work to others as they choose, may be classed as self-employed and excluded from all employment rights[50].

While some, although importantly not all, casual workers are therefore entitled to basic "day one" employment rights their lack of overarching work relationship means they are not protected against employer discrimination between engagements, and that they will be unable to access protections that have qualifying periods of continuous employment. Protection against unfair dismissal, for instance, is available to employees only[51], and in most circumstances only to those continuously engaged for 2 years[52]. As such, even where a casual worker can establish that they are an "employee" for each engagement the absence of continuous employment between engagements will generally prevent them from establishing the necessary continuous service to bring a claim for unfair dismissal[53]. The same is true of statutory rights to paid maternity and parental leave. Moreover, on an orthodox contractual analysis there would be no breach of contract where the employer refuses to offer a casual worker any further hours[54]. By contrast, individuals with an overarching contract of employment would be able to claim for unlawful wage deductions in these circumstances, or could resign and attempt to bring a claim for constructive unfair dismissal. UK law therefore fails to provide any protection for casual workers' security of hours, or against *de facto* terminations by their employers withdrawing work.

The exclusion of casual work from the full array of employment law protections under the orthodox approach is the result of the UK's categories of work relationship status being largely premised upon the individual being in a long-term and bilateral wage-work bargain. This assumption is in turn the product of a "smooth evolution" of the law on employment contracts from the eighteenth-century common law concepts of the master and ser-

[50] *Stringfellows v Quashie*, EWCA Civ 1735/2012 (CA); *R (IWGB) v CAC*, EWHC 3342/2018 (Admin).

[51] S 94 ERA 1996.

[52] S 108 ERA 1996.

[53] For discussion of this problem and the possibility of linking periods of intermittent employment see Davies, *The Contract for Intermittent Employment*, in *ILJ*, 2007, 36, p. 102.

[54] *Western Excavating (ECC) Ltd v Sharp*, ICR 221/1998 (CA) 226; Freedland, Prassl, *Zero Hours - Zero Solutions*, in *Oxford Human Rights Hub*, 22 February 2016. By contrast, in a permanent employment relationship, such a breach could give rise to a constructive unfair dismissal claim.

vant relationship[55]. The master and servant relationship has heavily influenced the "conceptual question as to which apparatus" should be used to organise work relationships[56], and the choice of contract law as the appropriate analytical framework. This narrow paradigm of "employment"[57] on which UK employment law is based goes some way to explain why the legal tests which determine employment, particularly mutuality of obligation, speak to these more traditional conceptualisations of what a formalised work relationship *is*. It is therefore no surprise that work relationships that deviate from that conception, such as causal arrangements, struggle to fit within the still-rigid legal frameworks which take that understanding of work as their central-case.

Furthermore, the centring of traditional models of employment means that even if the problems of rights allocation are overcome the substantive rights and protections contained in UK employment law are not designed to address the specific vulnerabilities and harms faced by casual workers. Working time law, for example, aims at the problem of *overwork* by providing annual leave and rest breaks, but does not address the problem of *underemployment* which is equally pressing for casual workers, for instance by providing rights to minimum or stable hours. Nor is the law well suited to deal with the complex issue of holiday entitlements in genuinely casual work relationships[58]. A right to an hourly minimum wage might similarly be of less immediate interest to casual workers than having a guaranteed weekly income by having a stable number of hours, or a right to payment for cancellation of shifts at short notice.

The standard rules of UK labour law therefore create two key problems for the regulation of casual work[59]. First, the exclusion of casual workers from some, and sometimes all, statutory employment rights. Second, the absence

[55] Otto Kahn-Freund, *Blackstone's Neglected Child: The Contract of Employment*, in *LQR*, 1977, 93, p. 508; Freedland, *The Personal Employment Contract*, Oxford University Press, 2003, pp. 36-37.

[56] Prassl, *Autonomous Concepts in Labour Law? The Complexities of the Employing Enterprise Revisited*, in *The Autonomy of Labour Law*, 2015, p. 153

[57] Fredman, *Women at work: the broken promise of flexicurity*, in *ILJ*, 2004, p. 299.

[58] See, for example, the extensive litigation in the recent judgments of *Smith v Pimlico Plumbers*, EWCA Civ 70/2020, ICR 818/2022, or *Harpur Trust v Brazel*, UKSC 21/2022, ICR 1380/2022.

[59] A further important issue not addressed here concerns the effective enforcement of casual workers' rights and protections, something which is also an ongoing problem in the UK.

of rights protecting against the specific risks and harms arising from casual work. Although the first question of employment status has largely dominated scholarly attention, the issue of what substantive rights casual workers should be entitled to is at least as important in ensuring adequate protection[60]. The following sections consider the extent to which developments in the courts and legislature have addressed these two issues and advanced the position of casual workers from the orthodox analysis.

4. *Judicial protection of casual work*

In this section we set out two innovative approaches to the law on employment status that are emerging in the UK courts, and which should extend statutory employment rights to more casual workers. Namely, the purposive and human rights approaches to casual work. These developments go some way to addressing the problem of casual workers entitlement to statutory protections. However, there has been no corresponding judicial development of substantive rights for casual workers, and the courts' ability to fashion such protections is limited. As a result, there continues to be a mismatch between the substantive rights and protections contained in UK law and those needed by casual workers.

4.1. The purposive approach to casual work

The first encouraging development is the emergence of a "purposive approach" to employment status, which will allow supposedly casual workers to be classed as having an overarching employment or worker contract where this reflects the reality of their working arrangement.

In some circumstances it was in fact already possible under the orthodox approach for a tribunal to find an overarching contract despite the employer claiming the work was performed on a casual basis. In the absence of any written contract, for instance, a tribunal could find on the facts that there was an agreement for the ongoing provision and performance of work[61]. Al-

[60] For an example of this type of enquiry in the context of working time law see KATSABIAN, DAVIDOV, *Flexibility, Choice, and Labour Law: The Challenge of on-Demand Platforms*, in *UTLJ*, 2023, 73, p. 348.

[61] *Newnham Farms Ltd v Powell*, All ER (D) 91/2003, EAT.

ternately, where the written agreement was one for casual work, a tribunal could find that it had subsequently been varied, either expressly or impliedly, so that the relationship had "crystallised" into a contract of employment[62]. The latter type of case was rare however, due to the high evidential threshold applied to determine whether the parties had varied the original agreement[63].

However, these earlier decisions could be reconciled with the standard rules of contract law, as they did not necessarily call into question the validity of the original written documentation. This is in stark contrast to the purposive approach developed in recent years, which represents a paradigm shift away from formalistic adherence to orthodox contract law principles, and towards a more relational understanding of employment[64]. One of the landmark developments came in the case of *Autoclenz Ltd v Belcher*[65], where the Supreme Court analysed the nature of the work relationship of car valeters whose written contracts purportedly engaged them as sub-contractors rather than employees. The Court found that the relevant written terms could be disregarded because they did not reflect the parties' true agreement, with Lord Clarke stating that:

" … the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description"[66].

As such, the Supreme Court adopted a mode of analysis which took into account the manner in which the work relationship was *performed* to determine what the legal characterisation of the work relationship was. The *Autoclenz* approach is at its core a tool of contractual interpretation, which allows terms to be disregarded as a sham where they do not reflect the reality of the agreement. It is therefore less useful where there are no written terms between the parties to interpret, such as where casual work is fragmented

[62] *St Ives Plymouth Ltd v Mrs D Haggerty*, WL 2148113/2008.

[63] *Accountax Marketing Ltd v Halstead*, UKEAT 2003 n.0313/03/0611.

[64] Atkinson, Dhorajiwala, *The Future of Employment: Purposive Interpretation and the Role of Contract after Uber*, in *MLR*, 2022, 85, p. 787.

[65] UKSC 41/2011; ICR 1157/2011.

[66] *Autoclenz Ltd v Belcher* UKSC 41/2011, ICR 1157/2011.

across numerous employing entities or quasi-employing entities. Nevertheless, it was a welcome decision that allowed supposedly casual workers to more effectively challenge contractual terms that would deny them statutory employment rights where these terms bore limited (if any) true relation to the manner in which the relationship is performed[67]. This includes written terms that would prevent a finding of employment status during the duration of each engagement, such as substitution clauses[68], as well as those denying any overarching employment contract due to a lack of ongoing mutuality of obligations.

The *Autoclenz* principle was further developed in the Supreme Court judgment of *Uber BV v Aslam*[69]. There, the Court was asked to consider the work relationship status of drivers who provided their services through a multilateral contractual relationship with a variety of Uber entities. Specifically, the question was whether the drivers were workers vis-à-vis Uber London Ltd, with which the drivers seemingly had no direct contractual relationship[70]. The Supreme Court concluded that the drivers *did* in fact have a limb-b worker relationship with Uber London. Crucially, in doing so the Court provided further illumination as to the meaning of "purposive" interpretation in this context. It held that the purposive approach looks to the "general purpose" of employment legislation as being to "protect vulnerable workers" in positions of subordination from the variety of wrongs that could occur in the context of a work relationship[71]. Statutory employment rights should therefore be interpreted as being allocated to those working in positions of vulnerability and subordination. The Supreme Court further stated that it would be "inconsistent with the purpose of this legislation" to take the written terms of a work relationship as the starting point for determining whether a worker falls within the definition of a "worker". Instead, an individual's work relationship status must turn on the reality of that relationship, as demonstrated via its performance[72].

[67] Bogg, *Sham Self-Employment in the Supreme Court*, in *ILJ*, 2012, 41, p. 328.

[68] *Pimlico Plumbers Ltd v Smith*, UKSC 29/2018, ICR 1511/2018.

[69] *Uber BV v Aslam* UKSC 5/2021; ICR 657/2021. Formally this case concerned "worker" status, rather than "employee" status, but as we have argued elsewhere, the principles of *Uber* must apply to "employee" status: Atkinson, Dhorajiwala, *The Future of Employment*, cit., p. 14.

[70] *Ibid*.

[71] *Ibid*.

[72] Adams J., Prassl, *Uber BV v Aslam: [W]ork relations … cannot safely be left to contractual*

Bogg and Ford KC described these two dimensions of *Uber* as "statutory" and "contractual" understandings of the *Autoclenz* principle respectively[73]. As we have argued[74], however, these two strands of the *Uber* judgment should be seen as mutually reinforcing elements of a comprehensive purposive approach rather than competing interpretations. The purpose of the relevant employment *legislation* should guide courts in interpreting its relational scope, as embodied by the legal tests and principles applied by the courts to determine status. Whereas the *contractual* question of which category the parties' relationship falls into on the facts involves a more granular assessment of the reality of the relationship (i.e., whether the reality of a particular casual work relationship was consistent with employment or "worker" status). Both aspects are necessary if labour law is to effectively protect those in need of employment rights.

We have yet to see authoritative applications of the *Uber* approach in the employment law field[75], and the interpretive doctrine has not yet fundamentally changed the legal tests applied to determine work relationship status. Nor is the decision wholly unproblematic, as a number of questions are left unresolved regarding the precise meaning of the Supreme Court's approach[76]. Nevertheless, there is cause for optimism that the purposive approach may be valuable for casual workers.

For example, a quarter of those with ZHCs report working "full time" hours[77], and there is plainly scope for these workers to now argue that the reality of their relationship is one of ongoing employment. In these circumstances the frequency and consistency of performance should generally be taken to undermine any contractual assertions of no ongoing obligation to offer work. In our (tentative) view, the approach set out in *Uber* should also

regulation, in *ILJ,* 2022, 51, p. 955. Cf. Atkinson, Dhorajiwala, *IWGB v RooFoods*: *Status, Rights and Substitution*, in *ILJ*, 2019, 48, p. 278 which does not suggest that written terms are *irrelevant* to this assessment.

[73] Bogg Ford QC, *Between statute and contract: who is a worker?*, in *LQR,* 2019, 347, pp. 353-354.

[74] Atkinson, Dhorajiwala, *The Future of Employment*, cit., p. 14.

[75] However, *cf.* the recent Court of Appeal judgment of *HMRC v Atholl House Productions Ltd*, EWCA Civ 501/2021; STC 837/2022, where the Court suggested that *Uber* did not apply to the "employee" concept as applied in relation to employment status for tax purposes.

[76] Adams I., Prassl, *Uber BV v Aslam*: *[W]ork relations … cannot safely be left to contractual regulation*, in *ILJ,* 2022, 51, p. 955.

[77] ONS, *People in Employment on Zero Hours Contracts*, n 6.

provide a powerful tool for other supposedly casual workers in positions of subordination and dependency who are in fact working on an ongoing and relatively stable basis. Such individuals should now be able to argue that their formal contractual documentation misrepresents the reality of their working relationship, and that these individuals should be classed as having an ongoing and overarching employment contract.

The purposive approach will be of less assistance in establishing a casual worker has an overarching employment contract, however, where the reality is that their working arrangement is genuinely of an occasional and *ad hoc* nature, with no legitimate expectation of being offered work in future. In addition to this, the open-ended way the purposive approach was articulated in *Uber* creates a risk of lower tribunals not fully embracing its logical implications for casual workers. Its consequences will therefore only become clear with future litigation.

4.2. The human rights approach to casual work

The second innovation that should help casual workers access statutory employment rights is the emerging "human rights approach" to employment status in the UK[78]. This human rights approach results from the obligation imposed on domestic courts and tribunals by the Human Rights Act 1998 to interpret and apply employment legislation in a manner consistent with the European Convention of Human Rights[79]. Crucially for the law on employment status, this includes the Article 14 right to non-discrimination, and the Strasbourg courts' jurisprudence on Member States' positive obligations to protect workers' Convention rights[80]. Both of which require that domestic employment legislation safeguarding workers' Convention rights must strike a fair and proportionate balance between all the competing rights and interests at stake[81]. The requirement to strike this balance applies

[78] For an extended discussion of the implications of the Human Rights Act 1998 for employment status see Atkinson, *Employment Status and Human Rights at Work: An Emerging Approach*, in *MLR*, 2023, 86, p. 1166.

[79] Human Rights Act 1998, s 3.

[80] As in, for example, *Siliadin v France*, ECHR 545/2005; *Vogt v Germany* EHRR 20/1996; *Barbulescu v Romania*, IRLR 1032/2017; *Demir and Baykara v Turkey*, ECHR 1345/2008.

[81] *Hatton* v *UK* Application, 36022/97; *Redfearn v UK* ECHR 1878/2012; *Gilham v Ministry of Justice*, UKSC 44/2019; *Vining v London Borough of Wandsworth*, EWCA Civ 1092/2017.

to the rules determining workers' *entitlement and access* to domestic protections of Convention rights as well as the substantive content of those rights[82]. Unless it can be justified, therefore, the exclusion of casual workers from domestic employment law frameworks that engage or safeguard Convention rights will breach the ECHR and trigger domestic courts' interpretive obligation under the HRA.

The result of this is that the HRA 1998 requires domestic courts interpret the personal scope of employment legislation to include casual workers unless, and until, their exclusion is shown to be justified as fair and proportionate. This human rights approach must be adopted in the broad range of cases where Convention rights are at stake, including cases involving employment rights relating to trade union membership and industrial action (Article 11), whistleblowing protections (Article 10), working time regulation and rights to maternity and paternity leave (Article 8). The human rights approach must also be adopted in discrimination and dismissal cases where a Convention right is engaged on the facts, such as where a worker has been dismissed or discriminated against because of how they have exercised a Convention right, or the effects are significant enough to engage the Article 8 right to private life[83].

Although still in the early stages of its development, the human rights approach has led to the expansion of statutory employment rights to previously unprotected groups, including collective labour rights for foster carers and parks police officers[84], and whistleblowing protections for judicial office holders[85]. While it has not yet been applied in the context of casual workers, it should similarly make it easier for this group to access statutory employment rights: the effect of the HRA is to create a *de facto* presumption that casual workers must be interpreted as having the status required for protection under the relevant legislation. The key question is then whether this presumption can be displaced by showing that the exclusion of the casual worker can be justified as striking a fair and proportionate balance between the competing rights and interests at stake. This is a question that will need to be resolved through further litigation. But we suggest that the courts

[82] As shown in *Opuz* v *Turkey* Application 33401/02; *Redfearn v UK* 1878/2012.

[83] Collins, *An Emerging Human Right to Protection against Unjustified Dismissal*, in *ILJ*, 2020, 50, p. 36.

[84] *Vining v London Borough of Wandsworth* 1092/2017.

[85] *Gilham v Ministry of Justice* 44/2019.

should be reluctant to identify any legitimate grounds for failing to protect casual workers' Convention rights, or to accept that doing so can be justified by reference to employers' interest in business freedom[86].

4.3. The limits of judicial protection

By empowering courts and tribunals to classify purportedly casual workers as having standard employment contracts, the purposive and human rights approaches might provide them with some additional substantive protections for job security. Casual workers may be able to access protections against dismissals that infringe their Convention rights by arguing the HRA requires them to be classed as employees with an overarching contract. Supposedly casual workers that in fact have an overarching contract under the purposive approach will also have contractual rights to be provided with work on an ongoing basis. A failure by the employer to provide, or pay for, the amount of work that reflects the parties' true agreement could therefore lead to claims for unlawful deduction of wages or unfair dismissal. A failure to give reasonable notice of any changes to these workers' schedules might also amount to a breach of the implied term of trust and confidence that exists in all employment contracts, allowing them to resign and bring a claim for wrongful or unfair dismissal.

However, individuals who genuinely work on an occasional and *ad hoc* basis, with no legitimate expectation or implicit agreement that they will be provided with work in future, will not have an overarching employment contract under even the purposive approach. While they may still be workers or employees for each individual engagement the reality of their relationship is that it is a casual one rather than ongoing employment. As there remains the problem that UK law lacks well-targeted and *sui generis* rights for genuinely casual workers, this group continues to lack protection against the precarity and instability created by their working arrangements. Moreover, the subsidiary role of the courts to Parliament in the field of employment law[87], and the incremental nature of common law development, means they

[86] See Atkinson, Dhorajiwala, *IWGB v RooFoods*: *Status, Rights and Substitution*, in *ILJ*, 2019, 48, p. 278.

[87] Bogg, *Common Law and Statute in the Law of Employment*, in *CLP*, 2016, 69, 1, p. 67; Davies, *The Relationship between Contract of Employment and Statute*, in Freedland *et al.* (eds), *The Contract of Employment*, Oxford University Press, 2016.

are not capable of fashioning the far-reaching new protections needed to counteract the vulnerabilities faced by genuinely casual workers. If this group is to be provided with secure hours and decent working conditions then legislation is the only viable way of achieving this.

5. *Legislative protection of casual work*

Since the 1980s, Government policy in the UK has largely been to regulate the labour market for competitiveness[88]. As part of this, casual and other atypical forms of work have been viewed uncritically, even positively, by both Conservative and Labour Governments[89]. But although there has been no comprehensive regulatory regime introduced to regulate casual work in the UK, there have nevertheless been some recent legislative developments aimed at casual work[90]. As we shall see, however, the practical value of these frameworks for workers is severely limited.

One area where there has been a notable absence of statutory intervention is in respect of casual workers' access and entitlement to employment rights. This is despite the Government commissioned "Taylor Review of Modern Working Practices" identifying employment status as an area in need of reform[91]. Although the Government did hold a consultation on the Taylor Review proposals, it subsequently declined to implement any of its (limited) recommendations on employment status and

[88] DAVIES, FREEDLAND, *Labour Legislation and Public Policy: A Contemporary History*, in *CLJ*, 1993, 53, 2, pp. 397-398; DAVIES, FREEDLAND, *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s*, Oxford University Press, 2007.

[89] See for example, BOARD OF TRADE, *Fairness at Work*, 1998, par. 3, pp. 14-15; DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS, *Zero Hours Employment Contracts*, 2013.

[90] While not discussed here, it might also be possible for casual workers to leverage or make creative use of statutory frameworks aimed at protecting other groups of workers, such as those regulating part-time and fixed-term work. See ATKINSON, *Zero-Hours Contracts and English Employment Law: Developments and Possibilities*, in *ELLJ*, 2022, p. 347 and pp. 368-71.

[91] TAYLOR *et. al., Good Work; The Taylor Review of Modern Working Practices*, Department for Business, Energy & Industrial Strategy, 2017, p. 62. Moreover, note academic criticism of the inadequacy of even the proposals in the Taylor Review: MCGAUGHEY E., *Uber, the Taylor Review, Mutuality and the Duty Not to Misrepresent Employment Status*, in *ILJ*, 2019, 48, p. 180; BALES, BOGG, NOVITZ, *"Voice" and "Choice" in Modern Working Practices: Problems With the Taylor Review*, in *ILJ*, 2018, 47, p. 46.

has instead merely published non-statutory guidance on the existing law for employers[92].

In terms of substantive rights, the first recent intervention aimed at casual work was a ban on "exclusivity clauses" for zero hours contracts and other low paid workers[93]. The legislation provides that any contractual clause that "prohibits the worker from doing work or performing services under another contract or under any other arrangement", or that requires the employer's consent for doing so, will be unenforceable. Subsequent regulations also protected individuals who have taken on work from another employer in breach of an exclusivity clause against dismissal and victimisation[94]. Although exclusivity clauses are undoubtedly exploitative, this ban "falls drastically short" of being an adequate response to casual work[95]. It addresses an issue that effects only a small minority of casual workers, while ignoring the most pressing problems of casual work[96]. Furthermore, these terms were likely already unenforceable at common law[97].

The second piece of legislation aimed at regulating casual work is the Workers (Predictable Terms and Conditions) Act 2023, which provides a right for employees and workers to request a more stable working pattern. This legislation was initially introduced as a Private Members Bill but passed into law with support from the Government. It is expected to be brought into force in 2024. Under the legislation workers who lack predictability in their work pattern, meaning the hours or periods they are contracted to work, can submit a written request for more stable hours which the employer must treat in a reasonable manner and only refuse where they consider one of six business-related grounds applies[98]. The permitted grounds for refusal

[92] See https://www.gov.uk/government/consultations/employment-status.

[93] Small Business, Enterprise and Employment Act 2015; Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015.

[94] Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2023.

[95] Atkinson, *Zero-Hours Contracts*, cit., p. 20.

[96] Estimates are that under 10% of zero hours workers have such terms in their contracts, Chartered Institute of Personnel and Development, *Zero Hours Contracts: Myths and Reality*, 2013.

[97] Kenner, *Inverting the Flexicurity Paradigm: The United Kingdom and Zero Hours Contracts*, in Ales, Deinert, Kenner (eds), *Core and Contingent Work in the European Union: A Comparative Analysis*, Hart Publishing, 2017, p. 176.

[98] Workers (Predictable Terms and Conditions) Act 2023, s 4. Amending the Employment Rights Act 1996.

include the burden of additional costs, a detrimental effect on ability to meet customer demand, insufficient availability of work, or some other detrimental impact on the employers' business[99]. Casual workers can attempt to use this framework to gain a more stable contract with guaranteed hours or shifts patterns.

The substantive content of this new right is limited, however, and in practice it will not be of much benefit to casual workers. It only applies where individuals have worked for the employer in the month preceding a specified period to be determined by the Secretary of State, which is expected to be set at 26 weeks[100]. The worker will therefore need to have worked for the employer at some point in the month preceding that 26-week period: effectively introducing a qualifying period that they must have been working for the same employer. This also means that it will be difficult for casual workers to access the statutory framework if they sometimes work for the employer on a less than monthly basis, and that employers will be able to avoid the right if they choose by changing their pool of casual workers on a 6 monthly basis.

More fundamentally, a right to *request* stable working conditions is very different to having a *right to* stable working conditions. The statutory framework does not provide for substantive judicial scrutiny of whether the employers' reasons for rejecting requests are reasonable[101], only whether they have decided the request on accurate facts and one of the permitted grounds, or failed to follow the defined statutory procedure for responding to requests[102]. Employers can therefore easily refuse requests on business grounds by stating that they need the flexibility provided by casual work for costs reasons, to meet fluctuating business demand, or because there is insufficient work available for them to offer more stable employment.

As we have seen, successive UK Governments have failed to introduce meaningful protections for casual workers. On the contrary, the limited statu-

[99] Where the worker has ceased to be employed after submitting their request, as will be the case for genuinely casual workers who lack an overarching contract, the employer can also reject the request for the reason that their contract was terminated on reasonable grounds.

[100] As per Department for Business, Energy & Industrial Strategy, "Good Work Plan", 13.

[101] Although rejections of flexible working request may be challenged as directly or indirectly discriminatory, as in *Thompson v Scancrown Ltd*, ET2205199/2019; *Glover v Lacoste UK Ltd* 2023/EAT 4.

[102] Workers (Predictable Terms and Conditions) Act 2023, s 4; Employment Rights Act 1996 as amended, s 80ID.

tory regimes that do exist have the effect of legitimising casual working arrangements with a thin veil of regulation, rather than providing them with security and decent conditions[103]. UK law therefore continues to lack any substantive protections that would counteract and alleviate casual workers' position of precarity and vulnerability; such as rights to a contract with guaranteed hours, to minimum notice periods for scheduling changes, or for compensation for work being cancelled at late notice. This is despite the Low Pay Commission advocating such measures in 2018 in response to the Government's request that it make recommendations on addressing the problem of "one sided flexibility"[104]. Indeed, the current Government's lack of interest in addressing the issue of casual work is demonstrated by its failing to respond to its own 2019 consultation on the Low Pay Commission's proposals[105], and abandoning its commitment to introduce a new Employment Bill implementing the Taylor review[106].

As a result of this inaction, the regulation of casual work in the UK will soon diverge from EU Member States, who are now required to introduce protective measures for casual workers by the Directive on Transparent and Predictable Working Conditions[107]. This includes rights to reasonable notice of working schedules, compensation for work cancelled at short notice, as well as "limitations to the use and duration" of zero hours arrangements or a "rebuttable presumption of the existence of an employment contract" with a minimum number of guaranteed hours[108]. Further legal divergence is also likely to occur in the context of regulating casual work performed via online platforms if and when the draft EU Directive on Platform Work becomes law. Additional substantive protections of casual work are desperately needed in the UK, and designing a new legal framework to tackle the ongoing problem of casual work should be a priority for any incoming Labour Government.

[103] As argued by Freedland *et al* in the context of the exclusivity clause ban, FREEDLAND, PRASSL, ADAMS, *cit.*, p.7.

[104] Low Pay Commission, *Response to Government on "One Sided Flexibility*, in *LPC*, 2018.

[105] See https://www.gov.uk/government/consultations/good-work-plan-one-sided-flexibility-addressing-unfair-flexible-working-practices.

[106] The relevant Minister has stated the Bill is no longer "on the cards", BEIS Select Committee, *Oral evidence: The work of the Business, Energy and Industrial Strategy Department*, HC 13 December 2022 n.529, Q145.

[107] Dir. 2019/1152 on Transparent and Predictable Working Conditions.

[108] *Ibid.*, artt. 10-11.

6. *Conclusion: the future of casual work in the UK*

Despite recent developments in common law and legislation UK law fails to adequately regulate and protect casual work relationships. The application of orthodox employment law doctrines denies rights to many casual workers, either in part or entirely, and fails to provide substantive protections of stable and secure work. While judicial innovations regarding the work relationship status of casual workers are welcome the application of these new approaches to casual work remains uncertain, and there has been insufficient legislative action taken in respect of either the scope or the substantive protections that are available to casual workers. More extensive and targeted statutory intervention is needed to ensure that the flexibility provided by casual work benefits both parties rather than just the employer.

Addressing the longstanding failure to adequately regulate casual work should therefore be a priority issue for any incoming Labour Government[109]. At a minimum this must involve implementing the rights contained in the EU Directive on Transparent Working Conditions, such as minimum notice periods for scheduling changes and compensation for work that is cancelled at late notice. But it should also extend beyond this, and further thought is now needed on how best to protect casual workers in the UK, including those classed as self-employed, and to identify the precise shape that additional reforms should take.

In respect of the problem of rights allocation, the two approaches already developed by the UK courts provide helpful inspiration for further statutory developments. The relational approach taken by the Supreme Court in *Uber* might be strengthened by formally breaking the link between one's contract and entitlement to employment rights, and creating a new unitary and inclusive work relationship status that protects all those performing work personally in positions of subordination and dependency[110]. Or legislation could build on the emerging human rights approach by introducing a re-

[109] Although the Labour party previously committed to create a right for casual workers to be provided with a stable employment contract there are some indications that are now adopting a less ambitious approach, and it not yet clear what their policy position will be heading into the next election. Fisher *et al*, "Labour rows back on workers" rights to blunt Tory "anti-business" claims', Financial Times, 17 August.

[110] See, for example, the proposals in EWING, HENDY, JONES, *Rolling out the Manifesto for Labour Law*, The Institute of Employment Rights, 2018, for a unitary status.

buttable legal presumption that everyone performing work for another has an overarching contract of employment, with any denials of this status needing to be established on a case-by-case basis. In respect of the substantive protections available to casual workers, promising new measures include rights to an employment contract with guaranteed working hours after a certain period of time, a higher minimum wage for workers who lack a stable contract, and extensions of legal rights to act and bargain collectively to self-employed sole traders. Only if action is taken to address the existing failures of UK labour law in respect of both the allocation and substantive content of rights will casual work be adequately protected.

Abstract

The growth of "atypical" forms of work has been one of the defining features of the UK labour market over recent decades, and regulating these evolving working arrangements represents an important challenge for labour law. This article focuses on the treatment of one longstanding form of atypical working arrangement, namely casual or intermittent work in British labour law. It argues that the treatment of individuals working on a casual basis represents an ongoing and unresolved problem, and that the failure to adequately protect casual workers is a serious lacuna that has not been addressed by recent developments in common law or statute and requires the attention of the legislature. In addition, we argue that in addressing the issue of casual work the focus needs to move beyond the issue of employment status and entitlement to existing rights. While undoubtedly important, it is also crucial to answer the question of what additional substantive rights are required to address the specific vulnerabilities and harms faced by casual workers.

Keywords

Casual work, Labour law, Employment law, Employment status.

Massimiliano De Falco

Cooperative work for persons with disabilities: the Italian case in the light of the Sixth Principle of International cooperation*

Contents: 1. The research question. **2.** The Italian case: facts and rules on employment vulnerability of persons with disabilities. **3.** The "Biagi reform": labour inclusion within social cooperatives. **4.** "Cooperation among Cooperatives", and more: a tool for Sustainable Development. **5.** Closing remarks.

1. *The research question*

The concept of sustainability comes from the environmental dimension, and moves to sustainable development, which includes a social character[1]. Sustainable development cannot be separated from the design of inclusive environments[2], because they both represent the "Just transition"[3].

An in-depth analysis of the UN "2030 Agenda for Sustainable Devel-

* In this paper, which deepens my speech at the *20th International Conference in commemoration of Prof. Marco Biagi* (March 17, 2022, University of Modena), I translated by myself all the Law and Scholars' contributions not originally available in English.

[1] According to PERULLI, SPEZIALE, *Dieci tesi sul diritto del lavoro*, il Mulino, 2022, p. 111, "the concept of sustainability is expressed by the ability of a company (or, more generally, of a community) to carry out its activities, in a long-term perspective, taking into consideration the impact they have on natural resources, on and social and human capital". In the awareness of an endless debate on sustainability, please refer to them at least, for the extensive international recognition, and doctrinal references.

[2] GRECH, *Disability, poverty and development: critical reflections on the majority world debate*, *D&S*, 2009, 24, p. 771.

[3] On the proposal of a "Just Transitions Law (JTL)", combining "insights from environmental law, environmental justice, and labour law", see DOOREY, *Just Transitions Law: Putting Labour Law to Work on Climate Change*, in *JELP*, 2017, 30, p. 206.

opment"[4] shows the relationship between environmental sustainability and decent work, especially for the most vulnerable categories of workers[5]. By this, the Goal (no. 8 – spec. 8.5 – of the UN Agenda) takes on an (even more) relevant meaning of promoting "sustained, inclusive, and sustainable economic grow […] and decent work for all, [especially for] persons with disabilities".

Moreover, the link between the environmental development and a fair working context is evident in the current (re-)definition of disability[6]. Due to the shift of the concept of equality "from the formal, to the substantive level"[7], this personal characteristic "must no longer be interpreted from the medical perspective, but from the relational one"[8], considering the relationship among impairments, and environmental, economic, and social barriers that "may hinder [his/her] full and effective participation in society on an equal basis with others" (Art. 1, par. 2, UN Convention on the Rights of Persons with Disabilities).

The pandemic hit people and companies hard, with tragic effects on the labour market. This is a social issue that all countries are still addressing: a huge amount of resources were mobilized within the framework of the European Green Deal[9], and by the "Next Generation EU" investment programs, to fight inequalities[10].

A "human-centered, inclusive, sustainable and resilient recovery" is a need for all and, in particular, for people, who, due to their characteristics,

[4] United Nations, *Transforming our word: the 2030 Agenda for Sustainable Development*, 2015, *https://sdgs.un.org*.

[5] International Labour Organization, *World employment social outlook 2018. Greening with jobs*, 2018, p. 15, *https://www.ilo.org*.

[6] On this point, from a medical perspective, see the transition from World Health Organization, *International Classification of Impairments, Disabilities and Handicap*, 1980, *https://www.who.int*, to World Health Organization, *International Classification of Functioning, Disability and Health*, 2001 *https://www.who.int*. For the legal embrace of this new approach, see United Nations, *Convention on the Rights of Persons with Disability*, 2006, *https://sdgs.un.org*.

[7] Garofalo D., *La tutela del lavoratore disabile nel prisma degli accomodamenti ragionevoli*, *ADL*, 2019, 6, p. 35.

[8] Malzani, *Inidoneità alla mansione e soluzioni ragionevoli, oltre il* repêchage, *ADL*, 2020, 4, p. 966.

[9] European Commission, *The European Green Deal*, 2019 *https://eur-lex.europa.eu*.

[10] Indeed, according to Jendroska, Reese, Squintani, *Towards a new legal framework for sustainability under the European Green Deal*, in *OSAL*, 2021, 2, p. 89, these resources are not only a tool to achieve a full ecological transition, but also a lever a lever to ensure equal opportunities.

are at risk of being progressively (more) excluded from the labour market[11]. Indeed, eight years after the adoption of the UN Agenda for Sustainable Development, the goal of a world where "*no one (is left) behind*" is still far from being achieved: many institutional reports on the employment levels of persons with disabilities show that they are positioned at the margins of the labour market, with low levels of social protection[12].

From this point of view, the Italian case appears emblematic[13]. Italy holds the lowest "disability employment gap"[14] in EU (14.9 p.p., compared to 24.4 p.p. on average in the 27 EU Member States). On one hand, it can be observed that the general employment rate is low; on the other hand, the Italian legal system provides for a mechanism that shows a good performance in the collaboration between enterprises and social cooperatives. It is worth sharing this Italian best practice to fight the risk of exclusion from the labour market of persons with disabilities because it is useful to "facilitate the efficient exchange of best practices from experiences carried out at national level"[15].

Moreover, the Italian legal system allows for the development of a further mechanism, drawing on the "Sixth Principle of the Statement on the Cooperative Identity"[16]. It states that "cooperatives serve their members most

[11] The call to action for a "human-centred, inclusive, sustainable and resilient recovery", agreed upon by the 187 ILO Member States at the International Labour Conference on June 3, 2021, is based on the knowledge that the pandemic contingency "has hit vulnerable people hardest and increased poverty and social inequalities".

[12] For an international comparison, see International Labour Organization, *Advancing social justice. Promoting decent work. Disability and work*, 2023, *https://www.ilo.org*.

[13] European Disability Forum, *European Human Rights Report. Issue no. 7 – 2023. The right to work: the employment situation of persons with disabilities in Europe*, 2023, p. 31, *https://www.edf-feph.org*, shows that, among the EU countries, Italy is not in the worst situation in terms of labour inclusion of persons with disability; other countries – such as Spain, which has a legal system of inclusion comparable to the Italian one – is even further behind.

[14] The "disability employment gap" shows the gap between the employment of persons with disabilities and the employment of persons without disabilities

[15] Biagi, *Cambiare le relazioni industriali. Considerazioni a margine del Rapporto del Gruppo di Alto Livello sulle relazioni industriali e il cambiamento nella Unione europea*, ADAPT, 2002, 5, p. 18.

[16] The "Statement on the Cooperative Identity" has been recognized by the International Cooperative Alliance at the XXIII Vienna Congress in 1966. For an overview of Principles of the Cooperative Identity see International Cooperative Alliance, *Cooperative identity, values, and principles*, 2002, *https://www.ica.coop* and, on their implementation within the Italian legal system, Verrucoli, *I «principi» dell'Alleanza Cooperativa Internazionale e la loro applicazione nella legislazione italiana*, in *RDC*, 1980, p. 5.

effectively and strengthen the cooperative movement by working together through local, national, regional and international structures". By this, the "Cooperation among Cooperatives" has been elevated from a practice traditionally followed by cooperative movement to a principle of their identity, for the achievement of greater efficiency, building a (even intersectoral) network, inspired by common ideological foundations[17].

Focusing on the Italian legal system, this paper aims to investigate: *A*) which is the situation of persons with disabilities in the labour market; *B*) how working in a social cooperative helps them to better their situation; *C*) exploring the Sixth Principle, understanding collaboration between social cooperatives, to combine labour inclusion of persons with disabilities, and sustainability for all. Alongside the analysis of the Italian case, the paper will *D*) add some insights to the international debate international debate, on inclusive, and sustainable development.

2. *The Italian case: facts and rules on employment vulnerability of persons with disabilities*

The Italian system of support for "targeted placement" of persons with disabilities provides for a framework of obligations, incentives, and sanctions, under Law No. 68/1999[18].

Public and private employers must recruit workers with disabilities, in proportion to their employment size. The minimum rate is one (for small companies, up to 30 employees), and the maximum is 7 p.p. of the workforce (for companies with 51 employees)[19]. The aim is to guarantee the "right to

[17] Fici, *L'identità delle società cooperative, i Principi dell'Alleanza Cooperativa Internazionale e le legislazioni nazionali europee*, in *RDS*, 2012, p. 2, who suggest that "working together" means that – "even if each cooperative achieves positive results on its own" – each one "should try to develop the benefits on a larger scale, collaborating with each other in the most suitable forms", while maintaining the advantages of territorial rootedness.

[18] In the Italian legal system, the "targeted placement" means labour inclusion of persons with disability, with the aim of the best match between the worker's skills and the job to be filled. On this topic, see completely Riccardi, *Disabilità e lavoro*, Cacucci, 2018, and her literature review.

[19] In particular, the Italian legal system – like other European legal systems (such as, for example, the Spanish one) – provides that "public and private employers are required to [employ workers with disability on their payroll, in an amount equal to]: *a*) seven per cent of the workers

work of the persons with disabilities", and the ambition is "to adequately assess persons with disabilities in their working capacities, and to place them in the appropriate place" (Art. 2, Law no. 68/1999).

Sanctions are associated with that obligation. The legislator has recently increased them. If the employer fails to cover the "quota" reserved for persons with disabilities, Art. 15, Law no. 68/1999 provides for sanctions for each working day of non-employment, setting up the amount at five times the expected contribution exemption provided for by Art. 5[20]; since, with the recent adjustment of the amount of the exemption contribution (according to Ministerial Decree no. 193/2021), the penalty system for non-compliant employers has been aggravated[21].

Originally, the legal system for the labour inclusion of persons with disabilities required the employer to declare the public employment service the number and the tasks of workers to be employed, up to 7 p.p. of the workforce. The public service would find workers, pick them in a special list, and match them with the employer.

This system was abolished in 2015[22]: now, the employer can choose the person with disabilities to be employed. This seems to have lightened the employer's obligation. While it may be a better solution for employers, on the contrary, for workers (and those seeking employment), it seems to have "legitimized an escape way to evade the recruitment obligation"[23], to the detriment of the most severe forms of disability.

But recruitment is still very problematic due to difficulties in placing persons with disabilities in the plant[24]. Especially in cases of mental disabil-

employed, if they employ more than 50 workers; *b*) two workers, if they employ between 36 and 50 workers; *c*) one worker, if they employ between 15 and 35 workers" (Art. 3, par. 1, l. no. 68/1999).

[20] Art. 5, l. no. 68/1999 establishes that "companies that, due to the special conditions of their activity, cannot employ the full quota reserved for persons with disability, may be partially exempted from the recruitment obligation [if they pay] an exemption contribution for each person not employed".

[21] With the rise of the amount of the exemption contribution to EUR 39.61, the penalty for each failure to hire becomes EUR 196.05 per day and, when multiplied by 260 working days, reaches EUR 50,973.00 per year.

[22] See the amendments to Art. 7, par. 1, l. no. 68/1999 provided for by Art. 6, d.lgs. no. 151/2015.

[23] Di Stasi, *Il diritto al lavoro dei disabili e le aspettative tradite del "collocamento mirato"*, in *ADL*, 2013, 4-5, p. 888.

[24] Although direct recruitment allows an immediate integration of the person with dis-

ities, employment requires (in addition to *the adaptation of the company to the person with disabilities*, also) *the adaptation of the person with disabilities to the company*, becoming a reason for further frustration, rather than an opportunity for fulfilment.

The most recent national reports testify that disability is still perceived as a personal characteristic that hinders a "targeted placement" useful to the needs of employers[25]. Due to an (alleged) lowed productivity, persons with disabilities are placed on the fringes of the labour market. Even more, in the rare cases in which they are employed[26], they are assigned to less relevant tasks for the company's production purposes, with lower remuneration, and precarious working conditions[27].

As mentioned above, the issue seems to be even more critical when disabilities are physical or mental[28]. In these cases, the discomfort suffered by the person limits his/her chances of being included within the labour market, and, even if he/she has a job, it significantly reduces the possibilities of maintaining employment[29].

ability into the labour market, MALZANI, *Benessere e sicurezza dei lavoratori*, in *VTDL*, 2020, 4, p. 980, affirms that this perspective presupposes "the design of an organization aimed at the well-being – and not only at remedying or combating discrimination already perpetrated – of the person with disability".

[25] For an investigation on the employment conditions of persons with disability, please refer to DE FALCO, *Il diritto al lavoro delle persone con disabilità: alla ricerca della "persona giusta al posto giusto"*, in *LG*, 2022, 4, p. 380, and references included therein.

[26] Looking forward to the next update, ISTAT, *Rapporto annuale 2022. La situazione del Paese*, 2022, p. 262, *https://www.istat.it*, remarked that "in the 2020-2021 average, the share of employed people aged 15-64 with disability is half of that observed in the population without limitations: only one third of the first ones is employed" to the advantage of unemployment and, above all, inactivity.

[27] FONDAZIONE STUDI CONSULENTI DEL LAVORO, *L'inclusione lavorativa delle persone con disabilità in Italia*, 2019, p. 8, *https://www.consulentidellavoro.it*.

[28] The surveys mentioned by UNITED NATIONS, *Conference of States Parties to the Convention on the Rights of Persons with Disabilities. Economic empowerment and Entrepreneurship of Persons with Disabilities*, 2022, *https://www.un.org*, agree that persons with mental or intellectual disability, on average, get a remuneration (often below 50% of the national minimum wage) equal to only 25% of the salary of people without limitations employed in the same task.

[29] Although d.lgs. no. 151/2015 extended the "targeted placement" also to persons with mental disability [Art. 2, amending Art. 1, par. 1, let. *a*), l. no. 68/1999], even providing new incentives for their recruitment (Art. 10, modifying Art. 13, l. no. 68/1999), the job placement remained almost impossible, in the comparison between physical and psychical disability (see the Evaluation Document *Disabili psichici e inserimento lavorativo: un percorso di ricerca*, 2017, *https://www.senato.it*.

Moreover, it should be noted that the unequal treatment experienced by persons with disability in the labour market involves a redundancy that falls overwhelmingly not only on their economic condition, but also on the family sphere (already weighed down by the burdens of care and assistance[30]), as well as on the sustainability of the whole national welfare system.

In this scenario, the 2020-2022 pandemic acted as a magnifying glass for known (but normally low observed) issues. In Italy, as well as in other countries, the spread of the virus has worsened the condition of persons with disability, contributing to slowing down their (already complicated) access to the labour market[31]. Although specific leaves[32] and measures designed to combine health and employment protection[33] have been foreseen, most persons with disability could not access them, due to their unemployment.

In front of these perspectives, where "few lights shine and many shadows fall"[34], there are timid encouraging signs, resulting from the growing attention given to the issue of social inclusion.

On the one hand, the National Recovery and Resilience Plan (*NRRP*) has recognized the disability as a "transversal priority", to which huge investments will have to be destined, in order to "ensure suitable social and working conditions for persons with disability throughout the country"[35].

[30] Tiraboschi, *Occupabilità, lavoro e tutele delle persone con malattie croniche*, ADAPT Labour Studies e-book, 2015, p. 682.

[31] Giovannone, *Il collocamento dei disabili nel mercato del lavoro* post-*emergenziale: criticità e prospettive*, in *Federalismi.it*, 2021, 10, p. 113. For an international overview, see the empirical research conducted by Leonard Cheshire, *Locked out of the labour market: the impact of COVID-19 on disabled adults in accessing good work, now and into the future*, 2020, (*https://www.leonardcheshire.org*), which shows that 42% of employers surveyed were discouraged from hiring persons with disability due to prejudices related to their needs during the pandemic.

[32] Lamonaca, *L'estensione della durata dei permessi retribuiti* ex *art. 33, L. n. 104/1992, e gli altri istituti di supporto dell'assistenza ai disabili in condizione di gravità*, Filì, *Covid-19 e rapporto di lavoro*, in Garofalo D., Tiraboschi, Filì, Seghezzi (eds), Welfare *e lavoro nella emergenza epidemiologica*, ADAPT University Press, 2020, p. 261.

[33] The reference is to "telework", on which refer at least to Brollo, *Lavoro agile per i lavoratori fragili: lezioni dalla pandemia…*, in *ADL*, 2022, 3, p. 405, and Zilli, *Il lavoro agile come "accomodamento ragionevole", fra tutela della salute, diritto al lavoro e libertà di organizzazione d'impresa*, in *Labor*, 2020, 4, p. 531.

[34] Griffo, *La L. n. 68/1999, un bilancio vent'anni dopo*, in Bruzzone (ed), *Salute e persona: nella formazione, nel lavoro e nel* welfare. *Multidisciplinarità e logiche condivise*, ADAPT University Press, 2017, p. 19.

[35] The job placement of persons with disability is of particular importance in the frame-

Among the main reforms planned therein[36], it is worth emphasizing the provision of the "Disability Framework Law" (provided by Law no. 227/2021[37]), for the reformulation of Italian legislation, to make it as adherent as possible to the principles sanctioned at international and European level[38].

Moreover, with the approval of Italian *RRP*, an essential role in the implementation and monitoring of investments for equal opportunities was attributed to the "National Observatory on the condition of persons with disability" (established by Law no. 18/2009), entrusting it the task of verifying the effectiveness of the reforms envisaged in the Plan[39].

On the other hand, it is necessary to mention the recent "Guidelines on the targeted placement of persons with disability" (Ministerial Decree no. 43/2022)[40], published on March 16, 2022. This document aims to support the application of Law no. 68/1999 on different Italian areas, introducing "a system of evaluation of the policies promoted by the Regional Administrations, which considers the potential impact on the world of disability of the measures provided, [and] interpreting work not only in terms of equity, but also in terms of economic growth".

The goal is to consolidate "a path of collaboration [...] oriented towards a more efficient and organic system of labour inclusion throughout the country", able to strengthen public services, in the perspective of their "continuous improvement"[41].

work of the "National Programme for the Employability Guarantee of Workers" (Mission 5, Component 1, p. 202, *NRRP*), as a "national programme of caretaking, provision of specific services and customised vocational planning".

[36] See Garofalo D., *Gli interventi sul mercato del lavoro nel prisma del PNRR*, in *DRI*, 2022, 1, p. 114.

[37] Please refer to De Falco, *Ragionando attorno alla L. delega in materia di disabilità: una prospettiva giuslavoristica*, in *RCP*, 2022, 5, p. 1738.

[38] The main reference is to the mentioned UN Convention on the "Rights of persons with disabilities", ratified by Italy, *ex* l. no. 18/2009. At European level, please refer lastly to the European Commission Communication of March 2021, which includes the "Strategy for the right of persons with disabilities 2021-2030".

[39] On this point, please refer to the Italian Labour Minister "Directive to the Administrations in charge of projects, reforms, and measures in the field of disability" (Decree February 9, 2022): it is a guideline document, aimed at valuing disability in the interventions planned under the *NRRP*, to allow the Administrations to verify – *ex ante*, *in fieri* and *ex post* – that each reform contemplated by the Plan has an inclusive and non-discriminatory character.

[40] Please refer to De Falco, *Linee guida in materia di collocamento mirato delle (e per le) persone con disabilità*, in *Boll. ADAPT*, March 28, 2022, no. 12.

[41] On the presentation of the Guidelines, it was also introduced the "Targeted Placement

These actions are welcome because no one – *companies, government*, and *society as a whole* – wants persons with disability to remain on the sidelines of the labour market. However, it is necessary to be aware that *no measure* is sufficient on its own, and that *all measures* are (not only useful, but) indispensable for a serious, lasting, and inclusive recovery after the pandemic.

3. *The "Biagi reform": labour inclusion within social cooperatives*

To overcome the problems in recruitment, the national legal system allows *alternative paths*, which are designed to balance the productive interests of the employer and the needs of the worker[42]. Law no. 68/1999 has allowed agreements among companies, in which the employer: *A*) employs a person with disabilities and transfers him/her to another company if the person cannot be included in the plant (Art. 12); *B*) agrees to postpone the coverage of the mandatory quota until the end of the Agreement, while the person with disabilities is working in another company, which is under contract with the required one (Art. 12-*bis*)[43].

These types of job placement accompany persons with disabilities towards a (work) environment suited to their characteristics, also allowing the employer to fulfil the coverage of the mandatory quota. The mechanism is useful, but the requirement of equal pay for all workers (*without* and *with* disabilities) does not encourage the placement[44].

Database", which intends collect all the information on the Labour inclusion of persons with disability, to simplify the fulfilments, strengthen the controls, and improve the monitoring and the evaluation of the measures provided for by l. 68/1999. In this regard, the Guidelines reiterate the "importance of systemic data management, the constant updating of information flows and the development of application collaboration oriented towards full interoperability between the reference systems on disability".

[42] In this direction, "the solidarity that everyone is now rediscovering must be looked for with the individual scruple to benefit from what one is entitled to and not to abuse or give an idea of abuse" (Miscione, *Il Diritto del lavoro ai tempi orribili del coronavirus*, in *LG*, 2020, 4, p. 323).

[43] On this topic, see widely Garofalo D., *L'inserimento e l'integrazione lavorativa dei disabili tramite convenzione*, in *RDSS*, 2010, 2, p. 231.

[44] For an extensive comparison of the different models, see the recent study carried out by Borzaga M., Mazzetti, *Le forme di sostegno all'instaurazione di rapporti tra imprese e cooperative*

The so-called "Biagi reform" (Legislative Decree n. 276/2003) seems to be very relevant on this side. Specifically, Art. 14, Legislative Decree no. 276/2003 entrusts the promotion of work inclusion to the "Framework Agreement on a territorial basis", granted by the Regions[45]. The stipulation of this "normative accord"[46] is entrusted to the employment public services, after consultation with the technical committee[47], and the "most representative trade unions of employers and employees at the national level", as well as the "associations representing, assisting and protecting cooperatives" [Art. 1, par. 1, let. *b*), Law no. 381/1991] "and their consortia" (Art. 8, Law no. 381/1991)".

Through the signing of this Framework Agreement, it is stipulated that the "social cooperative for the employment of disadvantaged people"[48] recruits the worker in place of the company obliged to employ; in return, the latter assigns work orders to the social cooperative[49], proportionate to the cost of staff included therein, for the entire duration of the contract[50]. It means that the person with disabilities can lawfully be paid less.

sociali di tipo B: gli artt. 12 e 12-bis della legge n. 68/1999 e l'art. 14 del d.lgs. n. 276/2003, in BORZAGA C., BORZAGA M. (eds), *Inserimento lavorativo e contratto di rete*, il Mulino, 2023, p. 111.

[45] On the profitable involvement of the public actor, see NOGLER, BEGHINI, *La lenta marcia verso le convenzioni per l'inserimento lavorativo dei disabili*, in *ISoc.*, 2006, 1, p. 130.

[46] The Framework Agreement is defined in these terms by TURSI, *Cooperative sociali e inserimento dei lavoratori svantaggiati*, in VV.AA. (eds), *Come cambia il mercato del lavoro*, Ipsoa, 2004, p. 71, as it sets "rules, conditions and modalities, with which subsequent contracts must comply".

[47] The reference is to the entity provided for by Art. 6, par. 3, d.lgs. no. 496/1997, as amended by Art. 6, par. 2, let. *b)*, l. no. 68/1999.

[48] In the Italian legal system, "social cooperatives for the employment of disadvantaged people" – as a *species* of the cooperative *genus* [provided for in Art. 1, let. b), l. no. 381/1991] – are legal entities obliged by the internal regulation to employ at least 30% of persons in a particular situation of the disadvantage, under Art. 4, l. no. 381/1991. For an overview of the discipline of social cooperatives, see FERLUGA, *Il lavoro nelle cooperative sociali*, in *VTDL*, 2019, 5, p. 1711.

[49] TIMELLINI, *La tutela dei lavoratori svantaggiati: il raccordo pubblico-privato e le cooperative sociali*, in GALATINO (ed), *La riforma del mercato del lavoro*, Giappichelli, 2004, p. 148, interprets Art. 14, d.lgs. no. 276/2003 as "a bet on social cooperatives".

[50] RICCARDI, *cit.*, p. 219. For a full examination of the tool, as well as for the value of the work order and its method of quantification, see also SLATAPER, *Le convenzioni con le cooperative sociali per favorire l'inserimento dei soggetti svantaggiati*, MISCIONE, RICCI, *Organizzazione e disciplina del mercato del lavoro*, in CARINCI F. (ed), *Commentario al d.lgs. 10 settembre 2003, n. 276*, Ipsoa, 2004, p. 300.

Moving from its heading ("Social cooperatives and job integration of *disadvantaged people*"[51]), it is possible to understand that Art. 14 of the 2003 Biagi reform is aimed at a wider audience than that identified by Law no. 68/1999, addressing (not only persons with disabilities but also) "any person [...] who has difficulty entering the labour market without assistance"[52]. However, this manifestation of the intention to incorporate the redefinition of disability[53] clashes with the absence, in the Italian legal system, of a recruitment obligation expressly provided for all "disadvantaged people"[54]; indeed, their labour inclusion could be facilitated only if their employment is encouraged by (economic or normative) incentives at the regional level[55].

Instead, regarding persons with disabilities, the integration into the social cooperative "is considered useful for the coverage of the mandatory quota" of the burdened companies (Art. 14, par. 3, Legislative Decree no. 276/2003). For this purpose, Framework Agreements concerning "workers with disabilities" require the specification of the maximum limit of the coverage that can be achieved with it [Art. 14, par. 2, let. g), Legislative Decree no. 276/2003], to ensure that the recruitment obligation provided for by Law no. 68/1999 is met[56]. The Law neither clarifies the nature, and the type of

[51] L. no. 76/2020 (by converting d.l. no. 137/2020) has modified the title of Art. 14, d.lgs. no. 276/2003 into "Social enterprises, social cooperatives and job integration of disadvantaged people", extending the possibility to sign a Framework Agreements also to social enterprises regulated by d.lgs. no. 112/2017.

[52] See the reference made by Art. 2, let. *k*), d.lgs. no. 276/2003 to Art. 2, let. *f*), EC Regulation no. 2204/2002 on State aid for employment, then in force, which identifies additional "categories" of social disadvantage to those referred to in Art. 4, l. no. 381/1991 (which also went beyond the sphere of disability *stricto sensu*).

[53] See above, Par. 1.

[54] Regarding employers, SARTORI, *Le cooperative sociali. Profili giuslavoristici*, in *VTDL*, 2017, 2, p. 456, claims that "it is legitimate to ask why they should confer for subjects not included among the person with disability [...], since only for the latter is the computation provided for in the quota *ex* l. 68/1999".

[55] On the assumption that the disadvantaged people excluded in Art. 4, l. no. 381/1991 can neither be counted by social cooperatives in the 30% useful to be included in the category, nor allow them to benefit from the tax relief provided by the same law, BORZAGA C., *Cooperazione sociale e inserimento lavorativo: il contributo dell'analisi economica*, in *GDLRI*, 2006, p. 123 asks "what the added value of this provision could be, when cooperation could already spontaneously accommodate disadvantaged people".

[56] TURSI, *Le nuove convenzioni per l'inserimento lavorativo dei disabili e dei soggetti svantaggiati tramite cooperative sociali, due anni dopo*, in *GDLRI*, 2006, p. 78.

the working relationship, nor its duration[57]: this lack led the legislator to repeal it in 2007[58], but it was reinstated the following year[59].

Nowadays, even as the result of the rediscovery of the world of social cooperation[60], it is possible to overcome the concerns of those who saw the risk of isolation of persons with disabilities in the tool[61], as it "breaks the established patterns of the targeted placement system"[62]. On the contrary[63], it is considered that, through the setting up of individual plans implementing the Framework Agreements, social cooperatives are working contexts that

[57] SARTORI, *Le cooperative sociali*, cit., p. 454 notes that "the doctrine does not exclude the possibility of relationships other than that of permanent employment [...], and refers to the sectoral bargaining, for which the relationship may be of various types depending on the needs of the concrete case".

[58] Art. 14, d.lgs. no. 276/2003 was abrogated by Art. 1, par. 37, let. *a)*, l. no. 247/2007, but was subsequently restored by deletion of the abrogating provision (see Art. 39, par. 10, let. *m)*, l. no. 133/2008).

[59] The Legislator intended to replace – through the introduction of Art. 12-bis in l. no. 68/1999 – the model of the Framework Agreement, as it allowed employers to fulfil their recruitment obligation without including, indefinitely, the person with disabilities within their organization. However, from this point of view, the Agreements provided for by Art. 12-*bis*, l. no. 68/1999 appeared to be worse than the tool they were intended to replace: on this issue, and for a complete comparison of the two agreements, see GAROFALO D., *L'inserimento e l'integrazione lavorativa*, cit., p. 261.

[60] On the evolution of social cooperation, from a marginal entity in the labour market, to a major player in the relations between persons with disability, public services, and local companies, see CALABRESE, FALAVIGNA, *Le cooperative sociali prima e durante il Covid-19. Un'analisi economico-finanziaria tramite* benchmarking, in *ISoc.*, 2021, p. 3.

[61] Art. 14, d.lgs. no. 276/2003 has long been hit by intense doctrinal criticism, resulting from prejudices towards the world of social cooperation, and towards the fear that the mechanism provided for therein "could lead to the creation of two non-communicating labour markets": the first one would be able to accommodate the milder – and "socially accepted" – forms of disability, and the second one would isolate the more severe forms of disability (in these terms, see CIMAGLIA, *L'esperienza applicativa dell'art. 14, D. Lgs. n. 276 del 2003*, in *GDLRI*, 2006, p 135, and, in the same direction, GARATTONI, *L'inserimento dei lavoratori svantaggiati nel sistema comunitario degli aiuti di Stato*, in *RGLPS*, 2006, 3, p. 650).

[62] CIMAGLIA, *cit.*, p. 133, according to whose approach the risk is that the work orders become "the price to be paid" to avoid the employment of the person with disability by the company obliged by l. no. 68/1999.

[63] See TURSI, *cit.*, p. 75, and NOGLER, *Cooperative sociali e inserimento lavorativo dei lavoratori svantaggiati*, in PEDRAZZOLI (ed), *Il nuovo mercato del lavoro*, Zanichelli, 2004, p. 192, who agree that the risk of isolation of persons with disability in the Framework Agreement model is "unfounded". Moreover, even though disadvantaged persons must "constitute at least 30% of the workers of the social cooperative and, depending on their individual status, be partners of the cooperative" (Art. 4, par. 2, l. no. 381/1991), the quota identified by the

are "more sensitive and attentive to the needs of people"[64], able to value them, even on the regulatory side, as working partners[65].

Hence, by exalting the virtuous collaboration between companies required to employ persons with disabilities, social cooperatives, and local public institutions, the model designed by Art. 14 of the 2003 Biagi reform seems to satisfy the interests of all parties involved in the mechanism, in a "*win-win*(*-win-win*)" solution.

A) First, it allows the employer with the recruitment obligation to fulfil it regularly, saving the greater burdens connected with direct recruitment or the payment of sanctions. Even if the employment in the social cooperative concerns disadvantaged workers (without disabilities), the company will be able to benefit from goods and services that it currently produces in-house, or that it buys from outside providers.

B) Consequently, by signing the Framework Agreement, the social cooperative guarantees work orders itself, that are functional to maintaining its financial equilibrium. Moreover, the social cooperative pursues its social objective[66], ensuring job opportunities for people who would risk being excluded from the ordinary channels through which labour supply and labour demand spontaneously meet[67]. In this way, cooperation is encouraged to

Italian legislator – in the *minimum*, but not in the *maximum* – is functional to mitigate this risk.

[64] Massi, *Il nuovo collocamento obbligatorio*, Ipsoa, 2000, p. 64, whose position is supported by the findings of the empirical investigation conducted by Chiaf, *Il valore creato dalle imprese sociali di inserimento lavorativo*, in *ISoc.*, 2013, 1. In similar terms, Corbo, *Le convenzioni per il diritto al lavoro dei disabili: natura, struttura, funzione e strumenti di tutela*, in *ADL*, 2009, 2, p. 385, interprets social cooperatives as a "disability-oriented environments".

[65] On the partnership and employment relationship in social cooperatives, see Biagi, *Cooperative e rapporti di lavoro*, Franco Angeli, 1983, p. 137, and, after the enactment of l. no. 381/1991, see at least Garofalo D., *Il socio lavoratore delle cooperative sociali*, in Garofalo D., Miscione (eds), *La nuova disciplina del socio lavoratore di cooperativa: L. n. 142/2001 e provvedimenti attuativi*, Milano, 2002, p. 51, as well as Laforgia, *La cooperazione e il socio-lavoratore*, Giuffrè, 2009, p. 85, and Imberti, *Il socio lavoratore di cooperativa. Disciplina giuridica ed evidenze empiriche*, Giuffrè, 2012, p. 131.

[66] According to Imberti, *Il socio lavoratore di cooperativa*, cit., p. 10, cooperation is "both a type of company that operates on the market, and a part of a social movement that does not only pursue economic purpose".

[67] In this way, Borzaga C., *Cooperazione sociale e inserimento lavorativo*, cit., 115, who identifies social cooperation as a "sheltered workshop, and a springboard to allow the enhancement of skills, through training, and the professionalism of those involved in their activity". See also Scalvini, *La cooperazione sociale di inserimento lavorativo*, in *ISoc.*, 2006, p. 22, who affirms that

emancipate itself from a purely welfarist vision, and to insert itself in the value chain as active members of the production cycle, generating economic prosperity, and social reinvestment[68].

C) Furthermore, the public welfare system benefits from the inclusion of persons with disabilities[69], since the reduction of the number of unemployed people alleviates the pressure on the national budget. For this reason, the economic independence of persons with disabilities relieves the Welfare State system of social assistance costs, otherwise necessary to guarantee the implementation of the principles of solidarity and equality.

D) Finally (and above all), persons with disabilities can recover satisfaction, professionality, and, more generally, dignity through work, in a context supervised by Public Administration. In this way, the inclusion of persons with disabilities in social cooperatives gives the possibility to appreciate their value[70], as (partner) workers and not as merely passive persons of care and assistance[71].

For these reasons, the mechanism provided for in Art. 14, Legislative Decree no. 276/2003 transforms social cooperatives into the highest expression of the "Benefit company"[72]. The "common benefit" of their activity lies on the one hand, in the neutralization of the negative effects produced by the non-employment (both on the person with disabilities, and the com-

social cooperatives transform persons with disability "from *objects* of assistance into value-generating *products*", for themselves and for others.

[68] TURSI, *Cooperative sociali*, cit., p. 45.

[69] On this point, it must be stressed that FIORENTINI, Welfare *e impresa sociale di garanzia*, in *ISoc.*, 2016, 7, traces the first experiences of social cooperation back to forms of "horizontal and circular subsidiarity, able to complement the public welfare system".

[70] As observed by NAVILLI, *I lavoratori disabili e il collocamento "mirato"*, BROLLO, *Il mercato del lavoro,* in PERSIANI, CARINCI F. (eds), *Trattato di diritto del lavoro*, Cedam, 2012, p. 284, "the valorization [of professionalism] and the concretization of the right to work [can] *neutralize* the handicap of persons with disability".

[71] It is about achieving the "protection that is not merely defensive, but proactive, and capacitating" demanded by CARUSO, DEL PUNTA, TREU, *Manifesto per un diritto del lavoro sostenibile*, in *"Massimo D'Antona"*, 2020, p. 11.

[72] This is a certification recognized to companies that add – to the typical lucrative purposes (Art. 2247, Italian Civil Code) – one or more purposes of "common benefit" aimed at producing a positive effect (or at reducing a negative one) towards the various parties that interact with the company. Among the first essays on the subject, see CORSO, *Le società* benefit *nell'ordinamento italiano: una nuova "qualifica" tra* profit *e* non profit, in *NLCC*, 2016, 5, p. 995 and, more recently, SQUEGLIA, *Le società benefit e il* welfare *aziendale. Verso una nuova dimensione della responsabilità sociale delle imprese*, in *DRI*, 2020, 1, p. 61, p. 81.

pany obliged to recruit), and, on the other hand, in the positive impact that this model produces on the community.

It can be deduced that the cooperative "social function" is recognized under Art. 45, par. 1 of the Italian Constitution[73] and incorporates a mutualistic spirit[74], which is an impulse to remove obstacles to the realization of the principle of equality[75]. It follows that, by combining solidarity, inclusion and participation, social cooperatives assume *socially responsible behaviour*[76], which, in the described model, is suitable for sustaining employment, development, and, by this, sustainability of the community.

4. *"Cooperation among Cooperatives", and more: a tool for Sustainable Development*

The widespread value of the Framework Agreements provided by Art. 14 of the 2003 Biagi Reform is confirmed by recent institutional reports on the inclusion of persons with disabilities[77], which confirm its attractiveness, and its

[73] IMBERTI, *La disciplina del socio lavoratore tra vera e falsa cooperazione*, in *"Massimo D'Antona",* 2007, no. 61, p. 278, and, widely, IMBERTI, *Il socio lavoratore di cooperativa*, cit., p. 27. At the same time, d.lgs. no. 117/2017 (on which extensively, RICCOBONO, *Diritto del lavoro e Terzo settore. Occupazione e* welfare *partenariale dopo il D. Lgs. n. 117/2017*, ESI, 2020) counts "social enterprises, including social cooperatives" (Art. 4, par. 1) among the Italian "Third Sector", recognizing their "value and social function [as expressions of] solidarity" (Art. 2). In this way, social cooperation is deemed capable of "pursuing the common good [and fostering] the inclusion and full development of the person" (Art. 1, d.lgs. no. 117/2017).

[74] Within the ("special") cooperative employment relationship, BIAGI, *Cooperative e rapporti di lavoro*, cit., p. 415 sees "a relationship which is instrumental to the fulfilment of the mutualistic purpose of ensuring better working conditions" to workers. In this direction, IMBERTI, *La disciplina del socio lavoratore*, cit., p. 291, identifies "false cooperation" in the absence of the "mutualistic purpose" (Art. 2511, Italian Civil Code), which distinguishes cooperatives with "social merit" from "companies that fraudulently use the cooperative scheme for profit-making purposes".

[75] PASTORE, *Brevi note sulla "Cooperazione a carattere di mutualità e senza speculazione privata"*, in *Federalismi.it*, 2008, 9, p. 5.

[76] According to SALOMONE, *La responsabilità sociale dell'impresa: riflessioni a margine di una strategia europea sullo sviluppo sostenibile*, in *DRI*, 2004, 2, p. 379, "the only way to think about corporate social responsibility today, from the perspective of labour law, would be to seriously reconsider forms of worker participation in company management, as a tool of controlling corporate governance".

[77] The reference is to the *X^th^* and *IX^th^ Reports to the Italian Parliament on the state of implementation of Law no. 68/1999* (both available on the official website of the Italian Ministry of

concrete application[78]. Even if the Italian system looks better than others, a deep analysis of these statistics shows that the recourse to this tool is still inadequate and can be strengthened, especially in some areas of the country[79].

Indeed, it emerges that many employers do not engage direct recruitment of persons with disability, and do not utilize Framework Agreements. The obstacles seem to be represented by the alleged impossibility of being able of profitably employing individuals with disabilities within the company and of entrusting social cooperation with profitable work orders[80].

By January 31, of each year, employers must submit an informational statement on their employment status, which determines the obligation to employ persons with disabilities, or affects the assessment of the mandatory quota[81]. If the employer does not submit it, or if the quota reserved for persons with disabilities is not met, employers should face costly sanctions. Even if sanctions will not help persons with disabilities to work, they may receive disability checks. Unfortunately, sanctions are not very effective, because they are not easy to collect[82]. Then, persons with disabilities do not find either a job or receive a pension.

But the informational statements on occupational situations could be

Labour: *https://www.lavoro.gov.it*), published, respectively, in May 2023, and in January 2021, but relating to the years 2019, and 2016-2017-2018.

[78] See Tab. 46, p. 100, *IX^th Report*, *cit.*

[79] For a striking overview of territorial differences in the use of labour insertion agreements, see Fondazione Studi Consulenti del Lavoro, *cit.*, Tab. 7, p. 20.

[80] The mentioned Reports highlight that, among the (more than) 900.000 people registered in the targeted placement system, the job placement at public and private employers is just over 43.000 (see Tab. 50, p. 104, *X^th Report*, *cit.*, and Tab. 19, p. 71, *IX^th Report*, *cit.*). Furthermore, 40.9% of the private companies, and 30.1% of the Public Administrations report the availability of job positions for people with disability (see Tab. 1, and Fig. 2-3, p. 44, *X^th Report*, *cit.*). In aggregating public and private sectors data, it emerges that the 110.060 surveyed companies – with more than 515.000 job positions to be assigned to persons with disability – do not cover 148,229 reserved quotas.

[81] Art. 9, par. 6, l. no. 68/1999 states that public and private employers "must send […] an information statement showing the total number of employed workers, the number and the names of employed workers with disability, and the jobs and the task available to persons with disability" that could be hired.

[82] Observing Tab. 11, p. 57, *IX^th Report*, *cit.* (concerning the "number of communications to Italian Territorial Labour Inspectorates on non-compliance with recruitment obligations"), in relation to the number of non-compliant employers (excluding those who can benefit from the contribution exemptions), it is easy to understand that the inflicted sanctions are lower than the number of non-compliant employers.

very useful, as far as they are accessible to everyone (Art. 9, par. 6, Law no. 68/1999). They show the overall mandatory quota for companies in a definite geographical area[83].

Then, we can move from a single to a territorial compensatory perspective, fostering partnerships among companies for labour inclusion.

The same perspective has already been developed in the context of the "sustainable finance" mechanisms called "carbon offsetting"[84]. They allow companies to compensate for their emissions if they cannot neutralize on their own, by buying "carbon credits" offered by environmental protection projects. Like the better-known "social impact bonds"[85], these investments in sustainability produce positive effects for companies, for the environment, and, more generally, for the community. In an ecological metaphor, the envisioned path leads to ask whether it is also possible to build a model of "social offsetting", able to achieve labour inclusion of persons with disabilities.

Going back to the 2003 Biagi Reform, it is a matter of shifting the focus from the environmental to the social dimension of sustainable development. Thanks to the driving force contained in Art. 14, Legislative Decree no. 276/2003, companies that can entrust work orders to social cooperation could post a higher quota of persons with disabilities than that required by law, to compensate for the shortcomings of other companies, which find it more difficult to use of Framework Agreements. The proposal is to focus on the Sixth principle of the Statement on the Cooperative Identity[86], under the banner of labour inclusion of persons with disabilities.

If a network for social inclusion is the *goal*, the *tool* to realize it could be the "network contract". It is the legal instrument through which "several entrepreneurs pursue the aim of individually and collectively increasing their

[83] In a perspective useful for the reasoning that will be conducted here, Zilli, *La trasparenza nel lavoro subordinato. Principi e tecniche di tutela*, Pacini, 2022, p. 119, observes that "a lot of information is accessible but offered without filters and keys to interpret it, to the point of being useless compared to understanding what is happening".

[84] On these procedures, see Ballassen, Leguet, *The emergence of volountary carbon offsetting*, Research Report, HAL, 2007, and, more recently, Dugast, *Net Zero Initiative. A framework for collective carbon neutrality*, 2020, *www.carbone4.com*.

[85] The "social impact bonds" constitute investments, whose remuneration depends on the achievement of a social outcome (such as, for example, "increased employment", on which see Cristofolini, *Potenzialità e criticità dei* social impact bonds *per l'inserimento lavorativo*, in *DRI*, 2021, 4, 2021, p. 1027) previously agreed upon between the client – often, a Public Administration – the investors, and the service provider.

[86] See above, par. 1.

innovative capacity and competitiveness on the market" by obliging themselves "to cooperate in predetermined forms, and areas" (Art. 3, par. 4-*ter*, Decree-Law no. 5/2009, converted into Law no. 33/2009)[87].

It was pointed out that "the employment of persons with disabilities can fit into the strategic objectives of a network of social cooperatives"[88]. Trying to take it a step forward, it is possible to imagine a broader network, including social cooperatives and companies required to employ persons with disabilities, to join *productivity* and *inclusion*, as *two sides of the same coin*.

By the admitted "co-employability of workers hired with rules established by the network contract"[89], and "according to a shared (network) interest of the parties involved (therein)"[90], the network contract combines the collaboration between companies, with the virtuous exchange of goods, services, and (above all) human resources[91].

From the legal point of view, the network is considered as a single entity, to which both labour relations, and legal obligations (including the recruitment obligation of persons with disabilities)[92] are ascribed. By this, it can be

[87] Without claiming to be exhaustive, see at least Alvino, *Il lavoro nelle reti di imprese: profili giuridici*, Giuffrè, 2014; Zilio Grandi, Biasi, *Contratto di rete e diritto del lavoro*, Cedam, 2014; Greco, *Il rapporto di lavoro nell'impresa multidatoriale*, Giappichelli, 2017; Maio, Sepe, *Profili giuridici ed economici della contrattazione di rete*, il Mulino, 2017.

[88] In this direction, see Borzaga C., Borzaga M., Depedri, Ferrari, Gubert, Iamceli, Mazzetti, *Reti tra imprese per l'inserimento lavorativo. Applicabilità e potenzialità del contratto di rete*, Euricse Research Report no. 21/2021, 2021, and, more recently, Ferrari, Iamceli, *L'utilizzo del contratto di rete da parte delle cooperative di inserimento lavorativo: strategie di collaborazione e disegno contrattuale*, in Borzaga C., Borzaga M. (eds), *Inserimento lavorativo e contratto di rete*, cit., p. 137, and p. 157 (to which please refer for a survey of good experiences already developed by Italian social cooperatives).

[89] See Art. 30, par. 4-*ter*, d.lgs. no. 276/2003 (introduced by the mentioned l. no. 33/2009), on which see exhaustively Perulli, *Gruppi di imprese, reti di imprese e codatorialità: una prospettiva comparata*, in *RGL*, 2013, 1, p. 83, and Greco, *cit.*, p. 113.

[90] Biasi, *Dal divieto di interposizione alla codatorialità: le trasformazioni dell'impresa e le risposte dell'ordinamento*, in Zilio Grandi, Biasi (eds), *cit.*, p. 137, to which please refer also for its appropriate doctrinal references.

[91] However, it should be emphasized that a common purpose consisting in the mere sharing (or in the promiscuous use) of human resources presents critical issues regarding the limits placed by Italian legal system on irregular staff leasing (on which see Borzaga C. *et al.*, *Reti tra imprese*, cit., p. 95). It becomes fundamental that the employment of persons with disability is supported by a concrete and coherent causal scheme, linked to the purpose of the network of "individually and collectively increasing [its] innovative capacity and [its] competitiveness on the market" (Art. 3, par. 4-*ter*, d.l. no. 5/2009).

[92] On this point, see specifically Borzaga M., Mazzetti, *I rapporti di lavoro nei con-*

realized a broader collaborative mechanism among social cooperatives, and companies required to employ persons with disabilities, under the banner of productive inclusion[93].

Through the described territorial compensations, the companies in the network (which do not currently employ persons with disability, and do not use the Framework Agreements) could fulfil the mandatory quota and save the sanctions. Of course, the mechanism could help persons with disabilities to restore dignity, well-being, and independence, which are likely to be damaged – if not lost – due to unemployment.

The criticism could come from those who see in the mechanism a "distorted" inclusion, mediated through cooperation, or from those who note lower sanction receipts for the Public Administration.

First, *the goal justifies the tool*: each step towards inclusion should be welcomed, rather than standing silently in front of discrimination that grips persons with disabilities in the labour market.

About the second potential critical issue, it should be remembered that the penalties for failure to comply with the recruitment obligation constitute a theoretical collection for the Public Administration, and that the purpose of the targeted employment system is not to collect the sanctions but to ensure the right to work of the persons with disabilities[94].

tratti di rete, in Borzaga C., Borzaga M. (eds), *Inserimento lavorativo e contratto di rete*, cit., p. 197.

[93] On legal level, it is a matter of reintroducing the network contract "with solidarity purpose", which emerged during the pandemic, as a result of the amendments made to Art. 3, par. 4-*sexies*, d.l. no. 5/2009, by Art. 43, par. 1, d.l. no. 34/2020, converted into l. no. 77/2020). On this tool, see at least Alvino, *Contratto di rete e diritto del lavoro: un bilancio delle funzioni e delle potenzialità del contratto di rete a otto anni dal varo del distacco semplificato e della codatorialità*, in *LDE*, 2021, 3.

[94] It is a matter of implementing Art. 4 and Art. 38 of the Italian Constitution. On the one hand, Art. 4 of the Italian Constitution states that "the Republic shall recognize the right of all citizens to work and shall promote such conditions as shall render this right effective. Every citizen shall have the duty, according to personal potential and individual choice, to perform any activity or function contributing to the material or spiritual progress of society". On the other hand, Art. 38 of the Italian Constitution states that "every citizen unable to work and without the necessary means of subsistence shall be entitled to welfare support. Workers shall be entitled to adequate means for their living requirements in case of accidents, illness, disability, old age and involuntary unemployment. Physically and mentally disabled persons shall be entitled to education and vocational training. Responsibilities under this Article shall be vested into entities and institutions established or supported by the State. Private-sector assistance may be freely provided".

The issue is how to settle economic, fiscal, or reputational[95] advantages for the network companies. If it is true that *unity is strength*, the virtuous collaboration among social cooperatives and enterprises generates sustainable development, which is disseminated and shared through inclusion. The hope is that the forthcoming "Framework Law on disability" will help, by rationalizing employment channels fulfilling the right to work of persons with disabilities[96].

5. Closing remarks

In this paper, the topic of Sustainable Development is focused on the working conditions of persons with disabilities, moving from the Italian case to draw up wide-ranging considerations. Persons with disabilities have always been very weak in the labour market, because of their (verified or supposed) reduced working capacity.

It has been observed that the inclusion of workers with disabilities in the plant is hard: for the employer's side, because of the need to adapt the organization to special needs; from the worker's side, because of the stressful working conditions, which are barely understandable, and affordable for a person with disabilities. After the pandemic, the situation has worsened and these vulnerable workers (or workers-to-be) had more difficulties in finding and keeping a job.

The Italian case shows quite well data and problems, and a useful tool to reverse the situation.

The 2003 Biagi Reform introduced a legal instrument, that is an alliance among employers, workers, and social cooperatives. By an agreement, monitored and guaranteed by the Regional Government, the workers with disabilities can work in a social cooperative, that is organizing work, and taking care of them. Through the Framework Agreement, the employer can ask (and pay) the social cooperative to realize a part of the firm production, which is realized by persons with disabilities.

The tool is effective and efficient, but up to now, it has had only little

[95] This enhancement could take place, for example, through the recognition of the "benefit company" certification (on which please refer to par. 3).

[96] According to SARTORI, *Transizioni occupazionali e vulnerabilità lavorative: il difficile compito per il diritto del lavoro* post-*pandemico*, in *DRI*, 2021, 4, p. 973.

diffusion, because it is not well-known by employers. Moreover, some employers cannot sign the Framework Agreement because their field of expertise is not compatible with work, realized by workers with disabilities.

According to this, Italian employers often prefer to pay sanctions, instead of hiring them. This is a critical issue, because *A*) sanctions are very harsh, and *B*) persons with disabilities are not included in the labour market.

To overcome these critical issues, the proposal is to build a network among social cooperatives and companies that are obliged to employ persons with disabilities. On the one hand, the model aims to enhance "cooperation among cooperatives", which from being a principle of Cooperative Identity becomes a vehicle for labour inclusion. On the other hand, through the integration of companies into the network, the purpose is to create partnerships for the virtuous exchange of goods and human resources in a selected geographical area.

As mentioned above, the inspiration comes from "carbon offsetting" procedures, which allow companies to compensate their emissions, by investing in environmental protection projects. In the same way, the perspective of "social offsetting" allows companies to compensate for their shortcomings in the employment of persons with disabilities, by investing in social cooperation. The proposal is to face problems and duties, through sharing resources for sustainable development: the Sixth Principle of the Statement on the Cooperative Identity can support the "cooperation among cooperatives" and more.

The Italian experience can represent a best practice, and can also be exported to other countries, considering the worldwide role played by cooperatives in supporting the labour inclusion of persons with disabilities[97]. It is a matter of finding "supported employment" (especially in the hardest cases)[98], to ensure sustainable development and, above all, the sustainability of Labour Law.

[97] Without claiming to be exhaustive, see at least Reports of INTERNATIONAL LABOUR ORGANIZATION, *Cooperatives and the Fundamental Principles and Rights at Work: Cooperatives and Non-Discrimination at Work*, 2017 *https://www.ilo.org*, and *At work together: The cooperative advantage for people with disabilities*, 2015, *https://www.ilo.org*. Moreover, see ALBERT, *In or out of the mainstream? Lessons from research on disability and development cooperation*, Leeds, 2006, and WESTOBY, SHEVELLAR, *The possibility of cooperatives: a vital contributor in creating meaningful work for people with disabilities*, in *D&S*, 2019, and the extensive references made therein.

[98] DRAKE, MCHUGO, BECKER, ANTHONY, CLARK, *The New Hampshire study of supported employment for people with severe mental illness*, in *JCCP*, 1996, 2, p. 391.

Abstract

The paper investigates a specific dimension of "Sustainable Development" within Labour Law, which is identified in the labour inclusion of persons with disabilities. Through an analysis of the Italian case, the reasoning develops by examining critical issues of the unemployment of persons with disabilities. Furthermore, the discussion concerns a legal tool provided for by the Biagi reform (that can potentially be exported beyond national borders), which allows equal opportunities, thanks to investments in social cooperatives. The aim is to reinterpret the model in the light of the Sixth principle of the Statement on the Cooperative Identity ("Cooperation among cooperatives"), identifying how a broader collaboration can be concretely realized, to support the sustainable development of Labour Law.

Keywords

Cooperation among cooperatives, Social cooperatives, Sustainable development, Persons with disabilities, Labour inclusion.

Olgu Özdemir Ertürk

The Judicial Reflections of the Termination Ban and Unpaid Leave as Interim Measures During Covid-19 Pandemic in Turkish Labour Law

1. *Introduction*

In the beginning of the Covid-19 pandemic, one of the pioneer concerns was to protect the labour contracts. Otherwise, the negative impacts of losing jobs would be devastating and millions of people and their families would be affected enormously. Respectively, many countries have taken preventive measures. In this paper, we are evaluating the effects of the interim measures taken by the Turkish Government at the beginning of Covid-19 pandemic, by discussing the judicial decisions[1]. Due to the time-consuming judicial process, the lawsuits regarding these regulations, which expired in July 2021, took quite a long time. As a matter of fact, even decisions dated 2023 are included in our study.

[1] The author would like to express her respect and gratitude to the Presidents of the Antalya 9th and 10th Regional Court of Justice providing access to reach up-to-date decisions via UYAP (National Judiciary Network Server) for this paper.

The main issue that we try to understand while analysing the decisions in this study is whether these regulations were effective in ensuring the continuity of the labour contract. Of course, there may have been disputes that were not subject to judicial proceedings or that the parties resolved through alternative resolution methods such as mediation. Therefore, it will not be possible to determine exactly how many employers have acted in compliance with the restrictions. However, at the outset, it is possible to briefly state that the cases that have been brought to courts have shown us that the existence of these prohibitions alone is not sufficient to protect the employees or to prevent the long-term negative results of Covid-19 pandemic on labour law.

In order to protect the employee, the first concern is to maintain the continuity of the legal relationship. As the first step, the legislation in Türkiye must be shortly clarified for the reader to understand the effects of measures.

In Turkish labour law, the "job-security system" had been adopted in Labour Code no. 4857 in 2002, in the light of Termination of Employment Convention no. 158 and Recommendation no. 119. In view of this Convention, the legislator determined the scope of the application, developed some conditions, and set some criteria, which will be explained when needed.

Firstly, the employee has to be in the scope of Labour Code no. 4857 or Media Labour Code no. 5953. This provision excludes, for instance, pilots or flight attendants, whose labour contracts are concluded according to the Code of Obligations no. 6098, or marine employees belonging to Maritime Labour Code no. 854. Due to this condition, only a group of employees subject to relevant laws can benefit from the job security.

Secondly, the employee has to work in a workplace consisting of at least 30 employees[2]. If the employer has more than one workplace in the same work field, the total amount of employees would be taken into account; for example, most of the branch banks consist less than 30 employees, but in total, the bank itself employs thousands in total throughout the country.

The third condition is the six months waiting period. In order to enjoy the security, the employee must be working for the same employer for at least six months of time, continuously or intermittently.

[2] Thirty-employee barrier had become a major source of criticism in the doctrine and even an application was made to the Constitutional Court for the annulment of phrase "30" but this application was rejected as it was not found to be unconstitutional. Legislator considered that smaller workplaces are not able to handle the economic consequences of the job-security system. So does the Constitutional Court.

The last condition relates to the type of contract. Definite or fixed term labour contracts end by itself, so these also fall out of the scope of protection. This, by nature, can be excluded from the job security and it's also stated in the Art. 2/2-(a) of the Convention no. 158.

If the employee is out of the scope of this job security system, the freedom of contract rule apply, the employee enjoys no protection. Those employees could ask for the severance pay – if deserved – or the compensation for notice period, if notice is not given by employer. Additionally, if the right of termination is not exercised in good faith, the employee may claim compensation for abuse of right to terminate. (Turkish Labour Code art. 17/6, Code of Obligations art. 434, Maritime Labour Code art. 16). The legislator regulated also two special compensations for discriminating termination[3]; one may either claim for general reasons or discrimination on grounds of union rights. Trade Unions and Collective Agreement Code of 6356 Art. 25 bans all terminations which are against union freedom. Union freedom is protected for all the employees, as it is considered a fundamental right within the scope of this Article.

2. *Interim Measures for Coronavirus Period*

After the Coronavirus (Covid-19) outbreak, the first case in Türkiye was announced on March 11, and the first death occurred on March 17, 2020. The Scientific Committee, which was established before these events, convened to take various precautions quickly. According to the precautions, the Turkish Government declared the closure of public and some private workplaces. Cinemas, theatres, concert venues, wedding venues, restaurants, cafes, beerhalls, amusement parks, swimming pools and any kind of spas, massage places, gyms, game venues, malls, children's playgrounds are all closed.

[3] It is important to point out that the type of compensation depends on the action of the employer and the position of the employee. For instance, if the right to terminate is used based on the ground of sexual discrimination and if the employee falls in the scope of the Labour Code 4857, the compensation for discrimination can be applicable (Art. 5/6). But the employees who are not in the scope of this Code, cannot enjoy this compensation. For example, air transportation work is out of the scope because of its own special working conditions. However, as there is no special legislation for this field, flight attendants and pilots are considered as employees within the scope of Code of Obligations. This Code does not contain any special compensation against discrimination.

Although some workplaces were physically closed, another group of workplaces continued their activities remotely or online; such as any level of schools, universities, any type of educational institution, banks... etc. Activity in some sectors significantly reduced or stopped, on the other hand, for instance, the volume of business in online shopping companies or logistics had grown tremendously. Therefore it is not possible to say that the pandemic alone might be the ground for suspending a business relationship. Depending on the nature of the work and workplace, the activity might have decreased or stopped, but on the contrary, in some, it might have increased[4].

On 26.03.2020, the first Covid-19-reasoned Amendment of Certain Laws No. 7226 ("Law no. 7226") had been adopted. This law had simplified the application process for the short-time work allowance. In order to benefit from the short-time work practice, employers had to keep the employees employed. Because of this indirect result, we chose to call this application an "indirect termination ban". But this application did not stop employers from dismissals. After the adoption of "indirect termination ban", from 26th March until 17th April 2020, there were more than half a million applications to the unemployment fund, according to the reports of the Turkish Employment Agency[5]. This data shows us that after the announcement of compulsory closure, many employers had chosen to terminate the employment agreements even though there was an opportunity to benefit from the short-time work practice. In order to prevent dismissals, it should have become necessary to take more drastic measures.

On 17.04.2020, Turkish Government adopted the Law on Minimizing the Impacts of the New Coronavirus (Covid-19) Outbreak on Economic and Social Life and the Amendment of Certain Laws ("Law no. 7244") published in the Official Gazette. First of all, this Law no 7244 had involved some provisional articles for the Labour Code, Social Security Code and other Codes regarding the labour relations. Although these were provisional articles, the President had the power to prolong the implementation of the provisional articles, with a Presidential Decree. To put it right up front, these articles had been prolonged 7 times until 30.06.2021.

As these rules were adopted in order to control the acute situation, the

[4] Alpagut, *Pandemi'nin İş Sözleşmesine Etkisi: Ücretsiz İzin, Fesih Yasağı, Zorlayıcı Neden*, in Alpagut (ed), *Pandemi Sürecinde İş Hukuku*, On İki Levha, 2020, p. 62.

[5] Www.iskur.gov.tr.

adaptation of the "provisional article" was a suitable choice as they won't be in force after the specific time period[6]. However, the effects on jurisdiction weren't provisional and we see the importance of adapting such articles in the long run.

It is possible to categorize the amendments adopted in two titles; "termination ban"; "unpaid leave and financial aid".

2.1. Termination Ban

The termination ban was adopted with the Provisional Article 10 of the Labour Code, regarding all employees throughout the country. Regardless of the Law he or she belongs to, all of the employees were protected, in all sectors and all workplaces[7]. In the doctrine, the addition of such a broad-applied article to the Labour Code was not found legally correct. Because this Code is not the only Labour Code. There are other Labour Codes such as Media Labour Code and Maritime Labour Code and also there are employees whose employment agreement is subject to the Code of Obligations[8]. Perhaps this Law no. 7244 should have been a separate Code, not an "Amendment Law", and applied as due to its status of *lex posterior*.

Although this name "ban" refers to a legally prohibited area of practice, the real aim of the legislator was never to interdict an employer from terminating the labour contract. It could be regarded as a temporary restriction[9]. It was clearly stated in the Article that an employer can only terminate a labour agreement, based on serious misconduct of the employee, according to the Art. 25/II of the Turkish Labour Code, effective immediately. Termination with a notice was prohibited and sanctioned with an administrative fine (for each employee who faced an illegal termination, the fee was equal to the minimum wage of the day) (Provisional Article 10/3 of Turkish Labour Code).

[6] Nazli, *Covid-19 Salgının Ekonomik ve Sosyal Etkilerinin Azaltılması Hakkında Kanunun İş Hukukuna Yönelik Hükümlerinin Değerlendirilmesi*, in *iMÜHFD*, 2020, vol. 7, p. 254.

[7] Alpagut, *cit.*, p. 91; Yiğit, *Bireysel İş Hukuku Açısından Zorlayıcı ve Zorunlu Sebeplere Bağlı Olarak Ortaya Çıkan Çalışma Koşullarının Yeni Koronavirüs (COVID-19) Nedeniyle Gerçekleştirilen Son Yasal Değişiklikler Bağlamında Değerlendirilmesi*, in *İHM*, 2020, 78/2, p. 292; Çelik, Canikloğlu, Canbolat, Özkaraca, *İş Hukuku Dersleri*, in *ED. 34 Beta Yayıncılık*, 2021, p. 650.

[8] Nazli, *cit.*, p. 253. The author criticize the law-making technique and argues in his article that this provisional article concerning all of the employers should have been formulated differently.

[9] Nazli, *cit.*, pp. 254-255.

2.1.1. Immediate Termination - The Door Left Open for Termination

Article 25/II of the Turkish Labour Code which is regulating immediate termination, has the title "*For immoral, dishonourable or malicious conduct or other similar behaviour*". Under this title, the Legislator formulated some examples of conduct, such as the harassment of the employee towards another employee or the committing of a dishonest act against the employer, or breach of his trust. These examples are indeed not *numerus clausus*.

As the Provisional Article had referred to the Art. 25/II of the Labour Code No. 4857, the question arises; what if the employee is working under the scope of other Labour Codes? In other words, what should be done if there is no Article "25/II" in the Code that employee belongs to?

Immediate termination based on a just cause is a subject which differs from Code to Code in Turkish Labour Law. Legislator had referred to a specific article in a specific code, but this must not be interpreted literally. *Ratio legis* would be taken into account and this reference to the specific Labour Code should be understood and interpreted in a way to protect all of the employers. If the employee is working in the scope of another Labour Code, the regulation of the same nature in the other law should be looked at and evaluated accordingly. In Maritime Labour Code or Media Labour Code, there are other examples of serious misconduct. On the other hand, Code of Obligations has only a general explanation: "Art. 435: All the situations and conditions that are not expected to continue the labour relationship according to the rules of good faith are considered to be just cause". In this case, the criterion for immediate termination for just cause will be determined by the rules of good faith.

2.1.2. Qualification of the Forbidden Termination

2.1.2.1. *Can a Termination Be Sanctioned by Nullity?*

The most important concern regarding protection against termination during the pandemic was the sanction of termination. Especially for employees who were not covered by job security, the consequences would be revealed by the judgments.

One of the arguments is that such a termination should be qualified as unjust termination and its' consequences should arise[10]. According to this

[10] ALPAGUT, *cit.*, p. 96; this is also discussed on on-line seminars and conferences; such as

opinion, employees who are under protection of job security system may bring a claim for reinstatement and invalidity of termination[11]. Those who aren't protected should apply for the Turkish Code of Obligations Art. 438 for unjust termination. Technically, none of these claims are a claim for nullity. The articles regarding protection against termination doesn't create a system that excludes the validity of termination, but only a system that holds the employer responsible for it. Therefore, we should act on unjust termination.

According to second view, it has been argued that the notice of termination can only be processed when the prohibition period expires. Pursuant to this opinion, the period in which termination is prohibited by regulation, is considered as the suspension period, as well as the periods during which the employee is on a sick leave[12].

A third view argues that when termination is prohibited, an administrative fine is determined as a sanction[13].

The fourth view supports that the sanction of the forbidden dismissal must be nullity[14], as the termination ban is a caution against dismissals and

CANBOLAT, *Koronavirüs Salgınının Hukukuna Etkisi*, avalaible on https://www.youtube.com/-watch?v=EJnQea2zmVk; Ç L, *7244 Sayılı Kanunun Hukukuna Etkileri ve Zorlayıcı Nedenler*, avalaible on https: //www.youtube.com/watch?v=b-EhknZeaAI.

[11] In general, employee may bring an action against the employer after the dismissal and claim that the reasons for dismissal were not valid. This claim is formulated as the "invalidity of the termination and reinstatement" in the Labour Code. If the decision is in favour of the employee, he has to apply to the employer within 10 working days from the finalization of the decision. The employer, after receiving this application, has to invite him to work in one month. If he doesn't invite the employee to work at the end of one month's time, the termination by the employer considered to be final at this date, and the employer has to pay the compensation of non-reinstatement and idle time fee. As stated in the doctrine, this case has a nature *sui generis*. Although the dismissed employee is demanding reinstatement, after the court decision, the employer has another string in his bow: to pay the compensation and not to reinstate. So, the results of the reinstation and invalidity decision are slightly different from a typical nullity.

Even though this action of invalidity is regulated by the legislator to protect the employee and the employment relationship, it is highly criticized in the doctrine. The employee has two paths to follow. He may demand the invalidity of the termination and reinstatement and apply to the employer when the decision is in favour; or if he does not want to go this way, he can only ask for severance pay and the notice indemnity he deserves. However, these compensations are the consequences of termination, not reinstatement.

[12] ALPAGUT, *cit.*, p. 96.

[13] EKMEKÇI, *Covid-19 Döneminde Fesih Yasağı, Kapsamı ve Yasağa Aykırılığın Sonuçları*, in ÖZEKES (ed), *Covid-19 Salgınının Hukuki Boyutu*, On İki Levha Yayıncılık, 2020, p. 714.

[14] NAZLI, *cit.*, pp. 258-259; GÖKTAŞ, *Covid-19 Salgınının İş Sözleşmesinin Feshine ve Diğer*

the legislator wants the labour contracts "not to be terminated". If the courts make the assessment of nullity, it means that all of the employees throughout the country can be protected from any kind of job loss during this period.

Finally according to a fifth view, keeping the employees were introduced as a prerequisite with Law no. 7226 for applying for short-time working allowance. For this reason, the employer who unlawfully terminates the employment contract during the prohibited period, cannot benefit from the short-time working allowance. The allowance paid for this period should be collected back with interest from the employer[15].

As we have seen in the disputes before some courts of First Instance, it has been decided that the contracts of the workers who are not covered by the job security cannot be deemed invalid with the "invalidity of termination and reinstatement" lawsuit. Before going to the Court of Cassation, Regional Court of Justice[16], which is the secondary court, made a different assessment. According to the Regional Court of Justice, the termination of the employee's contract during the prohibited period should be sanctioned by final nullity. Because the termination made in this period is null and void, according to the termination ban. The request of the employee who is not within the scope of job security, should be considered as a request for determination of final nullity.

After the appeal, the 9th Civil Chamber of the Court of Cassation ("Yargıtay") decided that the employee filed a lawsuit with a clear request for "reinstatement to work", and that no extension could be made through interpretation due to the procedural law rule of "commitment to the request"[17]. However, it should be summarised that, since there is no such type

Sona Erme Nedenlerine Etkisi, in *SİHD*, 2020, n. 43, p. 289. The latter publication and its interpretation slightly has more effect on the jurisdiction as the author himself is the president of the 9th Civil Chamber of the Court of Cassation of Türkiye (*Yargıtay*).

[15] Özkaraca, Ünal Adınır, *Yeni Koronavirüs (Covid-19) Salgını Kapsamında Kısa Çalışma, Ücretsiz İzin ve Fesih Yasağının İşçinin Hizmet Süresine Etkisi*, in *Çimento İşveren*, July 2020, vol. 34, no. 4, p. 34.

[16] In the Turkish legal system, conflicts arising from the labour contracts are evaluated by the Court of First Instance primarily. Afterwards, the parties may apply to Regional Courts of Justice. Request of appeal can be made to 9th Civil Chamber of Court of Cassation. Reinstatement claims aren't subject to the request of appeal since 2017, so Regional Courts of Justice is the place for the absolute judgment about a termination. The criteria and case law developed by the Court of Cassation before 2017 are now implemented by the Regional Courts of Justice.

[17] 9th Civil Chamber of the Court of Cassation, 01 December 2021, Case no. 8048, De-

of lawsuit as "nullity of termination", no result had been obtained in practice in this direction.

In addition to the Court of Cassation judgments mentioned above, as a result of our research, we have seen that there are also decisions of the Regional Courts of Justice where the case was not referred to the Court of Cassation. For example, in a decision of the Ankara Regional Court of Justice[18], while the employee was working as an apartment clerk, his contract was terminated during the prohibition period. The employee has no job protection. Therefore, the court of First Instance rejected the reinstatement claim of the employee due to a "lack of legal interest". Ankara Regional Court of Justice, upheld this decision as correct. As can be seen, whether the employee would be reinstated or whether the termination would be deemed null and void was evaluated differently in each city or district court.

2.1.2.2. *Immediate Termination Without Serious Misconduct*

As stated, only the immediate termination for just cause will be lawful, and all other types would result in invalidity. But the grounds of immediate termination are not limited to Article 25/II. In the article 25, there are other reasons such as "absences due to health reasons exceeding certain periods", "detention exceeding certain periods", and "compelling – *force majeure* – reasons". However, due to the clear statement of the legislator in the Provisional Article about termination ban, any reason other than Art. 25/II was not accepted as a legal ground for termination. Nevertheless, in some cases, employers terminated contracts based on other grounds.

In a decision of the Samsun Regional Court of Justice, the contract of the employee who had an accident in 2019 and received a long rest report extending to 2020, was terminated due to this long rest report. It should be noted that the rest report exceeding a certain period of time is recognized as a reason for immediate termination (without notice) in Article 25/I of the Labour Code. However, as the High Court rightly stated, the legislator limited the reasons for termination during the pandemic period. The reasons in Article 25/I are also within the scope of the prohibi-

cision no. 16025. Another decisions on the same issue were made by the same Chamber, 09 December 2021, Case No. 11212, Decision No. 16369; 20 January 2022, Case No. 12779, Decision No. 738, in *UYAP*, National Judiciary Network Server.

[18] Ankara 7th Regional Court of Justice, 21 September 2021, Case No. 2329, Decision No. 2456, in *UYAP*, National Judiciary Network Server.

tion. Therefore, the reason for termination cannot be considered as a just or valid reason[19].

In a decision given by the Ankara Regional Court of Justice, an employee who has been working since 2018, receives a total of 264 days of rest until July 2020. In this case, there wasn't any long rest report, but many intermittent reports were received. Due to the total reporting period of the employee, the employer terminated the employment contract again on the grounds of Article 25/I of the Labour Code. For the same reason, the High Court draws attention to the fact that termination is within the scope of the prohibition, and decides on re-instatement[20].

The courts have drawn a clear line that the contract cannot be terminated by other grounds for immediate termination.

2.1.2.3. *Valid Reasons - Can Be Valid Anymore?*

In some cases, "the just cause for immediate termination" and "the valid reasons for termination with a notice" may be very close to each other and the issue of which termination right can be exercised may be controversial. The behaviour of the employee can be a valid reason to terminate regularly. If this behaviour is more severe, it may cause a serious misconduct, so immediate termination may arise.

In a dispute before Sakarya Regional Court of Justice, there had been a continuous excess of employment since 2017 due to the contraction in demand at the employer's factories. It had been claimed that with the pandemic, things slowed down considerably, and sometimes even stopped. In this process, the employer terminated the employee's contract based on operational reasons. However, the High Court revealed that termination not for a just cause but a valid reason was prohibited here as well, and accepted the employee's request for re-instatement[21].

In another case evaluated by Ankara Regional Court of Justice, the employment contract was terminated in 05.08.2020 due to "frequent illness",

[19] Samsun 7th Regional Court of Justice, 15 March 2022, Case No. 243, Decision No. 513, in *UYAP*, National Judiciary Network Server.

[20] Ankara 5th Regional Court of Justice, 17 February 2022, Case No. 2158, Decision No. 408, in *UYAP*, National Judiciary Network Server. Actually, intermittent rest reports are not evaluated as a long absence in the meaning of Article 25/I. This issue was not discussed in the decision, it was only stated that the relevant article was within the scope of the ban.

[21] Sakarya 12th Regional Court of Justice, 22 February 2022, Case No. 2553, Decision No. 387, in *UYAP*, National Judiciary Network Server.

which may only be used as a valid reason. Regional Court of Justice evidently stated that this had fallen in the scope of the ban and the employee must be re-instated[22].

Retirement age is also a controversial issue when it comes to termination. In a case, the claimant was an employee in a municipality and his employment was based on a special legislation as he was working as an employee in a public institution. The employment contract was terminated due to retirement during the prohibition period on the grounds that the law under which the claimant was employed contained the phrase "cannot be employed after the retirement date". The Regional Court of Justice found the employer's termination to be lawful. However, one of the judges wrote a dissenting opinion and stated that the prohibition of termination was contrary to its purpose[23]. In our opinion, the decision is not correct and we agree with the dissenting opinion which clearly states that this termination must be null and void.

2.1.3. Unjust Immediate Termination

It is the employer (or HR department) that processes the data on why the employment contract ended into the National Social Security System. The employer can therefore write whatever he wishes.

It was possible to terminate effective immediately, but what if an employer had used the article 25/II as a reason to break the termination ban? This immediate termination might be the result of fraudulent behaviour.

In a case evaluated by the Sakarya Regional Court of Justice, the employee worked as a quality control employee in tire production. It had been claimed that the employee made some mistakes in quality control and he was warned several times during the total period of employment and his last action recorded in January 2020. But the contract of the employee was terminated on the 29th of December 2020. In addition, the employer marked the option "behaviours that do not comply with integrity and loyalty" (Art. 25/II) as the reason for dismissal while processing the exit record into the social security system and generated a false report. The court stated that 11 months have passed since the last action, it is no longer possible to talk about

[22] Ankara 5th Regional Court of Justice 2158/2022.

[23] Diyarbakir 8th Regional Court of Justice, 22 April 2021, Case No. 304, Decision No. 779, in *UYAP*, National Judiciary Network Server.

just cause, and there is a 6-working-day period to assert the just cause. High Court has ruled that the termination is invalid and the employee should be re-instated[24].

As we understand from this case, employers may enter erroneous information into the system, in order to issue the employee's dismissal, even though they have to make the termination for just cause within a certain period of time. The accuracy of the information entered into the system is not checked unless a lawsuit is filed, and there is no authorized person other than the employer in this regard. For this reason, they have the opportunity to act against the employee as if he acted contrary to the contract (Art. 25/II).

In another dispute that is the subject of Bursa Regional Court of Justice, the employee works as a driver and the employment contract was terminated by the employer for just cause on the grounds of absenteeism (Art. 25/II-g). According to the employee's claim, the absenteeism records kept at the workplace are not due to the employee's absence from work, but to the employer's refusal to accept him to the workplace. As a matter of fact, one of the witnesses, who was a security guard at the workplace, stated that he was instructed not to allow the plaintiff to be admitted to the workplace, and that he even wrote this instruction as a note to convey to the other security guards. Here, too, the court decided to reinstate the employee[25].

2.1.4. Resignation Re-evaluated as Employer Termination

In a decision of Sakarya Regional Court of Justice, there is a document stating that the employee resigned. Two weeks after this declaration, severance and notice payments were paid to the employee. However, the witnesses of the employee declared during the trials that, the employer terminated the contract. The witnesses of the employee claimed that the personnel service used by the employee was cancelled and everyone living in that area was dismissed. In addition, these compensations are not paid to the employee who resigns in the ordinary course of life. The employer, on the other hand, declared that the employee needed money and therefore he wanted to help. For this reason, the High Court considered the incident as an employer ter-

[24] Sakarya 12th Regional Court of Justice, 16 March 2022, Case No. 361, Decision No. 572, in *UYAP*, National Judiciary Network Server.

[25] Bursa 3rd Regional Court of Justice, 05 April 2022, Case No. 499, Decision No.650, in *UYAP*, National Judiciary Network Server.

mination and decided to accept re-instatement[26]. It should be noted that even before the pandemic period, employers had forced employees to sign "resignation statements", and these statements were carefully evaluated by the courts.

2.2. Unpaid Leave and Financial Aid

The legislator adopted an exceptional regulation for the Covid-19 period and give permission to the employer to coerce unpaid leave and change the conditions of the agreement all by himself[27]. Following this change, the employee may terminate the contract, but the reasoning of the termination cannot be counted on the ground of "just cause" or "serious breach of the employer". As a result, he isn't able to apply to the protective norms. This was a major change and this regulation had effected thousands of employees' rights.

This unilateral legal act of the employer has both advantages and disadvantages for the employee. On one hand, if there was no option to provide work because of governmental decisions or a protective measure, the employment agreement was suspended and kept until the circumstances allow. On the other hand, the employee was stuck in this suspended agreement without his consent and if he or she wanted to break free from it, the only way out was to resign. This was of course, not favourable, because the employee lost his severance pay by resignation.

According to the provisional article, the period of unpaid leave might be up to 3 months, but this article could be extended by a Presidential Decree. Yet it is prolonged 7 times until 30.06.2021. The aim was to lead employers towards short-time work practice. However, as this pe-

[26] Sakarya 12th Regional Court of Justice, 02 March 2022, Case No. 94, Decision No. 476, in *UYAP*, National Judiciary Network Server.

[27] If one of the parties wants or needs to amend the conditions substantially, the other must provide his consent. Otherwise, the substantial alterations are not applicable for the uncomplying party (Turkish Labour Code Art. 22). In general, the suspension of the contract is a substantial alteration and both parties must come to an agreement. If the employer coerces the employee to take unpaid leave, this would be a typical default of the creditor and give the debtor the right to withdraw from the contract. For the Labour Agreement, as it is an infinite contract, the right to withdraw would translate to the right to terminate. The employee has the right to terminate labour contract immediately and earn his severance pay (Turkish Labour Code Art. 24/II).

riod was extended by Decrees, employers also extended the period of unpaid leave.

During the period of unpaid leave, if the employer applied for the short-time work practice, employees might benefit from the allowance. In accordance with the Article 50 the Code No. 4447 (Unemployment Fund Code), employees must had been entitled to unemployment allowance in terms of their employment period and the amount of days of unemployment insurance payment by the date of the commencement of short-time work[28].

However, it should be noted that there were strict conditions for unemployment allowance and only those who had been working for the last 120 days and a certain amount of unemployment insurance premium for at least the last 3 years must be notified to be able to benefit from the short-time working allowance. In other words, if the employee did not fulfil the conditions for the application of unemployment fund, he cannot enjoy the short-time work allowance. Employees who were able to benefit the allowance, could earn 60% of the last twelve months' daily average gross earnings. Also, the sum of monthly wage cannot exceed the %150 of the minimum monthly wage (gross amount). According to the reports of Turkish Employment Agency, the amount paid as short-work allowance is TRY 25.5 billion in 2020 and TRY 11.2 billion in 2021[29]. It is important to state that the employers didn't have to apply for the short-work allowance, this was an option offered to them[30].

Short-work allowance application process was simplified and the major aim was to steer the employers towards the application, but it wasn't a necessity. If the firm carried on a business that was effected by social distance precautions, the employer was able to shut the firm down for a period of three months, and this duration is prolonged many times – as cited above. It is obvious that this regulation, which causes the contract conditions to be changed unilaterally without requiring the employee's consent, restricts the

[28] Short-time work practice is an exceptional provision for crisis situations and it is also a unilateral legal act of employer to shorten the working time. For more information, see KESER, *Korona Virüs (Covid 19) Özelinde Bir Salgın Durumunda İş Mevzuatı Kapsamında İşçi ve İşverenin Kullanabileceği İzin, Esnek Çalışma Süreleri ve Fesih Hakları Üzerine Bir Değerlendirme*, in *Legal SGHD*, 2020, vol. 17, no. 65, p. 54.

[29] Unemployment Fund Bulletin of January 2022, avalaible on https://-media.iskur.gov.tr/52881/01_ocak-2022-bulten.pdf.

[30] YIĞIT, *cit.*, p. 284.

employee's right to terminate. However, as stated in the doctrine, it is not a desired outcome for all employees to terminate their contracts at once due to this change[31]. The financial burden on the business should also be alleviated so that a sustainable job and employment opportunity can be found after when the pandemic is over or the restrictions are lifted.

The other group of employees, who cannot benefit from the short-time work allowance, would be paid 39,24 TL per day from the Unemployment Fund. This was called "Financial Aid" and it's an exceptional reimbursement. According to the reports of Turkish Employment Agency, the amount paid as financial aid was TRY 7.2 billion in 2020 and TRY 6.7 billion in 2021[32].

2.2.1. Effect of Unpaid Leave to the Period of Service

According to the Labour Code, during this period of unpaid leave, although there was no regulation regarding that, the employee considered to be off-work and faced the consequences. The nature of the suspension of the contract leads us to this conclusion. The fact that the period of unpaid leave arises from the law requires that it be included in the duration based on seniority[33]. It should be noted that contrary to this view, the Court of Cassation hadn't been including unpaid leave periods – before the pandemic – into the period of service.

It would not be a fair result to expose the worker to both his wage, job and seniority-related rights that will occur in the future during the mandatory unpaid leave periods created by the pandemic. As it is discussed in the doctrine[34], this Covid-19-related compulsory unpaid leave period had to be considered as a part of service period. As seen in the decisions in this process, compulsory unpaid leave is included in seniority[35].

[31] Başterz , *Kısa Çalışma (Kovid 19 Pandemisinde Yeni Yaklaşımlar*, in *Pandemi Sürecinde İş Hukuku, On İki Levha Yayıncılık*, 2020, p. 41.

[32] Unemployment Fund Bulletin of January 2022, avaliable on https://media.iskur.gov.tr/52881/01_ocak-2022-bulten.pdf.

[33] Özkaraca, Ünal Adinir, *cit.*, pp. 24-25.

[34] It is unanimously accepted that the short-work time must be included in the period of service; Özkaraca, Ünal Adinir, *cit.*, pp. 25-26.

[35] Sakarya 11th Regional Court of Justice, 23 March 2022, Case No. 542, Decision No. 693, in *UYAP*, National Judiciary Network Server; Antalya 9th Regional Court of Justice, 07 March 2023, Case No. 280, Decision No. 690; Antalya 9th Regional Court of Justice, 07 March 2023, Case No. 239, Decision No. 689; Antalya 9th Regional Court of Justice, 07 March 2023, Case No. 264, Decision No. 686.

2.2.2. Qualification of an Unpaid Leave

2.2.2.1. *Unpaid Leave Re-evaluated as Employer Termination*

In Türkiye, as in many countries in the world, some workplaces were closed for months or curfews were imposed when the number of cases peaked. The unilateral unpaid leave, which is a specific practice to the period when these very exceptional situations are experienced, can also be abused by the employer. Although the provisional articles have created a legal basis that the employer can coerce unilateral unpaid leave during the pandemic period, it is debatable that the employer can apply unpaid leave in any situation and condition. In a case where the employer claimed that the employee was sent to unpaid leave due to organizational reasons, the Istanbul Regional Court of Justice decided that, it was necessary to investigate how the unpaid leave procedure is used and whether it was an objective practice[36].

In an incident assessed by the Antalya Regional Court of Justice, the employee started to work in the barn section of the hotel in 2018. The employee was sent on unpaid leave in January 2021, during the termination ban continued. During this period, the employer's business continued at the same pace. However, in this process, he was replaced by another employee and it was verbally stated that he would no longer be working here. For this reason, the employee filed a lawsuit for reinstatement. The defendant hotel stated that, in fact, unpaid leave was applied and the contract is not terminated, and therefore the case should be dismissed. On the other hand, according to the testimonies of witnesses, the same number of employees work at the workplace. In the light of all these examinations, the Court of Cassation concluded that the employer's action was in fact termination[37].

In another case employees were forced to take unpaid leave before the right to unilateral unpaid leave was recognised. In the case at hand, the workers were called to the workplace in February 2020 and were asked to sign papers stating that they had consented to unpaid leave. They were intimidated that those who did not sign would be dismissed. The plaintiff worker claimed that he was dismissed because he refused and filed a lawsuit for the payment of unpaid labour receivables. The employer defended itself in the lawsuit on

[36] Istanbul 26th Regional Court of Justice, 16 November 2021, Case No. 2773, Decision No. 2217, in *UYAP*, National Judiciary Network Server.

[37] Antalya 9th Regional Court of Justice, 28 October 2021, Case No. 2774, Decision No. 2669, in *UYAP*, National Judiciary Network Server.

the grounds that "the effects of the pandemic were seen early due to the customers and therefore wanted to put the workers on unpaid leave". However, he did not present anything that shows and proves how it affected the workplace. The court accepted the employee's claim here[38].

In one case before Antalya Regional Court, the employee was founded inadequate for work but as there is a termination ban, the company decided to take him to "unpaid leave" instead. The plaintiff argued that this unpaid leave decision wasn't a result of pandemic precaution but a way of hiding the will to terminate the labour contract. The Regional Court stressed in the decision that an this measure of coercing unpaid leave must be used in good faith to prevent the risks of the illness in the workplace, not to discipline the employees[39].

On the other hand in a case dated 2021 at the Trabzon Regional Court of Justice, the employee was put on unpaid leave in October 2020, not at the beginning of the pandemic and he claimed that no one in his department had been given unpaid leave. The High Court ruled that the unpaid leave in question could not be considered as an act of termination and rejected the employee's re-instatement lawsuit[40].

2.2.2.2. *Alteration in Working Conditions During the Unpaid Leave*

As stated before, unilateral unpaid leave application is a substantial alteration in the working conditions, because wage payment and work, which are the main obligations of the contract, are suspended. During the pandemic period, this unilateral change has become exceptionally coercible by the employer. However, the employer was not given the opportunity to unilaterally make other fundamental changes. Making a change in the employee's job is also a change that must be made by agreement of the parties. Changing the place of duty of the employee during the pandemic period should also be evaluated in this context.

In a case before the Konya Regional Court of Justice, the employee has been working in the bank branch for 15 years. With the mention that this

[38] Antalya 9th Regional Court of Justice, 21 October 2021, Case No. 2470, Decision No. 2555, in *UYAP*, National Judiciary Network Server.

[39] Antalya 9th Regional Court of Justice, 20 October 2022, Case No. 2417, Decision No. 2800, in *UYAP*, National Judiciary Network Server.

[40] Trabzon 5th Regional Court of Justice, 29 September 2021, Case No. 1478, Decision No. 1469, in *UYAP*, National Judiciary Network Server.

employee has a chronic illness, unilateral mandatory leave was applied by the employer between the period from April 2020 to July 2020. When she returned to her workplace on 20.07.2020 and wanted to turn on her computer, she realized that her account was not working. It was not possible for her to start work in this way. The plaintiff employee sent a warning from the notary public the next day and reminded the employer to take necessary actions so that she could actually start working. After the warning, she was kept at the branch for two days in a row without the screen being opened. When she went on the third day, she was not taken to the office and was told that she had to send an e-mail to be assigned to another branch.

In response to the lawsuit, the defendant employer stated that the workplace was changed and the employee was transferred to the Customer Communication Centre as of 01.07.2020. The employer had assigned remote employees to this unit, which is more needed, during the pandemic period. Although the employee was transferred to this unit, she did not come and start work. According to the employer, the employee did not do the job despite being reminded. For this reason, the employment contract was terminated immediately for just cause (Article 25/II-h) and this termination is in accordance with the law.

Leaving aside the other details in the decision, it is seen that the transfer documentation was sent one hour after the notary notice sent by the employee. The employee wasn't notified of the change of duty in accordance with good faith. The employee is prevented from returning to her original job. Thus the employer is deemed to have terminated the contract indirectly; the court accepts that the employer actually terminated the contract[41].

In a dispute that is the subject of the Istanbul Regional Court of Justice, the employee works in airline ground handling services. The employment contract was terminated on the grounds that he did not accept the change in working conditions during the termination prohibition period. According to the employer, the aviation sector is one of the most negatively affected sectors during the pandemic period, and ground handling activities have completely stopped. In this process, the employer wanted to remove the regularly paid bonuses as it could no longer pay the bonuses. Since the workers did not accept this change, there was no solution other than the termination

[41] Konya 9th Regional Court of Justice, 15 December 2021, Case No. 2948, Decision No. 485, in *UYAP*, National Judiciary Network Server.

of the employment contract and the parties went to the mediator together. However, the worker claims that the mediator is the mediator determined by the employer himself.

The court of first instance rejected the worker's case on the grounds that a lawsuit could not be filed since an agreement was reached at the mediation stage. In the application for appeal made to the Regional Court of Justice, the worker claimed that his will was injured and demanded that his request be accepted. Yet, as a matter of fact, the High Court decided in the direction of the worker's request[42].

2.2.2.3. *Using the Unpaid Leave to Prevent Trade Union Activity in the Workplace*

The last day of the period that could be taken unpaid leave in the pandemic was 30 June 2021. As of 1 July 2021, employers were required to reinstate workers. However, some employees were not reinstated, and some of them who thought that this was "employer termination" filed a lawsuit.

In a case before the Istanbul 29th Regional Court of Justice, the employee and other employees are coerced into unpaid leave during the pandemic, but right after 5 days started back to work, they had received a "performance-related termination". Before the pandemic hit, the plaintiff and other employees were in trade union activity in the workplace. The court evaluated the situation and decided that the employee was a pioneer in trade union activity before the unpaid leave period and the employer could not prove that the legal ground of termination was real. So the court reinstated employee[43]. Similarly, in other decisions, it is seen that similar terminations are made as soon as the unpaid leave ends.

3. *Conclusion*

The prohibition of termination, unpaid leave, and short-time working and financial aid benefits implemented in Türkiye were introduced with the aim of protecting working relations, as stated at the beginning. However, during the pandemic, which is a very exceptional and extraordinary period,

[42] Istanbul 52nd Regional Court of Justice, 16 March 2022, Case No. 287, Decision No. 415, in *UYAP*, National Judiciary Network Server.

[43] Istanbul 29th Regional Court of Justice, 07 February 2023, Case No. 3525, Decision No. 259, in *UYAP*, National Judiciary Network Server.

every business has experienced a unique process. While the need for labour increased for some employers, others had to close their workplaces. For this reason, it is impossible to come up with a single and definitive solution that can be generalized. The aftermath of the measures can be understood by the evaluation of jurisprudence by specific situations. In this paper, we tried to include different events as much as possible. As seen, the practice of a termination ban did not prevent employers from terminating contracts. Some employers have portrayed the action as the resignation of the employee, while others have terminated the contract as if they had a just cause, although, in reality, there weren't any.

In some cases, the employer abused the right to take the employee on unpaid leave. Although other employees are not given unpaid leave in the workplace, unilateral leave has been applied to keep the employee away from the workplace for a long time. As a matter of fact, the High Court, which determined these situations, evaluated this as termination made by the employer.

In some disputes that are brought to the court, it is shown as if there is a mutual agreement between the employee and the employer to end the employment relationship. In these cases, a report was prepared as if the parties had gone to a mediator, but in fact, the employees were only forced to sign the papers against their will. Thus, the prohibition of termination was tried to be circumvented in the technical sense.

As far as we can see from the decisions we have accessed, employees who are covered by job security, have been protected accordingly. In terms of those who do not enjoy job security, it has been stated in a few decisions that the nullity of termination can be asserted. It is very pleasing that this view in the doctrine is recognized by the Court of Cassation. However, our analyses showed us two negative results. The first one is that due to the interpretation of the rule of "conformity with the request", the invalidity of termination lawsuits did not apply to workers outside the scope of job security, and the lawsuits were dismissed. Thus, it was impossible to reinstate these workers or invalidate the termination. Secondly, the fact that the Regional Court of Justice in each province rendered different judgments from each other and the final judgments, especially against the employee, have led to the lack of a uniform practice. Local differences prejudiced the principle of legal predictability. Therefore, the worker in a similar situation who filed a lawsuit in city A faced a different result than the

worker who filed a lawsuit in city B. As seen, those who suffered the most from this situation were those who worked in small enterprises that are not covered by job security.

Abstract

In order to align with the ILO Termination on Employment Convention no. 158, Turkish Labour Law has adopted job security system. This system protects certain workers against unfair and invalid terminations. Employers have to use the right of termination, which must be based on a valid reason either resulting from the employee or the enterprise. This usage of right should be in good faith, non-arbitrary; so Turkish Court of Cassation has developed some principles to assess this termination over the last decades. Although there are a great number of employees who are outside the scope of this protective norms, there are some other protective measures like severance pay, which is considered in the large-scale job security.

After the coronavirus outbreak, Turkish Government has adopted the Law on Minimizing the Impacts of the New Coronavirus (Covid-19) Outbreak on Economic and Social Life and the Amendment of Certain Laws (7244) ("the Amendment Law") published in the Official Gazette (31102) on 17 April 2020. This law included transitional provisions for the Labour Law no. 4857 and adopted an interim termination ban for all of the employers. On the other hand, employers forced to close down their workplaces had the opportunity to propose unpaid leave and employees were able to apply for the short-time allowance. Even though the unpaid leave proposal is a substantial alteration in the labour agreement, this measure was considered as a principal way for the agreements to continue. Generally, these interim measures were based on balancing mind-set and both parties of labour agreement were sharing the negative results.

This paper would like to discuss the effects of these interim measures. In order to pursue this aim, firstly we briefly explain the general job security tools provided in Turkish Labour Law. Following this explanation, we will try to understand the preventive measures' effects by examining the cases. Finally, we would like to address our view regarding the results and current and upcoming jurisprudential problems.

Keywords

Labour law in Covid-19, Turkish job security, Termination ban, Short-time work, Interim measures.

Adrijana Martinović

The Schengen Area, the Eurozone and the free movement of workers: The case of cross-border work between Croatia and Italy

Contents: 1. Introductory remarks. **2.** Traditional migration patterns between Croatia and Italy and labour market trends. **3.** Free movement of workers – regulatory framework. **4.** The relevance of the Schengen Area. **5.** The relevance of the Eurozone (common currency). **6.** Issues arising in practice. **7.** Concluding remarks.

1. *Introductory remarks*

The free movement of workers is one of the success stories of the European Union. Throughout the internal market millions of migrant EU citizens pursue their careers and seek livelihood in other Member States[1]. This was one of the objectives of the European Economic Community from its inception[2]. The primary EU law, notably the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union (CFREU) guarantee every EU citizen the right to move and reside freely within the territory of the Member States[3]. Article 45(2) TFEU prohibits any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. Numerous secondary sources of EU law guarantee freedom to move, reside

[1] See European Commission, *Annual Report on Intra-EU Labour Mobility 2022*, Publications Office of the European Union, 2023.

[2] Treaty on Establishing the European Economic Community (1957), Article 3(1)(c).

[3] See Article 3(2) TEU; Article 20(2)(a) TFEU; Article 45(1) CFREU - (consolidated versions 2016), OJ C 202, 7.6.2016.

and work in other Member States under equal conditions as nationals of that Member State, subject to justified limitations in accordance with the principle of proportionality. Social security coordination rules are in place to ensure that free movement does not cause the loss of social security rights, and to support the freedom of movement of all EU citizens and their dependants, not just workers or self-employed persons. However, the full potential of the freedom of movement is realised only through combined effect of all factors that could facilitate, or conversely, hinder the EU-wide mobility of workers, including their family members. Different economic, legal and social considerations, such as labour market demand and shortages, geographical proximity, administrative and language barriers, traditional, cultural and family ties, and access to social entitlements play an important role in the shaping of mobility patterns[4]. Border controls and different currencies are certainly liable to impede, or make it more difficult to work in another Member State, particularly in case of neighbouring Member States with the potential for daily commuting and cross-border work. After Croatia joined the EU on 1 July 2013 it became part of the internal market, which gave the Croatian workforce free access to the labour markets of all Member States, with certain temporary limitations. However, border crossing regime continued to apply, and the Croatian *kuna* remained a national currency. It took another decade for Croatia to fulfil all the requirements to join the Schengen Area and the Eurozone. This paper aims to identify and critically evaluate the legal effects that the abolition of physical borders and introduction of common currency have on the free movement of workers, in light of the Croatian accession to the Schengen Area and Eurozone on 1 January 2023. The accent is particularly on cross-border work between Croatia and Italy, as there are strong historical, geographical and cultural bonds between the inhabitants of these two Member States.

2. *Traditional migration patterns between Croatia and Italy and labour market trends*

According to unofficial estimates, around 25 000 to 30 000 Croatian workers work in Italy, primarily in the regions Friuli Venezia Giulia and

[4] Amelina, Horvath, Meeus, *Migration and social integration: Interdisciplinary Insights and European perspectives*, in Amelina, Horvath, Meeus (eds.), *An Anthology of Migration and Social Transformation. European perspectives*, Springer International Publishing, 2016, p. 12.

Veneto, and many of them commute either each day or at least once a week[5]. The official data shows that there are 30 000 – 35 000 Croatian cross-border workers in all EU/EFTA countries[6]. This indicates substantial cross-border labour movements, despite the relatively low magnitude considering the overall Croatian labour force[7].

Italy and Croatia share a common historical and traditional heritage, sometimes marked by turbulent events and frictions, particularly in the first half of the 20th century[8]. The Croatian and Italian citizens have nevertheless long nurtured the culture of mutual respect and cooperation, given the geographical vicinity and close economic and social ties.[9]

The most salient feature of labour market movement between Italy and Croatia is that it is almost entirely unidirectional: from Croatia to Italy[10]. Asymmetrical movement is characteristic for countries with a differing degree of economic development[11]. In 2013, around 5% of Croatian working age movers lived in Italy[12]. In the decade after accession, the moving pattern

[5] See net.hr, 26 February 2020 (https://net.hr/danas/hrvatska/situacija-je-neizvjesna-i-kompleksna-u-italiji-radi-oko-30-000-hrvata-jedni-svaki-dan-putuju-dok-se-drugi-vracaju-kuci-vikendima-3c433fbe-b1c5-11eb-801d-0242ac130050).

[6] European Commission, *cit.*, p. 188. The term cross-border worker in the Commission's publication comprises frontier workers, posted workers and seasonal workers.

[7] Labour force in Croatia is around 1.85 million. See Croatian Bureau of Statistics, *Employment – Active population (Labour Force)* (https://podaci.dzs.hr/2023/hr/58049).

[8] For a historical overview of the Croatian – Italian relations see Vukas, *The Role of Provisions on Human Rights Protection in Constructing the Croatian-Italian (formerly Yugoslav- Italian) Relations*, in Rüdiger, Serši , Šoši (eds.), *Contemporary Developments in International Law*, Brill, 2016, pp. 636-651.

[9] The Italian minority in Croatia represents around 0.36 % of the population, with a constitutionally guaranteed status and right to equality, including the use of minority language in education and public administration, as well as political representation at local, regional and national level. See *Ured za ljudska prava i prava nacionalnih manjina, Nacionalne manjine u Republici Hrvatskoj* (https://ljudskaprava.gov.hr/nacionalne-manjine-u-republici-hrvatskoj/352).

[10] Consiglio sindacale interregionale Italo-Croato Alto Adriatico (C.S.IR./MR.S.O.), *Pograni ni rad izme u Italije i Hrvatske. Orijentacijski vodi o pravima i o pristupanju problemu prepreka u mobilnosti radnika*, 2016 (https://upperadriatic.irtuc.org/wp-content/uploads/Guida-CSIR-su-frontalierato-HR.pdf), p. 4.

[11] See also Wiesböck *et al.*, *Cross-Border Commuting and Transformational Dynamics in Europe: What Is the Link?*, in Amelina, Horvath, Meeus (eds.), *cit.*, p. 192; Parenti, Tealdi, *Cross-Border Labour Mobility in Europe: Migration Versus Commuting*, in Kourtit *et al.* (eds.), *The Economic Geography of Cross-Border Migration*, Springer, 2021, p. 209.

[12] Vidovic, Mara, *Free movement of workers, transitional arrangements and potential mobility from Croatia*, The Vienna Institute of International Economic Studies, 2015, p. 6.

of Croatian nationals to Italy has remained the same, with around 2-3% of the total number of Croatian movers each year transferring their residence to Italy[13]. The projected increase of Croatian nationals living in Italy did not occur: in 2013, around 17 100 of working age Croatians lived in Italy, and in 2015 it was expected that this number might rise to 31 000 in 2019.[14] However, 15 754 Croatian citizens resided in Italy on 1 January 2022, meaning that their number remains roughly at the same level in the last decade[15]. The most problematic part of this statistic are the "invisible" numbers of persons performing domestic work (i.e. as household assistance), an area which is prone to undeclared work and residence[16].

Reliable data on the number of daily commuters, i.e. those that benefit the most from the open borders is lacking[17]. A conservative estimate is that around 10 000 workers commute daily from Croatia and Slovenia to Italy[18].

Interestingly, a significant number of Croatian workers in Italy are posted workers, sent by their employers to perform work in Italy. Their status is not regulated under the rules for the free movement of workers, but the volume of posted work indicates important labour market trends. For example, in the first half of 2021 90% of posted workers in Italy were from other EU countries, mostly from Romania, followed by Germany and Croatia[19]. The share of Croatian posted workers in Italy is around 4%. Posting has been on the rise in Croatia and Italy in the last decade. Similar characteristics between the two countries can be observed, despite a significant difference

[13] In numbers, 400 – 600 persons. See Croatian Bureau of Statistics, *Migration of population of Republic of Croatia in 2022* (https://podaci.dzs.hr/2023/en/58062); see also Istat, *Migrazioni (Transferimenti di residenza, Immigrati - cittadinanza* (http://dati.istat.it/Index.aspx?QueryId=9440#).

[14] Vidovic, Mara, *cit.*, pp. 25 and 26.

[15] See Istat, *Stranieri residenti al 1° gennaio - Cittadinanza*, http://dati.istat.it/Index.aspx?QueryId=9440#.

[16] Consiglio sindacale interregionale Italo-Croato Alto Adriatico (C.S.IR./MR.S.O.), *Rad u kucanstvu u Italiji*, 2017 (https://uilfvg.org/wp-content/uploads/2018/03/Guida-lavoro-domestico-lavoratori-Croazia-19.2.2018-CRO.pdf), p. 3.

[17] European Commission, 2023, *cit*. There is no data for Croatia in the Eurostat's statistics on the mobility in the EU "*People on the Move 2020 edition*", Commuting between the regions section (https://ec.europa.eu/eurostat/cache/digpub/eumove/bloc-2d.html?lang=en).

[18] C.S.IR./MR.S.O., *Rad u ku anstvu u Italiji*, cit., p. 7.

[19] European Commission, *cit.*, p. 44; Dorigatti, Pallini, Pedersini, *Posted workers to and from Italy. Facts and figures*, POSTING.STAT project VS/2020/0499, Leuven, 2022, p. 5.

in the overall size of the labour market and the volume of posting[20]. Both Croatia and Italy are net senders, meaning that they send more posted workers to other countries, than they receive them. Around two thirds of all PD A1 forms is issued in both countries for posting under Article 12 of the Regulation 883/2004[21], and more than 90% of PD A1 forms are issued to employed persons[22]. In the period between 2013 and 2021 the number of issued PD A1 forms has risen by 84% in Croatia, and by 70 % in Italy. Posted workers from Croatia are mostly active in the construction sector, whereas there is no data available for Italy. One outstanding difference in posting between Croatia and Italy is that Italy is the third receiving state for the Croatian posted workers, whereas Croatia is not even among the top ten receiving states for the Italian posted workers[23]. This is another example of asymmetrical movement, as wages, and consequently, the labour costs in Croatia are lower than in Italy, which generally fosters posted work.

Having in mind the described labour market trends and migration patterns, the existing regulatory framework, coupled with the recent developments, fosters further permeability of national borders and labour markets.

3. *Free movement of workers – regulatory framework*

Any discrimination based on nationality between workers from dif-

[20] The Italian labour market is 13 times bigger than the Croatian. The volume of posting (under Article 12 of Regulation 883/2004), i.e. the share of posted employed workers in the total number of employed persons in the period between 2013 to 2021 in Italy remains steady and well below 1% (around 0.2% - 0.6%), whereas in Croatia it is around 2% of employed persons (it has grown from 1.2% in 2014 to 2.2% in 2018, and dropped again to 2.0% in 2021). See Hiva, Ku Leuven, *Reports on social security coordination and intra-EU labour mobility* (https://hiva.kuleuven.be/en/news/newsitems/Reports-on-social-security-coordination-and-intra-EU-labour-mobility-20171212).

[21] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004. Article 12 of the Regulation 883/2004 determines the rules on applicable social security legislation for posted employed and self-employed persons.

[22] De Wispelaere, De Smedt, Pacolet, *Posting of workers. Report on A1 Portable Documents issued in 2021*, European Commission, Publications Office of the European Union, 2023 (https://op.europa.eu/en/publication-detail/-/publication/75ad4242-b97e-11ed-8912-01aa75ed71a1).

[23] De Wispelaere, De Smedt, Pacolet, *cit.*, pp. 34 and 54.

ferent Member States, whether direct or indirect, is prohibited under Article 45 TFEU and secondary EU legislation, primarily in relation to free movement and stay[24], taking up and pursuit of activities of employed persons[25], or recognition of professional qualifications[26], including institutional arrangements for effective exercise of rights for workers and their family members[27]. The Regulation 883/2004[28] and its implementing Regulation 987/2009[29] lay down common rules for the protection of social security rights of mobile EU citizens and application of the principle of equal treatment regardless of nationality. Any number of national rules and practices, even if they apply indistinctly to nationals and migrant workers[30], might impede free movement of workers in practice. They may include, for example, problems in recognising professional qualifications and/or work experience, recruitment practices, working conditions, conditions for granting tax and/or social advantages, nationality and/or language requirements for certain posts, conditions for accessing social benefits, including healthcare, problems/additional requirements for opening a bank account in the local currency, accessing loans or housing, etc. The Court of Justice has interpreted and shaped the application of the provisions on free movement of workers and social rights, taking mostly dynamic and pro-integration approach[31].

[24] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (…), OJ L 158, 30.4.2004.

[25] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 141, 27.5.2011.

[26] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255, 30.9.2005.

[27] Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, OJ L 128, 30.4.2014.

[28] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004.

[29] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 30.10.2009.

[30] See, e.g. Court of Justice March 10th 2010, *Olympique Lyonnais SASP v Olivier Bernard and Newcastle* UFC, Case C-325/08.

[31] See e.g. Monda, *The notion of the worker in EU Labour Law: "expansive tendencies" and harmonisation techniques*, in in this journal, 2022, 2, pp. 93-123; Menegatti, *Taking EU labour law beyond the employment contract: The role played by the European Court of Justice*, in *ELLJ*, 2020, Vol.

The Croatian labour force was subject to transitional arrangements after accession. The transitional arrangements are temporary derogations from the free movement of workers, agreed in the accession treaties for new Member States and applicable for a limited period (maximum seven years) from the date of accession. The terms of transitional arrangements for Croatian workers have been set in Annex V to the Treaty of Accession[32], involving temporary suspension of Articles 1 to 6 of Regulation (EU) No. 492/2011 and of the relevant provisions of Directive 2004/38/EC, to the extent necessary to implement this suspension. During the transitional period, any Member State was allowed to continue to apply the existing national measures concerning access to their labour markets for Croatian nationals, in particular, the requirement of obtaining a work permit. These restrictions applied only to workers, and not to self-employed or posted workers[33]. The seven-year period was implemented in three phases (2 + 3 + 2 years). In the first two-year phase, the national rules regulating access to the labour market continued to apply; the transition to the next three-year phase was contingent on a prior notification to the European Commission; and in the last two-year phase, a Member State was allowed to maintain restrictions only in the event of serious disturbances or a threat of serious disturbances of its labour market, with prior notification to the European Commission. A Member State could have decided to open up its labour market at any phase, but at the latest upon expiry of the seven-year period (i.e. on 30 June 2020). Croatia was also allowed to keep reciprocal restrictions for nationals of Member States that imposed temporary restrictions, with the so-called "standstill" clause which prohibited the imposition of stricter requirements for access to the labour market than those that existed at the time the Treaty of Accession was signed[34]. Italy was among the thirteen EU Member States (including Slovenia, Germany and Austria, as traditional destination countries) that im-

11, 1, pp. 26-47; GRAMANO, *On the notion of "worker" under EU law: new insights*, in *ELLJ*, 2021, Vol. 12, 1, pp. 98-101; ALES, *"Worker" (and) "Mobility" in the Case Law of the Court of Justice EU on Free Movement: A Critical Appraisal*, in MÜLLER *et al.* (EDS.), *Festschrift für Wolfgang Portmann*, Schulthess, 2020, pp. 31-50.

[32] Treaty of Accession of Croatia (2012), OJ L 112, 24.4.2012.

[33] Apart from the restrictions on posting agreed specifically for Austria and Germany, see Annex V, 2.12 to the Treaty of Accession.

[34] The "old" Member States were subject to the same obligation, see VUKOREPA, *Migracije i pravo na rad u Europskoj uniji*, in *ZPFZ*, 2018, Vol. 68, 1, pp. 85-120 and pp. 111-112.

posed transitional arrangements for the Croatian workers[35], but they were lifted already at the end of the first phase (after 30 June 2015)[36]. Evidence showed only a marginal increase in mobility and employment of Croatian nationals upon accession in countries with transitional arrangements. For example, in the first year upon accession the employment of Croatian nationals in Italy and Slovenia has not increased, while in Germany and Austria a somewhat more significant rise (+ 10%) was recorded[37]. In 2015, it was anticipated that about one tenth of the total of mobility of the Croatian workforce will be directed to Italy within the next five years[38]. However, this prediction did not prove correct. The number of Croatian citizens of working age who usually reside in another EU/EFTA country has been steadily rising since accession[39]. The majority of mobility is directed to Germany and Austria, followed by non-EU countries Bosnia and Herzegovina, Serbia, and Switzerland[40]. The migration patterns between Croatia and Italy in the decade following the Croatian accession to the EU also show a rising migration flow. More people emigrate to Italy from Croatia than those who immigrate to Croatia from Italy. However, whereas in the period between 2013 to 2015 the share of immigrants in the number of emigrants was below 50%, there is a noticeable increase since 2016, ranging from 67% in 2016, to 97% and 89% in the pandemic years of 2020 and 2021[41]. In 2022, the share

[35] With exemptions for certain categories of workers, see *Circolare congiunta n. 4175 del Ministero dell'Interno e Ministero del Lavoro e delle Politiche Sociali*, 2 luglio 2013 (https://sitiarcheologici.lavoro.gov.it/Strumenti/Normativa/Documents/2013/20130702_Circ.pdf).

[36] See *Circolare congiunta del Ministero dell'Interno e del Lavoro e delle Politiche Sociali* del 3 luglio 2015 (http://www.trevisolavora.it/guidastranieri/documenti/circocroazia6luglio2015.pdf?id_contenuto=1842&id_categoria=414). Croatia did the same in relation to the Italian workers.

[37] These four countries, together with the UK, covered approximately 95% of all mobile Croatian citizens in the EU. See European Commission, *Report from the Commission to the Council on the Functioning of the Transitional Arrangements on Free Movement of Workers from Croatia (First phase: 1 July 2013 - 30 June 2015)*, COM(2015) 233 final.

[38] Vidovic, Mara, *cit.*, p. 2.

[39] The increase between 2013 and 2022 is 61%. Eurostat, *LFS series – labour mobility, EU/EFTA citizens of working age who usually reside in another EU/EFTA country by citizenship and age* (https://ec.europa.eu/eurostat/databrowser/view/LFST_LMBPCITA/default/table?lang=en).

[40] More than half of outgoing Croatian movers in 2022 moved to Germany (43.3%) and Austria (15%). See Croatian Bureau of Statistics, 2022, *cit.* See also Draženovi , Kunovac, Pripužı , *Dynamics and determinants of emigration: the case of Croatia and the experience of new EU member states*, in *PSE*, 2018, Vol. 42, 4, 2018, p. 437.

[41] Croatian Bureau of Statistics, *Statistics in line, Immigrant and Emigrant Population*

of immigrants dropped again to 63%, and it remains to be seen whether this trend will continue[42].

True European integration and free movement collide with the border crossing regimes. It is therefore not surprising that the Croatian accession to the Schengen Area and the Eurozone in 2023 are regarded as crucial events with a positive impact on the mobility of labour force and population in general, as they both symbolically and practically mark a final stage of the integration process, which started in 2013 when Croatia became the EU Member State.

4. *The relevance of the Schengen Area*

In 2014, almost 1.7 million Schengen residents were cross-border commuters, and 0.93% of employed citizens living in Schengen countries worked across border[43]. The importance of the Schengen Agreement for daily lives and travel of all EU citizens cannot be overestimated, and it remains one of the most "visible and powerful symbol[s] of European integration"[44].

Croatia has joined the EU on 1 July 2013. Under the Treaty of Accession, the provisions of the Schengen *acquis* and the acts building upon it or otherwise related to it, listed in Annex II, were binding on, and applicable in, Croatia from the date of accession, while full application was made subject to Schengen evaluation procedures and fulfilment of all necessary conditions[45]. This required the adoption of the unanimous decision by the Council, after consulting the European Parliament and taking into account the European Commission's report confirming that Croatia continues to fulfil all relevant commitments[46]. The comprehensive evaluation procedures started in 2016[47], and were subject to rigorous scrutiny having in mind that the

to/from Republic of Croatia by Country of Origin/Destination, 2023 (https://podaci.dzs.hr/en/statistics/population/).

[42] This statistic does not show the nationality of the immigrant/emigrant population, nor the reason for movement, so it cannot serve as a basis for any wide-ranging conclusions on the labour market trends.

[43] Wolff, Boot, *Cross-border commuters and trips: The relevance of Schengen*, Bruegel, 2015 (https://www.bruegel.org/blog-post/cross-border-commuters-and-trips-relevance-schengen).

[44] Wolff, Boot, *cit.*

[45] Article 4 (1) and (2), and Annex II, Treaty of Accession.

[46] Article 4 (2) and (3), Treaty of Accession.

[47] Government of the Republic of Croatia, *Zaklju ak o prihva anju izjave o spremnosti*

Croatian borders with Bosnia and Herzegovina, Serbia and Montenegro are external borders of the EU and represent an important "gateway" to the EU from the Western Balkans migration route[48]. The process occurred practically simultaneously with the biggest refugee and migration crisis in the EU, beginning in the second half of 2015[49]. In October 2019, the European Commission issued its positive finding based on the analysis of evaluations, reports, implementation of action plans and recommendations aiming to eliminate the observed inconsistencies[50]. Management of external borders, especially those with Bosnia and Herzegovina, with repeated allegations of violation of human rights and illegal "pushbacks", represented the most controversial aspect of the Croatian accession to the Schengen Area[51]. The Council adopted the formal conclusions on the fulfilment of the necessary conditions for the full application of the Schengen *acquis* in Croatia on 9 December 2021[52]. One year later, the Council reached a unanimous Decision on the full application of the Schengen *acquis* in Croatia[53]. With effect from 1 January 2023, all checks on persons at internal land and sea borders with Croatia were lifted, and from 26 March 2023 the same goes for internal air borders.

One of the most obvious advantages of the lifting of internal borders includes facilitation of free movement of goods and persons, without delays and waiting at the borders[54]. This is particularly important for Croatia, given

za po etak postupka Schengenske evaluacije, (https://vlada.gov.hr/UserDocsImages/2016/Sjednice/2015/216%20sjednica%20Vlade/216%20-%203.pdf).

[48] Council of the EU, *Western Balkans Route* (https://www.consilium.europa.eu/en/policies/eu-migration-policy/western-balkans-route/#frontex).

[49] European Parliament, *The state of play of Schengen Governance - An assessment of the Schengen evaluation and monitoring mechanism in its first multiannual programme*, Policy Department for Citizens' Rights and Constitutional Affairs, 2020, p. 10.

[50] European Commission, *Communication from the Commission to the European Parliament and the Council on the verification of the full application of the Schengen acquis by Croatia*, COM(2019) 497 final.

[51] Zeko,Vrbanec, *Implementation of the Schengen acquis and the role of the Republic of Croatia in the protection of EU external borders*, in *PIS*, 2022, Vol. 31, 3, 2022.

[52] Council conclusions on the fulfilment of the necessary conditions for the full application of the Schengen acquis in Croatia, 14883/21, 9 December 2021.

[53] Council Decision (EU) 2022/2451 of 8 December 2022 on the full application of the provisions of the Schengen acquis in the Republic of Croatia, OJ L 320, 14.12.2022.

[54] Šegvić, *Šengenski režim upravljanja vanjskim granicama EU*, in *ZPFS,* 2011, Vol. 48, 1, 2011, p. 11.

that tourism represents a large share of its GDP[55]. Before joining the Schengen Area, daily or weekly commuters at land borders between Croatia and Slovenia (as the main point of entry on the journey from Croatia to Italy) experienced considerable difficulties with the coming of each tourist season, with border crossing waiting times rising up to several hours, in each direction[56]. The same was also true during the COVID-19 pandemic, when border controls intensified all around Europe in an efforts to contain the spread of the virus[57]. The expected benefit from elimination of border controls is particularly evident in view of the border crossing statistics. In 2022, 64 211 625 passengers crossed the land border between Croatia and Slovenia, whereas border crossings Kaštel and Plovanija, were the second and the fifth most frequent border crossings according to the number of passengers, closely followed by Rupa and Pasjak, which are all on the quickest road routes from Croatia to Italy[58]. Given such passenger inflows, even a couple of minutes for the control of documents at the border causes significant delays. The positive effect of the Schengen Area on the development of border areas through the facilitation of the labour force fluctuation and daily migrations between the Member States has been observed in literature[59]. Cross-border commuters benefit in particular from the absence of border controls, as commuting time is significantly reduced[60]. For example, evidence from

[55] See Rašić, *Turizam*, *Sektorske analize* n. 99, y. 11, Ekonomski institut, 2022, p. 25.

[56] See e.g. Dnevnik.hr, 26 May 2021 (https://dnevnik.hr/vijesti/hrvatska/radnici-uz-granicu-ljuti-jer-zbog-velikih-kolona-ne-mogu-svakodnevno-na-posao---653259.html).

[57] See also: Goldner Lang, *Obveze Republike Hrvatske na temelju europskog prava pri donošenju zaštitnih mjera protiv pandemije COVID-19*, in Barbić (ed.) *Primjena prava za vrijeme pandemije COVID-19*, Hazu, 2021; Schumacker, *Proportionality of internal border controls: From the Covid-19 pandemic to the 2021 Proposal*, in *CYELP*, 2022, Vol. 18. On the erosion of trust and tightening of border controls during and post-pandemic see: Bereins, Fratzke, Kainz, *When Emergency Measures Become the Norm: Post-Coronavirus Prospects for the Schengen Zone*, MPI, 2020 (https://www.migrationpolicy.org/news/post-covid-prospects-border-free-schengen-zone). On the impact of border closures on highly mobile workers see: Rasna a, *Essential but Unprotected: Highly Mobile Workers in the EU during the COVID-19 Pandemic*, ETUI Research Paper - Policy Brief 9/2020.

[58] Ministry Of Interior, *Statisti ki pregled temeljnih sigurnosnih pokazatelja i rezultata rada u 2022. godini* (https://mup.gov.hr/pristup-informacijama-16/statistika-228/statistika-mup-a-i-bilteni-o-sigurnosti-cestovnog-prometa/283233).

[59] Britvec, *Ekonomsko-politi ki aspekti pristupanja schengenskom prostoru*, in 3 *Zbornik sveu ilišta Libertas* 3, 2018, p. 245; Nerb *et al.*, *Scientific Report on the Mobility of Cross-Border Workers within the EU-27/EEA/EFTA Countries*, MKW&Empirica, 2009, pp. 59-60.

[60] Parenti, Tealdi, *Cross-Border Labour Mobility*, cit., p. 189. Other studies find that lan-

Switzerland shows that individual probability to cross-border commute in response to the abolition of internal borders has increased among inter-regional commuters between 3 and 6 percentage points[61].

Another potential benefit includes the pull effect for the labour force from the neighbouring countries to Croatia[62]. However, it is probably too bold to expect any significant impact in reversing the patterns of mobility. In this sense, the economic developments and labour market conditions in the border regions would likely play a more important role, than the abolition of border checks.

5. *The relevance of the Eurozone (common currency)*

Similarly to the above described situation in relation to the Schengen Area, Croatia has not become part of the Eurozone immediately upon joining the European Union. However, Article 5 of the Treaty of Accession from the outset prescribed a clear obligation to join the Eurozone and to introduce the common currency. From the date of accession, Croatia participated in the Economic and Monetary Union as a Member State with derogation within the meaning of Article 139 TFEU, i.e. a state "in respect of which the Council has not decided that [it] fulfil[s] the necessary conditions for the adoption of the euro"[63]. The following decade was dedicated to the fulfilment of all necessary legal, economic and political conditions and convergence criteria for joining the Eurozone[64]. In 2018, the Strategy for the adoption of euro as official currency in the Republic of Croatia was adopted, containing a cost-benefit analysis, procedures and activities for the introduction of euro[65]. An

guage borders play a more significant role than country borders in explaining the lack of labour market integration across borders. See Bartz, Fuchs-Schundeln, *The role of borders, languages, and currencies as obstacles to labor market integration*, in *EER*, 2012, Vol. 56, 6.

[61] Parenti, Tealdi, *Does the Implementation of the Schengen Agreement Boost Cross-Border Commuting? Evidence from Switzerland*, IZA DP, 2019, no. 12754. See also Parenti, Tealdi, *Don't Stop Me Now: Cross-Border Commuting in the Aftermath of Schengen*, in *BEJEA*, 2023, Vol. 23, 3.

[62] Edzes, Van Dijk, Broersma, *Does cross-border commuting between EU-countries reduce inequality?*; in *AG*, 2022, 139, p. 2; Britvec, *cit.*, p. 245.

[63] See Article 139 (1) TFEU.

[64] See e.g., Šabić, *Prakti ne pripreme za uvo enje eura: nacionalni plan zamjene hrvatske kune eurom*, in *PiP*, 2022, 1, p. 14.

[65] Government of the Republic of Croatia, Croatian National Bank, *Strategija*

important prerequisite for joining the Eurozone was the participation in the Exchange Rate Mechanism (ERM) II for two years. In the period between 2020 and 2022, Croatia has participated in ERM II, during which time it implemented reforms in relation to the strengthening of the banking system, development of the legal framework for combatting money laundering and statistical data processing, improvement of public sector administration, and decrease of administrative and financial burdens in the economic sector[66]. The height of preparatory activities took place simultaneously with the outbreak and duration of the global pandemic of Covid-19, which had a severe impact on economies around the world, including the EU and Croatia. However, despite the unfortunate timing, Croatia has managed to complete the accession process, which was closely scrutinized by the European Commission[67] and the European Central Bank[68]. The National plan for the exchange of *kuna* for euro[69] was adopted in 2020, whereas the Act on introduction of the euro as a currency in the Republic of Croatia was adopted and entered into force in 2022[70]. On 12 July 2022, the Council decided that Croatia has fulfilled the necessary conditions for the adoption of euro and its derogation from participating in the single currency was to end with effect from 1 January 2023[71], when Croatia officially became the 20th country that introduced the common currency. The so-called "big-bang" changeover scenario was applied: euro banknotes and coins acquired legal

za uvo enje eura kao sluzbene valute u Republici Hrvatskoj (https://www.mingo.hr/public/documents/Eurostrategija%20-%20FINAL.pdf).

[66] Ministry of Finances, *Uvo enje eura kao službene valute u Republici Hrvatskoj*, 27 January 2022, p. 2, (https://mfin.gov.hr/UserDocsImages/dokumenti/Uvo%C4%91enje%20eura%20kao%20slu%C5%BEbene%20u%20rh.pdf).

[67] See, European Commission, *Convergence report 2020* (https://economy-finance.ec.europa.eu/system/files/2020-06/ip129_en.pdf); European Commission, *Convergence report 2022* (https://economy-finance.ec.europa.eu/system/files/2022-06/ip179_en.pdf).

[68] European Central Bank, *Convergence Report* (https://www.ecb.europa.eu/pub/convergence/html/index.en.html).

[69] Government of the Republic of Croatia, Croatian National Bank, *Nacionalni plan zamjene hrvatske kune eurom* (https://mfin.gov.hr/UserDocsImages/dokumenti/hr_i_eu/Nacionalni%20plan%20zamjene%20hrvatske%20kune%20eurom%20-%20donesen%20na%20sjednici%20Vlade%20RH%20održanoj%2023.12.2020..pdf).

[70] *Zakon o uvo enju eura kao službene valute u Republici Hrvatskoj*, Official Gazette *Narodne novine* nos. 57/2022 and 88/2022.

[71] Council Decision (EU) 2022/1211 of 12 July 2022 on the adoption by Croatia of the euro on 1 January 2023, OJ L 187, 14.7.2022.

tender status on the day of euro adoption[72]. A two-week dual circulation period of both euro and *kuna* banknotes and coins allowed for a gradual withdrawal of *kuna* cash money. A recent Eurobarometer report shows that more Croatians tend to believe that having the euro is better for the EU (82%), than for Croatia (54%), with a slightly better perception concerning the positive consequences of joining the euro area for Croatia. On the other hand, almost four in ten respondents do not believe that euro is good for Croatia (38%)[73]. A rather high level of negative attitude towards the euro is more likely associated with the fear of rising inflation and prices, which is liable to overshadow the positive effects.

Although it is hard to measure the exact effects of the introduction of common currency on the free movement of workers[74], the benefits in daily lives of EU citizens and mobile workers are evident. For example, employers cannot require employees working in one, and residing in another country in the Eurozone to open up bank accounts in the country of work for the transfer of salary payments, as there are no additional banking fees for such transfers. Otherwise, for countries outside the Eurozone, this might be the case. Moreover, the obvious advantage of common currency is that there are no currency exchange rates that might affect the amount of workers' income, contributions and taxes received or paid in different currencies.

[72] European Commission, *Report from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. The introduction of the euro in Croatia*, COM(2023) 341.

[73] *Croatia after the euro changeover 2023*, Flash Eurobarometer 518 (https://europa.eu/eurobarometer/surveys/detail/3013).

[74] The effect of EMU on growth and employment is regularly monitored within the framework of the European Semester and other instruments of economic governance, see European Commission, *The European Semester* (https://commission.europa.eu/business-economy-euro/economic-and-fiscal-policy-coordination/european-semester_en). Furthermore, annual publications, such as *The labour market and wage developments in Europe* (LME) and the *Employment and Social Developments* (ESDE) provide insight into the effects that the euro and EMU might have on the labour markets in Member States, which is used to shape policy priorities under the European Semester, European Employment Strategy and Social protection and social inclusion strategy. See European Commission, *Employment and social analysis* (https://ec.europa.eu/social/main.jsp?catId=113&langId=en#LMD).

6. *Issues arising in practice*

It is important to take a look at the issues observed so far in practice, as they may substantially impede the mobility of workers. The examples mentioned here are drawn from a survey published in 2016 by the Italian-Croatian Interregional Trade Union Committee Northern Adriatic (MR.S.O./C.S.IR.). Since a more recent research is not available, these examples are without prejudice to any advancements that may have occurred in the meantime. The survey has revealed numerous deficiencies in practice which cause discrimination (particularly applying the residence criterion) and consequently foster preference for undeclared work arrangements[75]. The three most important areas where irregularities in practice exist include social security, taxation, and work conditions, including access to employment. In the area of social security and social benefits, residence is the most common criterion used to deprive the cross-border workers of entitlements, despite the formal guarantees of equality under the EU law[76]. This is found to occur due to uncertainties in the application of Regulation 883/2004. Even where such situations can be rectified by appeal to higher instances, the difficulties associated with such procedures (i.e. low awareness of the existing rights, language barriers, costs and duration of the proceedings, etc.) might have a dissuasive effect on the mobility. In the field of income taxation, there is a risk of double taxation[77], or incorrect implementation of tax deductions based on the worker's residence[78]. In the area of employment and working conditions, access to unemployment services for wholly unemployed cross-border workers[79] or access to supplement work might be more difficult for

[75] C.S.IR./MR.S.O., *Pograni ni rad izme u Italije i Hrvatske*, cit., pp. 4, 9-10. See also information on undeclared work between Italy and Slovenia analysed within the cross-border project Euradria (https://euradria.eu/informazioni/contrasto-al-lavoro-sommerso/).

[76] One example mentioned includes the administrative practice of the regional authorities to require a person to state the address of residence in Italy for the issuing of S1 certificate, disregarding the fact that cross-border workers will not be able to fulfil this requirement. See C.S.IR./MR.S.O., *Pograni ni rad izme u Italije i Hrvatske*, cit., pp. 12-13.

[77] Despite the application of the Agreement on avoidance of double taxation on income between Croatia and Italy, which is in force since 1 January 2010, Official Gazette *Narodne novine* – International Agreements no. 10/2000.

[78] See Court of Justice February 14th 1995, *Finanzamt Köln-Altstadt v Roland Schumacker*, Case C-279/93.

[79] See Article 65(2), Regulation 883/2004.

unemployed cross-border workers[80]. All these examples show the importance of cross-border cooperation between trade unions and other associations, as well as between the competent institutions in revealing the problematic areas and working to find solutions for the observed deficiencies. The identified issues might intensify in light of transformation of labour markets and the rise of teleworking, digital and platform work, which transcend and challenge traditional regulation patterns. National laws may accord different statuses to such workers, which has an important impact on their labour law protections and ensuing social security entitlements[81].

7. *Concluding remarks*

Further empirical research targeting the wider cross-border region between Italy, Slovenia and Croatia is necessary to provide a more detailed insight on the impact of the Schengen Area and the Eurozone on the free movement of workers across this area. However, it can be concluded that the majority of issues observed so far in practice mostly concern administrative barriers that hamper the practical implementation of the formal guarantees under EU law. Many issues surrounding the world of work and labour market transformation, such as the rise of the atypical labour force in the digital economy far surpass the ambit of this paper, but are bound to affect the workers' mobility and merit further inspection. Generally speaking, the existing evidence shows that the importance of joining the Schengen Area and the Eurozone for everyday life of citizens, in particular cross-border commuters cannot be denied. Whether their potential for the economic development of cross-border areas and well-being of mobile workers will be fully realised is a matter for future analysis.

[80] C.S.IR./MR.S.O., *Pograni ni rad izme u Italije i Hrvatske*, cit., p. 21.

[81] For an overview of issues in relation to the free movement of workers and social security coordination see VUKOREPA, *Cross-border platform work: Riddles for free movement of workers and social security coordination*, in *ZPFZ*, 2020, Vol. 70, 4, pp. 481-51. See also HIESSL, *Jurisprudence of national courts confronted with cases of alleged misclassification of platform workers: Comparative analysis and tentative conclusions* (Updated to 31 August 2022), European Centre of Expertise in the field of labour law, employment and labour market policies (ECE), 2022.

Abstract

The Croatian accession to the Schengen Area and the Eurozone in 2023 are regarded as crucial events which, both symbolically and practically, mark a final stage of the integration process, that started in 2013 when Croatia became the EU Member State. This paper explores their impact on the mobility of labour force and population in general, concentrating in particular on cross-border work between Croatia and Italy.

Keywords

Free movement of workers, cross-border work, Schengen Area, Eurozone.

Maria Teresa Ambrosio

Models and practices of social and working integration of migrants. A comparison between Italy and Spain*

Contents: 1. Reasons for study. **2.** The regulatory framework: How far is the social and working integration of migrants? **3.** Continued. The practice of "*arraigo*" in the Spanish legislative framework. **4.** *Continued*. The residence permit for special protection in Italy and its recent reform. **5.** Short conclusions.

1. *Reasons for study*

The reasons for studying the Italian and Spanish practices of migrants' integration are closely connected to a reflection on the condition of those who live and work in these countries. The systematic inequalities to the detriment of the foreign population compared to the national one – in particular, concerning placement in the labour market, income gained from work and exposure to the risk of exploitation and poverty – represent a problem that afflicts several countries, recently amplified by the pandemic emergency. In fact, the healthcare services emergency, which soon turned into an economic and social emergency, hit the lowest social strata, the most vulnerable individuals, especially workers from third-world countries.

In the Spanish and Italian labour markets, the greater frequency of fixed-term contracts and the high concentration of migrant workers in the most marginal sectors of the economy[1] have had a strong impact on the employ-

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[1] For the Italian labour market data see MINISTERO DEL LAVORO E DELLE POLITICHE SOCIALI, *XIII Rapporto annuale. Gli stranieri nel mercato del lavoro in Italia*, *Anno 2023*, pp. 48-56. For

ment rate of foreigners who, during the pandemic period, it has fallen below that of the natives[2]. The consequent employment gap has thus favored the increase and extension of poverty among foreigners, who currently live below the poverty line[3].

The condition of marginality and vulnerability inherent in the status of migrants also plays a fundamental role in the spreading of inequalities. To reduce the condition of marginalization, to be discussed in the following paragraphs, the national legislative framework on immigration should provide, in addition to effective and realistic rules on access to the labour market, measures for the integration and social inclusion of migrants present in the territory.

The integration of migrants represents one of the most delicate issues of the articulated and complex debate on immigration. One of the very first social areas with which the migrant comes into contact in the destination country is the labour market; for this reason (regular) work represents a useful tool to encourage and facilitate the integration of foreigners. The Report on the protection and reception system for asylum seekers recalled this some time ago, in particular in the part which highlights that "the working condition represents a priority aspect in the integration process"[4]. It is no coincidence that the Report refers to "working conditions" to indicate that only decent work can be considered a tool of inclusion. Despite that, over the years the legislator, especially the Italian one[5], has addressed immigration

the Spanish labour market data see Observatorio de las ocupaciones, *Informe del Mercado de Trabajo de los Extranjeros. Estatal. Datos 2022*, Servicio Público de Empleo Estatal, Madrid, 2023, in www.sepe.es; cfr. Mahía, *Los efectos del COVID-19 sobre la inmigración en España: economía, trabajo y condiciones de vida*, in *Anuario CIDOB de la Inmigración 2020*, enero de 2021, pp. 75-76; Torns, Moreno, Borràs, Carrasquer, *Mercato del lavoro e immigrazione in Spagna. Disuguaglianze di genere e di etnia*, in *Cambio. Rivista sulle trasformazioni sociali*, 2012, 3, p. 80.

[2] See https://www.openpolis.it/dopo-la-pandemia-non-migliorano-le-condizioni-degli-stranieri/, May 5th, 2023.

[3] According to ISTAT estimates, over 30% of foreign-only families are in absolute poverty, compared to less than 6% of Italian-only families, ISTAT, *Le statistiche dell'ISTAT sulla povertà, Anno 2022*, in https://www.istat.it/it/files/2023/10/REPORT-POVERTA-2022.pdf, p. 5. In Spain, more than half of foreign residents (54%) are at risk of poverty or social exclusion, see https://www.openpolis.it/numeri/in-spagna-e-grecia-piu-della-meta-dei-residenti-stranieri-sono-a-rischio-poverta/, June 3rd, 2023.

[4] The Parliamentary Commission that developed the Report was established by resolution of the Chamber of Deputies of 17th November 2014, amended by resolution of 23rd March 2016 (doc. XXII-bis, no. 21).

[5] Observing the Spanish legislation, we can notice a fluctuating trend that has alternated

policies (i.e. the measures that regulate the conditions of entry and residence) with an exclusively security and punitive approach, almost completely neglecting the measures for social integration and employment of migrants. Therefore, not only does the regulatory framework currently in force not facilitate the integration of migrants, but rather it has a profound effect on the growth of inequalities between foreigners and natives, also from the point of view of the labour market (lower wages; long working hours; humiliating, dangerous and low-paid jobs also called "3D-Jobs").

The study of the regulatory framework on immigration of the two Mediterranean countries (Italy and Spain) is useful not only to verify the effectiveness (or otherwise) of existing measures, but also to identify gaps and/or critical issues in the regulation in force in order to promote integration and fight, at least in part, against the marginal condition of migrants.

2. *The regulatory framework: How far is the social and working integration of migrants?*

Italy, like Spain, has long been one of the main emigration countries. It was only around 1970 that Italy became a land of immigration[6]. The main cause of this transition was almost certainly due to the economic growth that enveloped the country between the 1950s and 1980s, attracting citizens from both poorer countries and Eastern Europe[7].

In Spain, migration from non-European countries occurred a little later,

phases of opening with closing phases, not only as an expression of the different political forces that have taken turns in leading the country but also as a response to the different economic cycles. However, we must highlight a general openness of Spanish legislation towards immigrants, seeking the maximum possible equality with Spanish citizens. As proof of this, we can consider various measures adopted towards irregular immigrants, in order to promote their regularization and social and economic integration (§3). See Locchi, *I meccanismi di regolarizzazione permanente in Europa: una prospettiva comparata*, in *DIC*, 2021, 3, p. 151 ff.; Relaño Pastor, *Los continuos cambios de la política de inmigración en España*, in *MI*, 2004, 3, p. 113; Triguero Martínez, *La nueva reforma de la Ley Orgánica 4/2000 sobre derechos y libertades de los extranjeros y su integración social: notas clave para su comprensión*, in *REJ*, 2009, 9, pp. 347-362.

[6] Bonifazi, *L'immigrazione straniera in Italia*, il Mulino, 1998, p. 73; Bonetti, *La disciplina degli ingressi per lavoro in Italia nell'evoluzione delle norme sull'immigrazione*, in Cominelli (ed.), *Costruire la cittadinanza. Idee per una buona immigrazione*, Franco Angeli, 2004, p. 28; Colucci, *Storia dell'immigrazione straniera in Italia*, Carocci, 2018, pp. 29 and 49 ff.

[7] Einaudi, *Le politiche dell'immigrazione in Italia dall'Unità ad oggi*, Laterza, 2007, p. 54.

starting from the end of 1986. In that year, the first law on immigration and flow management was approved (*Ley Orgánica* no. 7/1986). However, it was not until 2000 that increasing flows of migrants from Latin America as well as African and Asian countries poured into Spain. In the same year, *Ley Orgánica* no. 4/2000 on rights and liberties of foreigners in Spain and social integration was approved. This law, together with Royal Decree no. 557/2011, represents the main regulatory framework[8].

The Italian legislator intervened around the same time. The first attempts to regulate the migratory phenomenon occurred with the law no. 943 of 30 December 1986, (the so-called "Foschi" law) and with law no. 39 of 28 February 1990, (the so-called "Martelli" law), when, faced with the first signs of social urgency, the legislator could no longer postpone its intervention. Particularly decisive, in this sense, was the murder of the South African agricultural worker, Jerry Esslan Masslo, in August 1989. The episode drew attention, for the first time, to the issue of foreign workers' rights and the limits of Italian legislation on the matter[9]. However, the two legal texts proved insufficient to regulate the migration phenomenon organically. The provisions contained therein addressed only some aspects, leaving numerous important issues unresolved relating to the access to work of third-country nationals and their integration[10]. Only with law no. 40 of 6 March 1998 (the so-called "Turco-Napolitano" law), later transfused into the Legislative Decree no. 286/1998 (the so-called "t.u. immigrazione"), was a real organic regulation on immigration introduced. This law intervened on multiple aspects of the migratory phenomenon, regulating not only the entry, residence and removal of foreigners but also the inclusion of migrants in the labour market. The t.u. and the subsequent implementation regulation still constitute today (with the amendments and additions made) the reference legislative source for the regulation of economic migration. However, as will follow shortly, the legislative changes that have affected the t.u. over the years have made the original *corpus* of legislation fragmented, as well as making the regular entry consequently also the integration of migrants extremely complex.

[8] Di Maio, *Spagna,* in Bonetti, D'Onghia, Morozzo della Rocca, Savino (eds.), *Immigrazione e lavoro: quali regole? Modelli, problemi, tendenze, Parte I: Modelli stranieri*, Editoriale scientifica, 2022, pp. 297-299.

[9] Colucci, *cit.*, pp. 79-101.

[10] Rusciano, *Introduzione*, in Viscomi (ed.), *Immigrati extracomunitari e lavoro subordinato. Tutele costituzionali, garanzie legali e regime contrattuale*, Edizioni Scientifiche Italiane, 1991, p. 1.

The challenging integration of migrants into the Italian social and economic context depends, most of all, on the system used for inlet flow regulation. The system calculates annually the number of migrants who can enter Italy for work reasons with a regular residence permit.

The regulation of inlet flows is articulated on two levels: the first is represented by the three-year planning document (Art. 3, paragraphs 1-3, d. lgs. no. 286/98), whose purpose is to determine the programmes and interventions on the migration phenomenon as a whole and, in particular, to define the general criteria for the subsequent annual determination of entry flows. The second is represented by the flows decree (Art. 3, paragraph 4) which establishes annually the maximum number of migrants that can be admitted into the territory for work reasons, based on the general criteria identified in the triennial programming document[11].

Originally, the Italian legislation (Art. 3, paragraph 4, d.lgs. 286/98) required that the triennial planning document be a legitimate condition for adopting the annual flows decree, by ensuring a dialogue between local authorities, trade unions and employers' associations representing the needs of the labour market and determining, if necessary, a quantitative and qualitative increase in admission quotas. In Spain, but not in Italy, the consultation phase with the most representative trade unions and employers' organisations is still fundamental in determining the admission of foreign workers. This phase allows for information to be published in the Catalogue of difficult-to-fill occupations ("*Catalogo delle occupazioni di difficile reperibilità*")[12].

It was the intention of the Italian 1998 legislation that the triennial planning document represent the fulcrum of entry flow programming by establishing the criteria for determining the real labour needs required by the national labour market. Instead, the planning document was never deemed effective and has not been adopted since 2006[13].

[11] See TURSI, *La nuova disciplina dell'immigrazione per lavoro: una ricognizione critica*, in TURSI (ed.), *Lavoro e immigrazione,* Giappichelli, 2005, pp. 11-13; CHIAROMONTE, *L'(in)evitabile nesso fra regolazione del lavoro immigrato e diffusione del lavoro sommerso: spunti ricostruttivi*, in CANAVESI (ed.), *Dinamiche del diritto, migrazioni e uguaglianza relazionale*, 2019, p. 249 ff.; PAGGI, *L'ingresso per lavoro: la decretazione annuale dei flussi. Criteri ed evoluzione normativa*, in GIOVANNETTI, ZORZELLA (eds.), *Ius migrandi. Trent'anni di politiche e legislazione sull'immigrazione in Italia*, Franco Angeli, 2020, p. 251 ff.

[12] DI MAIO, *cit.*, p. 305.

[13] GOTTARDI, *Politiche migratorie e programmazione dei flussi*, in TURSI (ed.), *Lavoro e immigrazione*, Giappichelli, 2005, p. 139 ff.; RICCOBONO, *Immigrazione e lavoro al tempo della crisi. Aspetti*

For over fifteen years there has been a lack of a real strategy for entry planning with the flows decree admitting increasingly insignificant entry numbers, especially with regard to fixed-term and permanent employment. The drastic contraction of work permits issued (from 250,000 in 2007 to just over 30,000 in 2015-2020) has thereby hindered the *legal* recruitment of the *regular* foreign workforce[14].

In this regard, it must be said that the recent d.l. no. 20/2023, converted with amendments by l. no. 50/2023, in Art. 1 has provided a planning of legal entry flows of foreign workers for the three years 2023-2025, in derogation of Art. 3 t.u. It is important to point out that this is a transitional regulation, valid only for the three years 2023-2025. The d.P.C.M. adopted based on Art. 1 increased the entry quotas for foreign workers from third countries and extended the professional categories and production sectors involved. However, although a total of 452,000 new entries were foreseen in the three years, the need identified in the Italian labour market is equal to 833,000 units. Furthermore, concerning the extension of the professional categories and the production sectors involved, although other professions such as hairdressers, electricians and plumbers, family and social health assistants, passenger transport and fishing workers have been included, it is not clear why the agricultural sector is not taken into consideration and only quotas for seasonal work continue to be allocated[15].

Over the years, the inlet flow planning system has encouraged irregular entries. All foreigners arriving in Italy irregularly have little chance of integrating into society because work can only be found in an informal and undeclared labour market, so their only hope is to wait for a collective regulation which, due to the complexity of the procedure, does not provide a definitive remedy to the irregularity or even to the consequences of the

problematici e prospettive di riforma del quadro normativo, in *NA*, 2013, 2-3, p. 401 ff.; Chiaromonte, *L'ingresso per lavoro: l'irrazionalità del sistema e le sue conseguenze al tempo delle fake news e della retorica nazionalista*, in Giovannetti, Zorzella (eds.), *Ius migrandi. Trent'anni di politiche e legislazione sull'immigrazione in Italia*, Franco Angeli, 2020, p. 268.

[14] D'Onghia, *Il lavoro (regolare) come strumento d'integrazione e inclusione sociale dei migranti*, in Caroli Casavola, Corazza, Savino (eds.), *Migranti, territorio e lavoro. Le strategie d'integrazione*, Rubbettino, 2022, p. 53.

[15] See Chiaromonte, *Una lettura giuslavoristica del d.l. 20/2023: le inadeguate politiche migratorie del Governo Meloni*, in *DLRI*, 2023, 179, 3, p. 440 ff.; D'Onghia, De Martino, *Lavoro e immigrazione: una nuova stagione nella regolamentazione dei flussi di ingresso?*, in *ADiM Blog*, Editoriale, luglio 2023.

irregular status[16]. The regularization began in 2020 represents the most recent demonstration of this tool's inadequacy[17]. The latest data[18] show a high number of cases still pending in the Prefectures Police and Police Headquarters (particularly in cities such as Rome and Milan) relating to emergency applications presented by irregular foreigners in 2020. This situation, primarily due to a lack of staff assigned to dealing with emergency applications, has extremely serious consequences on the life of hundreds of thousands of migrants forced to live in precarious conditions as well as social and working marginalisation.

Contrary to Italian legislative, as will be explained shortly (§3), the Spanish immigration law provides for exceptional instruments of individual regularization.

In Italy, other obstacles to the successful integration of foreigners come from the duration of the residence permit, which makes the legal status of the foreign worker highly unstable. The permanence in Italy for working purposes cannot exceed nine months for seasonal work, one year for fixed-term work and two years for permanent work (art. 5, paragraph 3-bis, d. lgs. no. 286/98)[19]. The foreign worker is therefore obliged to make difficult and frequent renewals of the residence permit in order to reside legally.

Additionally, there is the problem associated with the lack of flexibility of the legal status of the foreigner. In Italy, the conversion of the first-entry residence permit with a work permit on the basis of proven elements of integration is not permitted. An emblematic case is that of the asylum seeker. Pending definition of the protection application, Italian law (d. lgs. no. 142/2015) allows the asylum seeker to be employed (Art. 22, paragraph 1) without, however, the possibility of converting the residence permit into a

[16] See Morozzo della Rocca, *Le vie dell'immigrazione e quelle della regolarizzazione*, in Bonetti, D'Onghia, Morozzo della Rocca, Savino (eds.), *Immigrazione e lavoro: quali regole? Modelli, problemi, tendenze, Parte IV: Le lezioni della comparazione*, Editoriale scientifica, 2022, p. 565 ff.

[17] For All see Chiaromonte, D'Onghia, *Cronaca di una sanatoria in tempo di emergenza sanitaria: genesi, finalità e limiti*, in *DIC*, 3, 2020, p. 29.

[18] For data see the document in https://erostraniero.it/wp-content/uploads/2023/11/-Ero-straniero_nota-organico-PA-e-regolarizzazione_16nov2023.pdf.

[19] Despite d.l. no. 20/2023 having justifiably extended the duration of the residence permit for permanent work from two to three years (Art. 4), the problem of the length of time required for issuing the renewal of the residence permit still remains, see Chiaromonte, *Una lettura giuslavoristica del d.l. 20/2023: le inadeguate politiche migratorie del Governo Meloni*, cit., p. 454.

work permit (Art. 22, paragraph 2). As things stand, firstly, the asylum seeker is not encouraged to seek regular employment, because in the event of an application rejection he/she will have to leave the country and the existence of a regular employment contract would be useless. Secondly, the asylum seeker, who has been employed and has established social relations within the host community, may have his/her application for international protection definitively rejected without in the meantime having the possibility of converting a residence permit into a work permit and without the possibility of remaining legally in the country[20]. In these cases, for instance, it would be sufficient, for a permitted residence, to recognize any roots in the territory including family ties, social ties and the foreigner's employment history in the host country.

Finally, the Italian legislation on access to the labour market does not provide for a temporary residence permit that allows foreigners entrance to Italy to seek employment. Only in this way, the foreigner wanting to work in Italy would not be required to demonstrate the existence of an employment contract before entering the country. The residence permit for job seekers could have directly or indirectly positive effects on the integration of foreigners because it facilitates their entry into the regular labour market. On this issue the Spanish legal system takes a different approach to the Italian one, recognizing a specific entry visa for job seekers (Real Decreto 557/2011, art. 175-177).

3. *Continued. The practice of "*arraigo*" in the Spanish legislative framework*

Coming to integration practices, the *Ley Orgánica* no. 4/2000 *(LOEx)* introduced the regularization roots procedure of foreigners on the grounds of *arraigo*. It is a tool aimed at granting a temporary residence permit to irregular foreigners who have been in this situation for at least two years and who, by demonstrating that they have means of subsistence, can access a specific residence permit. It is, therefore, an individual regularization procedure recognizing the effective social, work and family integration in Spain.

[20] Corsi, Dall'Oglio, *Il quadro normativo*, in Bonetti, D'Onghia, Morozzo della Rocca, Savino (eds.), *Immigrazione e lavoro: quali regole? Modelli, problemi, tendenze, Parte II: La situazione in Italia*, Editoriale scientifica, 2022, pp. 426-431.

The Spanish legal system does not attribute the irregular permanence of foreigners to a hypothesis of crime; in Spain, irregular foreigners are punishable by administrative sanctions. This allows foreigners, who can demonstrate roots in the territory for social, work or family reasons to obtain a permit for *arraigo* even should the stay be irregular. In Italy, on the other hand, foreigners who reside illegally can be expelled from the country under the criminal charges of clandestinity (Art. 10-bis, d. lgs. no. 286/98).

The term *arraigo* in Spanish means to settle in a place, binding oneself both to people and social contexts, hence, any form of rooting (social, family, work) presupposes the integration of the person[21].

The form of *arraigo* that best suits the theme of integration through the tool of work is the *arraigo laboral*. In Spain, illegally residing foreigners can officially report their habitual residence to the municipal registry office and those without a criminal record, who can demonstrate they have stayed for a minimum of two years and can prove the existence of employment relationships for no less than six months, can apply for and obtain authorization to reside temporarily for a work permit. To prove the employment relationship, the foreigner must present an administrative or judicial document or any legally valid means. In this form of *arraigo*, the central element that allows integration is the existence of an employment relationship[22].

The *arraigo social*, however, requires proof of residence in Spain for at least three years and the presence of a job offer or the intention to set up an independent business. Furthermore, the foreigner who requests the authorization to reside temporarily for *arraigo social* must have established stable social, family or economic ties, which can be compromised in the event of any abandonment of the territory[23].

Unlike the Italian legislation on immigration, the Spanish one values work placement and actual residence in the host country for the purpose of integrating irregular foreigners.

Arraigo is a residency authorization allowing the recognition of effective social or working integration within the territory. It demonstrates how, from time to time, the existence of certain requirements (an employment relationship, a job offer, social or economic ties) can regularize the position of

[21] Triguero Martínez, *El arraigo y los modelos actuales jurídico-políticos de inmigración y extranjera*, in *Mig*, 2014, 36, p. 433 ff.

[22] Locchi, *cit.*, pp. 152-153.

[23] Locchi, *cit.*, p. 153.

the foreigner who is present in the territory, without having to wait for extraordinary collective regularization.

A more accurate analysis of the institute brings out its advantages and disadvantages. Given that the status of irregular migrant entails the risk of social marginalization, the tool of *arraigo* allows one to regularize his/her position and begin a process of integration and social inclusion. The different forms of *arraigo* undoubtedly constitute a valid tool allowing foreigners to escape from subordinate and precarious conditions but, at the same time, the *arraigo* constitutes only a temporary residency authorization which must therefore subsequently be transformed into a more stable residence permit, meeting the criticality of ordinary legislation. Furthermore, the requirements for obtaining the *arraigo* can be difficult to achieve due to the difficult situation of the national labour market. For this reason, it would be advisable to adapt these requirements, in terms of greater flexibility, taking into account the current delicate socio-economic situation. It is worth highlighting that the *arraigo* started out as an exceptional tool and has now become an ordinary procedure towards regularizing the status of migrants meeting the requirements required by law.

As will be outlined later (§ 5), even in the Italian legal system, an individual and permanent instrument of regularization motivated by employment or residence qualified by various integration indices could have an important impact on the lives of the many migrants who live and work irregularly in the country.

4. *Continued. The residence permit for special protection in Italy and its recent reform*

Currently, the Italian legislation on immigration does not include an individual regularization mechanism; the only instrument comparable to it was the residence permit for special protection based on private and family life, introduced in Italy with d.l. no. 130/2020 within the Art. 19, paragraph 1.1, part. 3-4, d. lgs. no. 286/98. The resident permit for special protection intervened on violation risks of the right to respect the private and family life of the foreigner residing in Italy, after careful verification of the nature and effectiveness of some criteria, such as family ties, effective social integration and the length of stay in the country.

Attention to humanitarian profiles and the recognition of exceptional circumstances (links with the territory, social and family ties) brought this form of protection closer to the *arraigo* model.

The special protection system allowed foreigners who have social or family ties in Italy, or who have undertaken a serious integration process (language learning, professional training courses or employment), to apply for a residence permit for special protection, which could also be converted into a work permit. The possibility of converting the residence permit for special protection into a work permit certainly represented an advantage for the foreigner present regularly or irregularly in the territory.

Therefore, through the introduction of residence permit for special protection, the Italian legislator, slightly behind other European countries[24], had prohibited the expulsion of foreigners when there was a risk of violating the right to respect one's private and family life, according to a formulation that, although indirectly, recalled the provision of Art. 8 ECHR (European Convention of Human Rights)[25].

It is not yet clear the *ratio* of recent reform (Art. 7, d.l. n. 20/2023 converted with amendments by law no. 50/2023) that has abolished the resident permit of special protection based on the recognition of private and family life, in fact, while the migrant could acquire a residence permit to protect a fundamental right, the State could bring out foreigners present irregularly on the national territory and struggle illegal work. With the same reform, the legislator has also eliminated the possibility of converting the residence permit for special protection into a work permit deleting the letter a) of the Art. 6, paragraph 1-bis, d.lgs. no. 286/1998[26].

Despite the irrationality of these measures, since the residence permit cannot be denied in the presence of constitutional or international obligations (Art. 19, paragraph 1.1., the first part, d. lgs. no. 286/1998) and since

[24] See the case of France. Benvenuti, Chiaromonte, *Francia*, in Bonetti, D'Onghia, Morozzo della Rocca, Savino (eds.), *Immigrazione e lavoro: quali regole? Modelli, problemi, tendenze, Parte I: Modelli stranieri*, Editoriale scientifica, 2022, pp. 115-118.

[25] Savino, *Lo straniero nella giurisprudenza costituzionale: tra cittadinanza e territorialità,* in *QC,* 2017, 1, p. 66 ff.; Curigliano, Mason, *La regolarizzazione straordinaria del 2020: una prima analisi*, in *DIC*, 2021, 3, p. 315.

[26] For the reflections on its constitutional legitimacy see Colamartino, *"Non ho paura. Ma ormai vivo qui". La protezione speciale e il diritto alla vita privata e familiare nell'applicazione della giurisprudenza (con qualche spunto di riflessione sul d.l. no. 20/2023)*, in *QG online*, 25 September 2023, p. 25.

one of the international obligations is the right to respect private and family life (art. 8 ECHR), the reform would not change things in theory[27]; while in practice, the administrative discretion regarding the elements to be evaluated for the issuance of the residence permit for special protection could increase and disadvantage those who, for instance, have recently started paths of integration and social inclusion, even through employment, precisely when the labor market is undergoing labour shortages in many sectors[28]. It will still take some time to understand how (and if) this reform constitutes a further obstacle to the social and working integration of foreigners.

5. *Short conclusions*

To conclude, the Italian legal system seems to be more incomplete than the Spanish one from the profile of social and working integration of migrants. For this reason, the Italian legislative framework on migration policy would benefit substantially from the introduction of an ordinary and individual regularization mechanism which, resolving the forms of irregularity on a case-by-case basis, would allow foreigners to remedy their status at any time, on the basis of various elements which include: the job placement or promise of employment, any ties in the country, knowledge of the Italian language or other circumstances that can demonstrate a certain degree of integration. This mechanism could encourage foreigners to take legal paths, thus decreasing the degree of marginality and vulnerability that affects inequality growth. Until a few months ago, the recognition of special protection for achieved social integration in Italy was the only instrument that allowed a sort of individual regularization[29].

Always with the purpose of allowing greater inclusion of foreigners in the social context, a further change to the immigration rules should then concern residence permits for work reasons, the duration of which should be extended. Greater flexibility should also be sought in the conversion of

[27] See Zorzella, *La riforma 2023 della protezione speciale: eterogenesi dei fini?*, in *QG online*, 14, September 2023, p. 18; Colamartino, *cit.*, p. 24.

[28] Zorzella, *cit.*, pp. 19-20.

[29] M.T. Ambrosio, *L'immigrazione per motivi di lavoro tra riforma e controriforma*, in Savino, Vitiello (eds.), *Asilo e immigrazione. Tra tentativi di riforma e supplenza dei giudici: un bilancio*, Editoriale scientifica, 2023, pp. 126-127.

residence permits so that foreigners can maintain the position of regularity for longer and have more stability in the host country.

Finally, even the asylum seeker who is employed with a regular employment contract should be given the possibility of obtaining a work permit while maintaining the status of asylum seeker until the procedure has been defined. At the end of a successful procedure, the asylum seeker will be able to choose whether to accept international protection or the residence work permit and should the procedure be defined with a rejection of the application, the asylum seeker will instead be able to keep the work permit and continue to reside legally in the territory.

Such an incomplete regulatory framework is counterbalanced by numerous best practices – recently reported by scholars – developed in various parts of Italy, created with the active participation of Trade Union organizations and Third sector employers' associations, from civil society to individual citizens, with the aim of promoting social inclusion of foreign workers and eliminating all forms of marginalization (for example the development of transparent agricultural supply chains)[30].

In particular, collective bargaining has played and could continue to play an important role. Already in the past, it offered tools for the inclusion of foreigners, helping to root the culture of inclusion in the working community, in trade union negotiations and the management of companies (for example the first clauses of the 1990s which established specific permits for temporary or literacy and professional qualification courses)[31]. The attention towards foreign workers by national collective bargaining is still present and is manifested through the activation of some good practices. In this sense, measures introduced at a decentralized level can be highlighted to encourage the participation of immigrant workers through the recognition of their cultural and religious needs or to provide administrative assistance in favour of foreign workers by bilateral bodies or to identify through observers initiatives aimed at promoting the inclusion of foreign workers within companies. In some national collective labour agreements, unpaid work permits have been adapted to guarantee the observance of religious holidays not recognized by

[30] D'Onghia, *cit.*, pp. 62-66.

[31] Chiaromonte, Ferrara, *Integrazione e inclusione sociale dei lavoratori migranti: il ruolo del sindacato*, in Chiaromonte, Ferrara, Ranieri (eds.), *Migranti e lavoro*, il Mulino, 2020, p. 223.

national law, or even the right, at the worker's request, to work shifts that allow him/her to attend Italian language learning courses and encourage preparation for exams[32].

However, integration policies cannot remain the prerogative of the private social sector but also public policies need to be implemented so that the effects are beneficial not only for migrants but for the entire community. Indeed, investing in integration means investing in services that can benefit everyone, even the territories. Reducing vulnerability factors of foreigners who live and work in Italy and promoting greater integration of the same are important challenges for the realization of "good immigration". The latter must consider migrants not only as a potential workforce but also as people, who are not only looking for employment but also for rights and inclusion and creating favourable policies can only result in economic growth and measurable improvements to the livelihoods of foreigners and the communities that host them.

[32] For an accurate analysis of the topic see CHIAROMONTE, FERRARA, *cit.*, pp. 223-234.

Abstract

The essay intends to make a contribution to the articulated debate on measures of social and working integration of migrants. Through the analysis of the Italian and Spanish legislative framework on immigration, the paper aims to identify particularly significant models and practices of social and working integration of foreigners that inspire innovative and more effective solutions especially than those currently present in the Italian regulatory framework.

Keywords

Migrants, Social and working integration, Comparison of practices, Italy, Spain.

Virginia Amorosi

Uniform plots. Comparative and Labour Problems in the Legal Culture of Journals at the beginning of the twentieth century

Contents: 1. Labour, law and the fashion for comparison. **2.** Comparative practices at the origin of international labour law. **3.** Legal journals as case studies: *Il contratto di lavoro. Rivista di giurisprudenza e legislazione sociale*.

1. *Labour, law and the fashion for comparison*

In 1973, Otto Kahn-Freund delivered a speech on the "Uses and Misuses of Comparative Law" at the annual Lecture in honour of Lord Chorley at the London School of Economics[1].

At the time, the debate on the application of comparative law to labour law was experiencing a period of great development in many Western countries, as part of a general trend towards the widespread use of comparative tools in the construction of law. As he was a keen observer of the phenomenon, he warned against the fashion for comparative law, carefully addressing the reasons for the danger of misuse of comparative law.

In particular, Kahn-Freund's analysis revolved around the question: "Can we do something to trace the line which separate the use of the comparative method in lawmaking from the misuse?"[2].

The author did not deny the usefulness of well-established comparative methodologies in research and university teaching and the opportune use of foreign models of legislative processes, but he wanted to suggest that a

[1] Kahn-Freund, *On Uses and Misuses of Comparative Law*, in *MLR*, 1974, 1, pp. 1-27.
[2] Kahn-Freund, *cit.*, p. 6.

thorough and critical assessment of the appropriateness of individual legal transplants is indispensable against the "risk of rejection". Beginning with a sophisticated reference to the "comparatist" Montesquieu, he develops a discourse that balances case studies of his contemporaries with incisive theoretical passages, and ends by convincing us that the use of the comparative method "requires a knowledge not only of the foreign law, but also of its social, and above all its political, context"[3].

Kahn-Freund's profound sense of history, even though he traces his analytical scheme back to the reflections of the French philosopher, prevents him from stopping at the outward appearance of the elements that he considers resistant to the test of comparison: geographical, moral and political factors. In the two centuries between the time of Kahn-Freund and the time of *Esprit de lois*, industrialisation, urbanisation and the development of communications had led to a flattening of cultural and economic differences between different countries, which was undeniably reflected in the law and consequently reduced the environmental obstacles to legal transplantation. Nevertheless, the political factor proved to be an obstacle to the international exchange of legal institutions, because the different forms of power organization – variable also in relation to the role of organised interest groups, which exercise their political power and influence in very different ways and with very different intensity from country to country – "can prevent or frustrate the transfer of legal institutions and turn the use of the comparative method into an abuse"[4].

In this line of argument, among other topical examples, there is a seemingly innocuous reference to the Industrial Act of 1971, by which the British legislature had decided to substantially reform the national system of industrial relations. Particularly with regard to collective bargaining, trade unions and strikes, the Act had attempted a "transatlantic transplantation" by introducing some American industrial relations rules into English law. On these points, Kahn-Freund's objection is significant[5]. The case is carefully analysed

[3] KAHN-FREUND, *cit.*, p. 27.

[4] KAHN-FREUND, *cit.*, p. 13.

[5] KAHN-FREUND, *cit.*, p. 25 ff. The author had already analysed the Industrial Relations Act in *Labour and the Law*, which he had written at the time of its enactment. This coincidence might have made a judgement on the effects of the Act seem premature, but Kahn-Freund took up the challenge, attempting to put things in perspective and formulating a reflection which in some respects returns in the text of the lecture, in a more concise manner and with more data from experience to support it. See KAHN-FREUND, *Labour and the Law*, Stevens & Sons, 1972, p. 8.

to show that it was a typical example of the misuse of comparative law, because the legislator who transplanted it failed to take into account the profound differences with US institutions and traditions: an error of judgement that proved old Montesquieu right.

The prominence of these conclusions also resonated in Italy where a year after the publication of the English text Bruno Veneziani published a translation[6] accompanied by a dense commentary that made the tenor of Kahn-Freund's objection even more explicit[7]. The failure of that law, which neglected the consensus of organised interests, failed to analyse the role of political institutions in the policy-making process, and attempted to superimpose itself on the customary values already accredited by the system, was sanctioned by the introduction of the Trade Union and Labour Relations Act of 1974. The new regulation of industrial relations restored the legal and customary values that existed before the Industrial Relations Act of 1971, with a return to the policy of "abstention of the law" with regard to collective autonomy[8].

First and foremost, the text of the conference provides the indispensable instructions on how to make good use of comparison, but we can also glean other lessons from it. The "use" of Montesquieu, for example, is of interest to legal historians. Kahn-Freund is aware of the profound change in contexts between the 18th and 20th centuries, and he emphasises this explicitly and very precisely. So why the erudite quotation? One hypothesis is that, despite its distant content, it had a not insignificant function: to verify a politically indigestible position and to support the difficult critique of a widely accepted methodology, in which Kahn-Freund himself was considered a specialist[9].

I will not dwell on this topic and this period, but it seems to me a good starting point to look back and describe once again a very different context, which dates back to the beginning of the last century, when neither labour law nor comparative law had gained their disciplinary autonomy and grew together intertwined.

[6] KAHN-FREUND, *Sull'uso e l'abuso del diritto comparato*, in *RDPC*, 1975, pp. 785-811.

[7] VENEZIANI, *A proposito di un saggio in tema di diritto comparato*, in *RDPC*, 1975, pp. 815-822.

[8] VENEZIANI, *cit.*, p. 820 and 821.

[9] In Kahn-Freund's production, legal comparative law does not remain in the realm of methodological argumentation but is the ground for actual experimentation. Representative of both profiles, see for example: KAHN-FREUND, *Comparative law as an academic subject*, in *LQR*, 1965, pp. 40-61; KAHN-FREUND, *Labour and the Law*, *cit.* Recently on this point: DELFINO, *Legal orders in dialogue and the "resources" of the Italian Workers' Statute*, in this journal, 2003, p. 91 ff.

2. *Comparative practices at the origin of international labour law*

At a time when neither labour law nor comparative law had yet achieved its autonomy, we might be forgiven for thinking that the warning against the misuse of comparative law in the construction of labour relations rules was a negligible trace of analysis. On the contrary, a study of the doctrinal and jurisprudential sources of the time, at the turn of the nineteenth and twentieth centuries, reveals that the programmatic attention to foreign contexts was based on a genuine conviction of the efficacy of comparative practices in solving the most pressing problems of industrial relations[10].

In fact, the discursive, scientific and institutional contexts in which comparative data are described as inescapable and reflections on foreign models motivate the essential content of legal texts impose themselves on the legal historian's gaze in terms of quantity and quality. These were comparative methods adopted in order to understand in depth economic and social phenomena that were born internationally – or, we would say, Western, if not really only European. In other words, these were comparative methods used for technical reasons, and the contexts studied to make comparisons and develop models were united by the capitalist economic structure and a political history that could be described as homogeneous in its long duration and ideal horizon. Nothing could be more different from the mere narrative trappings used to embellish the discourse by referring to distant experiences. The objectives pursued by the various attempts at comparison seem to fit adequately into the three categories described by Kahn-Freund: a) "preparing the international unification of the law", b) "giving adequate legal effect to a social change shared by foreign country with one's own country", c) "promoting at home a social change which foreign law is designed either to express or to produce"[11].

[10] On this point see GAETA, *La comparazione nel diritto del lavoro italiano*, in SOMMA, ZENO-ZENCOVICH (EDS.), *Comparazione e diritto positivo. Un dialogo tra saperi giuridici*, RomaTre Press, 2021, p. 1834 ff.; VANO, *Hypothesen zur Interpretation der 'vergleichende Methoden' im Arbeitsrecht an der Wende zum 20. Jahrhundert*, in Schulze (ed.), *Deutsche Rechtswissenschaft und Staatslehre im Spiegel der italienischen Rechtskultur während der zweiten Hälfte des 19. Jahrhundert*, Dunker & Humblot, 1990, pp. 225-243; VANO, *Riflessione giuridica e relazioni industriali tra Ottocento e Novecento: alle origini del contratto collettivo di lavoro*, in Mazzacane (ed.), *I giuristi e la crisi dello Stato liberale in Italia tra Otto e Novecento*, Liguori Editore, 1986, pp. 126-156.

[11] KAHN-FREUND, *On Uses*, cit., p. 2.

Comparison was an old technique, used by European jurists in the mid-nineteenth century in its more general form of "comparative methods" or "comparative practices", but between the 19th and 20th centuries it refined its objectives and gradually achieved a very significant theoretical transformation[12]. In its more traditional version, the comparison of legislation, the instrument of comparison lent itself very profitably to the study of labour problems. On the one hand, the topicality of this method was linked to the contextual internationalisation of human affairs; on the other, the labour question was a classic example of a "modernisation problem" that stimulated the "collection of persuasive examples to refer to in order to find effective and politically progressive solutions"[13]. The more macroscopic the problem became, the more it had to be addressed by sharing proposals and solutions: governments throughout the industrialised West provided for the creation of real institutional organisations in charge of this task, such as labour offices; lawyers set up private communication networks, such as scientific societies and international congresses.

The comparative approach was qualified with further nuances when doctrine, in addressing the transnational dimension of labour problems, constructed the first attempts to build an international labour law. At the beginning of the twentieth century, strands of research emerged that aimed to identify homogeneous rules for the regulation of industrial labour that could be widely applied in European countries, as a kind of "common labour law". In this sense, legal culture sought to shape political decisions by proposing a normalising strategy against inequalities in national social legislation that were harmful to competition between advanced capitalist countries[14]. There are numerous doctrinal works that we can place in this area, which support the political tendency to intervene in the economy and homogeneous legislation. These studies are traditionally considered minor because of the modest content of dogmatic reflection, but they tell a lot about the history of

[12] On this point see Vano, *Codificare, comparare, costruire la nazione. Una nota introduttiva*, in Vano (ed.), *Giuseppe Pisanelli. Scienza del processo, cultura delle leggi e avvocatura tra periferia e nazione*, Jovene, 2005, pp. XX-XXIX; Petit, *Lambert en la Tour Eiffel, o el derecho comparado de la belle époque*, in Padoa Schioppa (ed.), *La comparazione giuridica tra Ottocento e Novecento. Incontro di studio*, Istituto lombardo di scienze e lettere, 2001, pp. 53-98.

[13] Mazzacane, *Alle origini della comparazione*, in Padoa Schioppa (ed.), *cit.*, pp. 15-38.

[14] On the attempts to making of international labour law before 1919, see Amorosi, *Storie di giuristi e di emigranti tra Italia e Francia. Il diritto internazionale del lavoro di primo Novecento*, ESI, 2020.

comparative labour law, especially if one adopts an overall view that enhances the common lines and impact of the collection of texts. The common denominator of these texts is the determination not to go outside the existing regulatory framework, and to use the comparison between national legislations in a measured and almost never ideological way, as an essential tool for studying the workers' question and for identifying, through a game of cross-references and analogies, possible solutions at the legal level, first at the national level and then, finally, at the international level.

One of the most significant examples is a small treatise written in 1903 by Victor Brants, professor of political economy at the University of Leuven, entitled *Législation du travail comparé et internationale*. The author's desire to emphasise the close link between comparative study and the definition of an international legal horizon for labour problems is immediately apparent from the title. It reveals the content of the text, which is divided into two parts: one focusing on the comparison of legislation from a purely methodological point of view, and the other illustrating the instruments for drawing up international labour law. The inherent binary structure of the Treaty is reflected in an expressive dichotomy, starting with the Preface, which clearly distinguishes between an effective level, referring to comparative law ("*on fait partout de la législation compare*"), and an ideal level, referring to international law ("*on parle partout de législation international*", "*on préconise l'adoption de mesures générales*")[15]. While, at the time of Brants' writing, national labour legislation existed in every industrialised country and was at a stage of development where it could become the subject of further comparative doctrinal elaboration, international legislation on the same subject remained only a programme, an object of study in the planning stage. In the light of these considerations, the author declares his intention: "The purpose of these few pages is simply to examine the uses and abuses of comparing and imitating laws, and to see to what practical extent the laws of different countries can be brought into line with each other"[16].

The first part of the work is entirely devoted to a reflection on the comparative method applied to labour law, and the depth of this reflection is all the more interesting because the author is aware of the difference between a traditional approach, based on a simple comparison between regulatory

[15] Brants, *Législation du travail comparée et internationale*, Louvain-Paris, 1903, p. VII.
[16] Brants, *cit.*, p. VIII.

measures with the same content, belonging to different national contexts, and a more modern study of comparative law (there are frequent references to the thought of Raymond Saleilles and the theoretical innovations made by the *Société de Législation compare*).

Brants began by pointing out the difficulties involved in comparative work, which consist mainly in the inevitable "imperfect" knowledge of the laws to be compared – due to language or multiple interpretative tendencies and their application – which is reflected in their inaccurate and incomplete appreciation and in the tendency to hasty or thoughtless imitation[17]. These difficulties could be overcome by an in-depth, monographic study of the laws under consideration, a study that would take into account both the supreme moral principles of law, the general conditions of human society, and the physical, historical and social *milieu*[18].

Such an endeavour, Brants argued, could certainly be fruitful for those matters which, for a variety of reasons, lent themselves easily to "cosmopolitanism". Foreign legal experience could provide a useful model for the improvement of domestic legislation when economic and social development and the intensification of relations between nations produced a multiplication of analogies; the labour regime was an effective example in this sense because it was imposed on all industrialised countries for the social good and on the basis of higher principles[19].

The historical conditions observed by the author thus allowed him to affirm the existence of "*une sorte de législation international de fait*": a minimum of measures that were eventually imposed on all countries that had reached a certain level of industrialisation, because the differences in tradition and temperament of each people could not prevail against the principles, nor justify the perpetuation of abuses, but could, if anything, modify the timing and the manner of application of the reforms[20].

In the conclusions, the author, in keeping with the enthusiastic spirit that pervades the entire essay, gives the necessary indications for achieving an "effective and genuine concordance" between all industrialised countries in the field of labour law, which, he stresses, need not necessarily be common

[17] BRANTS, *cit.*, p. 2 ff.

[18] BRANTS, *cit.*, p. 26. Although never explicitly quoted, the thought of Montesquieu evoked by Kahn-Freud is echoed in these words.

[19] BRANTS, *cit.*, pp. 43-45.

[20] BRANTS, *cit.*, pp. 21-23.

but rather homogeneous. On the one hand, at the purely scientific level, it was a question of working with the tools of comparison; on the other, at the level of dissemination – or, if you like, politics – it was a question of finding the most useful strategies for building consensus around the common goal.

The same comparative intention, aimed at defining a space more specifically dedicated to the formulation of internationalist hypotheses of labour regulation, appears in works that are less pretentious than Brant's, but are perfectly in tune with the same essayistic vein – legal in the broadest sense – regarding the labour question as a problem common to the entire West.

In the pages of the legal journal *Il Filangieri* in 1904, an essay was published that captures some of the nuances of the link between legal discourse on labour issues and comparative approaches[21]. The author, Francesco Perrone, a lecturer in commercial law at the University of Naples, articulated a reflection on the uniformity of the legislative currents of his time with reference to the social question.

Perrone's attitude is that of an enthusiastic observer of a phenomenon he sees looming before his eyes and which he describes as necessary: the emergence, "among peoples living at a similar stage of economic civilization", of a movement of legal reforms uniform in outline and principles and aimed at the "beneficial" limitation of freedom and the concept of individual property[22].

Born of the "conquering power" of the masses, the "new spirit" that animated the law and penetrated all the relationships it regulated, uniformly characterised the most recent legislative currents in many Western states, whose similarities were due to an equally uniform set of causes. Perrone identified some of them: firstly, "consciousness in labour organisations", i.e. the constitution of an organised workers' movement, which manifested an increasingly widespread diffusion of interests of a collective nature; then "the solidarity of markets", which, strengthened by the similar development of industry and better communications, moved towards the formation of a single market.

In addition to the economic and social factors that, according to the author, preceded the law and conditioned it towards uniformity, Perrone also

[21] Perrone, *L'uniformità nelle correnti legislative contemporanee*, in *IFi*, 1904-1905, pp. 190-201, 270-280, 353-361, 436-445.

[22] Perrone, *cit.*, p. 445.

identified minor causes, cultural and scientific factors that contributed to the serenity of the social movement: the development of comparative legal literature, "social" teaching in universities, international congresses[23].

Having enumerated the causes, he went on to illustrate, on the basis of comparative evidence, the multiple manifestations of the phenomenon of legislative uniformity. The most obvious expression of this uniformity was the creation, in all Western countries, of homogeneous institutions with multiple purposes, but all committed to regulating the social question. In his paper, Perrone gave a brief classification of them. They were bodies in charge of studying labour problems (Labour Offices), defending and controlling workers (Inspection Institutes, Emigration Commissariats), settling individual and collective disputes (specialised courts, *probiviri*)[24].

Following a systematic list of countries and examples, the author found the same tendency towards uniformity in the regulation of accidents at work, in the various forms of insurance, in the creation of rules to protect female and child labour in factories, in the increasingly widespread guarantee of the right to form unions and to strike. In the final outlook, as grandiose as it was foggy, this was a trend that was becoming more pronounced, that was destined to constitute a new "*diritto comune*" that would almost slyly "infiltrate" and gently "revolutionise even the codes without leaving a trace of violence and blood"[25].

The comparative key to studying labour problems is also used by Leone Neppi Modona in *La legislazione operaia e l'Ufficio del lavoro*. The author gave the first clues for orientation: by "workers' question" he meant the complex of problems and solutions arising from the unequal distribution of wealth between the class of wage-earners and that of the bosses. Then settled the long-running diatribe between the supporters and opponents of state intervention in industrial relations by presenting public measures in favour of workers as inevitable, so much so that they had penetrated the common feeling and action of the industrialised countries[26].

Social legislation is therefore the central theme of the work, which is built around a specific objective: to show that labour legislation, far from

[23] Perrone, *cit.*, p 195 ss.
[24] Perrone, *cit.*, p, 273 ss.
[25] Perrone, *cit.*, p. 201.
[26] Neppi Modona, *La legislazione operaia e l'Ufficio del lavoro*, Torino, 1904-06, pp. 3-5.

being peculiar to one or a few countries, is a universal fact. The author approaches the subject in a schematic and precise manner, examining "for each institution the historical and legislative changes that this subject has undergone in the main civilised states"[27]. This was a classic application of the comparative law method to measures relating to the work of children, women and adult workers, adapted to cover a very wide geographical area. In fact, Neppi Modona included no less than nineteen countries in his study (in addition to the European nations, the United States, Russia, Argentina, Australia and New Zealand), reproducing and synthesising that scouting operation of foreign legal experience, to which national institutions and bodies were specifically assigned, as a preliminary stage to the drafting of legislation[28].

In fact, the element that characterises Neppi Modona's work is an in-depth reflection on the role of the *Ufficio del lavoro* and the *Consiglio Superiore del Lavoro* in Italy, of which the author seems to wish to promote, for the purposes of dissemination, the functions of special utility represented by the knowledge of the "reality of working class life" and the guarantee of a "greater agreement between the classes", in deference to that conciliatory spirit of Giolitti's imprint between the workers' organisations and the public powers[29]. At the same time, the author did not neglect to highlight the internationalist aspects of the problem. The structure of the work almost reflects a necessary process, which, starting from the awareness of the governments of the workers' problem, moved on to the phase of scientific elaboration carried out by the institutions in charge of seeking solutions. Finally, by observing the work of other countries, it was realised that the social question was a common problem and that it was necessary to be guided by the will to find a common solution: international legislation.

Paul Pic, Professor of Labour Law at the University of Lyon, was the pioneer of the successful trend towards the use of comparative methods in the study of labour law. His vast production, the originality of his approach and his prominence in scientific circles devoted to the social question would require a larger space for analysis than these pages[30]. However, it is appropriate

[27] Neppi Modona, *cit.*, p. 2.

[28] Neppi Modona, *cit.*, pp. 74-167.

[29] Neppi Modona, *cit.*, pp. 34-67.

[30] See, Bayon, Frobert, *Paul Pic (1862-1844) et les «Lois ouvriéres»*, in *RHDS*, 1997, 18, pp. 69-94; Hakim, *La science de la question sociale de Paul Pic ou les malheurs de l'hétérodoxie dans les facultés de droit*, in Hakim, Melleray (éd), *Le renouveau de la doctrine française. Les grands auteurs de*

to mention Paul Pic's *Traité de législation industrielle* as a very eloquent example of the methods and reasons for using comparison in the study of labour legislation in his time. It is an ambitious and avant-garde work, which was rewarded with lasting success at European level and numerous editions (six between 1894 and 1930 and two "supplements" to the sixth edition, in 1933 and 1937). In his *Traité*, from the very first edition, Pic articulated his discourse along the lines of an intuition that proved to be very fruitful: the existence of a necessary international link between the social policies of the countries of the West. Starting with the observation of certain empirical data: "Peaceful relations between nations, [...] similar organisation of large-scale industry [and] similar social problems in the various States, [...] general spread of socialism"[31], Pic showed an awareness of the importance of giving an accurate account of foreign labour legislation and accompanied each argument with a comparative feedback report. In this sense, highlighting the causes of the simultaneous development of labour legislation in the industrialised countries was an essential piece of the mosaic constructed by Pic, the glue that held the whole structure of the work together. The constant references to foreign legislation were based on the feeling that it was no longer possible to avoid reflecting on the homogeneous nature of the political and legal superstructures of the industrialised countries.

3. *Legal journals as case studies*: Il contratto di lavoro. Rivista di giurisprudenza e legislazione sociale

Pic's familiarity with comparative practice had been honed as editor of *Questions pratiques de législation ouvrière et économie sociale*, a journal he founded with Justin Godart in 1900 and edited until its closure in 1936.

From a methodological point of view, it should be noted that the journals have received generous attention from European legal historiography, thus stimulating a traditional but still very fruitful strand of studies dedicated to them[32]. As virtual meeting places for lawyers, the journals not only hosted

la pensée juridique au tournant du XXe siècle, Dalloz, 2009, pp. 123-158; AMOROSI, *cit.*, pp. 15 ff., 36 ff., 88 ff., 101 ff.

[31] PIC, *Traité élémentaire de législation industrielle*, Rousseau, 1894, p. 30-31.

[32] The bibliography on the subject is extensive and varied, I will only mention here GROSSI (ED.), *La "cultura" delle riviste giuridiche italiane*, Giuffrè, 1984, for the Italian context

and stimulated theoretical debate, but also served as a means of disseminating the latest publications, judgments and commentaries on legislation and political and social news, thus making available to a non-specialist public the views on the most pressing legal issues.

With regard to the journals devoted to labour problems at the beginning of the twentieth century, the discourse must be approached taking into account a number of specific factors: the embryonic stage of scientific specialisation, the complex and inhomogeneous nature of the legal sources in the technical sense (private contract law, public law, non-codified contractual practices), and the peculiar link between the nascent discipline and the material dimension of industrial relations (working conditions, emergence of collective instances, protagonism of political and trade union organisations). In view of these characterising aspects, comparison seems to be another attribute, of a methodological nature, functional to intensify the international exchange of virtuous models and to construct new and more effective rules.

The subject of the "uniform plots" of labour legislation in the various countries was frequently dealt with in the pages of Pic and Godart's journal, a journal that explicitly called itself "popular" and had as its programmatic aim the sensitisation and education of the general public on social issues[33]. In the dense programme published at the opening of the first issue, the comparison is immediately announced as a necessary complement to the first objective: the exposition of French legislation was to be compared with similar institutions abroad – there is no reference to Europe, demonstrating a comparative interest that could have a wider geographical scope. The third point of the programme is interdependent with the first two, since it was intended to highlight the shortcomings and deficiencies of French legislation, evidently on the basis of an analysis that would flank the study of national legal sources with a comparison with foreign ones.

An examination of the early issues of Pic and Godart's journal provides us with an interesting source of verification of the dissemination, in quantitative terms, and the instrumentality, in qualitative terms, of the legal understanding of labour problems at a crucial time for the definition of the discipline. The urgency of the topics dealt with in the journal is emphasised once again in the opening editorial, which makes it clear that social legisla-

and Stolleis, Simon (ed.), *Juristische Zeitschriften in Europa*, V. Klostermann, 2006 for the European context.

[33] La rédaction, *Notre programme*, in *QPLE*, 1900, 1, pp. 1-2.

tion was a recent phenomenon and at the same time developed rapidly because it responded to "urgent" and "universal" needs. On the basis of these considerations, the two editors went so far as to state "without fear of being contradicted" that the study of the protective laws of industrial labour dominated the concerns of political assemblies both in France and abroad. With such clarifications, the two authors implied the indissolubility of the transnational link of labour problems and consequently the necessary appropriateness of a comparative treatment of legal solutions.

The extensive and varied use of comparative methods in the doctrinal reflection on labour problems also characterises the editorial profile of the Italian journal *Il contratto di lavoro. Gli infortuni sul lavoro. Rivista di giurisprudenza e legislazione sociale*, published from 1904 to 1915. It is a publication that is still neglected in Italian historiography, although it seems to be rich in relevant insights: the strong comparative emphasis and the distinctly practical aims that can be deduced from its contents make it in many ways homologous to *Questions pratiques*, although less fortunate in terms of international resonance and longevity. Then, due to its thematic specificity, declared right from the title, it is a candidate to be considered as the first Italian labour law journal, at a time when the legal discourse on labour found space in journals of a heterogeneous nature and channelled a conspicuous number of successful research works to the *Rivista di diritto commerciale*[34].

Il contratto di lavoro was a monthly publication of about 32 pages that boasted an authoritative scientific commission composed of a number of personalities from the world of institutions and the legal professions with a keen interest and professional involvement in the legal resolution of social issues: the deputies Avv. Enrico De Marinis and Prof. Angelo Celli, the Advocate General at the Court of Cassation in Rome Oronzo Quarta, Prof. Pietro Cogliolo and the magistrate Camillo Cavagnari. Equally authoritative and recognised as labour lawyers are the many contributors listed on the cover, including Lodovico Barassi, Giuseppe Cimbali, Giuseppe Salvioli, Ercole Vidari, Luigi Rava and Lorenzo Ratto. Of this long list, which is intended to be a mere smokescreen to ensure scientific rigour, only Lorenzo Ratto stands out as a prolific collaborator.

The true soul of the Review was its two directors: the lawyers Cesare

[34] See Grossi, *Pagina introduttiva*, in *QF*, 1987, p. 4; Veneziani, Vardaro, *La "Rivista di diritto commerciale" e la dottrina giuslavorista delle origini*, in *QF*, 1987, p. 441 ff.

Cagli and Nilo Verona-Positano, assisted from the 1907 issue by the editors Tito Giorgi and Giovanni Secchi, carried out an editorial work that was sometimes ungrateful, out of respect for a goal that was not stated but that could be clearly deduced from the content and methodological approach of the Review. A brief letter *Ai lettori*, published on the back cover of the first issue of the second year, shows the interest of the editors in valuing the contribution of their readership, when they thanked the members and contributors and asked them to circulate the journal, to indicate possible subscribers and to report any judgments worthy of publication. From the few words of the editors, we can read several relevant profiles. The first point to consider is the difficulty of carrying out a publishing project that has all the appearance of a pioneering attempt in Italy, designed with the intention of creating a network among "those interested in the progress of the new social law" and in its implementation. The scarcity of resources and the magazine's peripheral position in relation to the more established journals, in terms of longevity, traditional content and the authority of the writers, led the editors to strengthen the loyalty of the readers with a call for collaboration in the expansion and improvement of the magazine, in the perspective of an editorial work that necessarily defined itself as "collective"[35].

The efforts of the editors to activate and involve the public, in addition to responding to the material need to keep the journal alive, should be read as a strategy for affirming a line of legal policy. From the very first doctrinal essay in the 1904 volume by Cesari Cagli, *Le trasformazioni del diritto privato e la legislazione sociale*, it is clear that the theoretical references of the editors were the exponents of legal socialism and that the common idea was the construction of a discipline of labour relations in which the benefits would be more fairly distributed among the different social classes[36].

From an overall view of the twelve volumes, it is possible to reconstruct a pattern of content organisation that remains stable over time and largely fulfils the promise contained in the terms of subscription (*Condizioni di Abbonamento*). The first section, with one or two essays per issue, is always devoted to doctrinal studies in the legal and social sciences. Most of the journal is devoted to case law: a review of the decisions of the Italian courts, ordinary, administrative and probiviral, carefully divided into recurring themes. The

[35] La direzione, *Ai Lettori*, in *CLR*, 1905.

[36] Cagli, *Le trasformazioni del diritto privato e la legislazione sociale*, in *CLR*, 1904, p. 4.

labour contract, accidents, women's and children's work, probationers, railway workers and work-related illnesses are some of the most frequent themes, and they show us in an effective and immediate way what were the emerging issues that were being imposed on the legal discourse on labour. In particular, from 1907 onwards, and always in a quantitative crescendo, the jurisprudential review was enriched with a subsection specifically entitled *Giurisprudenza estera*. References to foreign experience are not lacking in the sections devoted to: reviews of monographs and essays (*Rivista di dottrina*), also carefully divided by subject; the bibliographical review; the bulletin of information. In particular, the latter collected news on legislative matters and reproduced for the use of its readers the institutional acts considered most relevant, including laws, ministerial circulars, bills, both Italian and foreign, but also the deliberations of private bodies, such as chambers of labour, workers' or industrial associations. The consistency of the references to foreign experiences, the international dimension of the object of study and the heterogeneity of the topics covered can be easily appreciated through various examples found in the pages of the journal. Suffice it to quote here from the Bulletin of the first issue of 1907, which is entirely devoted to the transnational view: the presentation of the project for the codification of labour law in France; the news, with an agenda, of the forthcoming meeting of the Italian section of the *Association international pour la protection légale des travailleurs*; the news that the English House of Commons had approved in second reading a proposal to amend the Trade Unions Act of 1876, particularly important because it declared it lawful for trade union agents to use picketing to persuade anyone to abstain from work.

In the same way that the comparative approach is never declared but is adopted as an indispensable method and direction in the research carried out by the editors, the technical and instrumental component of the journal's content constitutes a distinctive profile that is nourished by the editors' privileged relationship with the professional environment and their familiarity with forensic and contractual practices. This feature is all the more evident in the final section of the dossiers, which is dedicated to resolving certain legal issues and is structured as a dialogue window between readers and editors, who discuss various, often very specific, topics.

It is not possible here to go into the depth of the various interest profiles covered by *Il contratto di lavoro*. The point would be to focus on its multiple thematic paths, the fluctuations in the political line adopted, the internal re-

lations between the various professionals involved as collaborators and the external projection of these relations and personalities. I can, however, offer some thoughts on a first approach to the case study, also in the light of the topic we have been given. *Il contratto di lavoro* is what one might call a "peripheral journal", because it did not attract the most established academic lawyers among its authors, and because it did not attract international contributors, it also had a pronounced practical vocation. Despite this description, however, the journal is full of topics of great appeal to legal historiography that questions the construction of the legal culture of labour in Europe. In fact, the comparative effort on the methodological level and the innovative ambition on the content level, the timid thrust towards legal policy objectives in the broadest sense, are peculiar characteristics precisely because they come from a journal with little resonance: they tell us of a wider community of jurists than has traditionally been represented, including lawyers, politicians, magistrates, state officials, who approached labour problems from localist perspectives and with different professional motivations, but who shared an imaginary of modernity and progress that was extraordinarily linked to the most advanced cultural coordinates of the legal discourse of the industrialised West.

Abstract

The use of comparative methods in the construction of labour law in the West has a longer history than labour law itself. The comparison of legislation, the circulation of institutional models and the sharing of interpretative paradigms are some of the features of a widespread practice that characterised labour law culture at the turn of the nineteenth and twentieth centuries. They contributed to defining the sources of national law, but also to activating European legal reflection on the hypotheses of international labour law. The paper deals with the intertwining of these themes and tries to examine the methods and the subject of the legal culture in an Italian journal of the early 20th century.

Keywords

History of Labour Law, Comparative Methods, International Labour Legislation, Legal Journals.

Simone Cafiero

The right to work as a social right in the Italian Constitution and in the Charter of Fundamental Rights of the European Union. A constitutional perspective

Contents: 1. Introduction. **2.** The notion of "social rights" in Italian constitutional law. The right to work as a social right. **3.** The Charter of Fundamental Rights of the EU: a European legal protection of the "right to work"? **4.** Conclusions.

1. *Introduction*

Much has been written, in Italian legal literature, concerning the relevance of work in the Italian Constitution. It is, in fact, art. 1 of the Constitution – whose legal significance has been at the center of attention in the academic debate[1] – that proclaims the Italian Republic to be "founded on work", thus introducing a principle pertaining directly to what constitutional law scholars name the "form of State", *i.e.* the relation between political authority and society[2]. On its basis, art. 35-40 contain provisions specifically

[1] About art. 1 of the Italian Constitution see MORTATI, *Art. 1*, in *Comm. Branca*, Zanichelli, 1975, p. 10 ff.; SMURAGLIA, *Il lavoro nella Costituzione*, in *RGL*, 2007, 2, pp. 427-428; FERRARA, *Il lavoro come fondamento della Repubblica e come connotazione della democrazia italiana*, in CASADIO (ed.), in *I diritti sociali e del lavoro nella Costituzione italiana*, Ediesse, 2006, p. 199 ff.; OLIVETTI, *Art. 1*, in BIFULCO, CELOTTO, OLIVETTI (eds.), *Commentario alla Costituzione*, Utet, 2008, p. 38 ff.; LUCIANI, *Radici e conseguenze della scelta costituzionale di fondare la repubblica democratica sul lavoro*, in *ADL*, 2010, 3, pp. 632-644; GROPPI, "*Fondata sul lavoro". Origini, significato, attualità della scelta dei Costituenti*, in *RTDP*, 2012, 3, p. 678 ff.; NOGLER, *Cosa significa che l'Italia è una Repubblica "fondata sul lavoro"?*, in *LD*, 2009, 3, pp. 436-437.

[2] About the notion of "form of State" see LANCHESTER, *Stato (forme di)*, in *ED*, Giuffrè, 1990, vol. XLIII, p. 796 ff.; BARTOLE, *Stato (forme di)*, in *ED Annali*, Giuffrè, 2008, vol. II-2, p. 1116 ff.

aimed at protecting the rights of workers, not only in relation to the State, but also in relation to private employers. In doing so, the Italian Constitution breaks ties with the tradition of liberal constitutions, whose indifference to the regulation of economic relations was in and of itself one of the key features of the liberal "form of State"[3].

In short, one of the most significant aspects of the Italian Constitution must be identified in the sheer number and detail of the provisions concerning work, workers, worker rights and employment relations. Among such provisions is art. 4 of the Constitution, which, significantly placed in the section of the constitutional document dedicated to the "Fundamental principles", enshrines the "right to work" as the first fundamental right to be individually mentioned in the whole text. Both in constitutional and in labour law doctrine, the right to work based on art. 4 of the Italian Constitution is commonly referred to as a "social right"[4].

It should be noted, however, that defining the right to work as a "social right" doesn't really help towards understanding its features and contents if there is no clear *consensus* as to what is meant by "social rights". Unfortunately, at least as far as Italian constitutional doctrine is concerned, this is precisely the case. In fact, although a careful reading of the Constitutional Assembly's debates and of the constitutional text itself makes it impossible to deny that such rights exist[5], that of "social rights" remains to this day one of the most obscure and disputed notions in the whole of Italian constitutional law.

In light of this, the present paper aims at answering the following questions: according to Italian constitutional law, what is a "social right"? Can

[3] Crisafulli, *Individuo e società nella Costituzione italiana*, in *DL*, 1954, 1, pp. 74-78. See also Giannini, *Lo Stato democratico-repubblicano*, in Id., *Per uno Stato democratico-repubblicano*, Edizioni di storia e letteratura, 2016, p. 16, as well as Dogliani, Giorgi, *Costituzione italiana: art. 3*, Carocci, pp. 84-85.

[4] Mazziotti, *Il diritto al lavoro*, Milan, Giuffrè, 1956, p. 87; Giubboni, *Il primo dei diritti sociali. Riflessioni sul diritto al lavoro tra Costituzione italiana e ordinamento europeo*, in *"Massimo D'Antona"*, 2006, 46, p. 5 ff.; Benvenuti, *Diritti sociali*, Utet, 2013, pp. 67-69. For a partially different approach to the social right to work see Salazar, *Alcune riflessioni su un tema "*demodè*": il diritto al lavoro*, in *PD*, 1995, 1, pp. 3-5 and 13-17, as well as Id., *Dal riconoscimento alla garanzia dei diritti sociali. Orientamenti e tecniche decisorie della Corte costituzionale a confronto*, Giappichelli, 2000, p. 43 ff.

[5] For poignant references to the debate about social rights at the start of the Constitutional Assembly's mandate see Calamandrei, *Costituente e questione sociale*, in Id., *Opere giuridiche*, Morano, 1968, vol. III, pp. 175-182.

the right to work, as set forth in art. 4 of the Italian Constitution, truly be defined as a "social right"? What consequences does such a definition entail, as regards the relation between the individual and public authorities?

After examining these questions, the focus will shift towards European Union law, in order to assess whether a legal protection of the "right to work" might be found in the relevant provisions of the European Charter of Fundamental Rights. Such an inquiry holds interest for at least two reasons. Firstly, because it highlights the benefits that, in a globalized world in which economic relations often escape the control of national States, might arise from a European protection of employment as the substantive object of a right. Secondly, because it might help towards understanding the extent to which, in this particular matter, the European Charter of Fundamental Rights builds upon the constitutional traditions of the Member States. In other words, confronting the Italian Constitution with the Charter in light of the "right to work" might offer a chance to ponder whether truly, as many say, the social model underlying the former finds itself replicated and strengthened in the latter.

In this perspective, it shall be necessary to face the following questions: is there a right to work in the European Charter of Fundamental Rights? If so, what kind of legal protection does such a right receive? Can it, too, be regarded as a "social right"?

2. *The notion of "social rights" in Italian constitutional law. The right to work as a social right*

As previously mentioned, although social rights represent one of the key components of the relationship between political authority and the community envisaged by the drafters of the Italian Constitution, and although the Constitution itself clearly refers to a group of constitutional rights named "social rights" (see articles 117, par. 2, lett. *m*, and 120, par. 2), few notions are as contentious and disputed, in the field of Italian constitutional law, as that of "social rights"[6]. As noted by Luigi Ferrajoli, such uncertainty is, no doubt,

[6] Giorgis, *Diritti sociali*, in Cassese (ed.), *Dizionario di diritto pubblico*, Giuffrè, 2006, p. 1903 ff.; Pinelli, *Dei diritti sociali e dell'eguaglianza sostanziale. Vicende, discorsi, apprendimenti*, in D'Amico (ed.), *Alle frontiere del diritto costituzionale. Scritti in onore di Valerio Onida*, Giuffrè, 2011, p. 1429 ff.

a symptom of the lack of a solid legal theory concerning the Welfare State, arising from a more general incapability of adapting the forms and instruments of the rule of law to the State's new social responsibilities[7].

Before trying to offer a clear definition, it might be useful to revisit the academic debate concerning the concept of "social rights", by briefly mentioning the main theories proposed on the subject. According to the more traditional theories[8] – which, despite having been first introduced in the Forties and Fifties, are to this day advocated by some Italian legal scholars[9] – constitutional rights should be divided into two groups: *civil rights* (also called *freedoms*), which require public authorities not to coerce the individual, thus protecting his/her autonomy; and *social rights*, whose main feature lies in a demand of a positive commitment by public authorities through legislative and administrative action. It must be stressed that, according to these theories, the difference between civil and social rights is of a purely *structural* nature: if the structure of a certain right entails some sort of an active benefit provided by public authorities, the right in question is a social right; if not, it must be defined as a civil right. For this reason, these theories have also been described as "structuralist theories"[10]. According to some "structuralist theories", from a strictly legal perspective, social rights should be regarded as somewhat less relevant than civil rights: unlike the latter, which are in full force by dint of their very mention in the Constitution, the former only truly take effect once the relevant public benefits have been outlined by the legislator[11].

Starting from the Nineties, the aforementioned traditional approach has been challenged by other theories, sometimes labeled "innovative theories" or "continuity theories"[12], whose unifying trait lies in opposing the idea of

[7] Ferrajoli, *Stato sociale e Stato di diritto*, in *PD*, 1982, pp. 42-43 and p. 44.

[8] For some of the earliest traditional theories see Giannini, *cit.*, pp. 20-21; Calamandrei, *L'avvenire dei diritti di libertà*, in Id., *Opere giuridiche*, *cit.*, vol. III, pp. 197-200; Pergolesi, *Alcuni lineamenti dei "diritti sociali"*, Giuffrè, 1953, p. 10; Grasso, *"Stato di diritto" e "Stato sociale" nell'attuale ordinamento italiano*, in *IlPol*, 1961, 4, p. 807 ff.; Mazziotti, *Diritti sociali*, in *ED*, Giuffrè, 1964, vol. XII, p. 805.

[9] Pace, *Problematica delle libertà costituzionali. Parte generale*, III ed., Cedam, 2003, pp. 140-152; Grossi, *Qualche riflessione per una corretta identificazione e sistemazione dei diritti sociali*, in Id., *Il diritto costituzionale tra principi di libertà e istituzioni*, Cedam, 2005, p. 29 ff.

[10] Piccione, *I diritti sociali come determinanti di libertà nello stato costituzionale. Il paradigma del rapporto tra libertà e condizioni di disabilità*, in *MCG*, 2021, 2, pp. 377-378.

[11] Pace, *cit.*, p. 149; Onida, *Eguaglianza e diritti sociali*, in *Corte costituzionale e principio di eguaglianza*, Cedam, 2002, pp. 104 and 107.

[12] Goldoni, *La materialità dei diritti sociali*, in *DP*, 2022, 1, pp. 144-145.

there being a structural difference between freedoms and social rights. Among these theories, the most influential are those proposed by Antonio Baldassarre and Massimo Luciani. According to the former, the notion of social rights should be construed as comprising all constitutional rights that are afforded to the individual by virtue of their belonging to a certain relational environment, such as their family, their school, their workplace[13]. This theory, however, appears to advocate an excessively broad notion of social rights: so broad, in fact, that on its basis *all* constitutional rights might be construed as social rights, since – at a closer look – all rights depend, one way or another, on the individual's connection to a certain human community.

On the other end, in Luciani's view, no structural difference should be drawn between civil and social rights because all constitutional rights, freedoms included, imply some measure of active commitment on the part of public authorities[14]. Despite raising some very valid points, this argument, too, does not appear entirely persuasive. While it is undeniable that social rights are not the only fundamental rights to require some form of active involvement by public authorities, the kind of involvement they require is vastly different to that of civil rights: in fact, only social rights entail benefits that are specifically targeted towards removing social and economic inequalities among the recipients. In a very well-meaning attempt to oppose the idea of a legal minority of social rights, Luciani's theory of social rights seems to downplay the essential relation between said rights and the principle of material equality set forth in art. 3, par. 2, of the Italian Constitution, and should therefore be rejected.

On basis of these remarks, it can be argued that the first and most significant difference between civil and social rights lies not in their structure, but rather in their respective *function*. The function of social rights, which

[13] Baldassarre, *Diritti sociali*, in *EGI*, 1989, p. 14 ff. Similar remarks are present in Bifulco, *L'inviolabilità dei diritti sociali*, Jovene, 2003, pp. 11-18.

[14] Luciani, *Sui diritti sociali*, in *Studi in onore di Manlio Mazziotti di Celso*, Cedam, 1995, vol. II, pp. 118-122. See also Salazar, *Dal riconoscimento alla garanzia dei diritti sociali. Orientamenti e tecniche decisorie della Corte costituzionale a confronto*, Giappichelli, 2000, pp. 11-15; Diciotti, *Sulla distinzione tra diritti di libertà e diritti sociali*, in *QC*, 2004, 4, *passim*; Razzano, *Lo "statuto" costituzionale dei diritti sociali*, in *GDP*, 2012, 3, p. 67 ff.; Rigano, Terzi, *Lineamenti dei diritti costituzionali*, Franco Angeli, 2021, pp. 78-79. The influence of this theory is also apparent in D'Aloia, *Eguaglianza sostanziale e diritto diseguale. Contributo allo studio delle azioni positive nella prospettiva costituzionale*, Cedam, 2002, p. 28.

separates them from all other fundamental rights, is that of removing those inequalities which prevent access to what we might call "fundamental opportunities", *i.e.* those resources – material or otherwise – that are indispensable towards personal fulfilment and active involvement in the community[15]. This particular function also determines the structure of social rights: unlike civil rights, social rights are what Italian legal theory calls "relative rights", that is to say rights whose fulfilment requires a positive action by specific subjects[16]. In most cases, these subjects must be identified in public authorities[17]; in others, they are to be found in individuals who, by virtue of their involvement in peculiar social and economic relations, find themselves in a position to directly influence the living conditions of other individuals[18]. In short, social rights are characterized first and foremost by their function, and only then by their structure[19].

It is on the first group of social rights – those implying the active involvement of public authorities – that we shall focus in the following analysis. If the peculiar object of these rights is represented by public provisions, the legislator's intervention is necessary to determine exactly what provisions are due, what groups of individuals are entitled to them, what public authorities are responsible for them[20]. As a consequence, social rights of this kind encompass, first and foremost, a claim against the legislator, in keeping with the idea – typical of the Italian system – that it is the Constitution's intention to indicate not only what the legislator *cannot* state, but also what the legislator *must* state and provide for[21].

This point might be better illustrated through a brief reference to Vezio

[15] Caravita, *Oltre l'eguaglianza formale. Un'analisi dell'art. 3 comma 2 della Costituzione*, Cedam, 1984, pp. 65-67; Barcellona, *Diritti sociali e Corte costituzionale*, in *RGL*, 1994, 2, p. 327; Pezzini, *La decisione sui diritti sociali*, Giuffrè, 2001, p. 189; Giorgis, *La costituzionalizzazione dei diritti all'uguaglianza sostanziale*, Jovene, 1999, p. 6; Riva, *Eguaglianza*, in Caruso, Valentini (eds.), *Grammatica del costituzionalismo*, il Mulino, 2021, p. 233.

[16] Grossi, *cit.*, p. 30.

[17] In the Italian Constitution, such is the case of the rights to work (art. 4), healthcare (art. 32), education (art. 33 and art. 34) and social security (art. 38).

[18] The main examples of this category of social rights are the worker's rights to adequate and fair wages, weekly rest and annual paid leave (art. 36). Such rights therefore pertain to the employment relation existing between employer and employee.

[19] Giorgis, *La costituzionalizzazione dei diritti*, cit., *passim* and especially pp. 6 and 50-51; Benvenuti, *cit.*, pp. 9-12.

[20] Onida, *Eguaglianza e diritti sociali*, cit., p. 107 ff.

[21] Giorgis, *La costituzionalizzazione dei diritti*, cit., pp. 15-16; Benvenuti. *cit.*, p. 48.

Crisafulli's theory of "programmatic norms". In this author's view, far from simply "recommending" this or that program of action, which public authorities may or may not pursue, "programmatic norms" impose a peculiar legal obligation on the legislator: the obligation to pursue a certain aim indicated by the Constitution[22]. Such an obligation produces legal consequences of the utmost importance, consisting of a *non-regression rule*: once the appropriate provisions have been set forth, they cannot simply be removed, and even their restrictive modification is subject to a strict scrutiny by the Constitutional Court. Further, "programmatic norms" prevent the legislator from setting forth norms that contrast with the aims indicated by the Constitution[23].

It is precisely this notion of "programmatic norms" that allows Italian legal scholars to construe the "right to work", as set forth by art. 4, par. 1, of the Italian Constitution, as a social right. As understood by the main constitutional doctrine, in addition to the freedom of choosing one's occupation, this article encompasses two kinds of obligations imposed upon the legislator. Firstly, an obligation to plan and promote expansive economic policies meant to increase the chances of employment, with a view at attaining full employment[24], as well as to structure a system of placement services allowing for the meeting of supply and demand of work[25]. Seen from this angle, the social right to work lends itself to being described as a "right to have work made available"[26]. Secondly, the social right to work implies the legislator's obligation to regulate employment relations in such a way as to prevent arbitrary termination by the employer, thus protecting the worker's interest in stability[27]. So construed, art. 4, par. 1, of the Italian Constitution enjoys con-

[22] CRISAFULLI, *Introduzione*, in ID., *La Costituzione e le sue disposizioni di principio*, Giuffrè, 1952, p. 19, as well as CRISAFULLI, *Le norme "programmatiche" della Costituzione*, in ID., *La Costituzione e le sue disposizioni di principio*, cit., p. 54.

[23] CRISAFULLI, *Sull'efficacia normativa delle disposizioni di principio della Costituzione*, in ID., *La Costituzione e le sue disposizioni di principio*, cit., p. 48; MAZZIOTTI, *Diritti sociali*, cit., p. 806; PACE, cit., p. 150.

[24] MORTATI, *Il diritto al lavoro secondo la Costituzione della Repubblica (natura giuridica, efficacia, garanzie)*, in ID., *Raccolta di scritti*, Giuffrè, 1972, vol. III, p. 152 ff.

[25] GIUBBONI, *Il primo dei diritti sociali. Riflessioni sul diritto al lavoro tra costituzione italiana e ordinamento europeo*, in *"Massimo D'Antona"*, 2006, 46, p. 7 ff.

[26] To employ a definition proposed by ASHIAGBOR, *Article 15*, in PEERS, HERVEY, KANNER, WARD (eds.), *The EU Charter of Fundamental Rights: a Commentary*, Beck-Hart-Nomos, 2014, p. 428, concerning art. 1 of the Revised European Social Charter.

[27] CRISAFULLI, *Appunti preliminari sul diritto al lavoro nella Costituzione*, in *RGL*, 1951, pp.

siderable similarities to art. 1 and 24 of the European Social Charter, as revised in 1996.

The latter of the aforementioned obligations represents, without a doubt, the main reading key of the constitutional jurisprudence concerning the right to work. As a matter of fact, starting from ruling no. 45/1965, the Italian Constitutional Court has held that the right to work, as protected by art. 4, par. 1, entails "an obligation to orient the activity of all public authorities, the legislator included, so as to create the economic, social and legal conditions" of full employment. Crucially, among such "legal conditions" is the provision of "due limitations" of the employer's power of discharge. An obligation which the Italian legislator has fulfilled with parliamentary act no. 604/1966 and, later, with parliamentary act no. 300/1970. In later years, in rulings such as no. 60/1991, 541/2000 and 56/2006, the Constitutional Court has further developed this theory by stating that the right to work includes a right "not to be unjustly dismissed": as a consequence, it is the legislator's duty to regulate the power of discharge in such a way as to prevent its arbitrary use. Lastly, in rulings no. 59/2021 and 125/2022, both concerning the regulation of dismissals for economic reasons in the so-called "riforma Fornero" (parliamentary act no. 92/2012), the Constitutional Court has taken another step forward, by adding that the aforementioned right requires remedies against unlawful dismissals to be effective both in discouraging the employer from unjustly terminating employment contracts and in compensating the damage inflicted on the worker. In summary, according to the Constitutional Court, a key component of the social right to work is the legislator's obligation to precisely regulate, and therefore limit, the employer's power of discharge.

To further highlight these features of Italian constitutional and labour law, it might be of interest to note that the approach to dismissals is vastly different from that of the U.S. system. Here there is no general principle of due protection of workers against wrongful discharge, much less a veritable "social right" requiring the national legislator to restrict the employer's power of dismissal. In fact, in the U.S. the subject of dismissals is governed by the opposite principle of "at-will employment", according to which both the employer and the employee are presumed to be able to terminate the

168 ff.; Salazar, *Alcune riflessioni su un tema "demodè*, cit., pp. 13-17; Calcaterra, *Diritto al lavoro e diritto alla tutela contro il licenziamento ingiustificato. Carta di Nizza e Costituzione italiana a confronto*, in *"Massimo D'Antona"*, 2008, 58, p. 14.

contract whenever they please and for whatever reason. Consequently, in principle, the employer is free to dismiss the employee without need of a valid reason.

These remarks, of course, shouldn't be taken to mean that dismissals are completely bereft of regulation. Such regulation exists, and it is, in fact, copious. But crucially, it arises not from the federal Constitution of the United States (which, as has been noted, does not contain a single article or amendment pertaining to social rights[28]), but rather from federal legislation, from State statutes and, in part, from the Supreme Court's case law[29]. The difference from the Italian system, as construed by the Constitutional Court, could not be clearer: neither the federal legislator nor the States are in any way obliged to restrict the power of discharge in view of the worker's interest to stability. The consequences are obvious: federal and State statutes are free to suppress all existing statutory protection against dismissal, if they so choose; a conclusion which, in view of the social right to work, the Italian Constitutional Court has consistently rejected.

3. *The Charter of Fundamental Rights of the EU: a European legal protection of the "right to work"?*

In light of the foregoing, it is possible to attempt a brief evaluation of the scope and meaning of the "right to work" in the Charter of fundamental rights of the European Union. Unlike the Italian Constitution, and unlike the Revised European Social Charter, the Charter of fundamental rights is undoubtedly centered around the idea of freedom to choose one's occupation[30]. Such a connotation is apparent in art. 15, which, tellingly placed in Title II (concerning "freedoms"), closely associates the "right to engage in work" with the right "to pursue a freely chosen or accepted occupation", as well as with the "freedom" of European citizens "to seek employment,

[28] Bassu, Betzu, Clementi, Coinu, *Diritto costituzionale degli Stati Uniti d'America. Una introduzione*, Giappichelli, 2022, p. 96-98.

[29] Foote, *Il diritto del lavoro statunitense: un sistema deregolamentato?*, in *DRI*, 1999, 2, pp. 129-130; Zubin, *Il licenziamento nell'ordinamento statunitense*, in *RGL*, 2018, 1, pp. 169-174.

[30] Ashiagbor, *cit.*, pp. 423 and following; Ales, *Articles 5, 8, 15, 29 CFREU*, in Ales, Bell, Deinert, Robin-Olivier (eds.), *International and European Labour Law*, Beck-Hart-Nomos, 2018, p. 195 ff. See also Del Punta, *I diritti sociali come diritti fondamentali: riflessioni sulla Carta di Nizza*, in *DRI*, 2001, 3, esp. p. 343 ff.

to work, to exercise the right of establishment and to provide services in any Member State". Even more significantly, the Explanations relating to the Charter of fundamental rights, as prepared under the authority of the Praesidium of the European Convention, state that art. 15 draws specifically upon art. 1, par. 2, of the Revised European Charter of Social Rights; that is to say, the only paragraph dealing not with the "social" dimension of the "right to work", but with free choice of occupation. Further, the Explanations strictly associate art. 15 with the "freedoms" guaranteed by artt. 26, 45, 49 and 56 of the Treaty on the Functioning of the European Union.

This isn't to say that the more "social" connotations of what the Italian Constitution names the "right to work" are completely absent from the Charter. In fact, whereas art. 29 guarantees a right to a free placement service, art. 30 endows workers with a right to protection against unjustified dismissal. It would be incorrect, however, to conclude that the latter provision enjoys the same systematic position – the same legal relevance – as in the Italian Constitution. As stated by the Court of Justice in the well-known *AMS* case[31], in order to determine whether an article of the Charter provides a "right" or a "principle", for the intents and purposes of art. 51 and art. 52, it is necessary to consider the "wording" of said article. Now, considering that art. 30 does not determine what is meant by "unjustified dismissal", nor what kind of "protection" is accessible in such cases, whereas it does refer to existing "Union law and national laws and practices", it seems inevitable to identify such article as a "principle", rather than a "right"[32]. And crucially, concerning the "principles" set forth in the Charter, art. 52, par. 5, explicitly states that they "*may* be implemented by legislative and executive acts" of the Union or the Member States, which has been taken to mean that the enactment of such "principles" is merely *optional* for the legislators involved[33]. Such a conclusion is again supported by the Explainations, according to which "[p]rinciples *may* be implemented through legislative or executive acts […]. They do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities". The non-mandatory nature of said implementation might find further confirmation

[31] Case C-176/12.

[32] *Contra*, however, see Delfino, *La Corte e la Carta*, in *DLM*, 2014, 1, pp. 179-180.

[33] Proia, *Lavoro e Costituzione europea*, in *ADL*, 2004, 2, p. 524; Peers, Prechal, *Article 52*, in Peers, Hervey, Kanner, Ward (eds.), *The EU Charter of Fundamental Rights*, cit., p. 1509.

in the fact that, to this day, a Directive of the EU on the general protection of workers against unjustified dismissals is yet to be adopted[34].

On the other hand, in the Italian constitutional order, the "right not to be unjustly dismissed" is a key component of the social right to work, that is to say a right provided by a "programmatic norm", whose implementation, by definition, is *mandatory* for the legislator; so much so that the relevant norms, once provided, are subject to a principle of *non-regression*, nor can the national legislator produce laws contrasting the constitutional objective.

4. *Conclusions*

It has been argued that, despite not explicitly mentioning the "right to work", the European Charter of Fundamental Rights contains all the main features that have been identified in art. 4 of the Italian Constitution. In particular, the "right not to be unjustly dismissed", *i.e.* the most significant "social" component of the right to work, is protected by art. 30 of the Charter[35].

Such a conclusion, however, does not appear entirely persuasive. Firstly, with the sole exception of art. 29, the aspect of the "right to have work made available" is completely absent from the Charter. Secondly, as art. 52, par. 5, makes abundantly clear, the Charter is unwilling to allow the existence of "programmatic norms" encompassing rights to a positive action by the European and national legislators. Unlike the "programmatic norms" set by some articles of the Italian Constitution, the Charter's "principles" – including art. 30 – are optional in nature, and therefore cannot give rise to any direct claim against public authorities. As such, no social rights against the legislator stem from the Charter's "principles". It follows that no "social right to work" might be derived from art. 30 of the Charter.

[34] KENNER, *Article 30*, in PEERS, HERVEY, KANNER, WARD (eds.), *The EU Charter of Fundamental Rights*, cit., p. 805 ff.

[35] ALAIMO, *Il diritto al lavoro fra Costituzione nazionale e Carte europee dei diritti: un diritto "aperto" e "multilivello"*, in *"Massimo D'Antona"*, 2008, 60, pp. 42-47.

Abstract

Moving from a recollection of the Italian academic debate concerning the notion of "social rights", the paper aims to offer a definition of "social rights" through which to look at the "right to work", as outlined by art. 4 of the Italian Constitution and by the rulings of Constitutional Court. On this basis, the Italian Constitution shall be compared to the European Charter of Fundamental Rights, in order to determine whether the "right to work" enjoys the same kind of legal protection both at the national and at the European level.

Keywords

Right to work, Social rights, Programmatic norms, Italian Constitution, European Charter of Fundamental Rights.

Archita Mohapatra

A Comparative Analysis of the Role of Key Actors in Recognizing Rights of Delivery Riders in the UK and Spain

Contents: 1. Introduction. **2.** Literature Review. **3.** Case description: Legal status and regulatory framework. **4.** Role of key actors in the recognition of rights of delivery riders. **5.** Concluding Remarks.

1. *Introduction*

Platform economy has been on the rise around the globe with non-standard work arrangements becoming more and more common. Platform work is a type of non-standard work arrangement which is an ideal tested for analyzing the suitability of the "binary divide" between employment and self-employment that is found in many legal orders[1]. Though platform work already existed since long, the outbreak of COVID-19 epidemic brought several alternative working arrangements into the mainstream. According to a press release by European Commission, over 28 million people in the European Union work through digital labour platforms and their number is expected to reach 43 million people in 2025[2]. Based on these figures, it has become crucial to bring this issue to the forefront and recognize basic social rights of platform workers.

The primary objective of the paper is to understand the current status of the rights of delivery riders in food delivery sector and analyze the role of institutional framework and social partners in the strategies

[1] Aloisi, *Platform work in Europe: Lessons learned, legal developments and challenges ahead*, in *ELLJ*, 2022, 13, 1, pp. 4-29, https://doi.org/10.1177/20319525211062557.

[2] EC, *Commission proposals to improve the working conditions of people working through digital labour platforms*, 9.12.2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6605.

adopted by two different countries, namely the United Kingdom and Spain, in recognizing the rights of these workers. The focus of this research is only on the rights of the delivery riders among the food delivery couriers. The paper has selected two countries belonging to two different Industrial Relations (IR) clusters in order to study the differences in the dimensions of IR regime in terms of the degree of state intervention in resolving social issues as well as the role of social partners in framing public policy.

In this paper, the aim is to understand how the differences in the institutional framework and degree of involvement of social partners in two distinct IR regimes have influenced the approach adopted by the UK and Spain for recognizing the rights of platform workers. The paper has drawn inspiration from a wide range of secondary sources including academic journals, jurisprudence, media reports, policy papers and reports of EU institutions.

The paper has been broadly divided into three chapters. The first chapter explains the current position of legal classification of platform workers in the UK and Spain and the rights that are guaranteed to them for their protection. The chapter also discusses the regulatory framework in both countries on this issue. Further, the second chapter delves into the main research question of this paper which is to understand the role of institutional framework and involvement of social partners in influencing the approach adopted in recognizing the rights of platform workers in the UK and Spain. Lastly, the third chapter brings out the societal and academic relevance of the research, provides research findings and recommendations for recognizing the rights of the platform workers.

2. *Literature review*

Since platform work has not been defined *per se*, it is generally explained by a wide range of terms used for identical or similar concepts, such as "platform economy", "sharing economy", and "collaborative economy" for the larger phenomenon, and "gig work", "crowd work", and "cloud work" for the labour-intensive part thereof[3]. However, the lack of clarity in termino-

[3] KILHOFFER, *State-of-the Art. Data on the platform economy*, in *InGRID Supporting Expertise*

logy puts these workers in a vulnerable position as the delivery platforms often deny having any employment relationship with them. As a result, food delivery riders (platform workers) struggle with precarious working conditions such as long working hours, no minimum wages or social insurance to comply with terms and conditions of engagement with platform companies leading to labour exploitation. Further, the recent surge in the number of law suits on this issue as well as various reports by EU institutions analyzing the legal status of platform workers has made it clear that the existing legal framework is not equipped to guarantee even the basic social rights to platform workers[4]. Therefore, the long-standing fight of delivery riders continues with the hope of securing some form of recognition and protection in the near future.

With regard to the issue of delivery riders, countries seem to be divided on the legal status that they assign to the workers depending upon their national political economies: while some countries establish the rights of workers through strategic litigations, others have enacted regulations to deal with the issue. Referring to the literature on Varieties of Capitalism, the UK features a Liberal Market Economy (LME) in which firms coordinate their endeavours relying on market institutions primarily[5]. In contrast to LMEs, Coordinated Market Economies (CMEs) follow the approach in which firms draw their support from political and societal institutions to resolve the coordination issue in addition to markets and hierarchies[6]. However, it is argued that Spain does not strictly fall under either of the two models which are the ideal capitalist models suggested by Hall and Soskice[7], and instead it follows "Mixed Market Economy" (MME) model. Molina and Rhodes argue that Spain possesses institutional framework along with strategic coordination

in Inclusive Growth, Deliverable n°12.3, Leuven, InGRID-2 project 730998 - H2020, 2021, http://www.inclusivegrowth.eu.

[4] Urzì Brancati, Pesole, Fernández-Macías, *New evidence on platform workers in Europe*, Publications Office of the European Union, 2020, https://publications.jrc.ec.europa.eu/repository/handle/JRC118570.

[5] Hall, Soskice, *An Introduction to Varieties of Capitalism*, in Hall, Soskice (eds.), *Varieties of Capitalism: The institutional Foundations of Comparative Advantage*, Oxford University Press, 2001, p. 27.

[6] Frege, Kelly, *Theoretical perspectives on comparative employment relations*, in Frege, Kelly (eds.), *Comparative Employment Relations in the Global Economy*, 2nd ed., Routledge, 2020.

[7] Royo, *Varieties of Capitalism in Spain: Business and the Politics of Coordination*, in *EJIR*, 2007, 13, 1, pp. 47-65, https://doi.org/10.1177/0959680107073967.

through tripartite social pacts[8], which are the salient characteristics of MMEs[9].

While state typically plays a greater role in MMEs, its role has changed substantially over the years giving way to various forms of social dialogue in order to resolve various issues of coordination[10]. Shifts in the triangle of state, associations and market have been determined by the capacity of economic actors to fill the consequent regulatory vacuum[11].

3. *Case description: Legal status and regulatory framework*

This chapter delves into the case studies of the UK and Spain clarifying the legal status of delivery riders as well as the institutional and regulatory framework in both countries.

United Kingdom

Under employment law in the UK, there are three main categories of employment status: worker[12], employee and self-employed independent contractor[13]. While there is a binary divide in the common law in UK between employees and independent contractors, work is a statutory status. A "worker" is defined under Section 230(3) of Employment Rights Act 1996 (ERA) as "an individual who has entered into or works under a contract of employment, in which the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by

[8] Hall, Gingerich, *Varieties of Capitalism and Institutional Complementarities in the Macroeconomy*, MPIfG Discussion Paper, No. 04/5, 2004, p. 35.

[9] Molina, Rhodes, *The Political Economy of Adjustment in Mixed Market Economies: A Study of Spain and Italy*, in Hancké, Rhodes, Thatcher (eds.), *Beyond Varieties of Capitalism: Conflict, Contradictions, and Complementarities in the European Economy*, Oxford University Press, 2007, pp. 223-252.

[10] Meardi, *Mediterranean Capitalism under EU Pressure: Labour Market Reforms in Spain and Italy*, in *WFES*, 2012, 3, p. 59.

[11] Molina, Rhodes, *cit.*, pp. 223-252.

[12] Employment Rights Act 1996, § 230 (3), https://www.legislation.gov.uk/ukpga/1996/-18/section/230.

[13] Employment Rights Act 1996, § 230 (3), https://www.legislation.gov.uk/ukpga/1996/-18/section/230.

virtue of the contract that of a client or customer of any profession or undertaking carried on by the individual[14]. All employees are "workers" under the law, however some of the employees who might not satisfy the criteria for the common law test for employee status may be described as limb (b) workers, by virtue of Section 230(3)(b) of the ERA"[15].

In the landmark judgment of *Uber BV v Aslam*, the UK Supreme Court has rejected the appeal and upheld the decision of the Employment Tribunal that drivers who worked for Uber London (which also includes UberEats) under "worker's contracts" are workers within the meaning of the statutory definition of Employment Rights Act, 1996[16], since the control exercised by Uber over the drivers was sufficient to indicate that, under the statutory tests, they were workers under the statutory definition[17]. Such workers have basic rights that employees possess and they claim these rights by meeting the statutory test.

However, the Central Arbitration Committee (CAC), in another case which was filed by a grassroot trade union, Independent Workers' Union of Great Britain (IWGB) on behalf of Deliveroo riders, held that Deliveroo riders are not "workers" within the statutory definition of either Section 296 Trade Union and Labour Relations Consolidation Act 1992 (TULRCA) or Section 230(3)(b) Employment Rights Act 1996[18]. In this case, Deliveroo sought to prevent a successful application to the CAC by inserting a "substitution clause" which enabled riders to fund a substitute to perform their work for them. Deliveroo provided evidence that a few riders did use that substitution clause which persuaded the CAC that it was genuine. Since "riders have a right to substitute themselves both before and after they have accepted a particular job", so there was no obligation for them to do or personally perform any work or services as required by Section 296[19]. It was on

[14] Nyombi, Chrispas, *A Response to the Challenges Posed by the Binary Divide between Employee and Self-Employed*, in *IJLMA*, 2015, 57, 1, pp. 3-16.

[15]Employment Rights Act 1996, § 230 (3), https://www.legislation.gov.uk/ukpga/1996/18/section/230.

[16] Uber BV and others v. Aslam and others 5 UKSC, 2021, https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf.

[17] Adams-Prassl, *Uber BV v Aslam: '[W]ork relations … cannot safely be left to contractual regulation'*, in *ILJ*, 2022, 51, 4, pp. 955-966, https://doi.org/10.1093/indlaw/dwac027.

[18] Independent Workers' Union of Great Britain (IWGB) v. RooFoods Ltd. T/A Deliveroo TUR1/985, 2016, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/663126/Acceptance_Decision.pdf.

[19] Atkinson, Dhorajiwala, *IWGB v RooFoods: Status, rights and substitution*, in *ILJ*, 2019, 48, 2, pp. 278-295, https://doi.org/10.1093/indlaw/dwz009.

this basis that the CAC found that the requirements of s.230(3)(b) ERA 1996 were not met. The decision was upheld on judicial review by the High Court and the Court of Appeal[20]. Lastly, the judgment has been appealed to the Supreme Court of UK and its decision is awaited, at the time of writing this article.

Based on the current decision, it is clear that delivery riders are not workers according to the CAC, the claim of IWGB for recognition and right to negotiate with Deliveroo on pay, hours, and holidays, was denied[21]. Since grassroot unions organize and mobilize workers in the UK and enter into litigations in courts to win strategic litigations to establish basic rights of delivery riders[22], these case laws resolve the issue only for the concerned parties in the lawsuit, and may not apply universally to all delivery riders in the UK unless it is a decision by the Supreme Court[23]. In case of a decision by the Supreme Court, the principle embedded in the *ratio decidendi* of the case is universally applicable due to the doctrine of precedent. To the extent that it is a decision by a lower court, it may be practically difficult for the grassroot unions to reach a solution which is binding on all delivery riders, due to limited resources and without any institutional support or intervention[24]. Therefore, it may be possible to put to rest the question of legal classification of delivery riders by way of a specific legislation[25], which has been done by Spain.

Spain

In Spanish employment law, three types of distinct professional status have been enshrined: employees, self-employed people and economically dependent self-employed (TRADE)[26]. In terms of the rights prescribed

[20] The Independent Workers Union of Great Britain v The Central Arbitration Committee [2021] EWCA Civ 952.

[21] Independent Workers' Union of Great Britain (IWGB) v. RooFoods Ltd. T/A Deliveroo TUR1/985, 2016, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/663126/Acceptance_Decision.pdf.

[22] Bertolini, Dukes, *Trade Unions and Platform Workers in the UK: Worker Representation in the Shadow of the Law*, in *ILJ*, 2021, 50, 4, pp. 662-688, https://doi.org/10.1093/indlaw/dwab022.

[23] Bertolini, Dukes, *cit.*, pp. 662-688.

[24] Bertolini, Dukes, *cit.*, pp. 662-688.

[25] Bertolini, Dukes, *cit.*, pp. 662-688.

[26] Perez del Prado, *The Legal Framework of Platform Work in Spain: The New Spanish "Riders' Law"*, in *CLLPJ*, 2021, *36 - Spain*, p. 1.

under law, TRADEs fall between two categories of employees and self-employed. The dichotomy under Spanish law was whether delivery riders fall within the category of TRADEs or employees. Consequently, the Spanish government intervened to resolve the dilemma by enacting Riders' law (*Ley Rider*) which has settled the legal position of delivery riders for the time being, making Spain one of the first countries in Europe to have a specific legislation on this issue. This law came into force on 12 August 2021 upon the conclusion of a tripartite collective bargaining agreement between representative social partners at national level – trade union CCOO (Workers' Commission) and UGT (General Workers' Confederation), as well as employer organisation CEOE (Spanish Confederation of Business Organisations) and CEPYME (Spanish Confederation of Small and Medium Enterprises) – and the Spanish government[27].

The new law in Spain brings to a close all ambiguities surrounding the legal status of the delivery riders and recognizes them as employees, under specific circumstances, instead of independent contractors. This provision is said to draw its recognition from the judgment of the Spanish Supreme Court in September 2020[28], in which the court held that Glovo food delivery riders were "employees" since the platform dictated working conditions of the workers and unilaterally determined the rates, and the performance of such work was integrated into the business of the firm[29]. Further, the law grants the right of information to the employees' representatives with respect to the parameters, rules and instructions on which algorithms or artificial intelligent systems are based[30].

The difference in the approaches adopted by both countries depends upon the institutional and regulatory framework in each country belonging to two different IR clusters. In Spain, state coordination and intervention are perceived by the social partners, especially the trade unions, as a precondition for effective and democratic industrial relations[31]. On the contrary,

[27] *Real decreto – ley 09/2021*, https://www.boe.es/boe/dias/2021/05/12/pdfs/BOE-A-2021-7840.pdf; Eurofound, *Riders' law*, Platform Economy Database, 2020, https://www.eurofound.europa.eu/nl/data/platform-economy/initiatives/riders-law.

[28] D. Desiderio v. Glovo App 23, Tribunal Supremo, Sala de lo Social Case 4746/2019, 2020.

[29] Aloisi, *cit.*, p. 12.

[30] Eurofound, *Riders' law*, cit.

[31] Martinez Lucio, *Incertidumbre, indecisión y neoliberalismo emergente. El papel dual y complejo del Estado español en las relaciones laborales y de empleo*, in *SocT*, 2016, 87, pp. 68-88.

UK's performance is below European Union (EU) average in terms of intervention of the state in IR regime while resolving an issue since the UK state provides minimal protection of individual employment rights, which has not kept pace with the needs of workers[32]. Though platform work is an example of such a field with minimal intervention of the state, the UK government still intervenes more than other states in collective industrial relations. Similarly, the degree of involvement of social partners in public policy and collective bargaining coverage has also been below EU average[33], reflecting the striking difference in the IR regime in both countries.

4. *Role of key actors in the recognition of rights of delivery riders*

This chapter has delved into the main research question of the paper which is to analyze the role of factors that influence the recognition of rights of the platform workers. The paper has based its analysis on two important factors, namely, social partners and institutional framework, in both countries to understand various approaches adopted to resolve the issue.

Role of social partners

In the UK, non-traditional trade unions or alternative trade unions have been typically active in organizing and mobilizing platform workers, unlike the traditional trade unions. Although, it is acknowledged that an established union, the GMB, has co-funded and supported the *Uber* litigation and the GMB has been recognized by the company for information and consultation/collective bargaining purposes.

Non-traditional unions are small and independent grassroot trade unions which have stepped up their organizing efforts towards delivery riders in the food delivery sector[34], irrespective of their limited size and resources.

[32] Eurofound, *Mapping varieties of industrial relations: Eurofound's analytical framework applied*. Publications Office of the European Union, Luxembourg, 2017, https://core.ac.uk/download/pdf/219377105.pdf.

[33] Eurofound, *Mapping varieties of industrial relations*, cit.

[34] VANDAELE, *Collective resistance and organizational creativity amongst Europe's platform workers: A new power in the labour movement?*, in *Work and Labour Relations in Global Platform Capitalism*, HAIDAR, KEUNE (Eds.), Edward Elgar Publishing, 2021, p. 221.

These grassroot unions tend to follow a narrower agenda than the traditional trade unions, which is to organize and mobilize workers in respect of specific issues[35]. It is pertinent to acknowledge that unlike the mainstream unions, these unions focus on catering to the workers' immediate needs and interests following a logic-of-membership approach[36]. That said, it is quite challenging for grassroot unions to conclude collective agreements on behalf of platform workers. The first and foremost hurdle is the characterization of platform workers by the platforms as independent contractors and not as "workers", who have the right to collective bargaining. A union must first convince the courts that the platform workers in question are actually employees or dependent contractors of the platform to be able to make use of the recognition procedure or call its members on strike in support of the recognition[37]. Further, the lack of organizational and financial resources of these unions to devote to recognition campaigns discourages them from participating in formal bargaining processes[38].

Alternatively, grassroot unions tend to engage in strategic litigation or legal activism[39], in support of workers to bring test cases that might effect a change in the law or clarification of existing rules favouring workers' interests[40]. Recently, strategic litigation has helped in realizing the rights of workers who are involved in "bogus" self-employment[41]. To that extent, these litigations help in publicizing the issue and contributing towards ongoing efforts to organize and mobilize workers[42]. However, without a specific legislation or collective agreement extending to all workers, these strategic litigations only help the workers concerned in a particular case and not

[35] Bertolini, Dukes, *cit.*, p. 670.

[36] Vandaele, *cit.*, p. 221.

[37] Bertolini, Dukes, *cit.*, p. 669.

[38] Woodcock, *Digital Labour and Workers' Organisation*, in Atzeni, Ness (eds.), *Global Perspectives on Workers' and Labour Organizations*, Springer, 2018, pp. 157-173.

[39] Oswalt, *Improvisational Unionism*, in *CLR*, 2015, 104, 3, pp. 596-670.

[40] Colling, *What Space for Unions on the Floor of Rights? Trade Unions and the Enforcement of Statutory Individual Employment Rights*, in *ILJ*, 2006, 35, 2, pp. 140-160, https://doi.org/10.1093/indlaw/dwl011.

[41] Pimlico Plumbers Ltd and another v Smith 29 UKSC (2018), https://www.supremecourt.uk/cases/docs/uksc-2017-0053-judgment.pdf; Uber BV v Aslam 5 UKSC, 2021, https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf.

[42] Bertolini, Dukes, *cit.*, p. 669; Moyer-Lee, *Challenging National Law in Occupational Health and Safety*, in *ILJ*, 2021, 50, 4.

workers in the entire industry. As a liberal market economy (LME), the lack of strong legal and institutional support in the UK, such as an extension mechanism for collective agreements (like *erga omnes*) or enactment of a legislation, has significantly constrained British unions' ability to bargain on behalf of platform workers[43].

In Spain, there are trade unions which have been specifically established for organizing and mobilizing non-standard workers as a response to labour market developments in certain industries[44]. The main strategy of these representative unions is to incorporate platform workers in existing collective agreements so that their working conditions are governed by the provisions of such collective agreements[45]. Unlike trade unions in the UK, Spanish unions follow a logic-of-influence approach which prioritizes concluding collective agreements instead of focusing only on immediate needs of the workers[46]. As the literature on mixed market economy (MME) suggests, trade unions (social partners) have been crucial in the IR regime of Spain in developing broader strategies for tackling unemployment and promoting job stability through national social bargaining with the government and/or employers and concluding social pacts[47]. Accordingly, social dialogue is considered as an important instrument in Spain for governing industrial relations to reaffirm the autonomy of social partners *vis-à-vis* the state[48].

In the food delivery sector, extension of the fifth sectoral collective agreement for restaurants and catering (ALEH-V) in March 2019 until December 2020 was considered as a major achievement for trade unions as platform workers were categorized as "workers" in the agreement removing the uncertainty associated with their legal status[49]. Later, the new law on delivery riders which is the result of a tripartite collective agreement among trade unions, employer associations and the state, strengthens the MME model in Spain, as suggested in the existing literature. It is a pioneering re-

[43] Bertolini, Dukes, *cit.*, pp. 669-670.

[44] Vandaele, *cit.*, p. 215.

[45] Molina, *Enhancing social partners' capacity and social dialogue in the new world of work: the case of Spain*, in Vaughan-Whitehead, Ghellab, De Bustillo Llorente, *The new world of work*, 2021, Elgar, pp. 433-434.

[46] Vandaele, *cit.*, p. 207.

[47] Royo, *cit.*, p. 61.

[48] Molina, *cit.*, p. 431.

[49] Molina, *cit.*, p. 430.

gulation in Europe which has been adopted within the framework of consultation of social partners under Article 154 of the Treaty on the Functioning of the European Union (TFEU)[50].

Role of institutional framework

Based on 2017 Eurofound report prepared by Jelle Visser for the European Commission with respect to the classification of industrial relations (which was also used in the previous Eurofound report, IR regime is strongly state-centered in Spain whereas it is liberal pluralistic in the UK[51]. The UK follows the notion of *laissez-faire* in which state should not intervene in economic life[52]. Whereas, state is a major actor in the IR regime of Spain since the intervention of the state is quite frequent in resolving IR related issues[53]. This difference is clear considering the lack of a legal framework in the UK on this issue, as opposed to Spain, which has resulted in precarious working conditions of delivery riders as their legal status remains unclear till date.

In July 2017, Matthew Taylor was asked by the government to conduct a review on employment law reforms and he submitted his report – *Good Work: The Taylor Review of Modern Working Practices* which provided certain recommendations on the issue of platform workers, although the team did not include any trade unions[54]. There were broadly three recommendations with respect to platform workers which have been broadly accepted by the government in its response, *Good Work Plan* published in 2018[55]. The recom-

[50] Art. 154 TFEU, http://data.europa.eu/eli/treaty/tfeu_2012/oj; Eurofound, *Riders' law*, cit.

[51] Eurofound, *Mapping varieties of industrial relations*, cit.

[52] Hyman, *The State in Industrial Relations*, in Blyton, Bacon, Fiorito, Heery (eds.), *The SAGE Handbook of Industrial Relations*, Sage Publications, 2008, p. 258.

[53] Guglielmo, Meardi, *Mediterranean Capitalism' under EU Pressure: Labour Market Reforms in Spain and Italy* 2010-2012, in *WFES*, 2012, 3, p. 59.

[54] Taylor, *Good Work: The Taylor Review of Modern Working Practices*, Department for Business, Energy & Industrial Strategy, UK, 2017, https://www.gov.uk/government/publications/-good-work-the-taylor-review-of-modern-working-practices.

[55] *Responses to Matthew Taylor's recommendations*, in *Policy Paper Good Work Plan*. Department for Business, Energy & Industrial Strategy, UK, 2018, https://www.gov.uk/government/publications/good-work-plan/good-work-plan#responses-to-matthew-taylors-recommendations.

mendations were (i) first, to retain the three-tier approach to employment status but rename it as "dependent contractors" (the category of people who are eligible for worker rights but are not employees), (ii) second, to develop tests to adequately differentiate the "dependent contractor" status in which control should be of greater importance and less emphasis should be placed on requirement of performing work personally, (iii) third, government should adapt piece rates legislation to ensure that workers in gig economy are able to enjoy maximum flexibility while being able to earn national minimum wage, (iv) fourth, government should extend the right to a written statement to dependent contractors as well as employees to improve certainty and understanding of all working people[56]. However, the Taylor Review was heavily criticized and much concern was shown with respect to the implementation of the proposals[57].

In response to the recommendations, the UK Government introduced a written statement of terms and conditions requirement for workers through the Employment Rights (Employment Particulars and Paid Annual Leave (Amendment) Regulations SI 2018/1378) that made the entitlement to the written statement of terms and conditions a primary right, and the Employment Rights (Miscellaneous Amendments) Regulations SI 2019/731. Further, after over four years since the response is issued, the UK government issued guidance in July 2022 on the employment status of gig workers and the rights applicable to them, to advise employers, engagers and individuals about the law and how to comply with it[58]. However, it has been clarified that «this guidance does not impose any legal obligations. It does not change the law»[59].

On the other hand, the Spanish government has enacted a specific legislation in 2021 on delivery riders which guarantees labour rights to the delivery riders amending the Spanish Workers' Statute law, significantly. The

[56] *Responses to Matthew Taylor's recommendations*, cit.

[57] Bales, Bogg, Novitz, '*Voice' and 'Choice' in Modern working Practices: Problems with the Taylor Review*, in *ILJ*, 2018, 47, 1, pp. 46-75.

[58] *New guidance brings clarity on employment status for workers and businesses*, 22.07.2022, https://www.gov.uk/government/news/new-guidance-brings-clarity-on-employment-status-for-workers-and-businesses.

[59] *Employment status and employment rights: guidance for HR professionals, legal professionals and other groups*, 26.07.2022, https://www.gov.uk/government/publications/employment-status-and-employment-rights/employment-status-and-employment-rights-guidance-for-hr-professionals-legal-professionals-and-other-groups#section-1-guidance-overview.

law was passed as a legal decree to avoid any further delay[60], providing a grace period of three months for the companies to adapt to the provisions of the law from the date of its official publication. Pursuant to the Supreme Court ruling in a case recognizing the former worker as an employee of Glovo, the state intervened to negotiate with other actors of MME, namely trade unions and employer associations in order to reach an agreement on the issue[61]. After six months of negotiations, the parties concluded a tripartite collective bargaining agreement, which was enacted as a law in Spain[62]. Based on the literature on various capitalist market economies discussed in Chapter 2 of the paper, it is evident that in addition to the state, trade unions and employers in MMEs (here, Spain) also play a stronger role organizationally than in LMEs (here, the UK), in resolving the coordination issues in the economy.

5. *Concluding remarks*

The difficulty of mapping the contours of gig economy has had serious implications on the social rights of delivery riders. Considering the lack of clarity in the definition of the term and legal framework of most countries with respect to the legal status of the delivery riders, it has been a challenge for the countries to adapt their existing laws for this work arrangement. Most countries are grappling with the issue of regulating the platform economy sector leading to increasing instances of human rights violations of delivery riders and series of conflicting judicial pronouncements.

This paper has chosen the case studies of two countries with varying IR regimes, namely, the UK and Spain. Based on the literature on Varieties of Capitalism and the case studies, it can be inferred that the UK shows characteristics of liberal market economy in which the state has adopted a passive role in the IR regime thereby other non-traditional actors (grassroot unions)

[60] Defossez, *The employment status of food delivery riders in Europe and the UK: self-employed or worker?*, in *MJECL*, 2022, 29, 1, p. 33, https://doi.org/10.1177/1023263X211051833.

[61] Eurofound, *Court judgement on employment status (Glovo),* 2022, Platform Economy Database, Record number 2272, https://apps.eurofound.europa.eu/platformeconomydb/court-judgement-on-employment-status-glovo-106119.

[62] Waeyaert, Lenaerts, Gillis, *Spain: The "Riders" Law', new regulation on digital platform work*, EU-OSHA, 2021, https://osha.europa.eu/en/publications/spain-riders-law-new-regulation-digital-platform-work.

in the market play an active role to coordinate their efforts to resolve the issue, relying on market institutions. On the contrary, state as an institution along with social partners (trade unions and employer organisations) drive the market economy in Spain, reflecting features of mixed market economy, which has effectively led to enacting a specific law on delivery riders to resolve the issue at hand. Based on the case studies of the UK and Spain, it may be concluded that there is a requirement of collaborative effort from both the state as well as social partners in order to find a solution to the social issue of recognizing rights of the delivery riders.

Moreover, the new law in Spain marks an important shift in the regulation of platform work since it is the first country in Europe to enact a specific legislation on this issue. This act might motivate other member states to follow suit in the future. Though European Union has also introduced a proposal for a Directive on improving working conditions of platform workers[63], it is yet to take the shape of a binding law within the member states of the EU as it is still in the pipeline. However, once the proposal becomes effective and is transposed by member states into their national law, it might resolve the issue of platform workers in the EU to a large extent.

The comparative research and analysis on the legal position of the platform workers and regulatory framework in the UK and Spain clarifying the standpoints on the issue might be relevant for further academic research. In light of the COVID-19 outbreak, there has been an exponential rise on the number of platform workers, accordingly, this research is likely to foster legal discussion about the classification issue and basic social rights of delivery riders, considering the current scenario. Further, the research has highlighted the role of state as an institution and social partners in developing public policy in a country which brings out some underexposed areas on this issue which enhances the academic relevance of this research.

In terms of enhancing societal relevance, a comparative analysis of the situation in two countries belonging to different IR clusters helps to better appreciate different strategies adopted by various countries on this prevalent issue. Further, the research has highlighted the interaction of two major actors in framing public policy and legislations in the IR regime is important since it shows that a collaborative effort from both the state as well as social part-

[63] *Proposal for a Directive of the European Parliament and the Council on Improving Working Conditions in Platform Work*, COM/2021/762 final, https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52021PC0762.

ners is required in order to find a solution to this issue. Moreover, a focus on the successful joint effort of the state and social partners like in Spain can also stimulate other national governments to adopt new policies on this issue.

Abstract

The outbreak of COVID-19 epidemic led to the exponential increase in the number of non-standard work arrangements including platform workers. Based on the analysis of figures, European Union recognizes the need for highlighting the issue of ensuring basic social rights of platform workers (delivery riders). The lack of clarity in the existing law regarding the legal status and rights of deliver riders, results in exploitation by organisations of such workers. In this paper, the aim is to understand the current status of the rights of delivery riders in food delivery sector and to analyze the role of key actors i.e. institutional framework and social partners in adopting strategies by two different countries, namely the United Kingdom and Spain, while recognizing the rights of these workers. Lastly, the paper proposes a workable solution based on the learnings from both the case studies.

Keywords

Platform workers, Riders' Law, delivery riders, industrial relations, trade unions.

Juan Peña Moncho

The right of information of workers' representatives regarding the use of algorithmic management. A comparison between the Spanish and Italian legal approach

1. *Introduction*

During the last years, the introduction and expansion of algorithms and artificial intelligence is tensioning our societies[1]. These technologies are part of the industrial and human evolution, and they are every day much more present in our life.

As part of today's society, artificial intelligence and algorithms in the workplace are also being introduced in the management of the workforce. Under the justification of a more efficient management[2], companies are already able to use these technologies for almost all decisions related to the managerial attributes regarding workers[3].

[1] Being an example of it the use of ChatGPT whose use was even momentarily banned by the Data Protection Authority in Italy due to an unjustified obtention of personal data. Garante per la Protezione dei Dati Personali, *Intelligenza artificiale: il Garante blocca ChatGPT. Raccolta illecita di dati personali. Assenza di sistemi per la verifica dell'età dei minori*, 2023 (Available in: https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9870847; consulted: 30.6.2023).

[2] Dagnino, *Dalla fisica all'algoritmo: una prospettiva di analisi giuslavoralistica*, ADAPT University press, 2019, p. 188.

[3] Adams-Prassl, *What if your boss was an algorithm? Economic incentives, legal challenges, and the rise of artificial intelligence at work*, in *CLLPJ*, 2019, Vol. 41, 1, p. 13.

Consequently, humans are being supported or, even, replaced in the managerial decision-making process, in a phenomenon that is known as "algorithmic management", that can entail data collection and surveillance, real-time responsiveness to data informing management decisions, automated or semiautomated decision-making, rating systems based on metrics, and the use of "nudges" and penalties to influence worker behaviours[4].

Nevertheless, algorithmic management comes at a price for workers' fundamental rights. In that regard, the use of these data-gathering technologies poses new challenges for workers, such as increased surveillance and control, bias and discrimination, and a loss of privacy, transparency, and accountability[5]. Also, as algorithmic management implies the obtention of huge amounts of workers personal information, it is said that boosts managerial powers and prerogatives in unseen levels before[6].

Having these feeble points in mind there have been advocations for a major involvement of workers in the deployment and use of these technologies. The European Social Partners[7], the European Commission[8] and the European Economic and Social Committee[9] have endorsed this possibility. Nevertheless, these positions are not completely new, since back in 1997 the ILO already stated that "(t)he protection of workers against risks arising from the processing of their personal data and the ability to defend their interests successfully depend to a decisive extent on collective rights".

The problem is that the current regulation on personal data protection – the GDPR – has been criticised since it does not enable workers' represen-

[4] Mateescu, Nguyen, *Algorithmic management in the workplace*, in *D&S*, 2019, p. 3.

[5] Nguyen, *The constant boss, work under digital surveillance*, in *D&S*, 2021, p. 3.

[6] De Stefano, Taes, *Algorithmic management and collective bargaining*, European Trade Union Institute (ETUI), 2021, p. 7.

[7] European Framework Agreement on Digitalisation. Where it can be read: "(i)t is critical that digital technology is introduced in timely consultation with the workforce, and their representatives, in the framework of industrial relation systems, so that trust in the process can be built".

[8] "White Paper on Artificial Intelligence - A European approach to excellence and trust", Brussels, 19.2.2020 COM(2020) 65 final. It is stated that: "*workers and employers are directly affected by the design and use of AI systems in the workplace. The involvement of social partners will be a crucial factor in ensuring a human-centred approach to AI at work*".

[9] Opinion of the European Economic and Social Committee on "Artificial intelligence: anticipating its impact on work to ensure a fair transition" (2018/C 440/01). Point 1.7 specifies that "(t)he EESC recommends applying and reinforcing the principles, commitments and obligations set out in the existing texts adopted by the European institutions and the social partners on informing and consulting workers, particularly when deploying new technologies, including AI and robotics".

tatives to monitor the use of data at work[10], guaranteeing only individual rights to workers – as data subjects –. One of those rights being the right to receive information on the logic of the fully automated systems used to make decisions on them, as per articles 13.2.f), 14.2.g), and 15.1.h) in relation to article 22 GDPR.

Considering the previous, some European countries have passed laws acknowledging collective rights that might help workers to control the employer's algorithmic management. In Germany the Works Council Modernisation Act (*Betriebsrätemodernisierungsgesetz*) passed in 2021 allows Works Councils to appoint an artificial intelligence expert to assist them when negotiating the implementation of such technologies[11]. Also, Spain and Italy have entrusted their workers' representatives with the right to obtain information related to the algorithms used by the employer to influence working conditions. The existence of these new regulations acknowledging a collective right of information has raised the opportunity to study both and compare how these countries have currently approached the need of collective rights protecting employees when they are affected by algorithmic management.

2. *A compared perspective of the recent right of information introduced by Italy and Spain*

2.1. The origins of each regulation

Spain was the first country in the European Union to establish the right of workers' representatives to obtain information related to algorithms at work through Law 12/2021, of September 28th, modifying the refunded text of the Workers Statute Law, approved by Royal Decree Law 2/2015, of October 23rd, guaranteeing the labour rights of people rendering delivery services in the context of digital platforms (Law 12/2021). This law, known as

[10] Todolí Signes, *Algorithms, artificial intelligence and automated decisions concerning workers and the risk of discrimination: the necessary collective governance of data protection*, in *Transfer*, 2019,Vol. 25, 4, p. 11.

[11] Becher, *Germany s Works Constitution Act: Important Changes to the Law Effective June 2021*, in *NLReview*, 2021 (available in: https://www.natlawreview.com/article/germany-s-works-constitution-act-important-changes-to-law-effective-june-2021; consulted: 30.6.2023).

"Rider Law", was the result of a negotiation period in the merit of a social dialogue table between the Government and the most representative trade unions and business associations. Therefore, the wording of the Law was agreed between all the parties involved.

Specifically, Law 12/2021 clarifies the competences of the Work Council by adding a d) paragraph to article 64.4 of the Workers' Statute (WS). Concretely, it introduces its right to obtain information regarding the "parameters, rules, and instructions" in which the algorithms and artificial intelligence systems used in decision-making processes at work are based. The parties introduced this right of information because, as stated in the memorandum of the law, they considered that it could no longer be ignored "the incidence of new technologies in the employment context and the necessity that the employment legislation considers this repercussion both in the workers' collective and individual rights and in the competences of the employers".

In Italy, considering the previous Spanish regulation and the debates ongoing at EU level, the Legislative Decree of June 27th, 2022, n. 104, known as Transparency Decree (*Decreto Trasparenza*), on the actualisation of Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, introduced article 1-bis in the Legislative Decree of May 26th, 1997, n. 152. (LD n. 152/1997), on the actualisation of Directive 91/533/EEC on an employer s obligation to inform employees of the conditions applicable to the contract or employment relationship.

The Italian law stablishes that the employer or contractor must provide workers together with workers' representatives with certain information regarding automated decision-making or monitoring systems when they are used in an employment context.

In Italy, unlike Spain, the Transparency Decree is a transposition of a Directive. More specifically, Directive 2019/1152. Nevertheless, it needs to be highlighted that this Directive does not contemplate any regulation regarding algorithmic management of employees. Therefore, the Italian regulation goes beyond the European regulation on employment transparency.

Nonetheless, although this has been severely criticised[12], it has also been said that the Italian regulation tries in fact to grant utmost transparency in

[12] Faioli, *Trasparenza e monitoraggio digitale. Perché abbiamo smesso di capire la norma sociale europea*, in *Federalismi.it*, 2022, 25.

accordance with problems indicated in the memorandum of the same Directive[13], such as the uncertainty with the applicable rights and the social protection of workers in digitalised new forms of employment (whereas 4) and the abuse of the status of self-employed persons (whereas 8). Therefore, the right of information included in the Transparency Decree would fall within the Directive spirit.

As it can be seen, each law derives from totally different contexts. While the Spanish law comes from a negotiation period between social agents involved and affected by the algorithmic management, the Italian law has used the transposition of a Directive to introduce informational rights related to the employment context. In my opinion, this difference has a clear influence on each law, as it shall be exposed in the following paragraphs.

2.2. The requirements for the application of the right of information

Considering that both legal systems introduce a right of information in favour of workers' representatives, it must be analysed when the obligation to provide information appears. That is, under which conditions would the use of algorithms at work raise the obligation to inform.

In that sense, both regulations have followed the same formula or scheme for the obligation to inform workers' representatives to be born. More specifically, in order to determine when it is mandatory to provide workers' representatives with information related to the algorithmic technologies, it is necessary to consider in both article 64.4.d) WS and article 1-bis LD n. 152/1997 (i) the existence of automated systems to make decisions; (ii) what influence do these automated systems have in the employer decision-making process; and (iii) which working conditions shall be affected by the automated decision-making.

Nevertheless, each regulation has its own particularities regarding the conditions that would lead to the obligation to inform workers' representatives.

Regarding the existence of automated decision-making systems, article 64.4.d) WS requires that the technologies to be used must be "algorithms or artificial intelligence systems" (*algoritmos o sistemas de inteligencia artificial*) af-

[13] Carinci, Giudici, Perri, *Obblighi di informazione e sistemi decisionali e di monitoraggio automatizzati (art. 1-bis "Decreto Trasparenza"): quali forme di controllo per i poteri datoriali algoritmici?*, in *Labor*, 2023, 1, pp. 10-11.

fecting decision-making, while article 1-bis LD n. 152/1997 demands the use of "fully automated decision-making or monitoring systems" (*sistemi decisionali o di monitoraggio integralmente automatizzati*). In my opinion, both regulations refer to the same phenomena: the use of automated systems to make decisions.

However, I consider that the wording used by the Italian legislator is much more appropriate. First, because the terms "algorithm" and "artificial intelligence" are not easy to comprehend. There is no agreement among academic experts on what "algorithm"[14] or "artificial intelligence"[15] is, abounding the definitions to specify what they really mean[16]. It should also be highlighted that there is neither a legal definition in the Spanish legal system on those terms, nor the legislator has incorporated it in Law 12/2021. Meanwhile, although the Italian legislator has also been criticised since it has not established what should be understood by "automated decision-making or monitoring systems"[17], understanding what an "automated" decision-making system is far easier, as it could mean any automated decision-making process without human intervention[18].

Further, the term "automated decision-making" is also used by the GDPR. Consequently, the interpretations of the European Union institutions could be easily used to support or clarify the concept of automated decision-making systems as used by the Italian legislation[19]. In fact, based on

[14] Mittelstadt, Allo, Taddeo, Wachter, Floridi, *The ethics of algorithms: Mapping the debate*, in *BDS*, 2016, p. 2.

[15] In AI Watch, *Automating Society. Taking Stock of Automated Decision-Making in the EU*, Bertelsmann Stiftung, 2019, p. 9 can be read "*Artificial Intelligence is a fuzzily defined term that encompasses a wide range of controversial ideas and therefore is not very useful to address the issues at hand. In addition, the term intelligence invokes connotations of a human-like autonomy and intentionality that should not be ascribed to machine-based procedures.*"

[16] AI Watch, *Defining Artificial Intelligence - Towards an operational definition and taxonomy of artificial intelligence*, Publications Office of the European Union, 2020.

[17] Faioli, *Giustizia contrattuale, tecnologia avanzata e reticenza informativa del datore di lavoro. Sull'imbarazzante "truismo" del decreto trasparenza*, in Dagnino, Garofalo, Picco, Rausei (ed.), *Commentario al d.l. 4 maggio 2023, n. 48 c.d. "decreto lavoro"*, ADAPT University Press, 2023, pp. 48-49. Dagnino, *Obblighi informativi in materia di algoritmo e condotta antisindacale: i primi effeti di una disposizione dibattuta*, in *Bolletino ADAPT*, 2023, 14.

[18] Information Commissioner s Office, *What is automated individual decision-making and profiling?* (Available in: https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/-individual-rights/automated-decision-making-and-profiling/what-is-automated-individual-decision-making-and-profiling/#id2; consulted, 28.6.2023).

[19] As done by Rossili, *Gli obblighi informative relative all'utilizzo di sistemi decisionali e di monitoraggio automatizzati indicati nel decreto "Trasparenza"*, in *Federalismi.it*, 2022, p. 3.

the Guideline WP251 of Article 29 Working Party[20], predecessor of the European Data Protection Board, Marazza and D Aversa consider that it would fall under the application of article 1-bis LD n. 152/1997 an automated decision-making system meeting the following requirements: (a) being a technological tool; (b) that this technological tool can render all its programmed functions without human intervention; (c) that the technological tool is able to make decisions[21].

It could be said that the Spanish jurists could do likewise the Italian counterparts with the GDPR, but regarding the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence, also known as AI Act. This regulation is meant to provide a definition of artificial intelligence in article 3. However, this does not solve the second critic, which is the fact of relying on the technology and not on the practice of automated decision-making.

Indeed, the Spanish regulation relies on the technology, but not on the fact of decision-making in itself. I mean, the obligation to provide information exists if the employer uses algorithms and artificial intelligence to make decisions, but an employer using automated decision-making systems not included in the concept of "algorithm" or "artificial intelligence" could defend its exemption from article 64.4.d) WS.

It needs to be noted that technology changes, and in the following years there might be new industrial developments allowing employers to make automated decisions without using algorithms or artificial intelligence systems. In that scenario, unless there is a modification, article 64.4.d) WS could no longer be invoked to obtain information on the automated systems used by employers to take employment decisions. Instead, article 1-bis LD n. 152/1997 does rely on the fact of automated decision-making. Consequently, it could be a much more abiding law, since apart from including algorithms and artificial intelligence systems[22], it could include future developments related to automated decision-making. That is, the Italian approach is independent of the technologies used to make automated decision.

[20] Article 29 Working Party, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 (wp251)*, 2018.

[21] Marazza, D Aversa, *Dialoghi sulla fattispecie dei "sistemi decisionali o di monitoraggio automatizzati" nel rapporto di lavoro (a partire dal decreto trasparenza)*, in *GC*, 2022, 11, p. 7.

[22] Carinci, Giudici, Perri, *cit.*, p. 17.

Regarding the influence of the automated systems in the decision-making process, there might be some disparities in both regulations.

In that sense, Spanish article 64.4.d) WS requires that the algorithms and artificial intelligence systems "affect" the decision-making process. This has been interpreted by the Spanish doctrine as meaning that employers will have the obligation to inform workers' representatives if they use algorithms or artificial intelligence systems to influence in the decision-making process, irrespective of the human involvement on it[23]. Consequently, both when the algorithmic system takes a decision by itself and when it only makes a suggestion in a much more complex decision-making process that includes human involvement, the obligation to inform workers' representatives shall remain the same.

Meanwhile, Italian paragraph 1 of article 1-bis LD n. 152/1997, modified by the Law-Decree n. 48/2023 (known as "Labour Decree"), requires now that the systems meant to provide indications to the employer (*deputati a fornire indicazioni*) must be fully automated (whilst the original wording demanded that they were simply automated). This change in the regulation could be on the account that, considering the original wording, the Italian Ministry of Employment deemed that article 1-bis LD n. 152/1997 was limited to decisions based solely on automated decision-making or when human involvement was irrelevant[24], while there was doctrine thinking that it applied also when there was human intervention in the decision-making process[25], thus semiautomated decision-making.

The new wording appears to create some inconsistency because, on the one hand, it seems to require that the decision-making must be fully automated but, on the other, the role of technology is to provide instructions to the employer making the final decision, allowing then semiautomated decision-making. Despite the difficulty of the writing, I would differentiate the way in which the technology works (fully automated systems) with the role it has in the decision-making (provide instructions to the employer). Therefore, I agree with Dagnino that the new wording only determines that the result of the data processing must come from fully automated systems but

[23] Pastor Martínez, *Los derechos colectivos de información, consulta y negociación del uso de algoritmos y sistemas de inteligencia artificial*, in Ginès Fabrellas (ed.), *Algoritmos, inteligencia artificial y relación laboral*, Aranzadi, 2023 (digital version).

[24] Ministero del Lavoro e delle Politiche Sociali, Circolare n. 19 del 20 settembre 2022.

[25] Faioli, *cit.*, 12, p. 111; Carinci, Giudici, Perri, *cit.*, p. 17.

does not change the fact that that same result is meant to influence the employment decisions affecting employees[26], acknowledging thus article 1-bis LD 192/1997 the right of information also when there are semiautomated decisions.

Nevertheless, the Tribunal of Palermo thinks otherwise. In its decision of 20.6.2023 considers that the Labour Decree reform has specified that the right of information of article 1-bis LD 192/1997 only applies when there are no human interventions in the final phase of the decision-making process. Therefore, when the decisions are fully automated.

Anyway, although there is no clear position in the Italian case, it looks as if both regulations had considered the limited scope of application of the right of information (articles 13.2.f) and 14.2.g)) and the right of access (article 15.1.g)) contemplated in the GDPR regarding automated decision-making and wanted to enlarge it. According to those rights, data subjects are entitled to receive meaningful information about the logic of the automated systems, together with the importance, and the envisaged consequences of an automated decision. However, these rights are only applicable when the decision-making process is completely automated, according to article 22 GDPR, that is when the human involvement in the decision-making process is irrelevant[27]. Nonetheless, in my opinion, both the Spanish and Italian regulation seem to recognise their informational rights also when there is a significative human involvement in the decision-making, rendering those decision-making processes as semiautomated.

As per the working conditions that must be object of automated decision-making in order to render applicable the national right of information, both countries have chosen a broad list of employment matters. In the case of the Spanish article 64.4.d) WS, the law determines that the algorithms and artificial intelligence systems used in the decision-making process must

[26] DAGNINO, *Modifiche agli obblighi informativi nel caso di utilizzo di sistemi decisionali o di monitoraggio automatizzati (art. 26, comma 2, d.l. n. 48/2023)*, in DAGNINO, GAROFALO, PICCO, RAUSEI (ed.), *Commentario al d.l. 4 maggio 2023, n. 48 c.d. "decreto lavoro"*, ADAPT University Press, 2023, pp. 56-63. Nevertheless, RECCHIA appears to be against this interpretation, considering that "the reference to fully automated systems seems to align and overlap the obligation of information of the creditor of the employment relationship to the provisions of GDPR, specifically to article 22" (own translation) in RECCHIA, *Condizioni di lavoro trasparenti, prevedibili e giustiziabili: quando il diritto di informazione sui sistemi automatizzati diventa uno strumento di tutela collettiva*, in *LLI*, 2023, Vol. 9, 1, p. 52.

[27] Article 29 Working Party, *Directrices sobre decisiones individuales automatizadas y elaboración de perfiles a los efectos del Reglamento 2016/679*, 2017, p. 23.

have an impact on "working conditions, access and employment conservation" (*condiciones de trabajo, el acceso y mantenimiento del empleo*). Italian article 1-bis LD n. 152/1997, as commented before, provides that the automated decision-making or monitoring system must produce relevant indications concerning termination of working relationships, and indications affecting the assignment of tasks or jobs, surveillance, evaluation, performance, and compliance of the workers contractual obligations. This has been interpreted by the doctrine of both countries as including such a wide range of matters that comprise any kind of impact on working conditions[28]. Therefore, the obligation to inform on the automated systems used shall apply in both countries even with a minor impact on any working condition.

2.3. The nature and subjects of the right

Having exposed what requirements lead to the application of the right of information established in each country, I think it is convenient to determine which subjects participate in the execution of this right. That is, who is the subject entitled to demand the provision of the information on the automated systems and who is the subject obliged to provide it. In that sense, both countries have opted for a different approach.

As explained before, the Spanish legislator incorporates the right of information on algorithmic and artificial intelligence systems in article 64 WS, which includes the main competences of the Work Council, the unitary body of representation in companies of 50 or more employees. The competences of the Work Council are extended by article 62.2 WS to personal delegates (*delegados de personal*), the unitary body of representation in companies between 6 and 49 employees. Additionally, article 10.3 of the Organic Law 11/1985 (LOLS by the Spanish initials), acknowledges that in companies of more than 250 employees, any trade union delegate that is not part of the Work Council is entitled to access to the same information provided to the Work Council.

[28] As per the Italian regulation, Marazza, D Aversa, *cit.*, pp. 3-4; as per the Spanish regulation, Gómez Gordillo, *Algoritmos y derecho de información de la representación de las personas trabajadoras*, in *TL*, 2021, Vol. 157, pp. 173-175; and, Cruz Villalón, *La participación de los representantes de los trabajadores en el uso de los algoritmos y sistemas de inteligencia artificial*, in *Blog de Jesús Cruz Villalón*, 2021 (Available in: http://jesuscruzvillalon.blogspot.com/2021/05/la-participacion-de-los-representantes.html; consulted: 30.3.2023).

The previous have several implications that need to be noted. The first is that the Spanish right of information on algorithms is of general application, meaning that is applies irrespective of the economic activity rendered by the employer[29] and irrespective of the employment contract binding the parties of the relationship. Consequently, the passive subject of the right – the person that must comply with the obligation – shall be the employer in a subordinate contractual relationship – subject to the worker statute –, whether it is a public or a private institution and whether it is a gig economy platform or an industrial business.

The second is that the right of information on algorithms is hold exclusively by collective bodies of representation. That is, by the personal delegates and the Work Council – unitary representative bodies – and trade union delegates – trade union representative body –, but not by employees themselves. Therefore, in those workplaces or companies in which there is no unitary representation, employees would not be entitled to receive the information on the algorithms and artificial intelligence systems established in article 64.4.d) WS.

Consequently, in those cases, employees can only rely on the individual right of information on automated decision-making included in the GDPR. Nevertheless, as exposed before, this right is limited to fully automated decision-making processing personal data. Therefore, companies with no unitary representation bodies in which the decision-making on employment conditions is done by humans but with the support of algorithms and artificial intelligence systems, would not be forced to comply with any right of information. Consequently, workers in such circumstances shall not be covered by any algorithmic transparency mechanism in Spain.

In my opinion, the fact that the Spanish right of information on decision-making algorithms is limited to workers' representative bodies is in a way related to the fact that this right was the result of the social dialogue table, being part of it the most representative unions and entrepreneurial associations.

The Italian right of information introduced in article 1-bis LD n.

[29] Among others, Garrido Pérez, *El nuevo y complejo derecho de información sobre algoritmos y sistemas de inteligencia artificial que inciden en el empleo y las condiciones laborales*, in *Net21*, 2021, 4, p. 1-2; and, Baylos Grau, *A vueltas con el algoritmo: derechos de información y negociación colectiva*, in *Según Antonio Baylos (blog)*, 2021 (Available in: https://baylos.blogspot.com/2021/05/a-vueltas-con-el-algoritmo-derechos-de.html; consulted: 27.4.2023).

152/1997 having also a general application[30], instead, has a double approach related to workers. That is, the law obliges the employer or contractor to provide both the worker and workers' representatives with the information on the automated decision-making or monitoring systems. This double approach has been confirmed by the Court of Palermo in its decision n. 14491/2023[31]. That means that both parties have the right to request the employer the submission of the information[32], including those workers that do not count with collective representatives. Consequently, under the Italian regulation, the right of information has an individual and a collective nature.

Since article 1-bis LD n. 152/1997 has general effects, like the Spanish article 64.4.d) WS, and acknowledges a double right of information (to workers individually considered and their representatives), like article 6 of the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, it is said that it was inspired by these two regulations[33].

In fact, this double approach, or double level of protection, is also manifested in two other ways that differ from the Spanish regulation. Regarding the individual expression, the Italian article 1-bis LD n. 152/1997 covers both workers rendering any kind of activity and subject to any kind of employment contract[34] and, unlike the Spanish legislation, some categories of parasubordinate workers. Indeed, according to its paragraph 7, the Italian right of information is also acknowledged to certain freelance workers (*raporti che si concretino in una prestazione di opera continuativa e coordinata*) and other forms of employment (*contratto eterorganizzato*). In these cases, in which *stricto sensu* there is no employer (*datore di lavoro*), the passive subject of the right of information would be the contractor (*committente*) of the parasubordinate worker or freelancer. Therefore, the general application of the Italian article 1-bis LD n. 152/1997 is wider than the Spanish article 64.4.d) WS as it applies not only to employees, but to other kind of workers.

[30] Recchia, *cit.*, p. 45.

[31] Court of Palermo 3.4.2023 no. 14491 in which it can be read that "it needs to be emphasised that the information can be requested "also" by the trade unions, in other words in addition to and not alternatively to the possible provision to the worker" (own translation).

[32] Faioli, *cit.*, 12, p. 113.

[33] Recchia, *cit.*, p. 45.

[34] Carinci, Giudici, Perri, *cit.*, p. 19.

Probably the fact that the Italian article 1-bis LD n. 152/1997 includes both employees and parasubordinate workers is also related to the origin of the law. In that regard, the Transparency Decree transposes Directive 2019/1152, which in its whereas 8 determines that its content could be applied also to workers meeting the status of "worker" set the Court of Justice of the European Union in its decisions.

Regarding the collective expression, together with acknowledging this right to the unitary and trade union representatives (*rappresentanza sindacale aziendali ovvero alla rappresentanza sindacale unitaria*), in the absence of them, the law entitles the territorial establishments of the most representative national trade unions (*sedi territoriali delle associazioni sindacali comparativamente più rappresentative sul piano nazionale*) the right to be informed on the algorithmic management delivered by the employers of its area of influence. Therefore, the Italian law imposes on the employer a trade union interaction when dealing with automated monitoring and decision-making devices in any case[35]. Something that I consider needs to be endorsed, because individual workers are not always in the best position to contest or refute employment practices, while trade unions are in a better position and have more means to challenge entrepreneurial practices[36].

Nevertheless, it needs to be noted that workers' representatives could only claim this right when representing workers subject to an employment contract or in case of a *contratto eterorganizzato* (according to article 2 d. lgs. n. 81/2015), but not freelancers (*raporti che si concretino in una prestazione di opera continuativa e coordinata*), because law does not recognise them the right to collective representation[37]. Anyway, they could still claim their right to be individually informed when a contractor uses automated system to make decision or monitors them in relation to their working conditions, based both in GDPR and in article 1-bis LD n. 152/1997.

Considering the previous, it is strange that the Spanish table of negotiations did not include a similar provision in their regulation in order to protect workers without representatives, since there are legal precedents also within the Spanish legal systems in which the most representative unions have been entitled to assume the representation of employees it such cir-

[35] Tursi, *Il "decreto trasparenza": profili sistematici e problematici*, in *LDE*, 2022, 3, p. 15.

[36] Gaudio, *Litigating the Algorithmic Boss in the EU: A (legally) Feasible and (Strategically) Attractive Option for Trade Unions?*, in *IJCL*, 2024 (forthcoming).

[37] Carinci Giudici, Perri, *cit.*, p. 23.

cumstances. For example, regarding the furlough proceedings during the pandemic[38] or regarding the gender equality plan negotiations[39]. Existing this possibility, in my opinion, it has not been sensible to leave out of this right of information workers without representation.

2.4. The content of the rights of information

It remains to be determined which information exactly must be provided when the requirements for its application are met, when it must be handed over, and how must it be delivered. In other words, what is the real content of the right of information according to both the Spanish and the Italian regulation. In fact, these factors will ascertain the real effectiveness of the laws, because they will determine whether it permits a certain function of control on the algorithmic management or not.

In that regard, both regulations have used different approaches. The Spanish article 64.4.d) foresees that when an employer uses algorithms or artificial intelligence systems to influence its decision-making process regarding working conditions, the employer will be forced to hand over workers' representatives the "parameters, rules, and instructions" in which those technologies are based. Meanwhile paragraph 2 of article 1-bis LD n. 152/1997 provides that, prior to the beginning of the employment activity, the employer must supply the following information: a) the aspects of the working relationship influenced by automated decision-making and monitoring systems; b) the purposes and aim of the automated systems; c) the logic and functioning of the automated systems; d) the data categories and the principal parameters used to programme and train the automated systems, including the mechanisms to evaluate the performances; e) the control measures applied to the automated decision-making, the potential correction processes and who is the person responsible of the quality of the system; f) the level of accuracy, robustness and cybersecurity of the automated systems, and the metrics used to measure such parameters, together with the potential discriminatory impacts of the same metrics.

Consequently, unlike the Italian regulation, the Spanish article 64.4.d) WS does not foresee a list of aspects to be provided regarding the algorithms.

[38] Royal Decree-law no. 8 of 17 March 2020, Art. 23.1, a).
[39] Royal Decree no. 901 of 13 October 2020, Art. 5.3.

The wording used by the Spanish legislator as the content of the information ("*parámetros, reglas e instrucciones*") is uncertain, although it has been considered an exemplificative list obliging the employer to provide information regarding the "reasoning" of the algorithm. That is, what is its goal, how it works and how it makes its suggestions[40]. Still, this interpretation does not resolve the main question, which is what specific information the employer must hand over to workers' representatives regarding algorithms and artificial intelligence instruments used for employment management.

The Spanish Ministry of Employment has tried to solve this circumstance by publishing a guide on the matter establishing a list of fifteen aspects to be delivered to the workers' representatives[41]. Among others, the employer must inform of the decisions to be taken with the influence of those systems, the specific software used, the human involvement in the decision-making process, the variables and parameters used by the technology, the data used to train the algorithm, the envisaged impact of the decisions to be taken, the results of the data protection impact assessment (DPIA) when necessary according to article 35 GDPR, etc[42].

Certainly, there are coincidences between paragraph 2 article 1-bis LD n. 152/1997 and the proposed list by the Ministry of Employment. However, the main difference between both is that while paragraph 2 article 1-bis LD n. 152/1997 is enforceable, as it is included in a law, the guidelines of the Spanish Ministry of Employment remain as that, guidelines. Consequently, as opposed to their Italian counterparts, I do think that workers' representatives in Spain cannot legally request the obtention of all the specifics of the right of information determined by the Ministry of Employment. Thus, the guide has no effect on the regulation itself.

Nevertheless, workers' representatives and their business association counterparts in Spain could obviously use the 15 aspects stablished in the Guideline on the algorithmic right of information of the Spanish Ministry of Employment as a reference in their collective bargaining agreements when regulating on the specifics of article 64.4.d) WS. That way, although not de-

[40] Gorelli Hernández, *Algoritmos y transparencia: ¿pueden mentir los números? Los derechos de información*, in *TD*, 2022, 86, p. 19.

[41] Ministerio de Trabajo y Economía Social, *Información algorítmica en el ámbito laboral: guía práctica y herramientas sobre la obligación empresarial de información sobre el uso de algoritmos en el ámbito laboral*, 2022.

[42] Ministerio de Trabajo y Economía Social, *cit.*, p. 12-15.

termined by law, workers' representatives could both concretise in what really consists of the right of information and resort to a legally enforceable document to request that information.

In fact, the content determined by the Spanish Ministry of Employment could also be used by negotiating parties in Italy, since there are points of the Italian list that would also need clarification. For example, what should be understood by the logic of the automated system or what would prove the accuracy, robustness, and cybersecurity of the automated system – probably the DPIA –.

Moreover, paragraph 3 article 1-bis LD n. 152/1997 determines that the worker, by herself or assisted by workers' representatives – including territorial trade union establishments –, is entitled to access the data used by the employer when using the monitoring or decision-making automated systems, in what would be a specific right of access (article 15 GDPR) related to employment relationships, and also to request further information on the listed matters of paragraph 2. What further information (*ulteriori informazioni*) really means would need to be determined, although I consider that at least it allows workers to request clarifications or more information regarding the aspects determined in paragraph 2 if they think their right of information has not been satisfied by a first communication of the employer.

Regarding the moment in which the information must be delivered, the Italian regulation in paragraph 2 article 1-bis LD n. 152/1997 determines that all the abovementioned listed information must be showed to the worker individually considered prior to the beginning of the employment activity. It also needs to be noted that the response to both the right to access and the right to request further information must be given within 30 days upon the request.

Paragraph 5 of article 1-bis LD n. 152/1997 also determines that employers must give written notice 24 hours before of any change in the information given at the beginning of the employment activity. This imposes the right of information not only in an initial phase, but also when, for example, the employer decides to modify the uses it gives to the automated systems during the performance of the employment contract or when it detects a new risk for the rights of workers.

Nevertheless, for workers' representatives the regulation does not specify neither the moment (at the beginning of the employment activity and when modifications are introduced) nor the proceeding for them to receive the

information (whether it is necessary to request it or it must be delivered directly by the employer)[43].

The Spanish article 64.4.d) WS, instead, provides that the information must be handed over "in the appropriate periodicity". Therefore, it does not explicitly demand the delivery of the information neither before nor after the use of these algorithmic and artificial intelligence systems. However, since the unitary representation must control and supervise that the employer respects the employment regulations (article 64.7 WS), the only way in which this function can be granted is by informing them at least prior to the use of these technologies. Otherwise, the effectiveness of the law in controlling algorithmic usages and biases could be avoided[44], and no modifications on the functioning of the algorithms could be suggested[45] in order to adjust them to respect fundamental rights.

It must be highlighted that, although there is no specific provision obliging the employer to provide information when there is a change in the conditions of the algorithms, part of the Spanish doctrine considers that the right of information of article 64.4.d) WS is a dynamic right[46], which implies that any change in the use or way of functioning of the algorithm must lead to inform again workers' representatives on the changes that have been introduced. This position is also endorsed by the Ministry of Employment[47].

As per the mode of providing the information, the Italian regulation foresees in paragraph 6 article 1-bis LD n. 152/1997 that the employer or contractor must provide the information in a transparent manner, with a structured format, of common use and in a machine-readable format. Spanish article 64.5 WS, that applies to all the information provisions foreseen in article 64 WS, determines that the information delivered to workers' representatives must be done "with the appropriate manner and content". Therefore, the information handed over must permit that workers' representatives control and supervise the employer practices[48] being necessary thus

[43] Recchia, *cit.*, p. 44.

[44] Gómez Gordillo, *cit.*, p. 178.

[45] Garrido Pérez, *cit.*, p. 5.

[46] Gorelli, Hernández, *cit.*, p. 20; Cruz Villalón, *cit.*

[47] Ministerio de Trabajo y Economía Social, *cit.*, p 16.

[48] Sáez Lara, *Gestión algorítmica empresarial y tutela colectiva de los derechos laborales*, in *CRL*, 2022, Vol. 40, 2, p. 294.

that it does use a language adapted to the interlocutor, without employing an excessive technological language. Otherwise, it risks becoming non-understandable to workers and, thus, the objective of the right of information would not be met.

Having exposed the previous, it can be said that the terms and conditions for the fulfilment of the right of information are clearer in the Italian regulation, since it specifies the content of the obligation, the moment in which the information must be delivered (only when the individual right of information is concerned) and that the concrete right of information must be fulfilled in a transparent manner. The Spanish regulation, instead, only determines clearly that the information must be given appropriately but does not specify neither the information to be delivered nor when it must be delivered. Therefore, from my point of view, it makes necessary the intervention of collective bargaining to render the right of information on algorithms completely effective.

2.5. The rights of information and their coexistence with the trade secret protection

When upholding their respective right of information, both the Spanish employees' representatives and the Italian workers could face the reluctance of the employer or the software designer to provide such information. In that sense, the trade secret regulation could be used as an excuse not to provide the corresponding information. In fact, on the decision of the Tribunal of Palermo of June 20th, 2023, Glovo refused to provide the information regarding the accuracy, robustness and cybersecurity of the automated system on the grounds it was covered by the trade secret regulation. Probably, because paragraph 8 article 1-bis LD n. 152/1997 foresees a non-disclosure clause based on the trade secret regulation.

Therefore, it needs to be ascertained, first, if the information to be provided when complying with the rights of information can be considered a trade secret. And second, if that was the case, whether that information could be also provided or not.

Regarding the first point, the regulation on trade secrets in both countries is clearly influenced by Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. In fact, the definition of a trade

secret is basically the same in both the Spanish[49] and the Italian[50] regulations as in article 2 of Directive 2016/943. Therefore, it would constitute a trade secret all the information meeting the following requirements: (a) it is secret in the sense that is not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) it has commercial value because it is secret; (c) the person lawfully in control of the information has applied measures to keep the information secret.

In that regard, the Spanish doctrine denies that the parameters, rules and instructions of the algorithms or artificial intelligence systems – namely, the information on their functioning – can be considered a trade secret[51]. In Italy, the Court of Palermo in its decisions of 20.6.2023 has stated that the only information protected by the trade secret regulation would be the source code and the mathematic formulas used by the software, following the position of article 29 WP on the matter related to the individual right of information in GDPR[52]. That would mean that under both legal systems their respective content of the right of information cannot be considered a trade secret, and, thus, the employer cannot deny workers the information on the technology used to make automated decisions.

Nevertheless, it must be highlighted that even if the information on the algorithms was considered a trade secret, the employee representatives in Spain could still obtain such information, since article 2 of Law 1/2019 determines that an information considered a trade secret can be provided to them for the exercise of their rights of information and consultation. In fact, this is a transposition of article 5.1.c) of Directive 2016/943.

A transposition of such a kind is not foreseen in the Italian legal system. However, part of the Italian doctrine considers that article 5.1.c) Directive 2016/943 would be fully applicable, since its lack of transposition could only mean that the legislative power has considered it implied in the regulation[53]. Therefore, the existence of trade secrets linked to the automated systems used to monitor or take decisions regarding employees would not be an excuse in order not to provide the information to workers' representatives.

[49] Law no. 1 of 20 February 2019, art. 1.

[50] Legislative Decree no. 30 of 10 February 2005, art. 98, Code of the industrial property.

[51] Gorelli, Hernández, *cit.*, p. 21; Gómez Gordillo, *cit.*, p. 182.

[52] Article 29 Working Party, *cit.*, p. 28.

[53] Carinci, Giudici, Perri, *cit.*, pp. 28-33.

2.6. The consequences of infringing the collective right of information

The effectiveness of these provisions can also be determined by the consequence of its infringement. That is, the level of punishment foreseen in the regulation could prevent the employer from wrongdoing, in this case, not giving the information requested or giving in a manner that does not meet the expectations.

When a Spanish employer does not supply the information determined by law to workers' representatives, it is deemed a severe infringement by virtue of article 7.7 of the Royal Legislative Decree 5/2000, of August 4th, on Infringements and Sanctions in the Social Context (LISOS by its Spanish initials), implying that any employer could face an economic sanction, that could amount to a quantity between 751€ and 7.500€ applying article 40.1.b) LISOS.

The infringement of the right of information will only lead to an additional violation of the freedom of association right (article 28.1 Spanish Constitution) when there are trade union representatives involved, that is, when the information has not been successfully delivered to trade union representatives. In those cases, the trade union representative could additionally request a compensation for moral damages (article 183 Law 36/2011, of October 10th, regulatory of the social jurisdiction). Therefore, the infringement of the right of information on algorithms in companies of less than 250 employees will stick to an administrative fine since unitary representatives in Spain are not protected by the freedom of association[54].

However, in Italy the infringement of the right of information leads to both an administrative fine and a breach of the right of freedom of association. According to article 19 of the Legislative Decree of September 10th, 2003, n. 276, the fine would amount between 400€ and 1.500€ per each month of infringement. Apart, two decisions[55] published in Italy regarding article 1-bis LD n. 152/1997 determine that Uber Eats and Glovo (respectively) infringed the freedom of association right (article 28 Law of May 20th, 1970, n. 300) by denying the trade unions the information on the automated systems established in article 1-bis LD n. 152/1997.

[54] Among others, Spanish Constitutional Court 11 January 1983 no. 118, and 13 June 1994 no. 134.

[55] Court of Palermo 3 April 2023 no 14491; Court of Palermo 20 June 2023.

Therefore, both legal systems foresee economic fines of a low-range scale as punishment for the violation. Additionally, the protection of the fundamental right of freedom of association is guaranteed in the Italian legal system, but not completely in the Spanish regulation as the unitary representatives are not protected by it.

3. *Conclusions*

The technological impacts that are occurring in the employment context need bold responses to protect the weak party in the employment relationship: workers. That answer might come in the form of new legislations, as it is the case of Spain and Italy. Both countries, by introducing the right of workers' representatives to receive information on the automated systems used to make decisions on employment conditions, have moved ahead not only of other countries with a similar economic context, but also the European Union legislation, which so far is limited to the generic and individual GDPR right of data subjects to know the logic of the fully automated systems using personal data to make decisions.

Considering the previous, both new national rights of information have in common the fact that they apply irrespective of the data used to make employment decisions. That is, the importance for their rights to apply is not the use of personal data, but the fact of automated decision-making. Additionally, although there is an ongoing debate in the Italian case, I think that both rights of information apply to semiautomated decision-making. Therefore, the Italian and Spanish rights of information are extending the scope of application of the GDPR right of information on automated systems, limited to the processing of personal data and to fully automated decision-making systems.

Another similarity between legislations – and difference regarding the GDPR right of information – is that both countries have given workers' representatives the ownership of this right, something that is sensible, since they are in a better position to contest the employer's power.

Apart from that, there are several differences among the national rights of information. It could be said that those differences are huge in relation to the active subjects of the right, the content, and the conditions for the completion of the right. As it has been explained, the Italian regulation on the

right of information covers more kind of workers and specifies the content of the right together with the moment in which the information must be submitted to the workers individually considered (it is not clear when the information must be delivered to the workers' representatives). Instead, the Spanish right of information is limited to workers with at least unitary representatives, and it is imprecise on the content and the moment of compliance of the right.

In that regard, the Italian right of information has probably benefited both from the scope of application of Directive 2019/1152 and the pre-existence of the Spanish right of information.

Anyway, as these rights of information are right now, it could be said that the boldness of these laws is limited. It is true that both regulations might allow to exercise some accountability on the use of such technologies by the employer. Nevertheless, the control foreseen by each regulation looks to me insufficient.

First, because both legislations have opted for the feeblest participatory right[56], even though it cannot be denied the usefulness of the right of information not only because of its supervisory function, but also because it is instrumental for the execution of other participatory rights, such as collective bargaining and, even, the strike[57]. A brave legislative practice would have implied the opportunity of workers' representatives to negotiate the conditions of the use of algorithms in the workplace and even the right to negotiate the algorithm itself[58]. However, such legal modification might be a step that these countries are not willing to implement yet.

Second, because of the configuration of the respective rights of information themselves. Neither the Italian article 1-bis LD n. 152/1997 nor the Spanish article 64.4.d) WS have dared to also include the right to check that the employer applies the algorithmic management as informed after the automated decisions are taken, even though this information might include personal data. Namely, from none of both regulations can be derived the existence of an *ex-post* right of information, including personal data, in order to control that these technologies have been used as they were meant to be in the first instance, and, more importantly, that no wrongful decisions have

[56] Baylos Grau, *cit.*; Recchia, *cit.*, p. 48.

[57] Gómez Gordillo, *cit.*, p. 170.

[58] De Stefano, *"Negotiating the algorithm": Automation, artificial intelligence and labour protection*, in *ILO Working Paper*, 2018, 246.

been taken. This, in fact, would facilitate the real control on algorithmic management since it could check the lawfulness of the automated processing of data in a broad sense. Both verifying that the data processing has respected GDPR and that the processing does not infringe the employment regulation and other fundamental rights.

In any case, the existence of these laws must be welcomed since they are the first opportunity to exert some control over algorithmic management, allowing workers' representatives to anticipate and mitigate possible negative impacts related to the use of these technologies[59]. Additionally, it cannot be ignored that they could also encourage collective bargaining to assume a more proactive role in extending these rights of information (by recognising an ex-post right of information or a formation right to workers' representatives in order to detect the wrongful use of these technologies) or even acknowledging other collective rights related to algorithmic management control.

[59] Adams-Prassl, Abraha, Kelly-Lyth, Silberman, Rakshita, *Regulating algorithmic management: a blueprint*, in *ELLJ*, 2023, Vol. 14, 2, p. 146.

Abstract

This article compares the right of information of both the Spanish article 64.4.d) WS and the Italian article 1-bis LD n. 152/1997. Both provisions acknowledge to the workers' representatives the right to obtain certain information on the use of algorithms at work. The aim of the article is to underline the points in common that have both regulations and highlight their differences, determining the positive and negative impacts that these regulations might have in controlling the algorithmic management at work. That way, this paper could help as a reference for new regulations that might come in the future.

Keywords

Algorithmic management, Collective right of information, Worker's representatives, Ley Rider, Decreto Trasparenza.

Thandekile Phulu

The conflict between the employee's right to disconnect and the employer's prerogative to dismiss for off-duty misconduct: A comparative study of South Africa, USA and UK

1. *The right to disconnect defined*

The digital age has transformed work dynamics, offering remote and flexible options with advantages like autonomy, work-life balance, and productivity. However, excessive digital device use may strain employee's accessibility, causing health problems and work-life imbalance. Hence, the "Right to Disconnect" emerges as a proposed human right, granting individuals the freedom to disengage from work-related electronic communication outside work hours. Since France passed legislation on the "Right to disconnect" other countries have followed suit. Italy, Spain, and Ireland have passed similar laws, and the European Union is thinking about doing the same[1].

[1] European Parliament, *Parliament wants to ensure the right to disconnect from work*, 2021, January 21, 2021, https://www.europarl.europa.eu/news/en/headlines/society/-20210121STO96103/parliament-wants-to-ensure-the-right-to-disconnect-fromwork#:-

The 2022 Eurofound report defines the right to disconnect as the right of employees to refrain from engaging in work-related electronic communications such as emails or messages after work hours[2]. Lagutina identifies three key components of the right to disconnect: 1) the employee's freedom from regular work outside normal hours, 2) protection from penalties for declining work-related matters after hours, and 3) the responsibility to respect others' right to disconnect, refraining from excessive communication outside normal working hours[3].

The author argues that the right to disconnect encompasses protection against dismissal for lawful off-duty activities unrelated to the employer. Article 2 of the EU Directive 2003/08 defines "working time" as any period when an employee is available to the employer and performs tasks, while Article 5 stipulates that the concept of "rest" must be quantified in terms of days, hours, and/or fractions[4].

The "right to disconnect" protects employees from engaging in work-related electronic communications during their off-duty time and shields them from negative consequences for being unavailable to their employers[5]. This right offers benefits to both employees and employers by promoting work-life balance, preventing burnout, and enhancing productivity[6]. With the increasing trend of remote and flexible work arrangements, employees can work from anywhere, blurring the boundaries between work and personal life[7]. The "right to disconnect" prevents abusive employment practices and ensures that employees can truly dis-

~:text=The%20right%20to%20disconnect%20is%20not%20defined%20in,consequences%20and%20setting%20minimum%20standards%20for%20remote%20work.

[2] Gaude, Eurofound, *Workplace innovation in European companies: A report on the fifth European Company Survey* (Report No. 01), 2019, p. 39, https://eurlex.europa.eu/legalcontent/-EN/TXT/PDF/?uri=CELEX:12019W/DCL(01)&from=PT.

[3] Lagutina, *"Right to disconnect" as one of the employee's digital labours right*, in JES, 2022, http://jes.nuoua.od.ua/archive/3_2022/5.pdf.

[4] *EU Directive 2003/08 concerning certain aspects of the organisation of working time*, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003-L0088&from=EN.

[5] Lungu, *The Right to Disconnect-A Necessary Demarcation between Professional and Private,* in *LICD Studii Europene si Relatii Internationale IX*, 2021, p. 178.

[6] Lagutina, *cit.*, p.2.

[7] Von Bergen, Bressler, Proctor, *On the grid 24/7/365 and the right to disconnect*, in *ERLJ*, 2019, p. 113.

connect from work after hours[8]. The author aims to contend that the right to disconnect extends beyond merely refraining from responding to work emails. It encompasses the broader entitlement to privacy and the freedom to choose off-duty activities without interference, as long as these activities do not adversely impact the employer's business. The discussion on the conflict between employee rights and employer prerogatives revolves around this premise, emphasising the need to strike a balance between an individual's right to personal space and an employer's prerogative to dismiss for off-duty misconduct.

2. *The right to disconnect and the International Labour Organisation (ILO)*

Ensuring employee well-being is a vital aspect of labour relations, aligning with the International Labour Organization's (ILO) mission to promote social justice and uphold human and labour rights globally[9]. The ILO's commitment to social justice as a foundation for lasting peace is reflected in its Decent Work Agenda, which aims to establish economic and working conditions benefiting employees, employers, and governments[10]. The right to disconnect, often associated with a safe and healthy workplace, finds support in modern international human rights frameworks mandating workplace safety. These frameworks, including ILO Conventions, Recommendations, and Protocols, the International Covenant on Economic, Social, and Cultural Rights, and the World Health Organization's Constitution, emphasise the fundamental right to a secure and healthy work environment[11]. The ILO Global Commission on the Future of Work and the 2022 International Labour Conference further underscore the significance of safety and health

[8] JOCHMAN, *Effects on employees' compensation under the right to disconnect,* in *MB& SW Law Review*, 2021, 22, p. 209.

[9] Mission and impact of the ILO, https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang—en/index.htm.

[10] The ILO Decent Work Agenda, https://www.ilo.org/global/topics/decent-work/lang—en/index.htm.

[11] *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up* https://www.ilo.org/wcmsp5/groups/public/—-ed_norm/—-declaration/documents/normativeinstrument/wcms_716594.pdf#:~:text=The%20Declaration%20on%20Fundamental%20Principles%20and%20Rights%20at,working%20environment%20as%20a%20fifth%20principle%20and%20right.

as fundamental workplace rights[12]. The author highlights the right to disconnect as an expression of privacy and freedom of expression. Governments must respect this right to support employee well-being and uphold the Decent Work Agenda's goal of advancing peace, prosperity, and growth for employees.

3. *The right to connect and employee off-duty private life*

Informal work patterns have led to widespread adoption of mobile work aided by ICT. This change has changed work and permitted continual employer-employee contact. The line between work and personal life has blurred, making work/life balance harder to attain[13].

Employers must follow maximum working hours and protect workers' privacy and freedom of expression. Avoiding activities that interfere with an employee's personal life during non-work hours can improve their downtime. Employees should be able to set boundaries between work and personal life by disconnecting from digital tools and responsibilities outside of work hours[14].

The addictive nature of the digital world and organisational practises that encourage continual connectedness affect workers' well-being and productivity. Maintaining work-life balance requires addressing these concerns[15].

As stated above, the right to disconnect allows employees to enjoy and exercise other fundamental rights during their off-duty hours. These rights and their protection in select countries are discussed below.

[12] *Ibid*.

[13] Mitrus, *Potential implications of the matzak judgment (quality of rest time, right to disconnect,* in *ELLJ*, 2019, 10, 4, p. 395.

[14] Lungu, *cit.*, p. 2.

[15] Pansu, *Evaluation of "Right to Disconnect" Legislation and Its Impact on Employee's Productivity*, in *IJMAR*, 2018, 5, 3, p. 100.

4. *Employee off-duty rights to privacy and freedom of expression*

The Universal Declaration of Human Rights (UDHR) guarantees global geographical and communications privacy[16]. Article 12 of the UDHR prohibits arbitrary interference with family, home, communications, honour, or reputation[17]. Balancing privacy with social interaction is essential as humanity values privacy and dignity. Privacy is described as a sanctuary for exploring one's thoughts, bodily autonomy, solitude at home, personal data control, freedom from surveillance, reputation safeguarding, and protection from searches and interrogations[18]. Both the 1976 International Covenant on Civil and Political Rights (ICCPR) and UDHR protect freedom of expression, emphasising its universal importance as a human right and a cornerstone of democracy.

In South Africa, the Bill of Rights, particularly Section 14 of the Constitution, safeguards privacy by preventing unwarranted searches, investigations, seizures, and interruptions. Several laws in the country bolster privacy rights, including the 1992 Interception and Monitoring Prohibition Act for telecommunications, the 2002 Electronic Communications and Transactions Act's Section 51 requiring written consent for personal data collection, and the Promotion of Access to Information Act (PAIA) defending information access rights. Additionally, the 2002 Regulation of Interception of Communications and Provision of Communication Related Information Act (RICA) prohibits unauthorized communication interceptions. The SA Constitution's Section 16 emphasises freedom of expression, a crucial element in a democratic state.

In the United States of America, the Fourth Amendment safeguards citizens against unreasonable searches and seizures of their homes and possessions. While it doesn't directly apply to private-sector employment, constitutional interpretations of privacy have extended rights, serving as a guide for courts and employers[19]. Privacy tort law aligns with Fourth

[16] Burchell, *The legal protection of privacy in South Africa: A transplantable hybrid,* in *EJCL,* 2009, 13(1), p. 3.

[17] Burchell, *cit.*, p. 5.

[18] Carbone, *To be or not to be forgotten: Balancing the right to know with the right to privacy in the digital age*, in *Va. J. Soc. Pol'y & L*, 2015, 22, p. 525.

[19] Abril, Levin, Del Riego, *Blurred boundaries: Social media privacy and the twenty-first-century employee*, in *Am. Bus. LJ*, 2012, 49,1, p. 7.

Amendment reasonableness standards[20]. The Electronic Communication Privacy Act (Wiretap Act) prohibits electronic communication interception, including employee social media monitoring[21]. However, this does not cover public electronic communication, allowing employers to monitor if digital information is publicly disclosed. The First Amendment protects freedom of expression, press, assembly, and petition, considered essential for preserving other liberties and democratic processes[22].

In the United Kingdom, privacy is an important workplace right, guaranteed under Article 8 of the European Convention on Human Rights and the Data Protection Act of 2018. Section 2 of the Data Protection Act defines "Data Protection Regulation" as protecting natural people's data and its free movement. Furthermore, Section 1(3) of the Regulation of Investigatory Powers Act prohibits employers from reading emails, scanning inboxes, or monitoring calls or websites without legal authorisation. UK law, together with the legislation of the European Union and international human rights law, protects the right to freedom of speech. The European Convention on Human Rights guarantees, in particular, Article 10's guarantee of freedom of speech. The ECHR governs domestic law under Section 3 of the 1998 Human Rights Act. The Human Rights Committee (HRC) has never had an issue applying that Article to online freedom of speech. All technological and internet-based communication is considered expression by UK courts[23].

Although employees should enjoy their off-duty rights, sometimes they get dismissed for conduct that occurred outside of working hours and away from the employer's premises. This is called dismissal for off-duty conduct.

5. *The right to disconnect and dismissal for off-duty misconduct*

The "right to disconnect" implies that employees have the freedom to engage in legal activities during their off-duty hours without being connected to the workplace. However, employers retain the prerogative to terminate employees for off-duty misconduct, creating a potential conflict between these rights. Generally, what employees do on their own time is

[20] Abril, Levin, Del Riego, *cit.*, p. 6.

[21] 18 U.S.C. section n. 2511.

[22] *Palko v Connecticut*, 302 U.S. 319/1937 319.

[23] *Handyside v United Kingdom*, 1 EHRR 737/1976, para 49.

their business, but exceptions exist[24]. Off-duty misconduct occurring outside working hours, away from the workplace, can lead to dismissal if it negatively affects the employer's business, especially in cases of off-duty social media misconduct. Dismissals often result from activities irreparably damaging the employment relationship, assessed through the "nexus" and "breakdown of the employment relationship" tests[25].

These two tests are discussed below.

5.1. Nexus and Breakdown of employment relationship tests

Before an employee is dismissed for off-duty misconduct, there must be a plausible nexus or connection between the misconduct and the employer's business interests, furthermore, the conduct must have a substantial effect on the employer's business[26]. An example of a substantial impact is the company's profitability or reputation[27].

When assessing guilt for off-duty misconduct, the nexus test is employed to determine the employee's culpability in the alleged misconduct. In the second stage, it is examined whether the employee's actions have sufficiently damaged the employment relationship to warrant dismissal.

The case for dismissal is strengthened if the employee posts derogatory or insulting comments about the employer on social media albeit off-duty. This was the situation in the SA case of *Edcon v Cantamessa*[28]. In this case, the employee was dismissed for posting derogative comments about the SA government on Facebook while she was off-duty. The same applied to a recent BBC employee Gary Lineeker who was suspended after a tweet criticising the UK government's refugee policy. In an American case *York University Staff Association v York University*[29], an arbitrator upheld York University's dismissal of a Laboratory Technologist for discriminatory Facebook posts.

[24] SANDERS, *The law of unfair dismissal and behaviour outside work*, in *LSt*, 2014, 34, 2, p. 332.

[25] *Council for Science & Industrial Research v Fijen*, 1996, n. 17 in *ILJ* 18,1999; 20 *ILJ*, par. 39, pp. 2437-2449.

[26] NEL, *Social media and employee speech: the risk of overstepping the boundaries into the firing line,* in *Comp. Int. LJ of SA*, 2016, 49(2), p. 88.

[27] *Dolo v. Commission for Conciliation, Mediation, and Arbitration and Others*, in *ILJ*, 2011, 32, par. 19.

[28] ZALCJHB 273/2019.

[29] Grievance, 47-16.

5.2. Employer's prerogative to dismiss for off-duty misconduct to protect reputation

Employer's prerogative encompasses an organization's right to effectively manage its resources and operations to achieve its goals[30]. In the employment context, it grants employers the authority to oversee work arrangements for optimal functioning[31]. While employees are safeguarded against unfair dismissal, employers retain the right to terminate employees who compromise business interest[32]. This power imbalance often leads to tension between employee rights and employer prerogatives, especially regarding off-duty activities[33]. Employers, driven by reputation concerns, may react strongly to off-duty misconduct, but proving reputational harm can be subjective and challenging in some off-duty cases. Evaluating such damage often lacks objective assessment[34].

6. *Adjudication and regulation of dismissal for off-duty misconduct in select countries*

6.1. South Africa

SA does not have a legislative framework that governs dismissals for off-duty misconduct. All forms of misconduct are governed by the Labour Relations Act 1995 (LRA) and the Code of Good Practice Dismissal (Code). Section 185 of the LRA prescribes that every employee has the right not to be unfairly dismissed and not to be subjected to an unfair labour practice[35]. The Code outlines some of the most essential aspects of dismissals for con-

[30] Bergen, *Management prerogatives*, in *HBR*, 1940, 18, 3, p. 279.

[31] Asvanyi, *Content and limitations of the managerial prerogative doctrine,* in *Jura: Pecsi Tudomanyegyetem Allam- es Jogtudomanyi Karanak Tudomanyos Lapja*, 2017, p. 268.

[32] Racabi, *Abolish the employer's prerogative, unleash work law*, in *BJELL*, 2022, 43, p. 79.

[33] Chambers Jr, *Employer Prerogative and Employee Rights: The Never-Ending Tug-of-War*, in *MLR*, 2000, 65, p. 881.

[34] Hill, *Discipline and discharge for off-duty misconduct: What are the arbitral standards*, in *Proceeding of the National Academy of Arbitrators*, Bureau of National Affairs, 1986, 152, p.152.

[35] See *National Education, Health and Allied Workers' Union v University of Cape Town* 3 SA 1/2003 (CC), par 42.

duct and capacity[36]. The Code emphasises fairness in dismissals for misconduct, allowing flexibility based on unique circumstances.

Case law shows that employers' rights and employees' rights compete and, in most situations, employee's rights are sacrificed at the expense of the employer's rights to business interests such as reputation.

In *Sedick & others v Krisray (Pty) Ltd*[37], two employees were dismissed for criticising their employer on Facebook. Since neither the company nor specific persons were mentioned, the employees complained to the Commission for Conciliation, Mediation and Arbitration (CCMA) that their posts did not tarnish the employer's image. The employees also cited privacy violations[38]. The CCMA ruled that the employees' privacy was not breached since they had not restricted their Facebook privacy settings and anybody could see their posts, including non-Facebook "friends"[39]. The CCMA also found that the employer's identity was quite likely to be discovered and that the prospect of damage was sufficient to warrant dismissal. Since the posts targeted the employer, the CCMA found a strong nexus between the employees' activity and the company's business. Since the post criticised the employer, it risked reputational damage and dismissal was a fair sanction[40].

In *Chemical Energy Paper Printing Wood & Allied Union obo Dietlof v Frans Loots Building Material Trust t/a Penny Pincher*[41] *(Chemical Energy)*, the applicant claimed on Facebook that the respondent discriminated against two long-serving employees by purposefully kissing the white female employee on the cheek and hugging the black female employee[42]. The employee testified that the social media post was unrelated to the employer. The employer testified that it could be identified by the comments even though its name was not mentioned[43]. The employer's event matched the Facebook posts, and the photos seemed to have been taken on the employer's property[44]. According

[36] Section 8(1) of the Code.

[37] 32 *ILJ* 752/2011 (CCMA).

[38] *Sedick & another v Krisray (Pty) Ltd*, par. 42.

[39] Facebook available at https://www.facebook.com/community/understanding-your-privacy-settings/, a Facebook friendship is a two-way relationship. When one accepts to be someone's friend, they can see each other's posts.

[40] *Sedick & another v. Krisray (Pty) Ltd*, par. 53.

[41] 38 ILJ 1922/2017 (CCMA)

[42] *Chemical Energy*, par. 5.

[43] *Chemical Energy*, par. 14.

[44] *Chemical Energy*, par. 28.

to the Commissioner, falsely accusing a supervisor or co-worker of racism was as heinous as racism itself[45]. The Commissioner found the applicant's dismissal procedurally and substantively fair even though the employer did not have a social media policy.

In *Gordon v National Oilwell Varco*[46], an employee was dismissed for social media racism. He wrote on Facebook, "My mother has been in the hospital since yesterday night after her ambulance was kidnapped by sh★t k★★★★★s[47] looking for a ride to their f★★★★★g knife stabbing, I'm tired of his country. Will everything return to normal? I doubt it – maybe I should leave the country"[48]. The employer provided proof that the applicant signed the company's social media regulations when he began working there[49]. He claimed desperation prompted the comments. The Commissioner found workplace racist statements unacceptable and upheld the applicant's dismissal[50].

In the case of *Edcon v Cantamessa*[51], an employee posted a Facebook comment criticizing South Africa's president and government, which led to her dismissal by Edcon, the employer [52]. The CCMA initially ruled the dismissal as substantively unfair, stating that Edcon's policy only regulated on-the-job conduct, and her Facebook post was unrelated to the company[53]. However, the Labour Court (LC) overturned this decision, finding a nexus between her off-duty conduct and Edcon's business interests[54]. The court saw no distinction between off-duty and on-duty social media activity and concluded that dismissal was considered fair because there was a nexus and potential reputational harm[55].

In the case of *Makhoba v CCMA*[56], an employee was dismissed for making racist remarks on a politician's Facebook page, advocating violence against a racial group. Despite initially denying the comment and claiming

[45] *Chemical Energy*, par. 28.
[46] 9 BALR 935/2017 (MEIBC).
[47] Kaffir is an exonym and an ethnic insult, notably about black people in South Africa.
[48] *Gordon v National Oilwell Varco*, par. 9.
[49] *Gordon v National Oilwell Varco*, par. 14.
[50] *Gordon v National Oilwell Varco*, par. 55-61.
[51] ZALCJHB 273/2019.
[52] *Cantamessa*, par. 5.
[53] *Cantamessa*, par. 5
[54] *Cantamessa*, par. 11.
[55] *Cantamessa*, par. 11.
[56] 1280-17/2021 (LC).

a hacked account, the employee later admitted to posting it[57]. He argued that the incident occurred outside work hours, did not involve company employees or supervisors, and was on his personal Facebook account, not the employer's[58]. However, the CCMA upheld the dismissal, emphasizing the severe consequences of racist remarks in South Africa[59]. The LC later supported this decision, stating that off-duty misconduct matters if it negatively affects the employer's business, and in this case, the employee's behaviour was linked to the company's diverse workforce[60].

In South Africa, the legalisation of cannabis has raised workplace challenges. Employees have the right to use it privately but can be dismissed for testing positive at work as discussed below.

6.1.1. The recent legalisation of private use of cannabis in South Africa

Cannabis, also known as marijuana, contains nearly 100 cannabinoids that impact brain and body receptors[61]. Tetrahydrocannabinol (THC) is a prominent cannabinoid responsible for the "high"[62]. It can be consumed in various forms like smoking, pills, food, creams, and vaporization, inducing effects like dizziness, fatigue, memory issues, and impaired motor skills[63].

The Constitutional Court of South Africa legalised adult cannabis use in the case of *Minister of Justice and Constitutional Development v Prince*[64], affirming the right to private use and cultivation of cannabis for adults while prohibiting public usage[65]. The ruling was based on principles of human dignity, equality, and freedom in an open and democratic society[66].

However, the legalisation of cannabis in South Africa presents challenges in the workplace. Employees have faced dismissal due to the presence of cannabis in their blood or urine, despite being off-duty and unimpaired dur-

[57] *Makhoba v. CCMA*, par. 2.
[58] *Makhoba v. CCMA*, par. 4.
[59] *Makhoba v. CCMA*, par. 4.
[60] *Makhoba v. CCMA*, par. 19.
[61] SMITH, *Cannabis confusion: criminalization and decriminalization revisited,* in *bachelor's thesis, University of Cape Town*, 1995, p. 4.
[62] SMITH, *cit.*, p.12.
[63] *Ibid*.
[64] CCT 108/17.
[65] *Prince*, par. 110.
[66] *Prince*, par. 110.

ing work hours. Cannabis testing complexities, including the detection of metabolites rather than impairment, lack of consensus on safe consumption limits, and varying effects based on THC content and other factors like alcohol or drug use, contribute to these employment issues[67]. This is because cannabis has been demonstrated to be present in a person's urine for days and weeks after use[68]. Some employees have been dismissed even if they tested positive days after cannabis usage, as employers cite non-compliance with zero-tolerance policies as a justification for termination.

In the *Nhlabathi and Others v PFG Building Glass (PTY) Ltd*[69], the LC defined a zero-tolerance policy as one that unequivocally prohibits any rule violations, making it clear that specific behaviours or activities will not be tolerated under any circumstances[70]. Such a policy, when consistently enforced, disregards factors like an employee's dependents, years of service, or mitigating circumstances[71]. Instead, it focuses on whether the employee was aware of the policy, if it was consistently applied, and whether it was reasonable for the workplace[72].

In this case, employees were dismissed for testing positive for cannabis, violating the employer's zero-tolerance policy on alcohol and drug abuse. Both the CCMA and the LC upheld their dismissal. The judge emphasized that it didn't matter if the employees used cannabis in private, posed no risk on the day of testing, had long employment terms, or had clean disciplinary records. The company implemented a zero-tolerance policy due to the hazardous nature of the workplace and its commitment to safety, and the key factors considered were adherence to the policy, consistent enforcement, and appropriateness for the workplace[73].

In *Mthembu and others v NCT Durban Wood Chips*[74], the CCMA ruled that, due to the high level of safety required of companies with heavy machinery and generally dangerous equipment, it is reasonable for employers to prohibit the use of substances such as cannabis at the workplace and re-

[67] Liquori, *The Effects of Marijuana Legalization on Employment Law*, in *NAAG*, 2016, p. 4.
[68] Liquori, *cit.*, p. 12.
[69] ZALCJHB 292/2022
[70] *PFG* case, par. 85.
[71] *PFG* case, par. 85.
[72] *SGB Cape Octorex (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others*, ZALAC 2022 n. 118, par. 17.
[73] *PFG* case, par. 84.
[74] 4 BALR 369/2019 (CCMA).

porting to work under the influence of such substances[75]. In this instance, the employees confessed to using cannabis off-duty; however, they were terminated for being under the influence of the substance after the presence of cannabis in their urinalysis was detected[76].

In the case of *Enever v Barloworld Equipment*[77], the employer had a strict zero-tolerance policy for alcohol and drug abuse[78]. An employee, who had transitioned from prescription medications to private cannabis use, was dismissed after testing positive for cannabinoids[79]. She argued that her private usage should have been permitted and claimed discrimination and a violation of her privacy rights[80]. However, the dismissal was deemed fair because the company's zero-tolerance policy applied uniformly to all employees, regardless of their roles[81]. The LC emphasized the policy's consistency, upholding the termination, even though the employee's role did not involve heavy machinery operation[82].

These rulings underscore that despite the decriminalization of private adult cannabis use, employers maintain the authority to regulate such usage among employees based on workplace policies. However, the fairness of dismissal as a consequence is subject to scrutiny. Firstly, these decisions overlooked mitigating circumstances, treating employees operating dangerous machinery the same as those in desk jobs. Secondly, the policies failed to distinguish between procedures for dismissing employees for alcohol or cannabis abuse, applying a blanket zero-tolerance approach. This raises concerns because assessing impairment from alcohol is more straightforward than from cannabis, as cannabis can yield positive test results weeks after consumption.

6.2. United States of America

At the federal level, the USA has no Act regulating off-duty misconduct. However, the National Labour Relations Act (NLRA) protects off-duty free-

[75] *Mthembu*, par. 72.
[76] *Mthembu*, par. 72.
[77] *ILJ* 43/2022(LC).
[78] *Enever*, par. 5.
[79] *Enever*, par. 5.
[80] *Enever*, par. 5.
[81] *Enever*, par. 5.
[82] *Enever*, par. 26.

dom of expression speech and limits employer disciplinary options for social media speech, if the off-duty conduct involves concerted activities[83]. Second, employees may voice their opinions on politics and working conditions on social media without a union[84]. Several states have taken a stance to regulate off-duty conduct to balance the employee's right to privacy and freedom of expression and the employer's right to reputation and the right to dismiss for off-duty misconduct. The three chosen states are California, New York and Colorado.

California's Labour Code protects employees' off-duty conduct. Section 96(k) prohibits employers from dismissing employees for legal off-duty activities, enabling the Labour Commissioner to file claims for those facing adverse actions due to non-work-related actions. Section 98.6(a) prohibits discrimination against individuals using Section 96(k) privileges. Section 98.6(b) grants reinstatement and compensation for employees facing adverse employment actions due to protected conduct.

Furthermore, sections 1101 and 1102 of the California Labour Code also prevent employers from controlling or influencing employees' political actions or affiliations under threat of dismissal or benefit loss. This legal framework is used to evaluate fairness in off-duty conduct dismissals. In *Snyder v Alight Solutions LLC*[85], a California-based remote employee faced unfair dismissal claims after participating in US Capitol demonstrations[86]. The case involves allegations of freedom of expression and assembly rights violation and political affiliation discrimination, grounded in California's Labour Code sections 1101 and 1102[87].

In *Martin House Inc v Tricia Blanton*[88], the employee worked for a non-profit residential institution for homeless people with mental conditions. The employee was dismissed for a Facebook conversation with two friends". She

[83] McGinley, McGinley-Stempel, *Beyond the water cooler: Speech and the workplace in an era of social media*, in *Hofstra Lab. & Emp. LJ*, 2012, 30, 75, p. 84.

[84] McGinley, McGinley-Stempel, *cit.*, p. 14.

[85] (8:21-CV-00187).

[86] Docket available at https://www.docketbird.com/court-documents/Leah-Snyder-v-Alight-Solutions-LLC-et-al/NOTICE-OF-MOTION-AND-MOTION-to-Dismiss-Case-Pursuant-to-Fed-R-Civ-P-12-b-6-filed-by-defendant-Alight-Solutions-LLC-Motion-set-for-hearing-on-4-26-2021-at-01-30-PM-before-Judge-Cormac-J-Carney/cacd-8:2021-cv-00187-00010.

[87] *Ibid.*

[88] 34-CA-012950 358 NLRB No.164 2012 WL 4482841.

ridiculed patients' mental issues on Facebook[89]. Since the employee did not contact other employees via her Facebook account and had no other employees as "friends", the NLRB's General Counsel (GC) decided that her speech was neither concerted nor protected. Her Facebook postings were unrelated to her career, and she never discussed them with co-workers[90].

New York Labour Law section 201-D safeguards employees from discrimination and dismissal due to off-duty activities. This law applies to all New York employers and distinguishes between work and off-duty hours. It prohibits the termination of employees engaged in authorized off-duty political activities outside working hours and away from the employer's premises and resources, as long as it doesn't severely conflict with the employer's proprietary interests. This provision aims to protect employees' rights while allowing employers to safeguard their trade secrets and intellectual property.

Justice Yesawich stated in *State of New York v Wal-Mart Stores Inc*[91]. that "the Legislature's primary goal in enacting Labour Law section 201(d) was to limit employers' ability to discriminate based on activities that occur outside of work hours and have no bearing on one's ability to perform one's job, and ensures employees a certain level of freedom to live their lives as they wish during nonworking hours". In this case, the court decided that Wal-Mart Stores' "fraternisation" policy, which prevented married employees from dating, was not subject to off-duty behavioural control. This lawsuit was based on whether "dating" constituted a protected "recreational activity" under the legislation. The court upheld Wal-Mart's policy.

In a recent New York case, *Cooper v Franklin Templeton*[92], Amy Cooper a white lady contacted 911 following a verbal disagreement with black Christian Cooper in Central Park. Mr Cooper shared the experience on Facebook. People called Ms Cooper racist when the video went viral[93]. Social media "detectives" quickly discovered Ms Cooper was Franklin Templeton's Vice President and Head of Investment Solutions. Franklin Templeton was accused of promoting bigotry on social media[94]. Franklin Templeton dis-

[89] *Martin House Inc v Tricia Blanton*, par. 3.
[90] *Martin House Inc v Tricia Blanton*, par. 3.
[91] 1995 N.Y. App. Div.
[92] 1:21-CV-04692.
[93] *Cooper v Franklin Templeton*, par. 1.
[94] *Cooper v Franklin Templeton*, par. 2

missed Ms Cooper because she violated their anti-racism policy[95]. In return, Cooper sued his employer for sexual harassment and defamation. Franklin's dismissal was upheld, hence the court dismissed her claims. The court held that her misconduct affected the company's reputation because clients threatened to leave, endangering the company's operations. The employee was dismissed to protect the company's reputation and to prevent the loss of customers[96].

Colorado's Revised Statute (CRS) section 24-34-402.5's section 1 states that "1) It is discriminatory or unfair for an employer to terminate an employee's employment because the employee engaged in any permitted activity off the employer's premises during nonworking hours unless such a restriction is properly and rationally related to the employment activities and obligations of a specific employee or group of employees, rather than to all employees".

The above law codifies the nexus test. It allows companies to terminate employees for off-duty activity related to the employer's business.

The court decided in *Marsh v Delta Air Lines*[97] maintaining an employee's off-the-job privacy must be balanced against an employer's financial interests[98]. However, an employer has the right to dismiss an employee if there is a conflict of interest[99].

From the analysis of the regulation of off-duty conduct in the three states above, it can be argued that while the right to disconnect may not be explicitly regulated in many jurisdictions, the broader legal framework around off-duty conduct, privacy, and workplace rights can significantly influence the practical application of this right. As work environments evolve, policymakers and employers may continue to reassess and adapt regulations to meet the changing needs of the workforce.

[95] *Cooper v Franklin Templeton*, par. 2.
[96] *Cooper v Franklin Templeton*, par. 2.
[97] 952 F. Supp. 1458 (1997).
[98] *Marsh v Delta Air Lines*, par. 1463.
[99] *Marsh v Delta Air Lines*, par. 1464.

6.3. United Kingdom

In the UK, there are five recognised reasons for a fair dismissal. These are conduct, capacity, redundancy, statutory illegality or breach of a statutory restriction and any other substantial reason[100]. Procedurally, an employer can only terminate an employee's job lawfully if a fair procedure has been followed[101]. The employer's right to dismiss employees for misconduct is limited by unfair dismissal legislation. Section 94 of the ERA provides employees with the "right not to be unfairly dismissed" by their employers, and section 98 delineates the process for determining whether a dismissal is fair or unfair. Section 111 of the ERA gives employees the right to file a case of unfair dismissal at an Employment Tribunal (hereafter ET). ETs are public organisations in the UK that have statutory competence to hear different forms of disputes between employers and employees.

Smith v Trafford Housing Trust[102] a devout Christian who worked for the respondent as a housing manager. He responded to a BBC article by posting on Facebook[103]. In the post, he opposed gay church marriages. After that, he conveyed his worries to two employees with Facebook access. He was suspended with pay for gross misconduct[104]. His long service earned him a demotion. He challenged the demotion. His employer justified the demotion because the postings could embarrass the Trust[105]. The employer further alleged that the claimant violated the Code of Conduct and Equal Opportunities Policy by failing to treat co-workers with dignity while promoting his religion[106]. However, Briggs J found that a demotion unfairly dismissed the claimant under current legislation. His dismissal was unfair since his Facebook wall lacked a work-related context to trigger the ban on political or religious advocacy[107]. The court also held that whether off-duty misconduct affects the working relationship is the most important issue in terminating an employee[108]. The court held further that it should be assessed if there was

[100] Employment Rights Act 1998 section 98 (1)-(2).
[101] Employment Rights Act 1998 section 98A.
[102] IRLR 86/2013.
[103] *Smith v Trafford Housing Trust*, par. 10.
[104] *Smith v Trafford Housing Trust*, par. 10.
[105] *Smith v Trafford Housing Trust*, par. 11.
[106] *Smith v Trafford Housing Trust*, par. 50.
[107] *Smith v Trafford Housing Trust*, par. 51.
[108] *Smith v Trafford Housing Trust*, par. 51.

an intentional infringement of corporate policy, a negative impact on the employer-employee trust relationship, damage to the employer's reputation, or a violation of employee duties.

In *Game Retail Ltd v Laws* (Game case)[109], an employee was dismissed for making rude personal insults on Twitter[110]. The ET found the dismissal unfair. The tweets were sent from Mr Law's phone, outside of office hours and for personal reasons[111]. It was unclear whether the public had linked Mr Law to the corporation through his Twitter account. Game's disciplinary policy did not specifically state that using social media in this manner constituted serious misconduct[112]. The EAT ruled on appeal that the dismissal was fair since the tweets were made on a public platform and stressed that Game Retail's shops relied on Twitter and other social media as marketing and communication tools, indicating a strong nexus[113].

In March 2023, the British Broadcasting Corporation (BCC) suspended broadcaster Gary Lineker after he tweeted against the UK government's treatment of refugee seekers. A few days later, the BBC and Lineker struck a deal, and BCC is currently examining its social media standards[114]. The BBC lifted his suspension, striking an agreement to get him back on air[115].

The UK cases above reveal that having well-defined policies and considering mitigating factors before dismissing an employee for off-duty misconduct is vital for safeguarding their right to disconnect. This practice creates a framework that respects the boundaries between professional and personal life while maintaining fairness and accountability in the workplace.

[109] UKEAT 0188/14.

[110] *Game Retail Ltd v Laws*, par. 4.

[111] *Game Retail Ltd v Laws*, par. 13.

[112] *Game Retail Ltd v Laws*, par. 31.

[113] *Game Retail Ltd v Law*, par. 31.

[114] UK Labour Law is available at https://uklabourlawblog.com/2023/03/13/censoring-gary-lineker-by-george-letsas-and-virginia-mantouvalou/.

[115] Lander, *BBC Ends Suspension of Top Sports Host After Staff Mutiny*, in *The NY Times,* 13/03/2023, https://www.nytimes.com/2023/03/13/world/europe/gary-lineker-bbc-return-motd.html.

7. *Concerns about the conflict between the employer's prerogative and employee rights*

Discussed cases bring to light the complex interplay between employee rights and employer prerogatives concerning off-duty conduct. While employees possess off-duty rights, it's evident that these rights can be constrained by the employer's authority to dismiss for off-duty misconduct. However, there is a legitimate concern when employees are dismissed for conduct unrelated to their employer's business, especially in cases where no company policy regulates such behaviour. This scenario raises questions about the infringement of employee rights, with a potential bias in favour of employer interests.

The decisions rendered by tribunals and South African courts suggest that certain ethical standards are implicitly expected of employees, even without explicit inclusion in workplace policies. Balancing the rights of employers and employees equitably is crucial, particularly when it comes to respecting employees' right to privacy. Dismissing employees for off-duty conduct completely unrelated to the workplace, especially when unregulated by company policies, may be seen as excessive.

The notion that dismissal is akin to a "death sentence" in labour law underscores the importance of employing this sanction judiciously. In cases where off-duty misconduct lacks company policy regulation, employers should consider implementing progressive discipline measures rather than immediate dismissal. Dismissal should be reserved for instances where there is a clear and substantial connection between the employee's conduct and the employer's business, and where the conduct is so egregious that it renders the employment relationship irreparable. Employers must demonstrate that no alternative or lesser sanction could effectively remedy the harm suffered by the employer. This balanced approach seeks to safeguard both employee rights and employer interests within the framework of fair labour practices.

SA can learn from the USA's well-defined legislative frameworks for off-duty misconduct and dismissals, as these provide structured procedures. Additionally, the UK's emphasis on policies governing off-duty behaviour offers insights, suggesting that South Africa could benefit from implementing a similar policy requirement to reduce ambiguity and protect the rights of all parties involved.

8. *Conclusion*

The concept of the "right to disconnect" encompasses not only the freedom to disengage from work but also fundamental rights such as privacy and freedom of expression. There is conflict between the employer's authority to dismiss employees for off-duty misconduct and employees' rights.

To mitigate this conflict and achieve a harmonious balance between employer prerogatives and employee rights, several recommendations are proposed below. These solutions aim to reconcile the rights of both parties involved in a fair and equitable manner.

9. *Recommendations*

To effectively uphold and balance the rights of both employers and employees, states must enact legislation that regulates and protects off-duty conduct. In doing so, these legislative efforts should also incorporate and elucidate the "right to disconnect", outlining its scope and implications within the legal framework.

Such legislation should provide a clear demarcation between work hours and rest hours, thereby distinguishing between on-the-job and off-duty hours. Furthermore, in consideration of contemporary technological advancements, it is essential to establish a modern nexus that objectively links an employee's conduct to the employer's business, with clear guidelines on what off-duty behaviour warrants dismissal.

To ensure compliance and clarity, legislation should mandate that employers institute off-duty conduct policies that strike a balance between employer prerogatives and employee rights.

Lastly, it falls upon the courts and tribunals to interpret and apply this legislation in a manner that upholds internationally recognized human and labour rights, fostering a fair and just working environments for all parties involved.

Abstract

Labour rights are an integral component of human rights, encompassing various entitlements for employees aimed at safeguarding them from potential exploitation by employers. Among these rights, the right to privacy and the right to disconnect from the workplace have gained prominence. The contemporary challenges posed by the widespread off-duty use of social media and the legalisation of private cannabis use (in some countries) have not only intensified the conflict between employees' privacy rights and employers' authority but have also underscored the relevance of the right to disconnect. As employees engage in off-duty activities that may inadvertently impact the workplace, the line between personal life and professional obligations becomes increasingly blurred. This becomes apparent when considering off-duty misconduct, where legal principles limit an employer's disciplinary actions unless a clear detriment to business interests is demonstrated. The right to disconnect, which advocates for employees' autonomy over their non-working hours, aligns with the need to address the evolving dynamics of off-duty conduct. The paper's comparative analysis across jurisdictions, including South Africa and selected United States of America states aims to shed light on how legal frameworks navigate these complexities, emphasising the interconnectedness of the right to disconnect with contemporary labour rights challenges.

Keywords

Employee rights, Right to disconnect, Freedom of expression, Privacy, Off-duty misconduct.

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abbreviations

The list of abbreviations used in this journal can be consulted on the website www.ddllmm.eu/.

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