RECENT LABOUR LAW ISSUES

A MULTILEVEL PERSPECTIVE

Editors

Stefano Bellomo, Antonio Preteroti

IUSTITIAM COLIMUS

G. Giappichelli Editore

RECENT LABOUR LAW ISSUES
A MULTILEVEL PERSPECTIVE

RECENT LABOUR LAW ISSUES

A MULTILEVEL PERSPECTIVE

Editors

Stefano Bellomo, Antonio Preteroti

IUSTITIAM COLIMUS

G. Giappichelli Editore

VIA PO, 21 - TEL. 011-81.53.111 - FAX 011-81.25.100
http://www.giappichelli.it

ISBN/EAN 978-88-921-2915-3
ISBN/EAN 9788892182400 (ebook - open access)

The manuscript has been subjected to the double blind peer review process prior to publication

This Collective Volume is an initiative of the group named ELLYS (European Labour Law Young Scholars), constituted within the ISLSSL (International Society of Labour and Social Security Law)

The publication of this volume has been funded with the contribution of the Department of Law of the University of Perugia.

Printed by Stampatre s.r.l. - Torino (Italy)

INDEX

III
REGULATING WORK FROM DIFFERENT PERSPECTIVES

IV
THE EMPLOYER ORGANIZATION: OLD AND NEW PROBLEMS

INTRODUCTION

The book contains a collection of essays produced by young scholars coming from many different Countries (Argentina, Austria, Brasil, Cech Republic, Italy, Greece, Japan, Netherlands, Portugal, Slovenia, Spain, Sweden, Taiwan).

The essays reproduce the papers presented during two different meetings. The first meeting was the 4th ELLYS Conference which took place in Gdańsk in July 2018. The second one was the session dedicated to young scholars during the ISLSSL World Conference which took place in Turin in September 2018. The main aim of those meetings is the promotion and encouragement of direct participation of early career scholars in the ongoing debate on key points and recent developments of our study subjects.

Indeed, the proposed essays – reviewed anonymously by a Commission of experts – cover different fields of our matter (global market, the function of labour law, new forms of work and new forms of protection, work relationship regulations, employer organization, gender discriminations and Industrial relations) and are structured into different chapters according to the approach chosen by the authors. All the topics addressed are crucial for the comprehension of the recent evolutionary paths of labour law.

This collective volume is only the last of a series of scientific products which testify to the liveliness and commitment with which the initiatives have been carried out in recent years by ISLSSL. Their continuity in recent times excellently represents the will to develop methods of analysis which proceed with constancy in increasingly uniform directions. Indeed, a standard method for comparative purposes presupposes a careful theoretical comparison between national experiences and requires an open dialogue on the issues under discussion. Such requirements are typical of the spirit of the young scholars sessions.

Finally, we would like to thank both the reviewers and the authors for their commitment and for their great effort.

Prof. Stefano Bellomo, Sapienza University of Rome
Prof. Antonio Preteroti, University of Perugia

I

REASONING ON THE GLOBAL MARKET AND ON THE FUNCTION OF LABOUR LAW

TOWARDS A GLOBAL VALUE CHAIN APPROACH IN LABOUR LAW: WHICH WAY FORWARD?

Michele Murgo [*]

1. Introduction: the present labour relation context

Since the last decades of the 20th century, multinational corporations (MNCs) have benefitted from the globalisation of economy more than their employees. Despite the progressive integration of capital markets, the legal regulation of employment relations is still a national prerogative. Such situation has led to widespread practices of delocalisation and outsourcing in order to exploit differences in labour costs. In fact, global production systems are increasingly organised throughout long chains of independent legal entities driven by MNCs, which are commonly known as global value chains (GVCs) [1].

Furthermore, national labour legislation is based on the contract-of-employment framework. However, individual employment relations can be affected by several commercial arrangements that fall outside of such contract. Accordingly, the contract of employment is becoming unsuitable to guarantee adequate protection to workers whenever their employer have to comply with standards dictated by others (*i.e.* the value-chain leading firms or clients of a different kind).

In light of the above, a change of the regulatory paradigm seems to be

[*] Ph.D. candidate in Labour Law at the University of Pavia, Italy.

[1] Among many others, see at least G. Gereffi, J. Humphrey, T. Sturgeon, *The Governance of Global Value Chains*, in *Review of International Political Economy*, 2005, 78 ff.

needed in order to counter this new imbalance of power[2]. Effective employment protections should indeed be shaped by taking into account the (growing) global and "fissured"[3] nature of nowadays labour relations.

With that in mind, this essay aims to pave the ground for the adoption of a GVC approach in labour law, by exploring its theoretical and practical viability. First of all, I identify some possible legal obstacles to such an approach. In particular, I focus on the two principles of legal independence and territoriality of law; and I investigate how such obstacles may be overcome. To this end, I present different solutions available and discuss their effectiveness and shortcomings. Then, I move to regulations specifically designed to ensure the respect of some given social standards in MNCs' GVCs. Finally, I draw the conclusion that the adoption of a GVC approach in national labour laws could be the first step towards a new way to conceive employment relations, by filling the gap between formal and substantial employer[4]. Besides, this approach would guarantee a higher protection for workers inasmuch as it is more consistent with the current practices of business.

2. The principle of legal personality, bilateral relations and the value chain

From a legal point of view, GVCs have no relevance *per se*: they could only be broken down into a number of contracts and arrangements, separate from each other. Indeed, the principle of legal personality entails that each entity in the chain is independent from the others and should not, as a general rule, suffer any legal consequence from their wrongdoings.

In the field of labour law, the aforementioned principle means that only the formal employer may be held liable for a breach of the employment contract as well as for more serious (even criminal) offences. As I mentioned, workers' protections derive from the existence of an employment contract,

---

[2] See also V. Brino, E. Gragnoli, *Le imprese multinazioni e il rapporto di lavoro*, in *Rivista giuridica del lavoro*, 2018, I, 209 ff.; and, on a more critical stance, R. Del Punta, *Lost in Externalisation: A Regulatory Failure of Labour Law?*, in A. Perulli, T. Treu (ed. by), *Enterprise and Social Rights*, Wolters Kluwer International, Alphen aan den Rijn, 2017, 93 ff.

[3] D. Weil, *The Fissured Workplace. Why Work Became so Bad for so Many and What Can Be Done To Improve It*, Harvard University Press, Cambridge, MA, 2014.

[4] L. Dorigatti, *Strategie di rappresentanza del lavoro nelle catene del valore: al di là della distinzione fra datore di lavoro «formale» e «sostanziale»*, in *Stato e Mercato*, 2015, 281 ff.

whether written or oral – or even implicitly inferable by the parties' behaviours. When an intermediary (such as a contractor, a subsidiary, a supplier etc.) is put, as a formal employer, between the employee and the GVC leading firm, the latter becomes virtually irresponsible – unless of course the whole operation is the result of some kind of fraud or abuse[5].

Therefore, the narrow scope of the employment contract as a bilateral relation[6], on the one hand, and the very concept of the employer[7], on the other, represent a first obstacle to the adoption of a GVC approach in labour law. Some mechanisms to link workers employed in the value chains with the leading MNC should consequently be found in order to overcome this obstacle.

Several labour law systems provide for some forms of joint liability with respect to specific subjects (maily monetary claims)[8]. For instance, under Italian law, principals are liable for wages and social contributions due to their contractors' employees, within two years after the termination of the contract itself[9]. This way, corporations are encouraged to choose their contractors very carefully, considering not only the price of the service, but also the (social) reliability of the entity that provides such service.

Similar results can be achieved through a due-diligence rule. It obliges undertakings to develop schemes aimed at identifying major risks and preventing serious offences. In other words, MNCs would bear a specific duty

---

[5] For instance, the EU directive no. 67/2014, "on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services", lays down a set of norms intended to identify bogus postings across the EU member states. In particular, art. 12 opens the door to special liability rules in subcontracting chains.

[6] In a similar fashion, J. Fudge, *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*, in *Osgoode Hall Law Journal*, 2006, 616 ff.

[7] S. Deakin, *The Changing Concept of the "Employer" in Labour Law*, in *Industrial Law Journal*, 2001, 72 ff.; and, more recently, J. Prassl, *The Concept of the Employer*, Oxford University Press, Oxford, 2016.

[8] For an interesting, albeit slightly old, overview of joint-liability provisions within the outsourced EU construction sector, read the detailed report by M. Houwerzijl, S. Peters, *Liability in Subcontracting Processes in the European Construction Sector*, European Foundation for the Improvement of Living and Working Conditions, Dublin, 2008.

[9] Art. 29 of d.lgs. no. 276/2003. The Italian Constitutional Court recently stated that such rule is applicable in each case of externalisation, notwithstanding the type of contract concretely concluded (decision no. 254/2017 – commented by, among others, M. Del Frate, *La Corte costituzionale sull'applicabilità della responsabilità solidale alla subfornitura: condivisibile il risultato ma non il metodo*, in *Diritto delle relazioni industriali*, 2018, 611 ff.).

of care [10] concerning working conditions in their GVCs. In national legislations, this technique is broadly adopted in the domain of health and safety at work [11]. In fact, the need to prevent serious accidents to occur justifies a more *ex-ante* approach.

For the same reason, the due-diligence rule seems to be preferable than joint liability for the purposes of this essay. In fact, joint liability could be really effective and deterrent only if the damaged workers are actually able to sue the leading firm (either directly or through their representatives). This implies, at least, that: 1) they should be aware of such possibility; 2) they should know precisely who is the principal of the particular job they are carrying out when the harm occurres [12]; and 3) they should have the financial resources required. On the contrary, due diligence targets MNCs directly and in advance. In other words, the MNC's home state authorities can verify the theoretical adequacy of the plan, therefore avoiding many of the hurdles (and shortcomings) related to the joint-liability rule.

Lastly [13], a relatively weaker instrument than the two explained above is social reporting. It consists in a mere obligation to disclose the efforts and

---

[10] It should be noted that some legal systems (especially within the common-law family) are already familiar with this concept: M. Bradley, C.A. Schipani, *The Relevance of the Duty of Care Standard in Corporate Governance*, in *Iowa Law Review*, 1989, 1 ff.; and, for a more comprehensive overview, S. Leader, *Enterprise-network and Enterprise-groups: Trends and National/International Experiences. The Duty of Care*, in A. Perulli, T. Treu (ed. by), *op. cit.*, 121 ff.

[11] See, for instance, the Italian legislative decree no. 81/2008, which is the consolidated text on health and safety at work in Italy. In particular, where one or more undertakings or self-employed persons are hired to work at the principal's premises, art. 26, par. 3, requires that the latter "promotes cooperation [...] by drafting a risk-assessment document [...] with a view to eliminate [...] risks of interference".

[12] This could be very difficult to determine, since suppliers might realistically work for several different companies at once.

[13] It is not worth mentioning here the so called co-employment, i.e. the situation where two separate entities share the same contract with the same worker. In fact, as it is usually intended in the legal systems where such figure exists, the co-employment framework would not be applicable to workers in GVCs. This is because the latters follow only the directives given by their direct employer, who, in turn, tries to comply with the standards imposed by the client in the value chain. Therefore, it cannot be established a co-employment relation between the MNC and the workers hired through its GVC, unless of course it turns out that the very act of subcontracting actually hides some form of unlawful job intermediation – in which case, other labour-law remedies would be available. For an overview of this topic under the Italian law, read I. Alvino, *Il lavoro nelle reti di imprese: profili giuridici*, Giuffrè, Milano, 2014.

activities put in place by a given company in order to act in a socially responsible way. Apparently, it relies mostly on consumers' awareness. As a consequence, its effectiveness is likely to vary extensively according to the specific features of each market where the MNC sells its products or services.

3. The theoretical and practical problems of extraterritoriality

If the principle of independence constitutes notably a legal issue, the principle of territoriality of law raises also practical questions.

Given that there is no international consensus on labour standards [14], and lacking in this field an international organisation provided with binding powers, protective norms must be enacted, and enforced, solely by nation states. However, whereas states hold the monopoly on the legitimate use of force within their territories, they have no coercive powers outside their borders. On the other hand, it is clear that the purposes of a GVC regulation would be hampered if such norms were applicable only to the national segment of the chain (as in the examples mentioned in the previous section). Therefore, in order to adopt a sound GVC approach, some ways must be found to effectively regulate situations that go beyond the national territory.

The first human-rights extraterritorial instrument of the modern age is probably the 1789 US Alien Tort Claims Act (ATCA). According to this statute, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States" [15].

---

[14] Of course, the ILO's eight core conventions have a very high number of ratifications (currently ranging from 155 and 182, out of 187 member states – see *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0*, last visited: December 2018). Nevertheless, those conventions stipulate basic protections regarding only fundamental aspects of employment relations. Besides, among the states that have not ratified two or more of them, we find some important and highly populated countries, such as China, Japan and the US – and I did not consider C87 and C98, which are the most controversial and less ratified ones.

[15] Arguably, labour controversies would rarely fall within the scope of this provision. This might be the case when gross infringements of fundamental labour rights (such as the ones incorporated into the ILO core conventions – or some of them) are alleged, as it happened in the Doe v. Unocal lawsuit – where forced labour was involved: C. Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in* Doe v. Unocal, in *Law & Society Review*, 2009, 271 ff.

This is not the place to debate about the political appropriateness of such a (prospective) intrusion into foreign states' home affairs [16]. Nonetheless, the concrete viability of this solution must be carefully discussed, since strong laws become hollow when they cannot be enforced in practice.

In order for universal-jurisdiction rules to function efficaciously, at least two major and, to some extent, intertwined conditions should be met. First of all, people who are theoretically concerned should be put in such a position as to get actual access to the court. Secondly, state authorities should be able to control (or, at least, get reliable information about) working conditions all along the value chain.

As I argued elsewhere [17], both the aforementioned conditions can be met in a rather satisfactory manner when global unions and, possibly, other international stakeholders (e.g. NGOs) are involved in the monitoring process. In fact, given their worldwide presence and their statutory humanitarian commitments, these actors are best placed to fill the gap between the global scope of laws on GVCs and the enforcement agencies' national powers.

Of course, nation states can also employ different means to extend their sphere of influence beyond their borders. As long as labour law and value chains are concerned, international trade can play an important role. Most notably, I am referring to international treaties [18] – such as free trade agreements (FTAs) and bilateral investment treaties (BITs) – and the generalised system of preferences (GSP) [19].

---

[16] For the so called "political question doctrine" and other objection against a broad interpretation of the ATCA, see L. Londis, *The Corporation Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence*, in *Meine Law Review*, 2005, 141 ff., in particular 169 ff.

[17] M. Murgo, *Global Supply Chains e diritto del lavoro: quale ruolo per il sindacato?*, in G. Casale, T. Treu (ed. by), *Transformations of work: challenges for the national systems of labour law and social security*, Giappichelli, Turin, 2018.

[18] Among several others, see the two reports on this subject presented at the XXII World Congress of the International Society of Labour and Social Security Law: J. Bellace, *The United States: Labour and Global Trade*; and A. Perulli, *The Use of Social Clause on the Latest European FTA's (CETA and EPA) and the Path for its New Legitimation*.

[19] For the two models of the US and EU in a nutshell, visit the websites of the US Government (*https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp*) and of the European Commission (*http://ec.europa.eu/trade/policy/countries-and-regions/ development/generalised-scheme-of-preferences/*).

The logic underlying all the aforementioned instruments is quintessentially the same: to make use of one state's commercial power in order to gain some sort of advantage. From this point of view, a minimum set of social standards is the condition required to get preferential access to the state's national market. In other words, it works as a shield to protect home markets from (unfair) competition on fundamental rights.

At the same time, these instruments could anyway be used to hold multinationals accountable for their foreign operations. Furthermore, they could strengthen cooperation between enforcing agencies in different countries (as well as between other national actors [20]), thus creating platforms for a transnational implementation of GVCs laws.

It should not be neglected, though, that a similar approach is, by its own nature, piecemeal – which contradicts the all-encompassing and monistic rationale behind the GVC approach. Moreover, since it resorts to public-law instruments, it does not, as a general rule, address GVCs directly. Instead, each state that is a party to the treaty is supposed to enforce it within its territory [21] – which bring us back to the issue of extraterritoriality.

Nevertheless, as I suggested above, international trade provisions could still be useful tools to improve the implementation of GVC statutes, rather than to substitute them.

4. The GVC approach in actual examples

In the previous two sections, I analysed a couple of legal (and practical) hurdles to the adoption of a GVC approach in labour law. Here, I am going to compare a few examples of regulations adopting such an approach, in order to identity how they actually coped with the aforementioned hurdles and to assess the relative effectiveness of the proposed solutions.

When I talk about laws/regulations on GVCs, I mean pieces of legisla-

[20] Some cases of transnational trade union cooperation fostered by the North American Free Trade Agreement (NAFTA) are reported in T. Kay, *Labor Transnationalism and Global Governance: The Impact of NAFTA on Transnational Labor Relationships in North America*, in *American Journal of Sociology*, 2005, 715 ss.

[21] In fact, A. Perulli, *Diritto del lavoro e globalizzazione: clausole sociali, codici di condotta e commercio internazionale*, Cedam, Padua, 1999 showed how this situation originated serious loopholes in the implementation of the NAFTA and of the related labour treaty, the North American Agreement on Labor Cooperation (NAALC), only few years after their entry into force.

tion that: 1) take into account the GVC as a whole; 2) regardless of the place where each particular entity is incorporated or established; and 3) laying down a minimum set of labour standards.

Despite the widespread character of GVCs and the serious challenges they pose to national labour-law regimes (which I briefly reported above), so far only few states have enacted laws on that subject[22]. Among the latters, the vast majority contains only transparency requirements, albeit structured in different ways.

This is the case, for instance, of the California Transparency in Supply Chains Act and of sec. 54 of the UK Modern Slavery Act[23]. Leaving aside some negligible differences, both of them stipulate that largest businesses shall disclose their efforts to eradicate slavery and human trafficking from their supply chain[24]. They also provide, in rather general terms, for minimum contents which shall be included in the statement[25].

In this connection, the EU directive no. 2014/95/UE concerning "disclosure of non-financial and diversity information by certain large undertakings and groups"[26] appears to be slightly more detailed, as well as much broader in scope. Indeed, information shall be related to "environmental, social and employee matters, respect for human rights, anti-corruption and

---

[22] On this topic, see also V. Brino, *Imprese multinazionali e diritti dei lavoratori tra profili di criticità e nuovi "esperimenti" regolativi*, in *Diritto delle relazioni industriali*, 2018, 171 ff.

[23] For a more in-depth analysis of those two Acts, read M. Koekkoek, A. Marx, J. Wouters, *Monitoring Forced Labour and Slavery in Global Supply Chains: The Case of the California Act on Transparency in Supply Chains*, in *Global Policy*, 2017, 522 ff.

[24] Interventions of this kind are under discussion also in the US, with the federal bill no. H.R.3226 (Business Supply Chain Transparency on Trafficking and Slavery Act).

[25] *I.e.* information about the supply-chain structure, audit procedures put in place (whether internal or carried out by an independent organisation), employees' training programs on trafficking. Furthermore, the California statute mentions also "internal accountability standards and procedures for employees or contractors failing to meet company standards" and suppliers certification requirements about the materials incorporated into the product; whereas the UK one considers instead the "effectiveness in ensuring that slavery and human trafficking is not taking place" and the parts of the company's supply chain "where there is a risk of slavery and human trafficking taking place".

[26] Even though the directive expressly mentions only undertakings and groups, information about the GVC should probably be included in the report, as it is argued at whereas no. 6 and no. 8 of the directive itself. In the same vein, M. Ferraresi, *L'adempimento datoriale degli obblighi giuslavoristici: strumenti volontari e incentivanti tra diritto e responsabilità sociale d'impresa*, in *Variazioni su Temi di diritto del lavoro*, 2018, 465.

bribery matters". Besides, where the entities concerned have not adopted any policy on such subjects, they "shall provide a clear and reasoned explanation for not doing so".

In any case, as I pointed out in the second section, statutes adopting a social-reporting technique are likely to have a very weak dissuasive effect, whereas they have no coercive power at all. In fact, it should be stressed that, while companies are bound to publish social statements, they do not have to implement any policy whatsoever [27].

The only statute demanding to take active steps to prevent gross violations along the GVC [28] is the French law no. 2017-399 "*relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*" [29]. According to this law, which amended the French Commercial Code, companies employing (directly or indirectly) at least 5.000 employees in France or 10.000 all over the world, have to establish a due-diligence plan. The plan is aimed, again, at identifying risks and preventing major violations of human rights, fundamental freedoms, health and safety of persons and environmental concerns. It has to cover the activities carried out by the company, its direct and indirect subsidiaries, as well as by its subcontractors and suppliers which have a long-lasting commercial relationship with the company itself and to the extent that their activity is linked to such relationship.

Despite the (relevant) differences highlighted above, the common thread between all the forms of regulation analysed in this section is that they target the leading company, giving it the task to monitor its own value chain in the first place. The economic power of MNCs is used here as a resource to ensure that fundamental rights are respected all along the GVC, hence

---

[27] Sanctions may be imposed only on corporations that provide false or deceiving information insofar as such behaviour can be deemed as constituting a misleading advertising (which is a matter of interpretation).

[28] However, similar obligations have been included in some sectoral collective agreements recently concluded in The Netherlands. Such agreements are specifically devised to implement the so called Ruggie Principles (see J. Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Human Rights Council, Geneva, 2008) and other soft-law instruments, and contain indeed mandatory due-diligence schemes.

[29] Among many comments, read at least I. Daugareilh, *La ley francesa sobre el poder de vigilancia de las sociedades matrices y contratistas: entre renuncias y promesas*, in W.R. Sanguineti, J.B. Vivero Serrano (ed. by), *Impacto laboral de las redes empresariales*, Comares, Granada, 2018, 357 ff.; and E. Aïssi, *The French Duty of Vigilance Law: A New Legal Instrument for a Fairer Globalisation*, in *Global Labour Column*, no. 331, June 2018.

reaching much bigger areas of the world without impairing the principle of legal personality.

5. Conclusive remarks: the GVC approach between tradition and innovation

In the previous sections, the GVC approach was presented as a new way to regulate labour in the globalised society. The challenges to this approach have been discussed, and a few possible solutions have been explored.

Although a sizeable stream of literature on GVCs has been developed over the last 20 years[30], its implications on labour legislation have been largely neglected. Only recently social scientists have started to draw attention to the adverse impact of GVCs on workers' rights[31]. At last, lawmakers are becoming aware of the problem too, and begin to address it in multiple ways[32].

This essay offered a legal perspective on this topic, with a view to orient lawmakers' choices and pave the ground for future debate in the field. In particular, I demonstrated that there is no insurmountable legal obstacle to the adoption of a GVC approach in labour law. Practical issues may occasionally arise, which could be be hard to tackle. Therefore, cooperation should be sought among states and other (global) actors in order to monitor the actual implementation of this model.

---

[30] Starting from the pivotal book by G. Gereffi, M. Korzeniewicz (ed by), *Commodity Chains and Global Capitalism*, Praeger, Westport, 1994.

[31] For instance, L. Riisgaard, N. Hammer, *Prospects for Labour in Global Value Chains: Labour Standards in the Cut Flower and Banana Industries*, in *British Journal of Industrial Relations*, 2011, 168 ff.; and more recently, K. Newsome, P. Taylor, J. Bair, A. Rainnie (ed. by), *Putting Labour in Its Place: Labour Process Analysis and Global Value Chains*, Palgrave, London, 2015.

[32] Apart from the examples mentioned in the previous section, see for instance the European Parliament resolution of 27 April 2017 "on the EU flagship initiative on the garment sector". In 2016, the 105th Session of the International Labour Conference (basically, the legislative assembly of the ILO, according to its Constitution) adopted a Resolution "concerning decent work in global supply chains". Lastly, a binding treaty on transnational corporations has being negotiated at the UN since the adoption of the Resolution no. 26/9 by the Human Rights Council in 2014 – O. De Schutter, *Towards a New Treaty on Business and Human Rights*, in *Business and Human Rights Journal*, 2015, 41 ff.

Nevertheless, the rapid evolution of business structures makes it compelling to adjust legislation so as to capture such new figures. In this connection, it is paramount to rethink labour regulation in a way that reflects the changes in the social reality.

The proposed GVC approach moves in this direction. It is not meant to substitute the traditional labour law, based on the contract of employment. On the contrary, it builds on the idea of the imbalance of powers and translates it into the broader framework of contemporary business-to-business relations.

Selected bibliography

Brino V., *Imprese multinazionali e diritti dei lavoratori tra profili di criticità e nuovi "esperimenti" regolativi*, in *Diritto delle relazioni industriali*, 2018, 171 ff.

De Schutter O., *Towards a New Treaty on Business and Human Rights*, in *Business and Human Rights Journal*, 2015, 41 ff.

Fudge J., *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*, in *Osgoode Hall Law Journal*, 2006, 616 ff.

Gereffi G., Korzeniewicz M. (ed by), *Commodity Chains and Global Capitalism*, Praeger, Westport, 1994.

Gereffi G., Humphrey J., Sturgeon T., *The Governance of Global Value Chains*, in *Review of International Political Economy*, 2005, 78 ff.

Murgo M., *Global supply chains e diritto del lavoro: quale ruolo per il sindacato?*, in G. Casale, T. Treu (ed. by), *Transformations of work: challenges for the national systems of labour law and social security*, Giappichelli, Turin, 2018.

Newsome K., Taylor P., Bair J., Rainnie A. (ed. by), *Putting Labour in its Place: Labour Process Analysis and Global Value Chains*, Palgrave, London, 2015.

Perulli A., Treu T. (ed. by), *Enterprise and Social Rights*, Wolters Kluwer International, Alphen aan den Rijn, 2017.

Ruggie J., *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Human Rights Council, Geneva, 2008

Sanguineti R.W., Vivero Serrano J.B. (ed. by), *Impacto laboral de las redes empresariales*, Comares, Granada, 2018.

Weil D., *The Fissured Workplace. Why Work Became so Bad for so Many and What Can Be Done To Improve It*, Harvard University Press, Cambridge, MA, 2014.

HOW ARE THIRD PARTIES REGULATED BY LABOR LAWS? *

Masahito Toki **

1. Introduction

This paper analyzes how labor laws regulate third party companies. The term "third party" in this paper refers to a company that has contractual or capital ties with a contractual employer that actually concludes employment contracts with employees [1]. Nowadays, active corporate restructuring and outsourcing of services motivated by intensified global competition makes a third party company control or affect contractual employers through its capital or contractual ties with them [2]. However, the "employer" in the statute of individual labor law traditionally means a contractual employer in Japan. It is the opposite party of the employee on an employment contract. This global phenomenon causes a drawback in traditional labor laws, whose addressees are contractual employers.

In the context of Corporate Social Responsibility (CSR), the norms require a company to make other companies within its "sphere of influence"

* This work was supported by JSPS KAKENHI Grant Number JP16K17002.

** Associate Professor at the Graduate School of Humanities and Social Sciences and the Faculty of Law, Okayama University, Japan.

[1] Typical third parties are parent companies or principal contractors of contractual employers.

[2] D. Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (2014) provides a clear viewpoint to analyze the fragmentation and externalization of employment.

comply with labor standards[3]. Parent companies or client companies are socially responsible to employees of their subsidiaries or subcontractors in their supply chains. Although these norms are usually soft laws and do not have a legally binding effect, social responsibility still reaches beyond the boundary of a legal entity of contractual employers. This suggests that possible labor law reforms in the future may require that legal responsibility reaches beyond contractual employers as CSR does in supply chains.

Although Japanese labor laws have some provisions that impose duties or liabilities on third parties who are outside of the employment contract, comprehensive analysis of these provisions has not been done. Such an analysis would contribute to clarification of a threshold of interpretation and develop a discussion on the notion of "employer" as an addressee of labor law.

With these points in mind, this paper analyzes patterns where individual labor laws impose duties or liabilities on a third party using a comparative study between the US, Germany, and Japan and also draws suggestions for issues on the addressee of labor laws[4].

2. Analytical perspective

This section explains the three focused perspectives for analysis in section 3. The first perspective is the justification for regulating (imposing duties or liabilities on) third parties. The basis for justification is further divided into two categories[5]. The first category is that third parties exercise (fully or even partially) the functions of contractual employers[6]. In other

[3] *See* ISO 26000:2010 Guidance on Social Responsibility 6.4.3.2. "Sphere of influence" is defined in 2.19. *See also* OECD Guidelines for Multinational Enterprises, General Policies A 13, Commentary on Employment and Industrial Relations 50. Although the main targets of these norms are companies acting in international level, the ideas stated in these norms also apply to the domestic context.

[4] This paper is based on the following works: M. Toki, *Hojin Kaku wo Koeta Rodo Ho Kisei no Kanousei to Genkai – Kobetsu teki Rodo Kankei Ho wo Taishou toshita Nichi Doku Bei Hikaku Ho Kenkyu* (1~6) [Possibility and Limit of Labor Law Regulations Beyond the Boundary of Legal Entity – A Comparative Study of Individual Labor Relation Laws in the US, Germany and Japan (1~6)], in *Hogaku Kyokai Zasshi*, 134(5), 669-764; 134(6), 962-1060; 134(8), 1411-1491; 134(9), 1633-1718; 134(10), 1934-2014; 134(11), 2186-2253 (2017). Due to the word limit, this paper gives only a brief summary of these works.

[5] However, this distinction is relative so that each category might overlap.

[6] J. Prassl, *The Concept of the Employer* (2015) defines employer as "the entity, or combination of entities, playing a decisive role in the exercise of relational employing functions,

words, third parties directly control an employee of a contractual employer to some extent. In this category, if a labor law does not regulate these third parties, it is almost impossible to achieve the goals of the regulations that impose duties on contractual employers to protect its employees. Another category for justification is that third parties have a unique status that contractual employers do not have. In this category, third parties surely do have control over a contractual employer to some extent, but not over its employees. Unlike the former category, third parties do not directly control employees of the contractual employer in the latter category. This point can suggest the limits of interpretation of existing provisions and what kind of duties or liabilities should be imposed on third parties.

The second perspective is a method of regulating third parties. When a labor law applies to a third party, there are different methods for regulating these parties. On one hand, special provisions directly address third parties. For example, safety rules for workers in construction sites in Japan impose some duties on the "orderer," and not the "employer". On the other hand, a labor law applies to a third party by interpreting the concept of statutory "employer." The joint employer doctrine in the US law is an example.

The final perspective is the relation between duties or liabilities of contractual employers and those of third parties when labor laws address the third party. Third parties might be obligated or liable alone instead of jointly with a contractual employer, be severally along with a contractual employer, or be imposed a unique duty, which the contractual employer does not have to deposit. It is important to consider whether the duties of third parties are equal to those levied on contractual employers or not, as it would be sometimes better to impose unique duties on third parties that are different from the contractual employer in order to enhance the effectiveness of labor laws by making third parties participate in the process of compliance by the contractual employer.

3. How labor laws regulate third parties

This section examines legal situations of targeted countries by using the perspectives described in section 2. The basis for justification for regulating third parties has a close relation with both the method of regulating third

as regulated or controlled in each particular domain of employment law" (Id. at 155), identifies five categories of functions and examines the functional concept of the employer.

parties and the relationship between duties of contractual employers and those of third parties. Therefore, the basis for justification has been divided into two sections and examines the correlation between each perspective.

3.1. Exercising of employer functions by third parties

Labor laws impose various duties or liabilities on contractual employers because they obtain the right to control their employees based on employment contracts. This suggests that labor laws only in limited cases regulate third parties which have contractual or capital ties with the contractual employer. When a labor law applies to third parties, it is necessary to address third parties in order to ensure the effectiveness of regulations and to achieve the goals of the statute.

One justification to address third parties is that they exercise (full or even partially) the functions of contractual employers. More specifically, third parties control and supervise employees hired by contractual employers or control the facilities of workplaces where the employees hired by contractual employers provide labor, as contractual employers physically control their employees.

For example, in temporary agency work or worker dispatching settings[7], special statutory provisions directly address the client company in order to apply labor protection laws (such as worktime, anti-discrimination and worker's safety regulations) to third parties outside the employment contract in Germany and Japan. In the US, the client company is considered as the statutory "employer" by the joint employer doctrine[8] as a result of interpreting statutory "employer". These results are justified by the fact that third parties control or supervise employees actually hired by others (con-

[7] In temporary agency work (in Germany and the US) or worker dispatching (in Japan) settings, an employment contract exists between the temporary agency worker (the dispatched worker) and the temporary work agency (the dispatch business operator), not between the worker and the client company that actually supervises the worker.

[8] Using the "joint employer" doctrine, the courts decide whether labor and employment statutes apply to a third party that has a contractual tie with an employer. This doctrine may also apply to subcontracting and franchising. Although there is a difference in the scope of the "joint employer" according to each statute, a putative joint employer would be a joint employer if the employee is controlled by or economically dependent on the putative joint employer. *See* M. Finkin, *The Legal Ambiguity of Fissured Work in the United States*, in *Reconsidering the Notion of 'Employer' in the Era of the Fissured Workplace: Should Labor Law Responsibilities Exceed the Boundaries of the Legal Entity?* (2016 JILPT Comparative Labor Law Seminar) 7, 2016, 17-24.

tractual employers). In addition, special provisions in the Industrial Safety and Health Act of Japan which address the "principal employer"[9] and the "controlling employer" doctrine[10] led by the interpretation of the Occupational Safety and Health Act in the US are justified by third parties, like general contractors have the comprehensive control and correcting authority over the (construction) worksites. Moreover, the "single employer" doctrine, which makes companies that have capital ties with contractual employers like parent companies liable in the US[11], is another example of this category because courts carefully look into whether the putative single employer has a (an ultimate) control over the matters which each statute regulates[12].

In these situations, in order to protect employees working in certain places, those parties which have the right to control the employees or the workplaces, can also ensure the protection and safety of employees who engage in actual physical labor. These situations mentioned above are justified by third parties' partial exercising functions of contractual employers. What is important here is whether an addressee has control or power over the matters which each statute regulates. It is not important whether an addressee of these situations has an employment contract with an employee, in order to achieve the goal of protection and safety of actual physical labor. Logically speaking, contents of duties or liabilities imposed on third parties are the same as those imposed on contractual employers because the justification for these rules is the third party exercising (partial) employer func-

[9] According to art. 29 of the Act, the "principal employer," defined as those who contract out a part of the work, shall give necessary guidance not to violate the Act or instruction to correct the violation to its contractors and their employees, if the work is done at one place.

[10] According to this doctrine, general contractors at construction sites are responsible for the violation of standards of occupational safety and health set by the administrative agency to their subcontractors' employees, if they have the ability to prevent or abate hazardous conditions created by subcontractors through the reasonable exercise of supervisory authority regardless of whether the general contractors created the hazard. *See Solis v. Summit Contractors*, Inc., 558 F.3d 815 (8th Cir. 2009).

[11] Although there are exceptional cases, common factors (functional integration of operations; centralized control of labor relations; common management; and common ownership) are used to decide whether a company constitutes single employer (*see e.g. Frank v. U.S. West*, Inc., 3 F.3d 1357, 1362 (10th Cir. 1993)).

[12] *See e.g.*, *Frank v. U.S. West*, Inc., *supra*, note 11, 1363 (employment discrimination case), Local 397, *Int'l Union of Elec., Elec. Salaried Mach. & Furniture Workers, AFL-CIO v. Midwest Fasteners*, Inc., 779 F. Supp. 788, 797 (D.N.J. 1992) (Worker Adjustment and Retraining Notification Act case).

tions. Therefore, third parties are obligated or liable either alone, or jointly and severally with contractual employers.

Theoretically speaking, when the justification basis is third parties' partial exercising of employer functions, it is relatively easier to address third parties by interpreting existing provisions without a new legislation. This is because the status of third parties is analogous to a statutory "employer". However, because an "employer" in individual labor laws refers to a contractual employer in Japan [13], special statutory provisions are needed to apply individual labor laws to third parties. By interpreting existing provisions, the first step is to give third parties a party status of employment contract using "implied employment contract" or "veil piercing" theories, but not to examine whether third parties exercise certain employer functions. But these theories do not work in most cases due to their strict requirements to establish the contractual party status. In contrast, third parties who partially exercise employer functions are relatively easier to classify as an "employer" in jurisdictions where a statutory "employer" does not mean a contractual employer, as the "joint employer", "single employer" and "controlling employer" doctrines in the US are derived from interpretations. In this regard, it is important to identify what elements should be considered as employer functions [14]. Answering this question is not in the scope of this paper, but identifying the elements will make individual labor laws function more effectively.

3.2. The unique status of the third parties

Applying labor laws to third parties is justified by other basis as well. It is the unique status of third parties that contractual employers do not have. By having contractual or capital ties with a contractual employer, the third party becomes economically superior and thus, it can influence the labor law compliance by the contractual employer. Here, it does not matter whether the third party controls the employees of the contractual employer or not.

For example, in case third parties have contractual ties with contractual employers, there are several provisions justified by this basis. In Germany, an "entrepreneur", who commissioned another entrepreneur with the provision of work or services, is liable for payment of the minimum wage to employees by a contractor or a subcontractor commissioned by the contractor or a subcontractor according to section 13 of the Minimum Wage

[13] *See e.g.* T. ARAKI, *Rodo Ho*, in *Labor Law*, III ed., 67, 2016.

[14] On this point, *see* Prassl, *supra*, note 6, 157-159.

Act and section 14 of the Act on Posting of Workers[15]. These provisions apply to all companies belonging to the entrepreneurial chain so that an entrepreneur is also liable for any subcontractor of its direct subcontractor[16]. From the view of the subcontractor's employee, third parties are jointly and severally liable for his or her minimum wage with his or her contractual employer. The purpose of this rule is to make an entrepreneur pay attention to compliance of its subcontractors with minimum wages[17]. These provisions do not require that the entrepreneur controls employees hired by other companies in its chain. In the US, the so-called "hot-goods" provision prohibits any person from transporting or selling any goods in the production of which any employee was employed in the violation of rules of minimum or overtime wage[18]. This provision does not directly obligate third parties (possessor of goods) to pay unpaid wages, but they are virtually forced to pay or make employers pay if they want to transport or sell the goods[19]. The hot-goods provision motivates third parties to ensure the compliance with the wage and hour law by contractual employers[20]. Japan has similar provisions. Art. 3(3) of the Industrial Safety and Health Act states that those who commission work to others shall consider not to impose conditions on them which may impede performing work in a safe and healthy environment in terms of methods, period, etc. Art. 31-4 prohibits "orderer[s]" from giving instructions to their subcontractors, if the subcontractors complied with those instructions, the subcontractors would be violating the Act. However, what should be mentioned is that there is no sanction or penalty for the violation of these provisions in Japan.

In case third parties have capital ties with the contractual employers, there are unique provisions in the arena of employment policy for the disabled in Japan. The Act on Promoting Employment Security for the Disabled obligates an entrepreneur to employ disabled employees beyond the

---

[15] Translation of the provision text is referred in B. Waas, *Reconsidering the Notion of 'Employer' in the Era of the Fissured Workplace: Should Labour Law Responsibilities Exceed the Boundaries of the Legal Entity?*, in *Reconsidering the Notion of 'Employer' in the Era of the Fissured Workplace: Should Labor Law Responsibilities Exceed the Boundaries of the Legal Entity?* (2016 JILPT Comparative Labor Law Seminar) 95, 105, 2016.

[16] BAG 17.8.2011, BAGE 139, 36.

[17] *See* DT-Druck. 14/45, S. 17f.

[18] 29 U.S.C. § 215(a)(1).

[19] *See* E.C. Kearns *et al.* (eds.),*The Fair Labor Standards Act*, 1999, 824-865, 864.

[20] C. Becker, *Labor Law Outside the Employment Relation*, in 74 *Tex. L. Rev.*, 1996, 1527, 1554-1555.

statutory employment rate[21]. Currently the rate is 2.2% for private companies. In principle, an entrepreneur only counts disabled employees whom the entrepreneur employs on its own. However, according to one of the special counting rules, which intend to enhance the employment security of the disabled more effectively, the parent company can also count the number of disabled employees hired by its group companies that satisfy the specified requirements by the Act[22]. By this rule, although each company of the corporate group shall employ disabled employees beyond 1.2% set by the Act, the parent company can satisfy the requirement of the statutory employment rate, even if the parent company by itself does not employ the disabled beyond 2.2%. This means that the duty of other companies in the corporate group would be mitigated if one of the group companies employs many disabled employees. From the perspective of the parent company, each company of the corporate group shares the responsibility of performing the parent company's duty mentioned in the Act. By counting employees in the whole company group as a unit, the parent company is expected to promote employment security for disabled employees in the whole corporate group.

These various provisions share the common ideas that third parties can and should enhance the compliance of labor laws by contractual employers to achieve the effectiveness of regulations. Justification for these provisions is the unique status of third parties that are economically superior to contractual employers. These provisions redeem the administrative enforcement by imposing liabilities or duties on third parties outside the employment contract, even though third parties themselves are just a private and not a public agency. These third parties play a role of ensuring the effectiveness of labor laws, in addition to original responsible parties such as public agencies and contractual employers.

An important feature of these provisions is that it is not the grounds for regulation that a third party exercised influence or control over a contractual employer and then caused violations by the contractual employers. It is regulated because it failed to exercise influence or control over contractual employers properly, which is why the contractual employer violated the labor law, although it was able to prevent the violation[23]. In other words,

[21] An entrepreneur that does not satisfy the rate has to pay a Disabled Employment Levy, while an entrepreneur that employs the disabled beyond the rate receives a Disabled Employment Adjustment Grant.

[22] This is introduced by the 2009 Amendment. Other exceptional counting rules are structured, and are centered on the "special subsidiary".

[23] For instance, to avoid strict liability for the payments of minimum wages in Germany,

these regulations have characteristic that CSR or the codes of conducts that are soft laws can turn into hard laws. As a result, some of these provisions substitute an employer's responsibility, but focus on different status that traditional regulations for the employer do not focus on. This suggests that it might be inappropriate to include a third party in the traditional concept of "employer" in some cases.

As the fact that these provisions are special legislative provisions and apparent third parties are explicitly addressed suggests, unlike the patterns described in section (1), it is relatively difficult to address third parties by interpreting existing provisions that address an "employer" because of the unique status a third party has. Therefore, legislative action may be needed here. Otherwise, general legal principles like tort may be utilized to impose liability or duty on third parties[24].

The contents of the duties or liabilities of third parties are not necessarily the same as those of contractual employers, because these regulations are justified by the unique status of third parties. Rather, imposing a unique duty, which is different from the duty that a contractual employer has, on a third party in accordance with its unique status is more effective. More specifically, the duty to monitor the labor law compliance by contractual employers or the duty to give appropriate instructions are much better than joint liability for monetary payments in certain contexts. The supreme court of Japan recently decided that if a parent company established a "compliance consult window" as internal reporting system and an employee of its subsidiary company reported being sexually harassed by her supervisor, the parent company might be liable for the subsidiary's employees in case the parent company failed to take appropriate measures in accordance with the internal reporting system established by itself[25]. Surely, art. 11 of the Equal Employment Opportunity Act of Japan imposes on an employer to take preventive and appropriate responding measures against sexual harassment. However, this provision addresses only contractual employers. Although whether a parent company in a concrete case is liable or not depends on a case by case analysis, a parent

---

an "entrepreneur" is expected to take preventive and monitoring measures toward contractual employers in its chain (*see* BAG 12.1.2005, BAGE 113, 149). Legislative materials described that these measures do not establish an employment relationship between the entrepreneur and an employee in its chain (*see* BT-Drucks. 18/1558, S. 40).

[24] In academic debates, B. Rogers, *Toward Third-Party Liability for Wage Theft*, in 31 *Berkeley J. Emp. & Lab. L.*, 1, 2010 lays the foundation for third parties' tort liability from this point of view. Recent Japanese case law mentioned later is another example.

[25] Ibiden case, Supreme Court 2018.2.15, 1181 *Rohan* 5 (tort case).

company is a dominant shareholder of (*i.e.*, economically superior to) its subsidiaries so that the parent company can affect labor law compliance (prevention and action against sexual harassment) by them. This case is an example that third parties can participate in the process of compliance of labor laws by the contractual employers by having a unique duty imposed.

In addition, as Japanese legislatures sometimes adopted, to impose duty to endeavor[26] on third parties could also be a choice. Art. 2(4) of the Act on Special Measures for Improvement of Working Hours Arrangements amended in 2018 imposes duty to endeavor not to set short delivery time and not to change the contents of orders frequently on those who commission another entrepreneur in order to secure smooth implementation to improve working hours arrangements taken by contractual employers[27]. The background of this provision is that frequent change of order contents and setting of short delivery date by the business partners of the employer can extend the working hours of its employees. Even though the "duty to endeavor" does not have a legally binding effect, it has played an important role in Japanese labor law. The "duty to endeavor" is a kind of statutory soft law because the nation does not enforce it, but it has a declarative effect to the society by being inserted into statutes. The courts sometimes take the "duty to endeavour" into consideration in deciding the content of duty in tort. After the value of the norms are accepted by the society, then the "duty to endeavor" often turns into legal duty later in Japan, although this is not always the case[28].

4. Conclusion

Individual labor law addresses third parties that are not contractual employers but employer-side companies in wider sense for employees of certain contractual employers in various ways. Although third parties are not always considered or mentioned as an "employer", individual labor laws address and impose duties or liabilities on the third parties. These patterns are justified not only by the fact that the third party exercises (partial) functions of a

---

[26] For more detail, *see* T. Araki, *Rodo Rippo ni okeru Doryoku-gimu Kitei no Kino: Nihon-gata Sofuto-ro Apurochi?* [The Function of the Duty to Endeavor Clauses in the Japanese Legislation: The Japanese Version of Soft Law Approach?] in M. Tsuchida *et al.*, R*odo Kankei-ho no Gendai-teki Tenkai*, 19, 2004.

[27] The 2018 amendment clarified the contents of duty to endeavor.

[28] *See* T. Araki, *supra*, note 26, 21, 43-44.

contractual employer but also by the fact that the third party is economically superior to a contractual employer due to contractual or capital ties with it. The latter ground suggests that third parties are expected to participate in the process of labor law compliance by the contractual employers, due to integrating contractual employers into a complex network of companies.

The goal of the discussion on the addressees of labor law is to ensure and increase its effectiveness. Some patterns suggest that it is a prominent strategy to impose a unique duty, and includes even statutory non-legal duty if, in an appropriate case, it is imposed on third parties in accordance with their status to make it possible for them to participate in the compliance of labor laws by contractual employers. Incorporating these third parties into the concept of a traditional employer is not the correct way to achieve these goals.

Selected bibliography

Araki T, *Rodo Rippo ni okeru Doryoku-gimu Kitei no Kino: Nihon-gata Sofuto-ro Apurochi?* [The Function of the Duty to Endeavor Clauses in the Japanese Legislation: The Japanese Version of Soft Law Approach?] in M. Tsuchida *et al.* (ed. by), *Rodo Kankei-ho no Gendai-teki Tenkai*, 2004, 19-45.

Araki T., *Rodo Ho*, in *Labor Law*, III ed., Yuhikaku, 2016.

Becker C, *Labor Law Outside the Employment Relation*, in *Texas Law Review*, 74, 1996, 1527-1562.

Kearns E. *et al.* (ed. by), *The Fair Labor Standards Act*, in *Bureau of National Affairs*, Inc., 1999.

Finkin M., *The Legal Ambiguity of Fissured Work in the United States*, in *Recon sidering the Notion of 'Employer' in the Era of the Fissured Workplace: Should Labor Law Responsibilities Exceed the Boundaries of the Legal Entity?* (JILPT Comparative Labor Law Seminar), 2016, 7-28.

Prassl J., *The Concept of the Employer*, Oxford University Press, Oxford, 2015.

Rogers B., *Toward Third-Party Liability for Wage Theft*, in *Berkeley Journal of Employment and Labor Law*, 31, 2010, 1-64.

Toki M., *Hojin Kaku wo Koeta Rodo Ho Kisei no Kanousei to Genkai – Kobetsu teki Rodo Kankei Ho wo Taishou toshita Nichi Doku Bei Hikaku Ho Kenkyu* (1~6) [Possibility and Limit of Labor Law Regulations Beyond the Boundary of Legal Entity – A Comparative Study of Individual Labor Relation Laws in the US, Germany and Japan (1~6)], in *Hogaku Kyokai Zasshi*, 134(5), 669-764; 134(6), 962-1060; 134(8), 1411-1491; 134(9), 1633-1718; 134(10), 1934-2014; 134(11), 2186-2253 (2017).

Waas B., *Reconsidering the Notion of 'Employer' in the Era of the Fissured Work place: Should Labour Law Responsibilities Exceed the Boundaries of the Legal Entity?*, in *Reconsidering the Notion of 'Employer' in the Era of the Fissured Workplace: Should Labor Law Responsibilities Exceed the Boundaries of the Legal Entity?* (2016 JILPT Comparative Labor Law Seminar), 2016, 95-113.

Weil D., *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, Harvard University Press, Cambridge, MA, 2014.

LABOUR LAW BEYOND ITS EMANCIPATORY NATURE: WHAT IS LEFT?

Silvia Rainone *

1. Introduction

Those who attempt to describe the essence of labour law have to deal with its transformative nature, which is a consequence of the impact of societal changes and socio-economic theories on rule-making [1].

The tightening of EU integration (with the consequent expansion of the single market), globalization, the development of new technologies, increasing world-wide competition, economic crises and privatization have been, and still are, challenging the efficiency and sustainability of many legal systems [2]. The pressure has been particularly strong on those systems where, throughout the 1950s, 1960s and the beginning of 1970s (the so-called "Welfare State" period [3]), political forces inspired by socio-democratic theories developed a body of legislation aimed at providing rather rigid forms

* PhD Researcher at Tilburg University.

[1] B. Hepple, *Factor Influencing the Making and Transformation of Labour Law in Europe*, in G. Davidov, B. Langille (eds.), *The Idea of Labour Law*, Oxford University Press, Oxford, 2011, 43-56.

[2] K.W. Stone, *Flexibilisation, Globalization and Privatization: Three Challenges to Labour Rights in Out Time*, in *Public Law and Legal Theory Research Paper Series*, UCLA School of Law, 2005.

[3] B. Veneziani, *The Employment Contract*, in *The Transformation of Labour Law in Europe – A Comparative Study of 15 Countries 1945-2004*, Hart Publishing, Oxford, 2009, 99-126.

of workers' protection, with the effect of reducing the contractual and business freedom of the employer.

The most evident result of the mentioned societal changes is to be identified with the deregulation trend. From the 1980s, this trend has led governments to lift regulations that limited the negotiation autonomy of the parties of the employment contract and that, therefore, implied higher labour-related costs [4]. Deregulation policies are generally aimed at realizing a trade-off between labour protection and labour market access, and fall within the so-called flexicurity agenda [5]. The belief is that the goal of social justice can be realized through the combined effort of making labour law more flexible and, at the same time, through creating a more inclusive labour market [6].

While undergoing this transformation, from minimum standard-setting to flexicurity, labour legislation has quite radically changed its face.

In the acknowledgment of the different positions of those that advocate for reinventing a new paradigm for labour law [7] and those that lean in favour of a re-adaptation of the original precept of labour law [8],this contribution does not have the ambition to formulate a normative stance. Rather, the purpose of this chapter is to assess whether we, when looking at the (relatively) recent developments affecting workers' rights, can still properly talk about labour law. The contribution also aims to discern the direction of EU policy-making.

In order to define whether (what is generally referred to as) labour law is still recognizable as such, this contribution departs from the description of the original justification for labour law. Paragraph 2 illustrates the axioms from which labour law departed and that, so it is argued, provide the basis

---

[4] *Ibidem*.

[5] A. Figueroa, *Labour Market Theories and Labour Standards*, in International Institute for Labour Studies, *International Labour Standards and Economic Interdependence*, ILO, Geneva, 1994, 57-65.

[6] The aim of flexicurity policies stems out quite clearly from the EU Social Action Programme 1998-2000, COM(1998)259 final.

[7] R. Blanpain, *The End of Labour Law*, in *The Global Market; From Globalization to Flexicurity*, in *Bulletin of Comparative Labour Law*, 65, 2008, 3-13; L. Wedderburn, *Labour Standards, Global Markets and Labour Law in Europe*, in International Institute for Labour Studies, *op. cit.*, 247-253.

[8] R. Dukes, *Hugo Sinzheimer and the Constitutional Function of Labour Law*, in G. Davidov, B. Langille (eds.), *op. cit.*, 57-68; M. Weiss, *Re-Inventing Labour Law?*, in G. Davidov, B. Langille (eds.), *op. cit.*, 43-56.

for the ontological characteristics of labour law. Paragraph 3 identifies three different purposes of labour legislation. Paragraph 4 focuses on the European Pillar of Social Rights, in the attempt to discern the predominant EU policy-making approach towards labour matters.
To conclude, this contribution suggests that depending on whether the original axioms defined in paragraph 1 still characterize the developments in the field of workers rights, it is, or rather it is not, appropriate to talk about labour law.

2. The rationale of labour law

A reflection on the origins of labour law allows us to re-discover its nature. For the sake of this contribution, we can refer to two elements that can be considered the starting points of labour law as a discipline: the acknowledgement of the uneven distribution of bargaining power that characterizes the labour relationship, and an ideal of social justice, according to which labour can't be a commodity.

Starting with the bargaining power within the labour relationship, labour law finds its rationale in the necessity to remedy the disproportionate contractual power of the employer vis-à-vis the worker [9].

Since the French Revolution, the exaltation of the freedom of contract, self-determination and the individual has characterized the regulatory approach to a wide spectrum of human interactions, including labour relations [10]. The parties stipulating a (labour) contract were deemed to be equally free before the law and the provision of labour was covered by civil law principles, falling within the category of the provision of services (*locatio conductio operarum*) [11].

However, attentive consideration unveils that these labour relations were characterized by the freedom of contract only formally. The employer, due to its greater contractual power, had the possibility to dictate the terms and conditions to its counterpart [12]. The worker, being the weaker party in the labour relation, did not have, in practice, enough bargaining authority

[9] B. Veneziani, *op. cit.*

[10] C. Watrin, *The Social Market Economy: The Main Ideas and Their Influence on Economic Policy*, in P. Koslowski (ed.), *The Social Market Economy*, Springer, Berlin, 1998, 13-28.

[11] B. Veneziani, *op. cit.*

[12] S. Sciarra, *Market Freedom and Fundamental Social Rights*, in *EUI Working Paper*, 2002.

to influence the content of the labour contract. Therefore, while the parties of the labour relations stood in a formally equal stance, the employer had a position of dominance over the worker [13].

Labour law is rooted in the acknowledgement that (formal) freedom of contract implies (substantive) dominance of the employer over the weaker contractual party.

The need to liberate workers from the submission to their employer became more palpable during the first industrial revolution. The creation of factories and the increasing gap between those owning the means of production and those working to produce, emphasised the employer's authority and the employee's subordination, that became the central aspects of the labour relation [14].

From the perspective of the distribution of bargaining power, labour law can therefore be perceived as a mechanism that contributed to the emancipation of the worker, who is perceived *as a weaker contractual party*.

Going beyond contractual aspects, labour law owes its formation also to the belief that labour is not a commodity [15]. When the performance of labour is conceived as an interaction among individuals, a whole dimension of values comes to the fore. Among those values are human dignity and democracy [16].

When labour is perceived as a commodity, it is de-humanized and appreciated in terms of a mere element of production, as a cost [17]. It descends that labour is seen as one of the factors that determine the comparative advantage of one business over another, or – if we adopt a supranational perspective – of one legal system over another.

Considering labour as a cost risks to lead to a downward spiral of cost-reduction triggered by global competition [18]. The prevention of cost-cutting deregulatory trends is what motivated the definition of minimum wages within countries [19], the establishment of the ILO and

---

[13] L. Wedderburn, *Labour Standards*, cit.

[14] A. Neal, *Comparative Labour Law and Industrial Relations: "A Major Discipline? – Who Cares?"*, in AA.VV., *Labour Law and Industrial Relations at the Turn of the Century*, Kluwer Law International, The Hague/London/Boston, 1998.

[15] R. Dukes, *Hugo Sinzheimer*, cit.

[16] B. Hepple, *Factor Influencing*, cit.

[17] R. Dukes, *Hugo Sinzheimer*, cit., 65.

[18] H. Feis, *International Labour Legislation in the Light of Economic Theory*, in International Institute for Labour Studies, *op. cit*., 29-57.

[19] M. Weiss, *op. cit.*

other efforts to harmonize labour rules across countries [20].

Labour law therefore also finds its origin in the necessity to shield labour from being perceived as an element of production and labour regulation from being influenced by the market-oriented discourse. In particular, preserving labour relations from the logic of market efficiency proved to be necessary in order to pursue a broader ideal of social justice [21].

From the assumption that labour is not, and shall never be, a commodity, labour law can be intended as an instrument that supported the emancipation of the worker, who is *perceived as a human being*.

It appears that the essence of labour law is intertwined with the natural state of the worker, who is oppressed by the employer's stronger contractual authority and by the logic of market efficiency that perceives the worker as a cost. Thus, it seems appropriate to designate any law or regulation that constitutes a reaction to the worker's state of oppression as "labour law".

3. (Three) purposes of labour law

Having delineated the rationale of labour law, let us now identify its aspirational goals. In other words, what is the purpose of labour law?

Depending on the approach that the legislature intends to adopt to react to the disadvantageous and dependent position of the worker, it is possible to determine three different purposes [22].

3.1. Protective function

First, labour law can have a protective function. This is the case when labour law is conceived through the theoretical lens of those legal scholars that uphold the ideas originally developed by Hugo Sinzheimer (1875-1946), the founding father of German labour law. According to Sinzheimer, the role of labour law should be to establish minimum standards of protection

[20] Declaration of Philadelphia concerning the aims and purposes of the ILO, in art. 1, lett. a) states that labour law is not a commodity.

[21] M. Hansenne, *The European Social Model and Globalization of the Economy*, in AA.VV., *Labour Law and Industrial Relations*, cit.; M.E. Streit, *Has the Market Economy Still a Chance? On the Lack of a Discipline Challenge*, in P. Koslowski (ed.), *op. cit.*

[22] B. Hepple, *Factor Influencing*, cit.

of workers, to shield them from the employer's disproportionate contractual authority[23]. To that end, statutory rules should be implemented to limit the freedom of contract of the employer. At the same time, the participation of the employers' and employees' representatives in the decision-making should be institutionalized. Moreover, he firmly believed that the norms governing labour relations should be based on the respect for human dignity[24].

The pursuit of the protective function requires an active role of the state, which is justified in light of the general public interest that labour norms aim to attain[25].

Labour law therefore takes the form of rules on minimum salary, working time, dismissals protection, support for social dialogue, and measures implementing industrial democracy providing for workers' representation in decision-making.

It is clear that, when labour law is intended to accomplish a protective function towards workers, it fulfils the normative requirements that its emancipatory nature demands. On the one hand, the uneven distribution of bargaining power between workers and employer is remedied through the imposition of rules that limit the contractual freedom of the latter[26]. On the other hand, the imposition of minimum standards reduces the risk of cost-cutting competition. This is especially true when we consider a legal system in isolation. However, it should be acknowledged that problems arise when the harmonization of the rules governing the terms and conditions of work is incomplete at the supranational level. In that case, a de-regulatory race to the bottom can materialize[27].

3.2. Counterforce to unequal bargaining power

Labour law might also be conceived as aimed at uplifting the negotiating position of the workers, rather than at directly limiting the contractual freedom of the employer. This normative position reflects the thoughts of

---

[23] R. Dukes, *Hugo Sinzheimer*, cit.; M. Weiss, *op. cit.*

[24] R. Dukes, *ibidem*.

[25] *Ibidem*

[26] A. Lyon-Caen, *Droit du Travail, Démocratie et Crise*, Actes Sud, Arles, 1986, 9-19.

[27] P. Syrpis, *EU Intervention in Domestic Labour Law*, Oxford University Press, Oxford, 2007, 41-42, among other.

Kahn-Freund (1900-1979), father of the so-called "*common law approach*", whereby labour law is perceived mostly from the perspective of allocation of power[28]. In particular, Kahn-Freund found that the unequal distribution of (bargaining) power has repercussions for social justice, particularly for the freedom and dignity of the worker[29].

In this case, labour law counteracts the inequality of bargaining power which is inherent in the employment relationship[30].

In order for labour law to be a counterforce, emphasis must be placed on the importance of collective bargaining because, in Kahn-Freund's vision, the workers' power lies in collective power[31]. Workers' rights advancement has to be pursued by way of direct confrontation between the collective representations of workers (trade unions) and employers (professional associations).

Differently from labour law with a protective function, labour law as a counterforce does not require the interference of the state into the (collective) mechanism of labour standards-settings[32]. The composition of the collective bodies, and their interaction among each other, should be self-regulatory and is often referred to as "*collective laissez-faire*"[33].

This interpretation of labour law does not envisage the statutory imposition of minimum labour standards. Wages and working conditions are established through social dialogue, and the fairness of the outcome of social partners' negotiations depends on the presence of a balanced system of industrial pluralism[34].

It appears that also the "*collective laissez-faire*" paradigm fits the emancipatory rationale of labour law that we identified in paragraph 2. Indeed, the set of rules imagined by Kahn-Freund aims at overcoming the bargaining imbalance between employer and employee[35].

---

[28] A. Neal, *op. cit.*

[29] P. Davies, M. Freedland, *Kahn-Freund's Labour and the Law*, Stevens & Sons, London, 1983.

[30] *Ibidem*.

[31] *Ibidem.*

[32] R. Dukes, *Hugo Sinzheimer*, cit.

[33] B. Hepple, *Introduction*, in ID., *Social and Labour Rights in a Global Context*, Cambridge University Press, Cambridge, 2002.

[34] B. Hepple, *Factor Influencing*, cit.

[35] *Ibidem*.

However, a twofold criticism can be advanced. First, as Sinzheimer himself noted, the absence of state intervention advocated by the "*collective laissez-faire*" approach makes the pursuit of the public interest rather uncertain [36]. In the end, there is the risk that this approach allows the perpetuation, even if on a collective dimension, of the dynamics characterizing the pre-industrial revolution era, whereby basically unlimited contractual freedom inevitably results in substantial dominance of the interests of employer over those of the workers. Second, as also noted in paragraph 3.2 with reference to labour rules performing a protective function, labour standards are not protected from deregulatory competition. The European single market and globalization have put the normative power of trade unions under pressure, leading the state to adopt reforms to reduce freedom of association [37], with the effect of undermining the efficiency of collective bargaining [38]. Even the introduction, in the Maastricht Treaty, of an institutionalised mechanism of EU social dialogue has failed to introduce an effective system of collective bargaining into the EU decision-making process [39].

3.3. Endurance with respect to socio-economic changes

The third function of labour legislation is to ensure that labour rights endure socio-economic changes.

Labour law, especially in those systems where it was conceived as an instrument to provide statutory protection to workers, has been confronted with the transformation of the economy and society [40], and has encountered the difficult task to maintain its autonomy and its significance [41].

Since the end of the 1970s, economic crises, globalization, the increased integration of the European internal market and the impact of new technologies have placed enormous pressure on existing labour rules (in systems

---

[36] R. Dukes, *Hugo Sinzheimer*, cit.

[37] A. Bogg, *Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State*, in *Industrial Law Journal*, (45)3, 2016, 299-336.

[38] L. Wedderburn, *Labour Standards*, cit.

[39] S. Sciarra, *op. cit.*

[40] K. Polanyi, *The Great Transformation: The Political and Economic Origins of our Time*, II ed., Beacon Press, Boston, 2001.

[41] A. Lyon-Caen, *Droit du Travail*, cit.

based on the *collective laissez-faire* approach as well as in systems based on protective state legislation) [42].

Labour prerogatives became more and more conceived in terms of costs and stakeholders as well as economists succeeded to channel their concerns into politics and law-making [43]. It is important to note that, while the mentioned socio-economic changes triggered a reconsideration of labour law rules, the premises that originally justified the adoption of those instruments are still valid. In other words, the pressure to lower labour guarantees originated predominantly from business actors, regardless of the fact that the worker's weaker position (and their state of oppression) remained unchanged.

Looking back at the past decades, it is possible to see that policy-makers face two alternatives.

The first alternative is to consider the traditional model of the open-ended, long-term employment contract outdated. This model, with its rigid labour guarantees, does no longer reflect the contemporary needs of the world of work, thus it is necessary to create new labour law paradigms [44].

This is the approach that underpinned the work of Gino Giugni (1927-2009), one of the major contributors to the formation and development of Italian labour law. He believed that a stronger cooperation between state and industrial relations was the way forward. In his view, social dialogue and the negotiations between workers' and employers' representatives are the elements that should direct the evolution of labour law and ensure that its axiomatic foundations are not abandoned [45]. The valorisation of the role of social partners is in line with the approaches of both Sinzheimer and Kahn-Freund, and reflects the admiration that Giugni had for their work [46].

The innovative aspect of the work of Giugni lies in the acknowledgment of the necessity to re-think labour law and to envisage its development. In order to prevent labour law from becoming obsolete, he argued for the combination of de-construction of anachronistic rigidities and re-construction,

---

[42] T. Treu, *The Role of a European Social Model*, in AA.VV., *Labour Law and Industrial Relations*, cit.

[43] A. Lyon-Caen, *Droit du Travail*, cit.

[44] M.V. Ballestrero, *Quarant'anni e li dimostra tutti*, in *Lavoro e Diritto*, n. 1 (inverno 2010), 19-30.

[45] A. Lyon-Caen, *Italie*, in ID., *Droit du Travail, Démocratie et Crise*, cit.

[46] G.P. Cella, *Il cammino del pluralismo: giugni e le relazioni industriali*, in *Giornale di diritto del lavoro e d relazioni industriali*, 114, 2007, 273-291.

to extend and adapt the existing guarantees to non-standard workers. In particular, de-construction and re-construction should pass not only through the legislator, but also through effective forms of workers' involvement, that should take place by means of an institutionalised system of social dialogue at the decision making level, and also by means of a system of workers' participation, at all levels (including the management of the enterprise) [47].

It is important not to confound this form of "negotiated flexibilization" with neo-liberal deregulation tendencies. First, flexibilization should take place in a gradual, regulated manner that combines legislative intervention and social dialogue. Second, the adaptation of the labour rules is oriented at addressing the evolution of the world of work and, *at the same time*, at enhancing workers' welfare. Indeed, the relaxation of certain prerogatives is counterbalanced by other elements, such as extending the access to the social security system and broadening the coverage of collective bargaining and collective agreements to the so-called atypical workers [48].

Reflecting now on this approach through the lens of the original emancipatory premise of labour law, it seems that the core characteristics are preserved. Adaptation and reformism are conceived in a way to not neglect the vulnerability of workers, and therefore the nature of labour law is not contradicted.

An alternative approach to the challenges that socio-economic developments represent for labour rules, is to look at the existing body of labour rules from a market-lens. The justification behind this approach is that, inasmuch as the pressure exercised on the existing body of labour laws originates directly from the development of market dynamics, the adaptation of labour rules should comply with such development [49]. This entails that labour policy should be shaped in order to fit with standards of economic efficiency [50].

This approach was embraced by a group of UK scholars since the 1980s. Authors such as Davies and Freedland sustained that the traditional con-

---

[47] F. Liso, *Appunti per un profilo di Gino Giugni dagli anni '50 allo Statuto dei lavoratori*, in *WP Centro Studi Massimo D'Antona*, 316/2016.

[48] R. Cosio, R. Foglia, *Il diritto del lavoro nell'Unione Europea*, a cura di P.G. Alpa, Giuffrè, Milano, 2011, 420.

[49] R. Dukes, *The Labour Constitution – The Enduring Idea of Labour Law*, Oxford University Press, Oxford, 2014, 92-119.

[50] R. Marshall, *The Importance of Labour Standards in a More Competitive Global Economy*, in International Institute for Labour Studies, *op. cit.*, 65-79.

ception of labour law was outdated, and that it should be re-aligned with objectives of economic policy and with the functioning of the labour market[51]. Collins nourished the concept of the "Third Way", inspired by the approach of the Blair government, that was aimed at the creation of a flexible and competitive workforce. A strong focus on the labour market is deemed central to reach economic growth and the amelioration of social problems[52].

Labour rights are reformed in light of a paradigm of coexistence between, on the one hand, the exigence of growth and competitiveness of the economy and, on the other hand, the objective of social inclusion[53]. In other words, workers' rights are supposed to be compatible with business freedoms and, in order to achieve this, policy makers should promote a deregulatory approach towards labour standards[54]. This vision demarks a shift in focus from labour rights to the labour market, and promotes the idea that a rationalisation of the rules governing the labour market allows for the achievement of both (market) efficiency and societal goals[55]. The adequacy of labour rights is measured in terms of economic sustainability and this places further pressure on the existing body of labour legislation[56].

Economic efficiency and promotion of employment are priorities for labour policies[57], and this leads to the establishment of a set of rules that have no ontological autonomy from economic and employment targets[58].

It descends that when the world of labour is considered as functional to economic growth and labour market objectives, labour law loses its ratio-

---

[51] R. Dukes, *The Labour Constitution*, cit., 97.

[52] H. Collins, *Is There a Third Way in Labour Law*, in J. Conaghan, R.M. Fischl, K. Klare (eds.), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities*, Oxford University Press, Oxford, 2000.

[53] L. Wedderburn, *Labour Standards*, cit.

[54] O. Oladeinde, *Global Capitalism and the Rise of Non Standard Employment – Challenges to Industrial Relations*, in *The Global Labour Market, from Globalization to Flexicurity*, in *Bulletin of Comparative Labour Relations*, 65, 2008, 53.

[55] S. Deakin, F. Wilkinson, *The Law of the Labour Market*, Oxford University Press, 2005, Oxford, 275.

[56] B. Hepple, *Factor Influencing*, cit.

[57] T. Treu, *op. cit.*, R. Blanpain, *op. cit.*

[58] N. Bruun, *The Old and New Foundations of Labour Law*, in K. Ahlberg, N. Bruun (eds.), *The New Foundations of Labour Law*, Peter Lang GmbH, Frankfurt am Main, 2017, 17-35.

nale[59]. Its nature is distorted, inasmuch as its justification is not found anymore in the position of dependence of workers and in the necessity to emancipate them, but in the socio-economic challenges that defy the competitiveness of legal systems.

When norms that affect labour rights are merely grounded in the necessity to respond to market-oriented priorities (economic growth, employment policies), we are facing a *corpus* of law whose nature is eclipsed. It cannot be properly addressed as *labour law*, or at least not in the meaning given thereto in paragraph 2, and it might be more appropriate to refer to *labour market law*[60].

Despite the distortion of the original nature of labour law, it seems that this *labour market law* approach is the predominant trend across Europe[61]. In the next paragraph, the focus is moved on the question whether this trend continues in recent EU policy-making.

4. Labour rights in the EU Pillar of Social Rights

Having reflected on what characterizes the nature of labour law, and on which aspirational goals are compatible with such nature and which aren't, this paragraph presents a brief assessment of the most recent EU labour agenda, the EU Pillar of Social Rights (hereinafter "EPSR" or "Pillar"). The idea is to consider whether the approach adopted by the EU is compatible with the notion of labour law as defined in paragraph 2.

Tracing back the origins of the Pillar leads us to the Five President Report on Completing Europe's Economic and Monetary Union, published in June 2015[62]. That document stated that "*Europe's ambition should be to earn a social triple A*", and referred to the necessity to develop four pillars to support the Union's convergence, growth and job creation. Among those pillars, the Report mentioned that one should reflect "*a greater focus on employment and social performance*".

---

[59] L. Wedderburn, *Common Law, Labour Law, Global Law*, in International Institute for Labour Studies, *op. cit.*

[60] N. Bruun, *op. cit.*

[61] B. Veneziani, o*p. cit.*

[62] *Completing Europe's Economic and Monetary Union*, J-C. Junker, in close cooperation with D. Tusk, J. Dijsselbloem, M. Draghi and M. Schulz, 2015, the so-called "Five-Presidents Report".

The launch of the first proposal of the EPSR was contextualized by the Social Affairs Commissioner Marianne Thyssen as follows: "*The EPSR should be seen as a compass pointing to a very specific destination: a stronger EMU* […] *since it helps creating a more level playing field and so improves the functioning of the internal market*" [63].

It is also interesting to note that, while launching the consultation on the content of the Pillar, the Commission specified that social policy should be conceived as a productive factor that should be able to sustain economic stability in the EU [64].

The Pillar was adopted in the form of an interinstitutional declaration (a non-binding instrument) in November 2017 [65], and it consists in the enunciation of 20 principles, divided in three chapters. The first and the second chapter touch upon labour matters. The first chapter concerns "*Equal Opportunities and Access to the Labour Market*" and focuses on life-long learning, support for labour market access and equal opportunities. The second chapter is about "*Fair Working Conditions*" and, more precisely, on information rights on the conditions of employment, notice periods in case of dismissals, fair wages, work-life balance, health and safety, social dialogue, workers' involvement and the *flexible and secure labour contract*. This last principle is justified in light of the fact that "*the necessary flexibility for employers to adapt swiftly to changes in the economic context shall be ensured*".

Following its adoption, the Commission has drafted legislative proposals with the objective to implement the principles of the EPSR [66]. For reasons of space it is not possible to provide an overview of all the legislative proposals, but it is worth to mention a few aspects concerning the Directive on Transparent and Predictable Working Conditions. This Directive is meant to repeal the Written Statement Directive and it aims at guaranteeing that workers are informed in writing about the essential aspects of their labour relationship. What is new is that the Commission, in its proposal [67], took a broad approach towards the definition of *worker*, who is

[63] Speech of Thyssen of 16 September 2016 at the 28th Conference of European Association of Labour Economists.

[64] COM(2016)127, Launching a Consultation on a European Pillar of Social Rights.

[65] In occasion of the Gothenburg Summit for Fair Jobs and Growth.

[66] Directive on Transparent and Predictable Working Conditions, Council Recommendation on Access to Social Protection for Workers and Self-Employed, Regulation Establishing the European Labour Authority.

[67] COM(2017)797, Commission Proposal for a Directive on Transparent Predictable Working Conditions in the EU.

described as "*a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration*". This seems to imply that, in the view of the Commission, the Directive should also apply to atypical workers not covered by a contract of employment, such as platform workers or the so-called *false* (or *bogus) self-employed*. As for the rights conferred to those workers, the proposal sets the maximum duration of probation periods to six months, establishes the workers' freedom to enter in more than one labour relationship at the time and discourages those working arrangements which do not respect sufficient standards of predictability of the work schedule. It also provides the right to request a more secure and predictable form of work, to which the employer must respond in writing.

It appears that the Directive was not conceived to substantially enhance the prerogatives of workers, as it provides relatively weak forms of protection [68]. In April 2019, the Council and the Parliament have reached an agreement on the final wording of the Directive, from which it results that the impact on workers' rights is going to be even lighter than in the Commission's proposal. Indeed, the Council and Parliament's agreement has altered the personal scope of application of the Directive, so that instead of applying to "*every worker*" applies to "*every worker* […] *who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State*" [69]. Platform workers and bogus self-employed are therefore excluded from the scope of application of the Directive.

It is now possible, in light of this brief outline of the Pillar and its first outputs, to reflect on the approach that EU policy-making has adopted with respect to labour rights.

It is clear that the EPSR and the measures it envisages respond to the third function of labour law (ensuring endurance with respect to socio-economic changes). Indeed, the Pillar attempts to make labour policy "fit" for the challenges that threaten the sustainability of the "traditional" labour law systems. Concerning the way in which such function is pursued, EU law-making appears to lean toward the second of the alternatives de-

[68] S. Rainone, *The European Pillar of Social Rights is One Year Old. Which Implications for EU Labour Law?*, Blog Post on European Lawyers for Workers Network, November 2018.

[69] Provisional agreement between the Council and the European Parliament, 16 April 2019, P8_TA-PROV(2019)0379, art. 2.

scribed in paragraph 3. The EPSR does not elaborates a new labour law paradigm apt at strengthening the position of those workers who, as a consequence of socio-economic developments, suffer from insufficient standards of protection.

The exclusion of provisions that intervene in the unbalanced bargaining position of workers and the accent on the strong bound between labour policies and economic growth and competitiveness indicate that the prevailing rationale responds more to (labour) market logic than to emancipatory intent.

The result is a set of policy proposals that bears the signs of a shift from labour law (as traditionally conceived and described in paragraph 2) to labour market law[70], whereby flexible forms of work are supported inasmuch as they facilitate mobility and encourage entrepreneurship[71].

5. Conclusion

This contribution embraces an idea of labour law that finds its rationale in its emancipatory nature. Labour law has been originally conceived to react to workers' vulnerability, due to their weaker contractual power and to their susceptibility to bear the negative effects of market economies.

Paragraph 3 presented three different purposes of labour law: protection of workers, provision of a counterforce to unequal bargaining power, and ensuring endurance with respect to socio-economic changes. With respect to the latter, this contribution has shown that the adaptation of existing rules respects the original premises of labour law only when the (weaker) position of workers vis-à-vis business actors is not disregarded. Accordingly, labour law reforms should include strategies to enhance social dialogue and workers' participation in the industry, as well as the re-formulation of the existing guarantees, instead of their mere abandonment.

Instead, when the legislator addresses labour rights predominantly from the perspective of their economic functionality, labour law loses its auto-

---

[70] S. Giubboni, *Appunti e disappunti sul pilastro europeo dei diritti sociali*, in *Quaderni Costituzionali*, a. XXXVII, n. 4, December 2017, 953; Z. Rasnaca, *Bridging the Gaps or Falling Short? The European Pillar of Social Rights and What it Can Bring to EU-Level Policy Making*, in *ETUI Working Paper*, 2017.

[71] Provisional agreement between the Council and the European Parliament, 16 April 2019, P8_TA-PROV(2019)0379, Recital 2.

nomy and its nature. The analysis of the EPSR and of the Directive on Transparent and Predictable Working Conditions suggests that EU labour policy is going in that direction. More needs to be done to avoid the full absorption of workers' prerogatives into plain (labour) market logic.

Selected bibliography

Ballestrero M.V., *Quarant'anni e li dimostra tutti*, in *Lavoro e Diritto*, 1, 2010, 19-30.

Blanpain R. *The End of Labour Law*, in *The Global Market; From Globalization to Flexicurity*, in *Bulletin of Comparative Labour Law*, 65, 2008.

Bogg A., *Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State*, in *Industrial Law Journal*, (45)3, 2016, 299-336.

Bruun N., *The Old and New Foundations of Labour Law*, in K. Ahlberg, N. Bruun (eds.), *The New Foundations of Labour Law*, Peter Lang GmbH, Frankfurt am Main, 2017.

Collins H., *Is There a Third Way in Labour Law*, in J. Conaghan, R.M. Fischl, K. Klare (eds.), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities*, Oxford University Press, Oxford, 2000.

Cosio R., Foglia R., *Il diritto del lavoro nell'Unione Europea*, a cura di P.G. Alpa, Giuffrè, Milano, 2011.

Davies P., Freedland M., *Kahn-Freund's Labour and the Law*, Stevens & Sons, London, 1983.

Deakin S., Wilkinson F., *The Law of the Labour Market*, Oxford University Press, Oxford, 2005.

Dukes R., *Hugo Sinzheimer and the Constitutional Function of Labour Law*, in G. Davidov, B. Langille (eds.), *The Idea of Labour Law*, Oxford University Press, Oxford, 2011.

Dukes R., *The Labour Constitution – The Enduring Idea of Labour Law*, Oxford University Press, Oxford, 2014.

Hansenne M., *The European Social Model and Globalization of the Economy*, in AA.VV., *Labour Law and Industrial Relations at the Turn of the Century*, Kluwer Law International, The Hague/London/Boston, 1998.

Hepple B., *Social and Labour Rights in a Global Context*, Cambridge University Press, Cambridge, 2002.

Hepple B., *Factor Influencing the Making and Transformation of Labour Law in Europe*, in G. Davidov, B. Langille (eds.), *The Idea of Labour Law*, Oxford University Press, Oxford, 2011.

Feis H., *International Labour Legislation in the Light of Economic Theory*, in International Institute for Labour Studies, *International Labour Standards and Economic Interdependence*, ILO, Geneva, 1994.

Figueroa A., *Labour Market Theories and Labour Standards*, in International Institute for Labour Studies, *International Labour Standards and Economic Interdependence*, ILO, Geneva, 1994.

Giubboni S., *Appunti e disappunti sul pilastro europeo dei diritti sociali*, in *Quaderni Costituzionali*, a. XXXVII, n. 4, December 2017.

Liso F., *Appunti per un profilo di Gino Giugni dagli anni '50 allo Statuto dei lavoratori*, in *WP Centro Studi Massimo D'Antona*, 316/2016.

Lyon-Caen A., *Droit du Travail, Démocratie et Crise*, Actes Sud, Arles, 1986.

Marshall R., *The Importance of Labour Standards in a More Competitive Global Economy*, in International Institute for Labour Studies, *International Labour Standards and Economic Interdependence*, ILO, Geneva, 1994.

Neal A., *Comparative Labour Law and Industrial Relations: "A Major Discipline? – Who Cares?"*, in AA.VV., *Labour Law and Industrial Relations at the Turn of the Century*, Kluwer Law International, The Hague/London/Boston, 1998.

Oladeinde O., *Global Capitalism and the Rise of Non Standard Employment – Challenges to Industrial Relations*, in *The Global Labour Market, from Globalization to Flexicurity*, in *Bulletin of Comparative Labour Relations*, n. 65, 2008.

Polanyi K., *The Great Transformation: The Political and Economic Origins of our Time*, II ed., Beacon Press, Boston, 2001.

Rasnaca R., *Bridging the Gaps or Falling Short? The European Pillar of Social Rights and What it Can Bring to EU-Level Policy Making*, in *ETUI Working Paper*, 2017.

Rainone S., *The European Pillar of Social Rights is One Year Old. Which Implications for EU Labour Law?*, Blog Post on European Lawyers for Workers Network, November 2018.

Sciarra S., *Market Freedom and Fundamental Social Rights*, in *EUI Working Paper*, 2002.

Stone K.W., *Flexibilisation, Globalization and Privatization: Three Challenges to Labour Rights in Out Time*, in *Public Law and Legal Theory Research Paper Series*, UCLA School of Law, 2005.

Streit M.E., *Has the Market Economy Still a Chance? On the Lack of a Discipline Challenge*, in P. Koslowski (ed.), *The Social Market Economy*, Springer, Berlin, 1998.

Syrpis P., *EU Intervention in Domestic Labour Law*, Oxford University Press, Oxford, 2007.

Treu T., *The Role of a European Social Model*, in AA.VV., *Labour Law and Industrial Relations at the Turn of the Century*", Kluwer Law International, The Hague/London/Boston, 1998.

Veneziani, B., *The Employment Contract*, in *The Transformation of Labour Law in Europe – A Comparative Study of 15 Countries 1945-2004*, Hart Publishing, Oxford, 2009.

Watrin C., *The Social Market Economy: The Main Ideas and Their Influence on Economic Policy*, in P. Koslowski (ed.), *The Social Market Economy*, Springer, Berlin, 1998.

Wedderburn L., *Labour Standards, Global Markets and Labour Law in Europe*, in International Institute for Labour Studies, *International Labour Standards and Economic Interdependence*, ILO, Geneva, 1994.

Weiss M., *Re-Inventing Labour Law?*, in G. Davidov, B. Langille (eds.), *The Idea of Labour Law*, Oxford University Press, Oxford, 2011.

II

NEW FORMS OF WORK AND NEW FORMS OF PROTECTION

LEAVE UBER DRIVERS ALONE: DO THEY REALLY NEED TO BE EMPLOYEES?

Jakub Tomsej [*]

1. Opening remarks

A lot has been written about the challenges of the gig economy [1]. So far, it seems that it has been leading to mixed feelings. On one hand, there is undoubtedly an advance in matching the customer's demand with the appropriate offer, and the overall customer experience with various on demand platforms seems to be usually very good. Notwithstanding that, key players in the gig economy are often accused of not complying with various regulatory requirements, including licenses, taxes and other mandatory deductions, immigration laws and others.

A stand-alone, and very important topic is the (allegedly) insufficient protection of individuals who choose to perform services as part of the on-demand structures. As such, they are deemed to carry out a series of gigs (one-off jobs) and be paid for them individually, rather than receiving a guaranteed income [2]. The terms and conditions of all applications that are

[*] The author is an assistant professor at the Department of Labour and Social Security Law of the Law Faculty of the Charles University in Prague, Czech Republic. The article reflects the legal status as of 31 December 2018 and the conclusions of the author within the scope of projects UNCE/HUM/034 "Dependent work in 21. century: questions and challenges" and PROGRES Q03 "Private law and the challenges of today", Charles University, Faculty of Law.

[1] Due to these discussions, it appears unnecessary to provide a definition of this term. Reference can be made to R. Botsman, R. Rogers, *What's Mine is Yours: The rise of Collaborative Consumption*, Collins, London, 2011.

[2] M. Sargeant, D. Lewis, *Employment Law*, VIII ed., Routledge, London, 2018.

declared to form part of the gig economy do not envisage that these individuals would be employees, and thus deprive them of some rights such as minimum or overtime pay, limitation of working hours, employer liability for work accidents, unionization rights, and other.

Most labour scholars seem to be confident that increasing protection of these individuals is desirable, either by form of classifying them as employees, or by applying a "third category" of labour which extends some basic standards also to individuals who do not necessarily meet all criteria of dependent work (in some countries, such as the UK or Germany, such category already exists).

This article is based upon my experience from the Czech Republic, and more widely from the Eastern Europe, which may in many aspects differ from the situation, for example, in the United States or in the UK. My analysis targets Uber as it seems to be the only example of a platform that is widely used in most CEE countries; my conclusions, however, seem to be also applicable for any similar platforms. The claim of this article is the role of the gig economy at the labour market may be (at least in some countries) more profitable than it is commonly claimed, and that the label of an independent contractor better matches the actual position of an Uber driver.

2. Gig economy in the Czech Republic

The issue of sharing economy, or gig economy is not expressly regulated in the Czech Republic. This does not mean that providing services under an on-line platform is not regulated at all. On the contrary, a general regulation of providing that type of services must be applied. In the case of Uber, this means that the drivers must meet all requirements prescribed by the local law for entrepreneurs in the area of taxi transport.

Besides Airbnb where the focus is on renting rooms and apartments rather than providing any services, Uber seems to be the only platform falling within the scope of the gig economy, which is commonly known and used in the Czech Republic (and similarly in most other CEE countries, such as Slovakia, Poland, Romania or Russia). In the Czech Republic, it operates only in the capital of Prague where its drivers had to obtain a taxi license, whereas in the second largest city of Brno, the use of the application was banned by a court due to non-compliance with local regulatory rules.

According to data provided by Uber, there are more than 2,000 Uber drivers in Prague, 90% of which however do not drive full-time. A recent

poll among Uber drivers has shown an increased percentage of approx. 39,5% full-time drivers; the validity of this number can however be challenged by the fact that only 43 drivers have participated at the poll[3].

Besides Uber, there is one other popular application for taxi rides (Taxify) which is however based on the same principles as Uber, and competes with Uber merely in the taxi price and quality of services. Most other online applications relating to other services than taxi services (e.g. Deliveroo, TaskRabbit) are not existent in the Czech Republic and would not be found in most other CEE countries.

Two topics need to be emphasized about the Czech labour market. First, the Czech Republic has been benefitting from a very low unemployment rate (2,8% as of 30 November 2018)[4]. This equals to 215.010 unemployed job applicants, while the Labour Office has reported 323.542 job vacancies[5]. Employers often complain about difficulties to find suitable candidates for their job position, as well as about increased competition and solicitation of employees. This situation is very beneficial for employees who are looking for permanent employment, as there is a higher likelihood that they will find it easily.

From that point of view, it can be argued that a majority of employees does not become an Uber driver in an unsuccessful search for any job, but they seem to have made a decision to prioritize Uber over more standard and secure jobs. It could be argued that even individuals who do not possess any other skills than riding a car could find a better employment if they desired, as the database of available job positions maintained by the Czech Labour Office even contained 43 available job positions of a taxi driver in an employment status, and far more positions of personal and company drivers.

There can be diverse reasons why individuals choose to work for Uber. In the case of the Czech Republic and other CEE countries, flexibility can, however, play the decisive role. As outlined in one of my other pa-

---

[3] V. Krajčík, J. Veber, A. Ključnikov and coll., *Analýza dopravních služeb v sektoru sdílené ekonomiky a na jejím pomezí*, Vysoká škola podnikání a práva, Prague, 2017.

[4] Based on the statistics of the Czech Ministry of Labour and Social Affairs: *https://portal.mpsv.cz/sz/stat/nz/mes* (accessed 30 December 2018).

[5] Since 2012, there is no obligation for employers to report vacancies to the competent Labour Office, unless they contemplate to hire a non-EU citizen. As Labour Offices are usually not used for recruitment of highly qualified and senior employees, there is high likelihood that the full number of job vacancies would be even higher.

pers[6], the Czech Republic shows a surprisingly low number of part-time employment opportunities (only approx. 5% of employees work part time), and there seems to be a widespread mistrust among employers in work from home and other flexible arrangements. Employees who are unable to work in a full-time job in a regular daily pattern may thus have a difficulty to find a sufficiently flexible opportunity, and may find themselves attracted to an option where no-one forces them to turn on the application, where they are free to work only during evenings and weekends, or where they can appoint a substitute who uses their car and account while they have other commitments.

In many developed market countries of Western Europe, sharing economy is mostly viewed in negative light as a tool of modern precarity and evasion of worker's rights; the UK could serve as an excellent example thereof[7]. From their point of view, it could seem rather bizarre that Uber can prove to be a preferred "employer" for individuals with caring responsibilities or with disabilities[8], but this can be the case in countries with less opportunities.

3. Legal status of Uber drivers

In most countries of continental Europe, the classification of an individual as employee goes hand in hand with the concept of dependent work, where an employer exercises control over the employee and her work. Local laws typically define such dependent work as permanent activity that is carried out exclusively by an individual, based on the employer's instruction, on the employer's costs and liability.

Uber classifies its drivers as independent contractors rather than employees. In most countries, such classification is however not crucial, as courts would typically apply the principle of primacy of facts, and focus more on the actual nature of the legal relationship than on its contractual description. Notwithstanding that, a number of factors can be used to demon-

[6] J. Tomšej, *Between Flexibility and Precarity*, in *SSRN Electronic Journal* (Charles University in Prague Faculty of Law Research Paper no. 2018/II/4), 2018.

[7] J. Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy*, Oxford University Press, Oxford, 2018.

[8] As an example, I have personally witnessed at least two Uber drivers who suffered from deafness.

strate that the allegation about an independent relationship is correct. In legal literature concerning the status of Uber drivers, main focus is typically being put on the freedom of the drivers to start and finish driving whenever they want, take any breaks as well as to determine where they would drive [9]. Uber does not restrict drivers from working for more applications at the same time, or work on parallel as a traditional taxi driver. Another important argument lies in the fact that Uber does not require the contractors to personally perform the services: they can be substituted by other individuals or even build up their own fleet (in which case their position could seem closer to the position of an employer of other drivers, rather than of an employee of Uber) [10].

On the other hand, there are still some important areas where Uber exercises significant control over its drivers. This includes the powers of Uber to fully determine the price, as well as some restrictions of drivers when accepting rides (in particular, drivers do not know the identity of the customer or where they want to travel to, and if drivers repeatedly refuse a ride, their account will be temporarily deactivated, with an option to sign up again without any restriction).

In the UK, the first instance court decision in *Aslam, Farrar & others vs. Uber B.V.* has shown a strong resistance to the allegation of Uber that it was just a developer of a mobile application rather than a transportation company, and that the contract for the provision of transport services was concluded between the driver and the user and not between Uber and the driver [11], emphasizing the absurdity of a scheme where "*the driver enters into a binding agreement with a person whose identity he does not know (and will never know) and who does not know and will never know his identity, to undertake a journey to a destination not told to him until the journey begins, by a route prescribed by a stranger to the contract ... from which he is not free to depart (at least not without risk), for a fee which (a) is set by the stranger, and (b) is not known by the passenger (who is only told the total to be paid), (c) is calculated by the stranger (as a percentage of the total sum)*

[9] In this context, Prassl mentions one and only restriction of working time which consists in the fact that in some countries, driver's accounts would be automatically deactivated after 12 hours of service for a break of at least 6 hours. This, however, seems to be a safety restriction rather than a manner to manage the working schedules.

[10] J. Tomšej, *Legal Status of Uber Drivers: Let Sleeping Dogs Lie?*, in J. Pichrt, R. Boháč, J. Morávek, *Sdílená ekonomika – sdílený právní problém?*, Wolters Kluwer, Prague, 2017.

[11] M. Sargeant, D. Lewis, *op. cit*.

and (d) is paid to the stranger". While it has been emphasized that Uber could theoretically structure its business model in a manner that does not raise any doubts about the drivers being independent contractors [12], the position of the Tribunal court is that in this particular case, employees must be deemed workers under the UK regulation.

A different approach to the topic is shown in a US decision of *Razak and others vs. Uber Technologies, INC. and GEGAN, LLC* [13]. The court has applied existing U.S. precedents and reached the conclusion that Uber drivers cannot be deemed employees, using all of the arguments mentioned above. In the court's view, the right of Uber to deactivate users in certain specific situations does not suggest employer control but rather a sense of responsibility. This convenes with the argumentation of Uber which declared this as a system integrity measure. The court has likened the position of a Uber driver to a carpenter or plumber, engaged to complete renovation projects for homeowners who can impose certain requirements while the individual is at their home, but which are not sufficient to conclude that the carpenter/plumber is an employee.

From that point of view, it may be a surprise that the court in Razak case stated that the business model of Uber represents a novel form of business that did not exist in the past. I am in agreement with Prassl [14] who, after having carried out an extensive analysis of potential predecessors, concludes that there is little new about most types of work in the sharing economy.

From that point of view, it would appear unwise to analyse the position of Uber drivers separately from other taxi drivers. The mere fact that Uber operates through a mobile application cannot give rise to a different worker status. It must be acknowledged that there are even "traditional" taxi companies which have recently launched a mobile application. Therefore, the only specifics of Uber seems to be its openness to irregular, one-off gigs.

That being said, it could be argued that Uber is closer to the independent contractorship status than other taxi companies that adopt a more restrictive approach in that respect. Notwithstanding that, in the Czech Republic as well as some other Eastern European countries (e.g. Slovakia), taxi dri-

---

[12] E.-L. Fenelon, *Uber, Doublespeak and the "Gig" Economy*, UK Human Rights Blog, available at *https://ukhumanrightsblog.com/2016/11/01/uber-doublespeak-and-the-gig-economy/* (accessed on 30 December 2018).

[13] Judgment of the United State District Court for the Eastern District of Pennsylvania of 11 April 2018, civil action no. 16-573.

[14] J. Prassl, *op. cit.*

vers who enjoy the status of an employee seem to form a minority, while most taxi drivers operate as independent contractors in a very similar modus as Uber employees, and their status has never been successfully challenged.

4. Minimum wage issues

In many countries, the dispute about the proper classification of Uber drivers has materialized into a claim of Uber drivers regarding minimum wage. Many countries guarantee a minimum level of pay to all employees regardless of the nature of their job; this is also the case of the Czech Republic where as of 1 January 2019, minimum hourly wage equals to 79.20 CZK (approx. EUR 3,2). Independent contractors do not enjoy any such rights.

In order to assess the justification of this claim, it is necessary to deep dive into the method of calculation of the remuneration. Of course, Uber drivers are only paid for the portion of their travel when they actually have a customer. The fee is calculated as a combination of a minimum entrance fee, distance and time. If the demand for cars exceeds the offer, Uber can automatically increase the fee in a certain territory in an attempt to get more drivers to that territory; thanks to this, the fee can be even doubled. This happens relatively often. The payment occurs automatically from the customer's credit card (in some countries, cash payments are also permitted) and Uber receives a commission of 25% (20% in some other countries).

My calculations show that average remuneration for times spent driving a customer can be very attractive at first glance [15]. If we disregard any time spent travelling to pick up a customer or waiting for a customer and simply determine the average hourly income based on the fee, we can see that such income usually ranges between CZK 600-1.100, depending mostly on the increase of the fee, but also on other aspects such as the length of the journey, its speed etc. In that case, the applicable Czech minimum salary would appear to represent only 7-13% of the total fee. The total fee, however, would need to be decreased by a number of items representing costs of the drivers. The amount of some of them is known or can be at least well estimated (Uber commission, fuel costs, etc.). An important factor

[15] J. Tomšej, *Legal Status of Uber Drivers*, cit.

which is difficult to predict and include in the calculation is however the percentage of time spent waiting for an order and travelling to a customer.

Based on calculations carried out by a research team from the Czech Business and Law College [16], it appears that the total costs of an Uber driver could amount up to 88% of the total fee. As a result, one could argue that the driver will remain with an amount close to the minimum wage, or even beyond its level. The calculation is, however, based on a number of assumptions coming from a poll with a relatively low number of participants, and also a relatively conservative estimation of some costs (e.g. high parking and insurance fees).

What seems to be the most important takeaway, though, is the fact that the differences between the incomes from different trips can be tremendous. From that point of view, it appears critical that Uber lets the drivers determine at their own discretion what will be their income strategy: at what times they will ride, which parts of the city they will choose, whether they will accept all rides or use on parallel more applications and fish for more advantageous offers, etc.

This seems to correspond well with the position of other entrepreneurs who enjoy the potential of gaining high earnings if they are successful with their business strategy, but also bear the risk of failure if their tactics proves inefficient. This motivates the drivers to develop their own strategy, unlike in employment, where employees typically act in line with instructions of the employer who is responsible for the business strategy.

From that point of view, minimum wage in employment relations serves as a guarantee of some minimum income to employees who cannot influence (or can do so just in a very limited way) the economic success of their employer and who therefore should not bear any entrepreneurial risks. On the other hand, Uber drivers are in a position which undoubtedly comprises some business risk. The fact that they bear the costs of the rides represents a significant factor. Offering a minimum hourly wage to drivers who have all the flexibility described above may lead to opportunism which can in the end impact the customer experience, as drivers with all flexibility and a promise of a minimum hourly wage may end up with strategies avoiding customers (driving outside peak hours and on less busy places, rejecting rides to the greatest permit possible, etc.) in an effort to get the minimum wage while their car is safely parked and they do not incur any costs connected with a ride.

[16] V. Krajčík, J. Veber, A. Ključnikov and coll., *op. cit.*

As a result, if the reflections about introduction of minimum salary have a greater ambition than just an increase of the driver's fee per kilometer, I fear that they could only be introduced if the current paradigm of Uber is completely reversed and Uber starts to exercise much more detailed control. This would not only impact most of the flexibility which (as outlined above) is in my view a key element of the success story of Uber's recruitment, but most probably Uber would no longer be able to operate in the manner as it does today.

5. Conclusions

Even though working in gig economy does not represent a completely new and different pattern, it cumulates certain aspects that are not so common in other areas. It was argued that these workers *might face a host of bosses in the form of customer ratings, algorithms, apps, and tasks, all clamouring for immediate and constant attention – without the regular pay, insurance, and pensions that traditional employers had to provide*[17]. It is beyond any doubt that the life of Uber drivers may not always be very easy – for similar reasons as the case is for other entrepreneurs who must work hard to make a living in changing conditions.

It cannot be challenged that Uber exercises some level of control of its riders. In my view, such manner of control is however not unusual even in B2B relations (imagine a franchisee who opens a branch of a well-known brand) and does not change the conclusion that the drivers in most aspects are more resembling to individual contractors than to employees. Even if we attempt to follow a more purposive approach[18] to the topic without focusing on formal details of the control tests, I don't see sufficient reasons to apply employment regulation, as I am not convinced that the current status of the drivers requires (and leaves room for) a more protective stance. While we are fascinated with some controversial aspects of the sharing economy, we should not ignore its positive impacts in the area of flexibility and work-life balance. By increasing the security of workers, we could easily deprive the labour market of another opportunity to perform earning activi-

[17] J. Prassl, *op. cit.*

[18] G. Davidov, *The Status of Uber Drivers: A Purposive Approach*, in *Spanish Labour Law and Employment Relations Journal*, Forthcoming; Hebrew University of Jerusalem Legal Research Paper no. 17-7, 2017.

ty in a flexible way which is well received among workers who do not want to perform (or cannot perform) work in a more traditional way.

Uber and other gig economy players surely gave an important lesson to the theory of the labour law, as they help us view the legal instruments in a more complex way, and introduce questions that seems very relevant for future, including the sustainability of the control test and the definition of dependent work as the one and only subject-matter of labour law relations. The experience from the Czech Republic and other Eastern European countries, however, suggests that they do not necessarily represent a "problem" where we would need to rush for a "solution".

Selected bibliography

Botsman R., Rogers R., *What's Mine Is Yours: The Rise of Collaborative Consumption*, Collins, London, 2011.

Cherry M., *Beyond Misclassification: The Digital Transformation of Work*, in 37 *Comp. Lab. L. & Pol'y J.*, 2016, 577.

Cherry M., Aloisi A., *"Dependent Contractors" in the Gig Economy: A Comparative Approach*, in *American University Law Review*, 66, 2017, 635.

Davidov G., *The Status of Uber Drivers: A Purposive Approach*, in *Spanish Labour Law and Employment Relations Journal*, Forthcoming; Hebrew University of Jerusalem Legal Research Paper no. 17-7, 2017.

Debruyne N., *Uber Drivers: A Disputed Employment Relationship in Light of the Sharing Economy*, in *Chicago-Kent Law Review*, 92, issue 1.

Gundt N., Tomšej J., *Organization, Well-being and Productivity in Employment Law: Current Issues*, Wolters Kluwer, Prague, 2018.

Krajčík V., Veber J., Ključnikov A. and coll., *Analýza dopravních služeb v sektoru sdílené ekonomiky a na jejím pomezí*, Vysoká škola podnikání a práva, Prague, 2017.

Pichrt J., Boháč R., Morávek J., *Sdílená ekonomika – sdílený právní problém?*, Wolters Kluwer, Prague, 2017.

Prassl J., *Humans as a Service: The Promise and Perils of Work in the Gig Economy*, Oxford University Press, Oxford, 2018.

Sargeant M., Lewis D., *Employment Law*, VIII ed., Routledge, London, 2018.

Tomšej J., *Legal Status of Uber Drivers: Let Sleeping Dogs Lie?*, in J. Pichrt, R. Boháč, J. Morávek, *Sdílená ekonomika – sdílený právní problém?*, Wolters Kluwer, Prague, 2017.

Tomšej J., *Between Flexibility and Precarity*, in *SSRN Electronic Journal* (Charles University in Prague Faculty of Law Research Paper no. 2018/II/4), 2018.

NON-STANDARD, NEW(ER) FORMS OF WORK AND CHALLENGES FOR THE FUTURE REGULATION OF SOCIAL INSURANCES

Primož Rataj [*]

1. Introduction

In the last decade, legal debate and attention in the fields of labour and social security law has been increasingly centred around non-standard and new(er) forms of work. It appears there are two underlying reasons for it, namely the development of technology and a deep economic recession. While the latter influenced the decisions of companies to seek to a larger extent the workers outside of traditional employment relations, the former "digitalization" allowed for a different organization of work and blurred the nature of work performed in comparison to the elements or indications of employment (work) relationship on which labour law is based (especially in regard to the prevalent element of subordination). The traditional employment relationship (*i.e.* full-time for an indefinite period of time on the premises of employer) has remained the standard, however, other non-standard types of employment contracts (e.g. part-time, fix-time, agency-employment) have started to slowly, but steadily, lower the gap between both.

Moreover, work outside of employment has increased, including work on civil contracts, student work, voucher-based work, etc. At least in some Member States of the EU, the issue of disguised employment relationships has come up, also in relation to the self-employed persons. While the em-

[*] Master of laws, teacher assistant at the Faculty of Law, University of Ljubljana, Slovenia, primoz.rataj@pf.uni-lj.si.

ployers argued for flexibility in the time of crisis and often avoided new employment relationships, some Member States attempted to "push" the unemployed persons in the sphere of self-employment by subsidizing some of their costs and simultaneously lowering the numbers of official unemployment. Other factors, such as different treatment in tax legislation or lower payment of contributions might have also been the edge to influence individuals to work outside of an employment relationship.

The purpose of this contribution is not a more detailed outline of the origins, consequences and perspectives of the current labour law issues. The first paragraph merely attempts to paint the picture as to why these developments could be relevant for the social security systems of EU Member States. These systems seem similar from the perspective of their intent, that is providing income replacement benefits or benefits in kind when a social risk, such as old-age, sickness, unemployment, etc., materialises. Nevertheless, once one looks at the regulation of each social security system in detail, more and more differences become apparent and it could be argued that there are no two systems alike. From a design perspective, they could be divided into two groups, one predominantly based on contributory social insurances and the other on tax financed national (universal) coverage.

Since social insurances are contributory, one has to contribute to be included in the scheme, which generally occurs when one receives income out of work. Moreover, income replacement benefits are granted once one is not working, making the design of the scheme centred on one's work activity. Considering the fact that contributory social insurance schemes are far more reliant on work than tax financed national (universal) schemes, social security systems based on social insurance in comparison face more challenges due to non-standard or new forms of work. These forms of work often result in intermittent periods of working and no long-term predictability (and stability), hence why their spread could present challenges for social insurances, who took traditional, standard employment as their model basis. The first challenge is, obviously, how to include these persons and close formal coverage gaps (*i.e.* scope of insured persons), and the second, how to shape their rights and obligations in the scheme(s).

These foundations and the fact that Slovenia, as the author's country of citizenship, is one of the EU Member States, where social security system predominantly consists of social insurances, lead to the decision that challenges and potential advancements are highlighted only with respect to the future regulation of social insurance legislation. Even though majority of the contribution is focused on the Slovenian social security system, cross-

border solutions (or their current state) are offered in comparison where relevant and most of all, possible. This should enable the reader a broader (legal) perspective and the option to compare with the situation in their own Member State.

2. Scope of insured persons

General

The fundamental and always relevant systemic question concerning the scope of insured persons is, who should be solidary with whom. Some EU Member States have established several social insurances for the protection against the same social risk for several groups of persons (for instance, separately for the self-employed[1], public servants, etc.). It is often easier to achieve consensus between members of the society for solidarity (through social insurance) within each group of active persons. These can better relate and feel more connected with each other than in the case of inclusion of several different groups of active persons, especially if contribution obligations between them are not balanced.

Solidarity among different groups of people can be viewed also from the income perspective. For workers, whose monthly income is low (or does not reach a defined amount), inclusion in social insurance(s) may not be mandatory. Voluntary insurance could still be possible and theoretically there are two mechanisms for it. They could be included voluntarily (*i.e.* opt-in) or could voluntarily decide to not be insured (*i.e.* opt-out). From a systemic perspective, emphasizing solidarity would result in mandatory inclusion whereas leaning on self-responsibility would result in voluntary in- or exclusion[2].

It is not a rare example, that once an individual has the option of choice, despite the noble idea of solidarity, they more often than not do not wish to part with some of their already low income for reasons of contributing

[1] For instance, this applies to the pension and health insurance schemes in Belgium and France. See comparative tables, *www.missoc.org* (December 2018).

[2] It has already been determined that an opt-out mechanism is generally better if the goal is to have more persons insured. The inclusion of "mini job" workers with low income in public pension scheme in Germany has been changed from an "opt-in" to an "opt-out" mechanism in 2013. See N. Duell, *Case Study – Gaps in Access to Social Protection for Minijobs in Germany*, in *European Commission*, 2018, 11.

to an insurance scheme[3] (although, if they fear that a social risk will materialise, they can still choose to do so). If persons with low income are included in a social insurance scheme, the question is, how to include them. If their obligations are proportional to their income or even progressive, preventive measures against possible abuses have to be thought of, possibly with a minimum insurance base. This obviously is not much of an issue with income replacement schemes, where benefits are proportional to an insurance base, but could be a problem when benefits out of a scheme are benefits in kind, as is the case in health insurance. Without a minimum insurance base, the solidary community of insured persons could be disproportionally burdened, not only vis-à-vis minimal contributions and (possibly relatively large) entitlements, but also with the burden of extra administrative costs for negligible amounts.

EU developments

From a systemic perspective, the notion that (all) active persons should be included (if not mandatory, then at least optionally) in the scope of insured persons, is gaining significance in an international setting[4]. Not only is this important from the perspective of sustainability of social security systems, where social security contributions can be collected from the income sources out of work, it carries along with it the notion of solidarity and fairness.

Just recently, in March 2018, Proposal for a Council Recommendation on access to social protection for workers and the self-employed[5] has been issued by the European Commission and some of the following procedural steps have already been undertaken. It is aimed at supporting all self-employed workers and non-standard workers who, due to their contract type or labour market status, are not sufficiently protected by social protection

[3] Vast majority of mini-jobbers in Germany wish to remain excluded, as only every fifth mini-jobber acquires own pension rights. *Ibidem*, 6.

[4] It is interesting that majority of respondents in the public consultation procedure on the EU level (ranging from members of various organizations, administrations, citizens and others (e.g. research institutes and networks)) were in favour of the principle that social security rights should be tied to individuals as they work and not tied to the contract. See European Commission, *SWD*, (2018)79 final, 6-7.

[5] European Commission, *Proposal for a Council Recommendation on access to social for workers and the self-employed*, Strasbourg, 13 March 2018, COM (2018)132 final, 2018/0059/NLE.

schemes regarding unemployment, sickness, maternity or paternity, accidents at work and occupational diseases, disability and old-age.

More specifically, the initiative aims to encourage Member States to close formal coverage gaps [6], provide adequate effective coverage and facilitate transferability of social protection entitlements between schemes, and to increase transparency regarding social protection systems and rights. This seems to (sooner rather than later) become a requirement for national policies as the world of work is evolving, creating structural changes in the labour market that blur boundaries between different labour market statuses, leaving a significant number of people in self-employment or in jobs or contractual statuses that are not governed by the protection of labour and social security law [7].

Employees, self-employed and working persons in other legal relationships – the case of Slovenia

Since general remarks and EU developments were already debated, it could be interesting to offer an example, a Slovenian example, of the statutory shortcomings in social insurance schemes that are related with non-standard forms of work. With respect to employees and self-employed persons, there is, at least from the coverage point of view, no issues. All employees and self-employed persons in Slovenia are included in the scope of insured persons in all (four) social insurance schemes. Even though employees are (traditionally) covered also in other EU Member States, this does not always apply to self-employed persons, who are deemed to be more independent (in comparison to employees), with respect to social security as well. Moreover, other built-in factors in social insurance schemes could pose issues, for instance, how to determine whether a self-employed person could claim an unemployment benefit, since they are independent and by definition their stoppage of economic activity is expression of their will, and not the will of another party (e.g. employer) [8].

---

[6] Gaps in formal coverage for non-standard workers and self-employed persons in EU Member States can be seen in European Commission, *SWD*, (2018)70 final, 75-79. Moreover, options of their voluntary inclusion in a social security scheme are shown.

[7] European Commission, COM (2018)132 final, 2018/0059/NLE, 1-2.

[8] In Slovenia, where self-employed persons are covered in the scope of insured persons in the unemployment insurance scheme, they can only claim income replacement benefit, if their economic activity has been stopped due to objective reasons, such as sickness for a long period of time, insolvency, bankruptcy, an elementary accident, substantial material damages,

Nevertheless, not all working people in Slovenia are classified as employees or self-employed persons for the social security purposes. They might be performing their work on various other legal grounds, for instance as a party to a contract of service, author's contract(s), as students, etc. (hereinafter as "other legal relationships")[9]. It is not always easy to include such persons in an insurance scheme. They might differ from employees in the sense that they are paid for one particular service or their work is merely temporary or intermittent. As a consequence, their income can be irregular, making it difficult to track insurance periods that are embedded in the functioning of a particular social insurance scheme. The other issue of course is the determination of the moment, when they are out of work and subsequent calculation of an income replacement benefit. The latter can be problematic in relation to insurance periods and proportionality of previous received (irregular) income. For this reason, they might sometimes be excluded from a social insurance scheme.

It is questionable, whether this should (always) require criticism or not. It could be viewed, for instance, that students as a working category of individuals in other legal relationships, should, at least in the case where their education is financed out of the State budget (as in Slovenia), primarily study, attend lectures and finish their exams. Hence, it could be viewed completely justified that they are excluded, for instance, from an unemployment insurance scheme, since they could not be required to actively seek work (but study). Moreover, it is difficult to determine legally, what kind of work they should seek, etc. Unfortunately, also due to reasons stated above, in Slovenia, active working persons in other legal relationships are insured solely in the pension and disability insurance on the basis of their work, but they are not included in the unemployment, parental care and health insurance scheme (although, they might be insured for health care as dependent family members for a limited scope of entitlements).

Considering the fact that the use of these non-standard legal grounds for work has spread in Slovenia in the last decade, which coincides with the economic crisis and employers' policy to remain flexible, people subjected to such work are mostly new entrants to the labour market, majority

---

the loss of a business partner, to which business was predominantly linked, etc. See paragraph 4 of art. 63 of Slovenian Labour Market Regulation Act, Official Gazette of RS, no. 80/10.

[9] The latter three examples are dominant in Slovenia in the category of "other legal relationships".

of them being young people. As younger members of the society, the risk of old-age, disability and sickness is substantially lower than for (older) persons. However, their intermittent (sometimes also referred to as "precarious") work often leads to periods of inactivity. Moreover, as younger members of the society, they could and are able to start a family, where parental care security seems crucial. For these reasons, it seems important to find a pathway to their inclusion in both insurance schemes, taking into account other broader social consequences connected with security, such as birth rate, etc.

Observing the phenomenon of civil contract work and exclusion from social insurance scheme(s) in a wider context, similar issues were identified in Poland, where the (assumed) number of such working persons on civil contract grounds is close to a million. It is positive that in the past few years, some systemic improvements have already been made with regard to accessing unemployment and parental care benefits [10]. This is relevant as predominantly these persons do not have an actual influence on the type of contract concluded due to their weaker bargaining position [11]. At first sight, it seems odd, that such an issue would exist solely in Slovenia and Poland. Explanation might be found by comparing other insurance grounds, especially the status of self-employed persons. Where there is the ability to pay proportional or progressive contributions to one's income, these persons likely obtain the status of a self-employed person and could be included in such schemes. In Slovenia, however, minimal statutory contribution basis, based on full-time insurance, is established [12], making the option of self-employment for persons with fewer working hours (or work opportunities) financially unattractive or sometimes even impossible. This very much leaves their social security status in jeopardy, if they are not offered an employment contract for their work.

One option of providing social security coverage for these people (apart from being an individual insurance basis), would be to funnel them in the self-employed status, where they could be included in all social insurance

[10] See European Commission, *SWD*, (2018)70 final, 151.

[11] P. Lewandowski *et al.*, *Case study – Gaps in Access to Social Protection for People Working Under Civil Law Contracts in Poland*, Institute for Structural Research, European Commission, 2018, 16.

[12] See art. 145 of Slovenian Pension and Disability Insurance Act, Official Gazette of RS, no. 96/12. In the year of 2018, the minimum contributions for the self-employed amounted to approximately 373 EUR monthly.

schemes (in Slovenia). This could be achieved by adapting the minimal contribution basis and linking it to (actual) profit, which is relevant especially for the self-employed deciding to have their calculation of business costs calculated with a lump sum. This percentage in Slovenia is currently 80% of one's income and should be lowered [13]. Why this is so, is that it has several negative effects in the fields of labour and social security law. Firstly, it provides an incentive for disguised employment relationships, as it is financially more rewarding, since contributions and taxes are paid out of profit (*i.e.* 20% of income), instead of the gross amount of wages. Secondly, the vast majority [14] of the self-employed persons is liable to pay minimum contributions, since they would need to earn an income several times greater than the minimum insurance basis for it to slightly proportionally rise. This could be seen as a violation of the constitutional principle of equality, since it leads to the same treatment of very different self-employed persons, where their obligations remain the same, despite the fact that their income and/or profit is substantially different. Moreover, in the time of social security system's sustainability debates, transferring the burden of financing on employees, where the self-employed predominantly pay merely minimal contributions, could be seen as a violation of the equality principle between employees and the self-employed. For instance, Slovenian Constitutional Court has already held that the rights for both groups in the pension insurance scheme should be regulated in the same manner, but unfortunately, it did not go a step further and demand the same on the side of their respective financing obligations [15]. Reference to Slovenian pension insurance scheme and suitable rights and obligations brings the discussion to the next chapter of this contribution.

3. Rights and obligations

Non-standard or new forms of work often result in lower income, temporary or intermittent work and they are sometimes not included as legal

[13] See art. 59 of Slovenian Personal Income Tax Act, Official Gazette of RS, no. 13/11 with amendments up to 69/17.

[14] The amount of such self-employed persons in Slovenia is around 70%. See European Commission, *Social protection Committee*, *The 2018 Pension Adequacy Report: current and future income adequacy in old age in the EU*, 2018, 66.

[15] See judgment of the Slovenian Constitutional Court U-I-358/04, adopted on 19 October 2006, ECLI:SI:USRS:2006:U.I.358.04.

insurable grounds in social insurance schemes. Primarily, pathways need to be found for their inclusion, and secondarily, rights and obligations have to be suitably adapted. One usually goes hand in hand with the other. With respect to social insurance entitlements, it seems imperative to first look at the right to an old-age pension, which is an income replacement benefit that can provide financial security to older persons for decades and is generally also the largest "social security cost right" in EU Member States. In order to compensate for the loss of income, an insured person has to fulfil the required conditions.

In this sense, it is important to note that many EU Member States [16] still require an insurance period of 15 years to fulfil conditions for the entitlement to an old-age pension, possibly even requiring that this period is to be achieved with re-calculation to a full-time basis, as is the case in Slovenia. It is questionable whether this condition, established several decades ago, should still persist in the future. It could present an important obstacle towards the effectiveness [17] of social security rights, especially for those, who would face lengthy periods of inactivity or worked part-time. Regarding the latter, such a condition could also be a violation of EU law, namely Directive 79/7 [18], if part-time workers are more frequently women [19].

The social risk of old-age in the present means that work after attaining a certain age is no longer necessary and income replacement benefits can be claimed. In this sense, it is crucial that citizens are able to claim an old-age pension and not rely solely on social assistance. This could be achieved by abolishing full-time (re)calculation, by reducing the insurance period required (as is already the case in some EU Member States) [20], or even do-

[16] For instance, Croatia, Cyprus, Greece, Latvia, Lithuania, Portugal, Romania, Slovakia, Slovenia, Spain, Austria and Poland (the latter two only in some cases). See comparative tables, *www.missoc.org* (December 2018).

[17] Along with the formal coverage, effective access to a right is highlighted as crucial in literature. See S. Spasova *et al.*, *Access to Social Protection for People Working on Non-standard Contracts and as Self-employed in Europe: A Study of National Policies*, 2017, 14.

[18] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6, 10 January 1979, 24-25.

[19] See the Spanish case C-385/11, *Moreno v. INSS and TGSS*, judgment adopted by the CJEU on 22 November 2012, ECLI:EU:C:2012:746.

[20] For instance, one quarter of a year in France, 5 years in Germany, 10 years in Luxembourg, United Kingdom and in Malta. See comparative tables, *www.missoc.org* (December 2018).

ing both. Obviously, the pensions could then be lower for shorter periods of insurance, but at least they could be claimed. If that is not the case, the fact that paid social security contributions can't be (re)claimed, if one does not fulfil conditions for an old-age pension entitlement [21], also seem unfair from an individual's point of view. This idea of reducing lengthy required insurance periods is not present solely in the pension insurance schemes. It might be interesting that in comparing the unemployment insurance schemes, Italy has adopted a solution, where it is required to complete an insurance period of 13 weeks in the past 4 years and at least 30 days in the last 12 months before unemployment occurred, in order to claim an unemployment benefit [22]. It is hard to suggest it as a model; however, it may serve as a developing trend in this respect by casting a wider (security) net.

While the first issue deals with insurance period requirements, the second issue is how to calculate the insurance periods. They could be recognised (for instance for a monthly period), if any income was received out of work in a particular (monthly) period. The amount of income received could also be relevant, but this might very easily lead to full-time recalculations in comparison to minimum wage or another similar criteria, which would likely still not solve the issue at hand, since insurance periods for persons working part-time or intermittently are then more difficult to achieve by a default setting. An idea could be to explicitly foresee an option of proving (by an individual, or a duty of the entity, for whom the work is performed) to the social insurance carrier the legal basis (*i.e.* contract) for work, from which it could be seen that a period longer than a month could be recognised for a particular payment, making it easier to fulfil statutory requirements (e. g. if it concerns a larger sum, paid at once). Either way, solution in the sense that a social security right is granted, albeit for a lower sum, should be thought of, otherwise non-standard workers might not be able to claim benefits, even if they become included in a social insurance scheme. Due to spatial restrictions, it is not possible to discuss the rights' aspect in more detail.

Nevertheless, one special issue deserves another paragraph, and it relates to the obligations side. Non-standard or new types of work represent a particular deviation from the classical, typical employment contract. It

[21] This is possible only in some cases, for instance in Luxembourg, and is more of an exception to the general rule. *Ibidem*.

[22] See NASpl (it. *Nuova assicurazione sociale per l'impiego*) in the comparative tables. *Ibidem*.

could be argued, that it has become difficult to delineate what is work as a fundamental basis for inclusion and corresponding rights and obligations. This especially applies in the cases where capital is linked to the performance of work, making the distinction somewhat blurred [23]. In this sense, it is hard to determine whether someone's income is income out of work or income out of capital. In the latter case, it may not be required to contribute out of it. This leads to the question, whether income out of capital could be subject to payment of contributions. Several members of society earn substantial amounts of money through their capital, and not solely through their work. From a solidarity and sustainability perspective in social insurance schemes, new financial sources might have to be sought and capital could become one of them [24].

4. Concluding thoughts

Right to social security is a renowned human right and a source for measures that are constructed on the idea of solidarity. This applies also to social insurance schemes, where social security contributions, deducted out of income from work, serve as means to provide security to people facing a social risk. In an era of labour market changes and the ongoing widespread use of non-standard work, it is required to find pathways towards providing effective and adequate social security for these persons, which often have a greater need than standard employees. The idea of law is to regulate societal relationships and it might be constitutionally required to modify legislation, where societal changes occur. These have already occurred and it could be argued that to a sufficient extent. It is the task of a thoughtful and responsible social policy maker to see suitable changes through, which could, in social insurance schemes, relate to the scope of insured persons and to the appropriate modifications of their respective rights and obligations. Challenges can be connected to qualification issues, determination of work, calculation of insurance periods and benefits, providing income

[23] For more discussion on this issue see P. Schoukens, A. Barrio, *The Changing Concept of Work: When Does Typical Work Become Atypical?*, in *European Labour Law Journal*, 8(4), 2017, 328.

[24] Financing social security through income out of capital and strengthening of the solidarity principle is advocated by B. Suárez Corujo, *The 'Gig' Economy and its Impact on Social Security: The Spanish example*, in *European Journal of Social Security*, 19(4), 2017, 310.

replacement benefits or benefits in kind instead, but they can also be connected with obligations. If it is solidary to include all working persons in the scope of insured persons, especially where various working categories of individuals are already included in a uniform national insurance scheme, it could also be viewed solidary if, also for the purposes of sustainability, new financial sources are sought and capital being one among them.

Social security, if it is to stay relevant, will have to be adapted with the intent to answer to social problems of today and the future. In doing so, differing features of non-standard workers have to be accounted for to the extent possible, and only in doing so, can social insurance schemes, as building blocks of social security systems, receive the support and be perceived as equally valuable to everyone [25].

[25] P. Schoukens, A. Barrio, *op. cit.*, 332.

THE CHALLENGE OF SELF-EMPLOYMENT PROTECTION IN THE EUROPEAN UNION

Fabrizio Ferraro *

1. Self-Employment in the EU

Self-employment has been for a long time perceived by labor law scholars as a "foreign body". Especially in Europe, the legal discipline has progressively focused on the protection of subordinate work, considered – even in the variety of forms that characterize it – the typical social model of contractual weakness [1]. The regulation of self-employment was mainly remitted to private bargaining and to free market forces.

In this short essay I do not intend to draw a complete comparative analysis between national legal frameworks or deepen the cultural and sociological roots of the dualism between subordination and autonomy (which seems to resist the profound metamorphosis endured in the last thirty years).

It is enough to report, on one side, that the interstitial area between the two categories – forming according to some theories a sort of *tertium genus* – has grown hugely and is extremely diversified inside. On the other side,

* Research Fellow and PhD, Sapienza University of Rome.

[1] A. Perulli, *Subordinate, Autonomous and Economically Dependent Work; a Comparative Analysis of Selected European Countries*, in G. Casale, *The Employment Relationship*, Hart Publishing-ILO, Oxford-Geneva, 2011, 137 ff.; and L. Nogler, *The Concept of Subordination*, in *European and Comparative Law*, Università degli Studi di Trento, Trento, 2009; F. Rosioru, *The Changing Concept of Subordination*, in *Working Papers Adapt*, 2015, *adapt.it*.

"*the basic problems which labour laws are designed to compared are very similar across time and place*" [2]. Indeed, the difference between self-employment and employment is one of the basic dualisms in European Labour Law [3], altough the crisis of this traditional distinction led to the birth of huge number of intermediate forms [4].

However, the effective area of self-employment depends, in each Country, on the amplitude of the area occupied by the correlative concept of subordination. There is a uniform concept of self-employment neither in the Member States nor in EU legal framework [5].

In post-fordistic and globalized productive systems, the performance of the autonomous worker is frequently fully integrated into production processes. The transformation of the entrepreneurial world is undermining the traditional classification of work types and altering the concept of subordination and its boundaries [6]. As these transformational processes developed, self-employed claimed progressively more protections.

European Union has long been aware of this issue [7]. The Council Recommendation 92/442/EEC32 encouraged the possibility of introducing and/or developing appropriate social protection for self-employed persons. In this regard, the "Supiot report" in 1999 [8] and its implementation

---

[2] G. Davidov, *Setting Labour Law's Coverage: Between Universalism and Selectivity*, in *Oxford Journal of Legal Studies*, 34(3), 2014, 543.

[3] Read critics in M. Freedland, N. Countouris, *The Legal Construction of Personal Work Relations*, Oxford University Press, Oxford, 2011.

[4] T. Vettor, *Tra autonomia e subordinazione. Problemi definitori e tendenze regolative negli ordinamenti giuridici europei*, in M. Pallini (a cura di), *Il "lavoro a progetto" in Italia e in Europa*, Il Mulino, Bologna, 2006, 163 ff.

[5] Each definition of self-employment is relevant for the specific purposes of the directive which provides it. According to art. 2 of the directive 2010/41 (on on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, repealing Council directive 86/613/EEC) self-employment workers are "namely all persons pursuing a gainful activity for their own account, under the conditions laid down by national law". See also the definition provided by art. 3 of the directive 2002/15/CE on the organisation of the working time of persons performing mobile road transport activities.

[6] A. Goldin, *Labour Subordination and the Subjective Weakening of Labour Law*, in G. Davidov, B. Langille (eds.), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work*, Hart Publishing, London, 2006, 109 ff. Read also ILO Resolution, 27 June 1990 and see M. Pallini, *Il lavoro economicamente dipendente*, Cedam, Padova, 2013, 16-18.

[7] Regulation no. 883/2004.

[8] *Au-delà de l'emploi*, Flammarion, Paris, 1999. See G. Bronzini, *Il futuro del lavoro autonomo e la sharing economy*, in *Rivista italiana di diritto del lavoro*, 2016, 92 ff.

proposals [9] must be mentioned. The Green Paper of the 2006, a milestone of this path, testifies to the intention to draw minimum standards at least for economically dependent self-employed.

The notion of "economic dependence" still dominates the debate on the social protection of the self-employed. However, it is still uncertain [10]. The characteristic of "economic dependence" should be the continuance of the working performance, the mainly personal nature of the work and the perception of most of the income by a single client. The notion takes on different shades of meaning in different European Countries and in most Countries is not provided by the law [11]. However, it identifies a rather homogeneous phenomenon [12].

The Court of Justice referred to the figure of economically dependent self-employment in a recent decision in the FNV Kunsten case (*infra*). I will go deeper in the next paragraphs.

Some recent studies testify to the growing interest in the topic of economic weakness of the self-employed, even beyond the notion of economically dependent self-employment [13]. The wider notion of economic weakness regards even some individual entrepreneurs [14]. Nevertheless, it is not

---

[9] A. Perulli, *Economically Dependent/quasi subordinate (parasubordinate) Employment: Legal, Social and Economic Aspects*, EC, Buxelles, 2003; and S. Sciarra, *The Evolution of Labour Law* (1992-2003), *General Report*, 2004, written for the European Commission. Relationship, *A Comparative Overview*, Hart Publishing, 2011.

[10] A. Perulli, *Un* Jobs Act *per il lavoro autonomo: verso una nuova disciplina della dipendenza economica?*, in *Diritto delle relazioni industriali*, f. 1, 2015, 109 ff.

[11] Read the V.A. Study, *Social Protection Rights of Economically Dependent Self-employed Workers*, Directorate general for internal policies.

[12] C. Williams, F. Lapeyre, *Dependent Self-employment: Trends, Challenge and Policy Response is in the EU*, in *Employment Policy Department*, ILO, Working Paper no. 228, 2017.

[13] *Recent changes in self-employment and entrepreneurship across the Eu*, Research note no. 6/2015; *classifying self-employment and creating an empirical typology* (Eurofound, 2017); *exploring self-employment in the European Union* (Eurofound, 2017). These analytical studies based on statistical surveys also provide significant data on the dissemination and trends of self-employment in Europe.

[14] G. Santoro-Passarelli, *Falso lavoro autonomo e lavoro autonomo economicamente debole ma genuino: due nozioni a confronto*, in *Rivista italiana di diritto del lavoro*, 2013, I, 103 ff.; O. Razzolini, *The Need to Go Beyond the Contract: 'Economic' and 'Bureaucratic'*, in *Dependence in Personal Work Relations*, *Comparative Labor Law & Policy Journal*, 31(2), 2010; M. Freedland, *Application of Labour and Employment Law Beyond the Contract of Employment*, in *International Labour Review*, 146(1-2), 2007, 2; V. Dubal, *Wage Slave or Entrepreneur? Contesting the Dualism of Legal Worker Identities*, in *California Law Review*, 105, 2017,

easy to imagine and, consequently, structure dedicated protection policies: rough interventions could clog the moving parts of the economic system based on the competition rule and on the freedom of establishment.

2. Limits to the implementation of a social protection strategy designed for self-employed and the Antitrust Rule

Despite the growing awareness of a need for protection, some cultural and juridical hurdles hinder the acquisition of a social – and dignity – *status* for the self-employed in Europe: a) the inadequacy of the cultural modules historically used by scholars and law makers, due to the "entrepreneurial" attitude of the Self-Employed, diverse from the traditional subordinate worker not bearing economic risks from his activity; b) the variety of concrete forms and the typological heterogeneity, and consequently different contractual strength and diverse social needs [15]; c) the prejudice fueled by the so called "Labour Law Synecdoche" according to which employees are weak and need heteronomous protection, while self-employed are strong and can "defend themselves", a conviction which relegated self-employment in the sphere of the principle *qui dit contractuel dit juste*.

In the last thirty years Globalization provoked deep social transformations [16] accompanied by a progressive revaluation of the role of individuals [17], particularly in the construction of entrepreneurial paths [18]. More specifically, the growth of Services at the expense of Industry, the advent of technological changes, the emphatic decentralization and fragmentation process of the firm [19] and the birth of new professional

65 ff. Initiatives like the *Small Business Act* and *EU2020 Strategy* contain a dynamo of new protection perspectives for self-the employed seen as small entrepreneurs.

[15] Self-Employment can be declined only "in the plural": read A. Perulli, *Lavoro autonomo*, in A. Cicu, F. Messineo (a cura di), *Trattato di diritto civile e commerciale*, XXVII, I, Giuffrè, Milano, 1996, 76 ff.

[16] S. Bologna, A. Fumagalli (a cura di), *Il lavoro autonomo di seconda generazi*one, Feltrinelli, Milano, 1997.

[17] S. Deakin, *Il Trattato di Lisbona; le sentenze Viking e Laval e la crisi finanziaria: in cerca di nuove basi per l'economia sociale di mercato europea*, in *Rivista giuridica del lavoro e della previdenza sociale*, 2013, 683 ff.

[18] A. Bonomi, E. Rullani, *Capitalismo personale. Vite a lavoro*, Einaudi, Milano, 2005.

[19] F. Valdés Dal-Ré, A. Valdés Alonso, *Lo statuto del lavoro autonomo nella legislazione spagnola con particolare riferimento al lavoro autonomo economicamente dipendente*, in *Dirit-*

skills [20] increased the occupational relevance of non-subordinate employment in Europe [21].

Self-employment is sometimes used by the employers as a mean to "escape" from the "more expensive" subordination (the well-known phenomenon of bogus self-employment). It is of course necessary to distinguish genuine and false self-employment. However, my reasoning refers exclusively to genuine self-employment in order to understand whether and how the European institutions influence self-employment social protection and, on the other hand, if and how they can contribute *de jure condendo* to the construction of an effective protective apparatus dedicated to non-subordinate work.

From the European Union point of view, the starting point is the historic prevalence of economic freedoms on the *social acquis* [22]. According to EU legal framework, self-employed are subjected to the freedom of competition rule, on a par with undertakings, as holder of a business activity [23]. Such a qualification implies the application of art. 101 TFEU and, as a result, no antitrust immunity usually operates in favor of professionals and self-employed [24].

In the well-known Albany case [25], the European Court of Justice (ECJ) found that by virtue of its nature – as a fundamental right – and purpose – improve social protection – a collective agreement cannot constitute an

---

to delle relazioni industriali., 2010, 705 ff.; and A. Perulli, *Diritto del lavoro e decentramento produttivo in una prospettiva comparata: problemi e prospettive*, in *Rivista italiana di diritto del lavoro*, 2007, I, 52.

[20] R. Arum, W. Muller, *The Reemergence of Self-employment: A Comparative Study of self-employment dynamics and social inequality*, Princeton University Press, Princeton, 2004.

[21] C.F. Wright, N. Wailes, G.J. Bamber, R.D. Lansbury, *Beyond National Systems, Towards a "Gig Economy"? A Research Agenda for International and Comparative Employment Relations*, in *Employ Responsabilities and Rights Journal*, 2017.

[22] S. Garben, *The Constitutional (Im)balance between the "Market" and the "Social" in the European Union*, in *European Constitutional Law Review*, 2017, 23 ff.

[23] See P.J. Sloan, M. Farley, *An Introduction to Comparative Law*, Hart, 2017, 24. On the notion of udertaking: CJ CE C-41/90 Macron; only employees are not subject to the Antitrust rule; see CJ CE C-22/98, 16 September 1999, Becu.

[24] *i.e.* CJ CE C-180/98 and C-184/98, 12 September 2000, "Pavlov"; and CJ CE C-309/99, 19 February 2002, "Wouters *et a.*". On the contrary each Member State can regulate tariffs under certain conditions: CJ CE C-35/99, 19 febbraio 2002, n. 309.

[25] ECJ 21 September 1999, C-67/97, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, in which the Court "saved" agreements aimed at improving working conditions of employees. Read K.S. Desai, *E.C. Competition and Trade Unions*, in *European Competition Law Review*, 1999, 20, 3, 175 ff.

anticompetitive agreement between undertakings. Consequently, such agreements fall outside the scope of the Antitrust rule.

ECJ did not confirmed such an interpretation in the case *FNV Kunsten*[26]. A collective agreement fixing the compensation of self-employed (musicians substitute in an orchestra made of employees, whose salaries – what is more – were regulated by the same collective agreement as well) was declared anticompetitive and so null[27]. The Court decided not to apply the Antitrust immunity stating that "a provision of a collective labour agreement, such as that at issue in the main proceedings, in so far as it was concluded by an employees' organisation in the name, and on behalf, of the self-employed services providers who are its members, does not constitute the result of a collective negotiation between employers and employees, and cannot be excluded, by reason of its nature, from the scope of Article 101(1) TFEU". As a consequence, self-employed components of the orchestra were deprived of the right to bargain collectively. This decision is open to criticism.

Preliminarily, it should be stressed that the European Committee of Social Rights (ECSR) revealed a different approach to this issue. In a recent case regarding an Irish law accused of banning on collective bargaining[28], it stated that "in establishing the type of collective bargaining that is protected by the [European Social] Charter it is not sufficient to rely on distinctions between workers and self-employed" because "the decisive criterion is rather whether there is an imbalance of power between the providers and engagers of labour". Therefore, "self-employed should enjoy the right to bargain collectively through organizations that represent them".

To go deeply on, many remarks on this controversial issue must be made.

First, principles written in many important Charters should be considered. Indeed, some principle in the preamble of the EU Charter are being interpreted in the sense that they apply to self-employed. Furthermore, the

---

[26] ECJ C-413/13, 4 December 2014, FNV Kunsten.

[27] M. 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 *European Labour Law Journal*, 2018, 9, 354 ff.; V. Brino, *Il caso Uber tra diritto del lavoro e diritto della concorrenza*, in G. Zilio Grandi, M. Biasi (a cura di), *Commentario breve allo statuto del lavoro autonomo e del lavoro agile*, Wolters Kluver, Milano, 2018, 135 ff., 149-151.

[28] ECSR, *Irish Congress of Trade Unions vs. Ireland*, Complaint no. 123/2016, merits, published 12 December 2018.

Charter of Nice and in the Treaty of Lisbon – preceptive acts – often generally refer to "workers" when defining the scope of social rights [29]. On the contrary, the ECJ didn't smooth out the uncertainties about the extent of the term "worker": although the notion operates in the limited perspective of the specific normative measure, the Court often takes on board a restrictive notion of worker as "employee" derived from the "Free Movement Context" also with reference to different fields [30].

Even in some International Declarations the word "worker" sounds broader and more comprehensive [31]. For example, art. 11 of the European Convention on Human Rights, on freedom of assembly and association, considering that according to the reference Court "the right to bargain collectively with the employer has, in principle, become one of the essential elements of the 'right to form and to join trade unions for the protection of [one's] interests'" [32].

In addition to it, art. 2 of the ILO Convention no. 87 recognizes the right to assembly and associate to "workers and employers, without distinction whatsoever" and art. 4 of the ILO Convention no. 98 refers to "workers' organizations". Such international principles "could, and arguably should, act a catalyst of the future expansion of the personal scope of application of important areas of the European Social Pillar, including an Expansion '*Au-delà de l'emploi*'" [33]. This reasoning should lead to the inclusion in social policies at least of the weakest self-employed.

It should be stressed that EU itself conceives self-employed as persons too, beyond their strictly economic depiction [34]. A significant example can

---

[29] P. Davies, M. Freedland, *Employees, Workers and Autonomy of Labour Law*, in D. Simon, M. Weiss (eds.), *Zum Autonomies Des Individuums. Liber Festschrift Spiros Simitis*, Nomos, Baden-Baden, 2000.

[30] N. Countouris, *The Concept of "Worker" in European Labour Law: Fragmentation, Autonomy and Scope*, in *Industrial Law Journal*, 2018, 192 ff. 210. Self-employed have freedom of establishment.

[31] B. Creighton, S. McCrystal, *Who Is to "Worker" in International law?*, in *Comparative Labour Law & Policy Journal*, 37, 2016, 694. See art. 8 of the International Covenant on Economic, Social and Cultural Rights, signed in New York, 16 December 1966.

[32] For the interpretation of this article refer to ECHR 12 November 2008, no. 34503/1997, *Demir and Baykara v. Turkey*.

[33] N. Countouris, *The Concept of "Worker" in European Labour Law: Fragmentation, Autonomy and Scope*, in *Industrial Law Journal*, 2018, 218.

[34] The directive 2004/38 on citizenship and right of residence; the directives 86/613/EEC and 2002/15 on health and safety; the directive 2010/41 on equal treatment between men and

be the directive 2010/41 which contains norms on equal treatment, social protection, maternity allowance, access to employment services and effective judicial review against discriminatory acts. Another noteworthy example can be the interpretation of the notion of "unemployment" (art 7.3 of directive 2004/38/EC) given by the ECJ in the Florea Gusa case [35], in order to let the self-employed worker maintain his *status* in case of involuntary job loss and so preserve his right of residence.

For these reasons, a reconsideration of the interpretation of the term "worker" – at least in some directives – seems to be coherent with art. 9 of the TFEU [36].

Beyond the inclusion of the self-employed in a stressed notion of "worker", an antitrust immunity could be guaranteed for – at least – two different reasons.

Firstly, in some cases – and for sure in FNV case considering that the self-employed substitutes performed the same activity as the proprietors-employees – service providers cannot be "undertakings". Indeed, according to ECJ, "a service provider can lose his status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking" [37]. Such a description perfectly corresponds to the situation of the substitute components of the Dutch orchestra.

Secondly, social protection of certain forms of self-employment could be fully compatible with art. 101 TFEU if it matches one of the exemptions there provided. In our case, the downward competition – which the contracting parties are often obliged to – undermines the quality of the

---

women engaged in an activity in a self-employed capacity and the recast directive 2006/54; the directive 2000/43 on equal treatment (art 3.1.a); the directive 2000/78 in access to employment and self-employment.

[35] ECJ C-442/16, 20 December 2017, Florea Gusa.

[36] The article stipulates that "in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health". Such a clause realizes a positive connection between social and economic policies (read M. Roccella, T. Treu, *Diritto del lavoro dell'Unione europea*, Cedam, Padova, 2016, 32).

[37] Read the judgement *Confederación Española de Empresarios de Estaciones de Servicio*, EU:C:2006:784, paragraphs 43 and 44.

service [38]. This is truer if one considers that the self-employed works to live and is therefore willing to accept worst working conditions.

Finally, from a wider perspective, it has been agreed that the right to collective bargaining could be recognized as a human right [39]. Significantly in the Irish case above mentioned the ECSR included in the relevant materials article 11 of the European Convention on Human Rights on "Freedom of assembly and association".

In conclusion, the absolute equivalence self-employed = undertaking, both at a cultural level and at the legal level, configures an obstacle to the realization of objectives of inclusion and social protection, which seem today increasingly to set out in the "agenda" of the European Institutions (*infra*).

3. Some steps "ahead": the European Agenda for the Collaborative economy

The problems underlined above are linked to the issues arising from the diffusion of digital platforms in the so-called *Gig-economy*. This topic is not yet systematized [40].

Algorithmic automatization makes online platforms fruitful environments for the proliferation of forms of work on the border between self-employ-

---

[38] G. Santoro-Passarelli, *Lavoro autonomo*, in *Enciclopedia del diritto*, 2012, 736-737.

[39] V. De Stefano, *Non-standard Workers and Freedom of Association: A Critical Analysis of Restrictions to Collective Rights from a Human Rights Perspective*, in *WP CSDLE Massimo D'Antona*, 123/2015, 22.

[40] From a methodological point of view, *Gig-economy* puts at the center of the reflection the relationship between technique, law and work: G. Bronzini, *L'idea di un pilastro sociale europeo: cenni introduttivi*, in Id. (a cura di), *Verso un pilastro sociale europeo*, Fondazione Basso, Roma, 2019, 43, richiamandosi anche ad A. Perulli, *Lavoro e tecnica al tempo di Uber*, in *Rivista giuridica del lavoro della previdenza sociale*, 2017, 2, I, 195 ff. It must be underlined that each platform has its own organization. Sometimes the platform realizes a mere brokerage between demand and supply on the market. In other cases, it hires directly the collaborators to carry out its main service on demand and via apps automated through complex algorithms. Look at the classification proposed by Eurofound, *Digital Age. Employment and working conditions of selected types of platform work*, cit., 13 ff; and the "social taxonomy" conceived by B. Caruso, *I diritti dei lavoratori digitali nella prospettiva del Pilastro sociale*, in G. Bronzini (ed.), *Verso un pilastro sociale europeo*, cit., 46. See also M. Delfino, *Work in the Age of Collaborative Platforms Between Innovation and Tradition*, in *European Labour Law Journal*, 9, 2018, 346 ff.; and J. Prassl, *Humans as a Service*, Oxford University Press, Oxford, 2017.

ment and subordinate work. The working relationships inside the platform are often discontinuous, casual and characterized by the worker choice regarding if, how, when and where to work. In most cases subordination – and its powerful and granite protective apparatus – may not be the most appropriate response of the legal system, essentially because Gig-workers often aspire to organizational freedom (above all to reconcile at best work and life).

For those reasons Gig-economy is warping the founding principles and traditional techniques of labour law [41].

However, it is a fact that the collaborative economy is expanding from an economic point of view [42]. Furthermore, many judicial Courts in Europe and outside Europe are facing the problem of qualifying the relationship of platform worker to find out proper protections, but they operate without adequate legal instruments. The judgements are heterogeneous: in common law systems, a pragmatic remedial logic – according to which protections must be assigned to the person who deserves them – prevails [43]. On the contrary, civil law legal systems in most cases maintain the (outdated?) cleatcut distinction between autonomy and subordination [44]: sometimes Gig-workers are qualified as subordinate, in other cases as self-employed.

---

[41] M. Jenum Hotvedt, *The Contract-of-employment Test Renewed A Scandinavian Approach to Platform Work*, in *Spanish Labour Law and Employment Relations Journal*, 7(1-2), 2018, 56 ff. For example, the speed with which work performance can be acquired and abandoned is significant, as underlined by V. De Stefano, *The Rise of the Just in Time work Force: On-demand Work, Crowdwork and Labour Protection in the «Gig-economy»*, in *Condition of Work and Employment Series*, ILO, 71, 2016, 4 and 6.

[42] *Platform work: Types and Implications for work and Employment. Literature Review, Eurofound 2018*, 8. Read A. Sundararajan, *The Sharing Economy: The End of Employment and the Rise of Crowd-based Capitalism*, MIT Press, Cambridge-London, 2016, Ebook Chap. 7; and S.D. Harris, A.B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-first-century Work: The Independent Worker*, The Hamilton Project, Discussion paper 10, 2015.

[43] T. Treu, *Rimedi, tutele e fattispecie: riflessioni a partire dai lavori della Gig economy*, in *Lavoro e Diritto*, 2017, 367 ff.

[44] See the Italian judgement of the Tribunal of Turin, 7 May 2018, in *Rivista italiana di diritto del lavoro*, 2018, II, 283 ff. with a comment by P. Ichino, *Subordinazione, autonomia e protezione del lavoro nella* gig-economy, and a similar ruling by the Tribunal of Milan 10 September 2018 n. 1853. The Court of Appeal of Turin applied art. 2, par. 1, d.lgs. no. 81/2015 (hetero-organized collaborations, to whom the discipline of subordination applies) because of the characteristics of the working performances and, therefore, some protections were recognized. What is most striking, however, is the choice to apply only partially the discipline of subordination without clear selection criteria.

I have no intention to analyse the impact of Gig-economy in each national legal system. Simply, I want to underline that EU addressed the phenomenon by promoting an "Agenda". This programmatic document ranges in different fields, and stimulated a debate on competition, market, costumers, taxation and work [45].

In the matter of labour, it points out that "there are increasingly blurred boundaries between the self-employed and workers, there is an increase in temporary and part-time work and multiple job-holding". Moreover, the document sponsors on one hand the ECJ notion of subordination [46] but confirms, on the other hand, the need for minimum standards regardless of the contractual qualification and over the barrier between the traditional typologies [47].

However, the Agenda cannot be decisive to deaden the impact of collaborative economy. Indeed, the metamorphosis of working typologies and the distribution of social protection are entrusted to national laws [48].

Recently, the Resolution 2017/2003(INI) of the European Parliament (May 2017), *on a European Agenda for the Collaborative Economy*, intervened. This para-normative act does not seem to introduce significant elements into the debate, as it limits itself to reiterating known concepts and problems. However, it supports the need to establish a framework of general principles and rules universally applicable to this sector, not only (and perhaps not so much) with reference to labour relations. Here, autonomous

---

[45] The Agenda tends to legitimize the advent of the collaborative economy, as a bearer of "new employment opportunities". The Agenda is therefore aimed at avoiding, on the one hand, indiscriminate openings and, on the other hand, excessive restrictions.

[46] According to ECJ, the essential characteristics of the employment relationship is the circumstance that a person, for a certain period, works under the direction of an entity and performs services in return for which he receives a remuneration. The reference to the "hetero-direction" reflects the traditional notion of subordination, perhaps to avoid excessive conditioning on the European market of collaborative economy. The platform is an employer only "when it determines the choice of the activity, the remuneration and the conditions of work". Such a response, as it has been opportunely pointed out by A. Perulli, *Capitalismo delle piattaforme e diritto del lavoro. Verso un nuovo sistema di tutele?*, in Id. (a cura di), *Lavoro autonomo e capitalismo delle piattaforme*, Cedam, Padova, 2018, 115 ff., 136, "is not very original".

[47] Coherently with the purposive approach proposed by G. Davidov, *A Purposive Approach to Labour Law*, Oxford University Press, Oxford, 2016.

[48] M. Barbera, *Impresa, lavoro e non lavoro nell'economia digitale, fra differenziazione e universalismo delle tutele*, in *Giornale di diritto del lavoro e delle relazioni industriali*, 2, 2018, 403 ff.

workers are appointed both as subjects whose opportunities increase in the collaborative economy and as persons deserving social defence. Indeed, the European Parliament "underlines the importance of ensuring the fundamental rights and adequate social security protection of the rising number of self-employed workers, who are key players in the collaborative economy, *including the right of collective bargaining* and action, also with regard to their compensation". Fortunately, the Parliament expresses clearly here the necessity to overcome the ECJ statements in FNV Kunsten (see *supra*).

4. Towards an "effective" European Pillar of Social Rights?

The European Pillar of Social Rights (EPSR) contributes to the debate on the protection of self-employment [49].

The use of the noun Pillar evokes the main "scaffoldings" of the European unification process. Instead, the EPSR is a mere soft-law declaration of social rights signed by the three main European institutions. It aimed at building "a more inclusive and sustainable growth model by improving Europe's competitiveness and making it a better place to invest, create jobs and foster social cohesion". The final aim is to consolidate the slow and difficult process of affirmation of a "Social Europe" [50], particularly in the context of digital platforms [51].

The document starts with a preamble and is divided into three chapters: equal opportunity and access to labour market; fair working conditions; social protection and inclusion. Each chapter contemplates different rights, aligned in a "to-do list" without strong coherence. Furthermore, some norms are extremely vague. For these reasons, the concrete implementation of the "social pillar" will probably encounter many hurdles [52] and it

[49] On the subject read L. Ratti, *Il pilastro europeo dei diritti sociali nel processo di rifondazione dell'Europa sociale*, in W. Chiaromonte, M.D. Ferrara, *Bisogni sociali e tecniche di protezione del diritto del lavoro*, Franco Angeli, Milano, 2018, 7 ff.

[50] A.C.L. Davies, *How Has the Court of Justice Changed its Management and Approach towards the Social* Acquis*?*, in *European Constitutional Law Review*, 14, 2018, 154 ss.

[51] B. Caruso, *I diritti dei lavoratori digitali nella prospettiva del Pilastro sociale*, in G. Bronzini (a cura di), *Verso un pilastro sociale europeo*, cit., 40-41.

[52] According to F. Hendrickx, *European Labour Law and the Millennium Shift: From Post to (Social) Pillar*, in F. Hendrickx, V. De Stefano, *Game Changers in Labour law*,

would be unsuitable to determine, even in perspective, an enlargement of the Union's competences in this field.

Some significant principles refer expressly to self-employment in the areas of support to employment, secure and adaptable employment (encouragement of entrepreneurship and self-employment) and right to adequate social protection. Other norms refer generally to "workers"; even dough those norms contemplate rights and interests compatible with the position of the self-employed, the explanatory note to the Pillar states that "for the purpose of this consultation, the term 'worker' designates any person who, for a certain period of time, performs services for another person in return for which she or he receives remuneration, and acts under the direction of that person as regards, in particular, the determination of the time, place and content of her or his work". This definition matches approximately the (wider) concept of "subordination" and, for this reason, it excludes the self-employed from joining some important protections.

Recently, the European Commission made a proposal for a Council Recommendation on access to social protection for workers and the self-employed[53], on the base of art. 3 (promotion of well-being, sustainable development, social progress, social justice and protection, equality between women and men and solidarity between generations) and 9 (promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion and a high level of education, training and protection of human health), and of course artt. 151, 152 and 352 of the TFEU. This initiative is both consistent with the Commission Communication on "A European agenda for the collaborative economy" and the European Pillar of Social Rights (*supra*).

The proposal regards both workers (meaning employees) and self-employed. It aims to reduce the gaps in access to social protection and ensure formal, effective, adequate and transparent coverage of social protection,

---

2018, 61-62, the EPSR can be a game changer having "the potential of bringing about a new dynamic policy ... Will certainly be subject of further legal debate and, quite likely, be used in legal interpretation ... Besides the Pillar's political effects, the power of its words should not be underestimated". Read also Z. Rasnača, *Bridging the Gaps or Falling Short? The European Pillar of Social Rights and What it Can Bring to the EU-level Policy-Making*, Etui, Brussels, 2017. Other authors criticize harshly the Pillar because it ignores the constitutionalizing process of social Rights (Nice and Lisbon): for this opinion S. Giubboni, *Oltre il Pilastro europeo dei diritti sociali. Per un nuovo riformismo sociale in Europa*, in G. Bronzini (a cura di), in *Verso un pilastro sociale europeo*, cit., 16 ff., 17.

[53] COM(2018)132 final, 2018/0059(NLE).

particularly with reference to unemployment benefits, sickness and health care benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits, benefits in respect of accidents at work and occupational diseases. It is interesting to remark that, according to this document, "Member States should ensure that the self-employed have access to social protection by extending their formal coverage: (a) on a mandatory basis for sickness and healthcare benefits, maternity/paternity benefits, old age and invalidity benefits as well as benefits in respect of accidents at work and occupational diseases; (b) on a voluntary basis for unemployment benefits". It is not clear why the obligation of the Member States regarding unemployment is voluntary; probably due to its financial weight and the specific connotations of some self-employed.

Unfortunately, the directive is going to become only an unbinding recommendation. However, the resolute inclusion of self-employment in the EPSR and in the proposal above mentioned reveals a new "awareness" [54] and signals a new course in observing the self-employed at first sight as a working person deserving social – and collective [55] – rights.

A new process in terms of values started. In this regard, it is interesting to observe that the proposal states clearly that fairer competition has social benefits. It conceives the opportunity to look at competition and social cohesion not like opposite concepts: fairer competition between economic actors can be a key to improve social cohesion [56]. The category of self-employment can be considered an ideal "area" to test mediation tools between market and persons.

---

[54] N. Countouris, *The Concept of "Worker" in European Labour Law: Fragmentation, Autonomy and Scope*, in *Industrial Law Journal*, 2018, 222.

[55] Resolution of the Parliament no. 2033 (2015) of 28 January 2015: "investing in social rights is an investment in the future. In order to build and maintain strong and sustainable socio-economic systems in Europe, social rights need to be protected and promoted … In particular, the rights to bargain collectively and to strike are crucial to ensure that workers and their organisations can effectively take part in the socio-economic process to promote their interests when it comes to wages, working conditions and social rights".

[56] Read the reflections on this topic of R. Whish, D. Bailey, *Competition Law*, Oxford University Press, Oxford, 2015, 20; and M.E. Stucke, *Reconsidering Antitrust Goals*, in *Boston College Law Review*, 53, 2012 566-568. See also C. Barnard, *EU Employment Law*, IV ed., Oxford University Press, Oxford, 2012, 195.

LEGAL ASPECTS OF NEW FORMS OF WORK-ORGANIZATION

Stella Weber [*]
Katrin Wetsch [**]

1. Introductory remarks

Society and work organization has always been dynamic, not static. The characterizations in this respect range from *Bells* (1973) "post-industrial society [1]", *Druckers* (1969) "knowledge society"

[*] Research associate at the Institute for Labour and Social Law of the University of Salzburg (Austria).

[**] Research associate at the Institute for Labour and Social Law of the University of Salzburg (Austria).

[1] In the pre-industrial societies, which were primarily determined by agriculture, there was no strictly delimited working day, which was separated from non-working time (according to the modern concept of employment law: leisure time); see M. Risak, *Arbeiten in der Grauzone zwischen Arbeitszeit und Freizeit, Dargestellt am Beispiel der „Dauererreichbarkeit" am Smartphone*, in *ZAS*, 50, 2013, 296.

to *Münchs* (1991) "communication society" [2].

Since the 1980s, production through the use of information technology and electronics has been automated more and more and national markets are opening up as a result of Europeanization and Globalization. After all, in the 1990s [3] the change to the "*information society*" was established and has brought important changes [4] and will increasingly do so. In this context, some new phenomena can be identified that apparently contradict the basic conception of the employment relationship.

In many places – it has been noted with remarkable synchrony – that, apart from national and political borders, other cultural boundaries and classifications have come into motion [5]: The German Federal Ministry of Labour and Social Affairs has comprehensively analyzed these developments and called these new forms of work "Working 4.0" in an extensive Green Paper 2016 and a subsequent White Paper 2017. This term is analogous to the discussion on the fourth industrial revolution (Industry 4.0) and the change in work is brought to the fore.

Many believe that the current technological progress is changing our traditional concept of labour [6]. This discussion has become a national and international trend in the labour law and legal policy debate. If we take a short look back at our current state of social policy, it can be concluded that this area has a respectable record. On the one hand, a rather wide range of labour law provisions, on the other hand, a comprehensive system of social protection, is reflecting a very high level of social policy. This system [7], in its

---

[2] U. Knoblauch, *Arbeit als Interaktion: Informationsgesellschaft, Post-Fordismus und Kommunikationsarbeit*, in *Soziale Welt*, 1996, 344 f.

[3] A. Roßnagel *et al.*, *Digitalisierung der Grundrechte*, in *Zur Verfassungsverträglichkeit der Informations- und Kommunikationstechnik*, 1990, 1.

[4] In the Austrian field *K. Firlei* pointed out already in 1987 that new trends lead to massive doubts about a linear further development of labour law following the pattern of the past decades. He deals with the problems of the escape from the traditional labour law, the increase of atypical employment, new nomadism, the end of the era of the traditional Austrian employment contract and the beginning of "new forms of work".

[5] See K. Gottschall, G.G. Voß, *Entgrenzung von Arbeit und Leben – Zur Einleitung*, in K. Gottschal, G.G. Voß (Hrsg.), *Entgrenzung von Arbeit und Leben. Zum Wandel der Beziehungen von Erwerbstätigkeit und Privatsphäre im Alltag, Arbeit und Leben im Umbruch, Schriftenreihe zur subjektorientierten Soziologie der Arbeit und Arbeitsgesellschaft*, II ed., 2005, 16 f.

[6] R. Giesen, J. Kersten, *Arbeit 4.0, Arbeitsbeziehungen und Arbeitsrecht in der digitalen Welt*, 2018, 13.

[7] See J. Cerny, *Aus der Geschichte des Arbeitsrechts und des Sozialrechts*, in *DRdA*, 6, 2018, 527.

current form, is the result of over one hundred years of social and political conflict. The pursuit of social legislation often had similar patterns in Europe.

There has always been a demand for protective provisions, such as for working time [8] as well as laws concerning the health and accident insurance of the workforce or provisions on Sunday and holiday rest and control by state authorities in the form of a labour inspectorate.

All these examples show that these aspects of labour (and social) law in its current form are employee's (workers) rights [9], which have changed or evolved through technological advances to relationships between people and institutions. Thus, in every epoch of time, society sought to get rid of externally imposed borders. Now, of course, one has to ask oneself what has changed since then. Is the current labour law really in crisis due to the progressive "digitization of the working world" and the often stated "dissolution of boundaries"? Across Europe, new forms of work are influencing the traditional form of employment in a large number of ways. Some transform the relationship between employer and employee, some change work organization and work patterns, and some do both [10].

Therefore, several fields of action can be identified. Which changes of working reality can be observed that make the currently existing set of norms inadequate? Is the current legal framework for the challenges still appropriate? What are possible solutions for these challenges?

1.1. Technical changes

A glimpse into the past shows how fast digitization is progressing: In this regard – after the industrial revolution – computers represented one major turning point in the working life [11]. This wave of economization,

---

[8] L. Brügel, *Soziale Gesetzgebung in Österreich von 1848 bis 1918 (1919)*, 71 ff; G. Löschnigg, *Arbeitsrecht*, XIII ed., 2017, 46; mwN.

[9] J. Püringer, *Die Entwicklung des Arbeitsrechts in Österreich, Die Ausbildung der Sicherheitskraft6*, 2014, in *https://emedien.arbeiterkammer.at/viewer/*, (06 June 2019), 28 f.

[10] I. Mandl *et al.*, *New Forms of Employment*, in *https://www.eurofound.europa.eu/de/publications/report/2015/working-conditions-labour-market/new-forms-of-employment* (06 June 2019).

[11] dBMAS, *Grünbuch Arbeiten 4.0* (2015), in *https://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen-DinA4/gruenbuch-arbeiten-vier-null.pdf?__blob=publicationFile* (06 June 2019).

which began in the 1980s, brought a new quality to the reorganization development of companies. Beginning in 1986 only 9% of the Austrian workforce worked at their workstation on a computer. In 2003 this number had already risen up to 64% [12]. In 2014, 72% of Austrians had a desktop computer, 57% had internet access at their workplace and 27% even worked on a laptop or another mobile device (smartphones, tablet computers, etc.). Mobile use in general increased from 18% in 2011 to 60% in 2013 and 88% in 2018 in Austria. Furthermore, the Internet [13] made its way into all companies where communication via e-mail has increased.

According to the Federal Austrian Statistic Office in 2016 digitization had reached the majority of workplaces. In 2018, around 51% of Austrians spend at least half of their working time on a computer or a mobile device, the most common activities are writing e-mails, performing file management or online banking [14]. The world's highest-valued company [15] is a good example of how most successful companies today are digitized companies. Everything that can be automated is automated; everything that can be networked is networked. "New forms of work" are often digitized and therefore more flexible than ever before. Even though the abbreviation "4.0" suggested that the changes in the world of work would be driven primarily by digitization, there is much more hiding behind it: It is also the social trends of globalization and demographic change that are already influencing working today and will influence our future as well. Our society is confronted with new technologies that, at various levels, make us rethink our idea of work, life and society. The debate must also include other relevant trends and their interactions with technological progress [16].

Crowdwork is a new form of work, which is common nearly all over the

---

[12] M. Haller, *Auf dem Weg zur mündigen Gesellschaft? Wertwandel in Österreich 1986 bis 2003*, in W. Schulz, M. Haller, A. Grausgruber (Hrsg.), *Österreich zur Jahrhundertwende, Gesellschaftliche Werthaltungen und Lebensqualität 1986-2004*, 34, 2005.

[13] See W. Däubler, *Challenges to Labour Law*, in *J. Higher Sch. Econ.*, 2016, 196; online available *https://www.researchgate.net/publication/312546811_Challenges_to_Labour_Law* (06 June 2019).

[14] A, Mehrheit der Österreicher hat schlechte Computerkenntnisse *https://derstandard.at/1395056911259/Mehrheit-der-Oesterreicher-hat-schlechte-Computergrundkenntnisse* (06 June 2019).

[15] F. Abolhassan, *Was treibt die Digitalisierung, Warum an der Cloud kein Weg vorbeiführt,* 2016, 5 f.

[16] R. Krause, *Gutachten B zum 71. Deutschen Juristentag, Digitalisierung der Arbeitswelt – Herausforderungen und Regelungsbedarf*, 2016, 11.

world. This is the result of globalised markets, strong competitive pressure and the financialization of the economy [17].

These employment relationships are atypical because they differ from an unlimited full-time employment relationship. The most common types of employment are part-time work, fixed-term employment and temporary employment [18]. We may be permitted to concentrate on the discussion taking place in Austria. It may sometimes happen that social phenomena are less recognized in one country whereas they are at the centre of scientific interest in another. In other cases, the point of departure may be the same, but the way of dealing with problems can be very different.

1.2. Social changes

Work is also influenced by changes in mentality. Work is increasingly determining the consciousness of society and creating identity. This is the reason why the notion of "erosion of normality" has become more and more an essential part of the current sociological, but also jurisprudential debate when it comes to the interplay of questions surrounding work and privacy.

For some time now, there have been increasing tendencies at the societal level that people's values in particular in western industrialized countries are changing [19]. Scientists from various disciplines have been dealing with this change in values for several decades. The fact that people have differentiated realities and wishes is basically nothing new; one recent German study [20] concludes that we are now dealing with very different working cultures that cannot be lumped together as well. On the one hand, this was a shift from materialistic (bourgeois) values to post-materialist (post-bourgeois) values. Those who grow up in times of shortage will constantly

[17] M. Risak, in D. Lutz, M. Risak, *Arbeit in der Gig-Economy*, 2017, 13.

[18] See European Parliament, *Atypical work in the EU*, 2000, 37, 38, 60, in *http://ec.europa.eu/social/BlobServlet?docId=2440&langId=en* (12 December 2019).

[19] H.-G. Dachrodt, *Arbeit und Gesellschaft im Umbruch, Zukunft ohne Arbeit – Arbeit ohne Zukunft?*, 1986, 44.

[20] See *Bundesministerium für Arbeit und Soziales, Wertewelten Arbeiten 4.0*, in *https://www.arbeitenviernull.de/fileadmin/Downloads/Wertestudie_Arbeiten_4.0.pdf* (01 Agust, 2018); see also *Bundesministerium für Arbeit und Soziales, Weißbuch Arbeiten 4.0*, in *https://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/a883-weissbuch.pdf?__blob=publicationFile* (06 June 2019), 35.

want to satisfy their primary needs, even if they are going to do well economically in the future. Those individuals will give preference to materialistic values (e.g. economic action, achievement, competition, obedience, discipline, hierarchy, power) throughout their lives. On the other hand, those who did not become aware of their childhood deficiency will use "post-materialistic" values (e.g. qualitative growth, ecological action, co-determination, quality of life, self-determination, personality development, cooperation, decentralization, etc.) as a benchmark for their thinking and acting throughout their lives[21]. These so-called "*higher values of life*" such as leisure or art determine this attitude, but this does not mean that these persons regard the material basis as unimportant. Although a material basis is presupposed according to these theories, this is not decisive for the thinking of these persons[22]. Moreover, the importance that people give to individualization has been steadily increasing. New forms of work, such as Crowdwork[23], promise so-called "digital natives" an increasing degree of self-determination of the working condition[24].

What has been apparent for some time now in the western industrialized countries is the development of a new "mode of socialization"[25].

1.3. Traditional boundaries and limitations

Employment relationships are continuing obligations. Usually employees have a commitment to their employer to perform work based on a labour contract (either in written form, verbally or by conclusive behaviour). Traditionally, the individual person is not in the service of the employer with his entire (social) existence: As a rule, one makes his workforce available full-time or part-time, whereby a concrete number of weekly hours are usually specified in the employment contract[26].

---

[21] P. Purgal, *Wertewandel der Y-Generation, Konsequenzen für die Mitarbeiterführung*, 2015, 22.

[22] H.-G. Dachrodt, *op. cit.*, 44.

[23] See J. Warter, *Crowdwork*, 2016.

[24] G. Löschnigg, in W. Brodil (Hrsg.), *Betriebsverfassungsrechtliche Fragen entgrenzter Arbeit, Entgrenzte Arbeit, Aktuelle Fragen neuer Formen der Arbeitsleistung, Wiener Oktobergespräche 2015*, 2016, 43.

[25] U. Beck, *Risikogesellschaft, Auf dem Weg in eine andere Moderne*, 1986, 205.

[26] W. Däubler, *Entgrenzung der Arbeit – ein Problem des Arbeitsrechts?*, in *Soziales Recht*, 4(2), 2014, 45.

Therefore, essential characteristics of an employment relationship are the personal dependence on the part of the employee and the incorporation in the organization of the company, so the employee is subject to the directives of the employer in the employer's organization on a specified workplace. Only employees who fulfil these criteria are fully protected by Austrian labour laws and are also covered under health, pension and accident insurance according to the General Social Insurance Act („Allgemeines Sozialversicherungsgesetz – ASVG[27]").

2. Challenges to labour law

2.1. Delimitation of traditional boundaries

One question is the notion of "delimitation" as an important keyword in terms of the change of work that occurs as a result of new (company) and societal changes; it also affects the relationship between "work and private life". In the field of "work", the dynamics of the dissolution of these traditional boundaries are shown in more dimensions. Particularly mobile devices are much more powerful and feature-rich than the "normal" desktop-computers. Someone can work where and when he or she wants. On the one hand, these changes offer good possibilities and bring many opportunities for a more self-determined work. Especially for those who are interested in a more flexible way of dealing with their leisure-time ("flexible working hours") and their place of work. Those employees are given a good opportunity to balance their working hours, especially with family matters ("work-life Balance"), which can possibly lead to an increased job satisfaction. The other side of the coin is the dissolution of the boundaries between the professional and the private spheres, the danger of an extension of the occupational requirements and the associated reduction of the regeneration times required for a long-term maintenance of the workforce.

Another question is, if crowdworkers in Austria are protected by labour law. Among other things, labour law in Austria serves to balance the (economic) imbalances of power between employers and employees, thereby protecting workers. The existing institutions of labour law, such as trade unions, works councils, chamber of labour, chamber of commerce, collective agreements and company agreements, establish the balance between the-

[27] BGBl I nr. 59/2018.

se parties [28]. Different ways of implementing protection provisions have to be studied. Certainly mainly employees are fully protected. There are only two groups of self-employed persons, who enjoy a similar protection under labour law, like employees. Sometimes crowdworkers are treated as self-employed persons. They are not covered by labour law. In Austria only home workers and employee-like persons are protected even though they are self-employed. We want to find out, if crowdworkers – when they belong to one of these two categories – have labour rights [29]. Therefore it is necessary to identify the contractual relationship between crowdworker, crowdsourcer and crowdsourcing platform and to screen the type of contract they received.

2.2. Local delimitation

Usually every business is based on a specified workplace ("Betriebsstätte") in which employees perform their specific work according to their contract. A workplace in the sense of the Austrian labour law is typically a concrete localized facility with a defined degree of organization that must be given. The main elements therefore are – in particular – the concrete location, the permanent character as well as the resources of the employer. Work always takes place in a specific location. This is typically – unless there is a tele working agreement – not congruent with the apartment of the employee, but separated from this. This traditional separation is dissolving more and more due to the new possibilities of digitization. One problem area concerns the issue of dealing with ICT-based workplaces in the employee's home or another place chosen by the employee [30]. In this regard, one special question that arises is to what extent the employer is responsible for mobile workplaces. The Mobile devices available today enable a high degree of flexibility. This complicates the handling of work in the mobile office for the employer. In this sense, there is a fundamental difference to pre-capitalist modes of production and business structures from which the traditional labour law has developed. This clear separation of work and privacy had the great advantage of being "free from work de-

[28] M. Risak, *Kollektive Rechtssetzung auch für Nicht-Arbeitnehmer*, in *ZAS*, 2002, 165.

[29] M. Risak, in D. Lutz, M. Risak, *op. cit.*, 45.

[30] R. Krause, *Gutachten B*, cit., 11.

mands" at home. Leisure periods were at the same time resting phases. Telework can be done on the basis of a traditional employment relationship that obliges the employee to perform instruction-bound, externally-determined work in personal dependence. The only legal basis for telework is a non-binding framework agreement on telework signed by the European social partners in Brussels on 16 July 2002. The Austrian law does not provide any explicit rules on telework, which, in their direct application, cover this complex. That is the reason why telework raises numerous labour law issues: Who has to provide the resources? Do employees have a claim to compensation for the use of their apartment or their resources? Are employers responsible for the equipment of the Home Office employee protection law? [31] One special problem is the Austrian concept [32] of "workplace" ("Betriebsstätte") as defined in § 2 (3) ASchG [33]. In the context of digitization the question arises if any place of work chosen by the employee (such as the living room, a café or the train) is also covered by the fundamental concept of the Austrian Employee Protection Act ("ASchG [34]"). The "workplace" within the meaning of the Austrian law is usually a workplace in buildings or workplaces outside (e.g. construction work), but employers are therefore required to ensure the safety and health of their employees and must take the necessary measures to protect life, health, integrity and dignity, including measures to prevent work-related risks, to inform and instruct, and to provide appropriate organization and resources. It is argued [35] that the employer would have a legitimate interest in entering the workplace (outside the company) to assess the suitability and condition of the "workplace". In Austria, a discussion on this subject is only taking place to a limited extent. According to the prevailing opinion [36], the apartment (or working on a train or somewhere else) does not fall under the Austrian concept of "workplace". This is justified with the extension of

[31] See only M. Risak, *Home Office I – Arbeitsrecht, Vertragsgestaltung, Arbeitszeit und ArbeitnehmerInnenschutz*, in *ZAS*, 36, 2016, 204 f.

[32] See the Legal Information System of the Republic of Austria *www.ris.bka.gv.at*; this platform and data base is providing information on Austrian law. Its main contents are legislation in its current version (federal and state), law gazettes (federal and state) and case law.

[33] ArbeitnehmerInnenschutzgesetz.

[34] BGBl I nr. 126/2017.

[35] B. Boemke, P. Ankersen, *Telearbeit und Betriebsverfassung*, in *BB*, 2000, 1570.

[36] B.W. Gruber, *Arbeitnehmerschutz bei Teleheimarbeit*, in *ZAS*, 1998, 68; N. Melzer-Azodanloo, *Tele-Arbeitsrecht*, 2001.

the provisions[37] on VDU workstations and measures for computer screen work[38]. According to the explanatory notes[39] these regulations should historically take the development of so-called "tele-home-work" into account. *Risak* deduces that if the ASchG already applied to teleworkers, the extension of the new provisions to activities outside the workplace would have been superfluous. This argument is insofar comprehensibly as responsibility for the equipment of the workplace can only arise if it is within the sphere of influence of the responsible person. This responsibility is already in dispute in cases of regular home office, but even more difficult to argue with changing workplaces. Following Article 13 of the European Charter of Fundamental Rights, the apartment is protected under constitutional law. In addition, Article 8 of the ECHR could also be affected if the employee lives together with his family. Every time the apartment is entered, the employee's personal circumstances become apparent and personal data is collected. Since it does not matter whether these data are processed automatically, the provisions of data protection are relevant[40]. It should also be noted that a visual inspection of the external workplace can also be carried out by means of an employee survey[41].

2.3. Temporal delimitation

If someone carries a smartphone or a tablet he or she is (theoretically) always reachable, after hours, on weekends or even during his or her holiday. What are the reasons for that behaviour? One aspect might be that the employee is highly motivated and considers his work at the computer to be much more important than his private life[42]. So as mentioned in the beginning: Work is increasingly determining the consciousness of employees and creating identity.

Referring to a study commissioned by the Federal Ministry of Labour and Social Affairs, a not insignificant proportion of employees are doing

[37] Introduced with BGBl, I, 1997/9.

[38] M. Risak, *Digitalisierung der Arbeitswelt – Rechtliche Aspekte neuer Formen der Arbeitsorganisation*, in *DRdA*, 2017, 331 f.

[39] ErläutRV 461 BlgNR 20. GP 10.

[40] S. Müller, *Homeoffice in der arbeitsrechtlichen Praxis*, 2018, 100.

[41] M. Risak, *Digitalisierung der Arbeitswelt*, cit., 331 f.

[42] W. Däubler, *Challenges to Labour Law*, cit., 197.

work-related tasks outside their regular working hours at home (21%). A majority (75%) of these employees neither receive a time off nor a financial compensation [43]. Calls are made on weekends; e-mails are answered on the train or on holidays: 5% of these employees do it "daily", 15% "a few times a week", 25% "a few times a month", 20% "a few times a year" and 35% "never" [44]. "Leisure activities" and "accessibility" outside of normal working hours are therefore not inconceivable phenomena, but not merely marginal phenomena.

Often the problem is that people are not accustomed to making their own schedule. Starting at kindergarten, continuing at school and finally working in an office or a factory, the individual has to follow a schedule fixed by other people. Doing it yourself has to be learned – time management is not a natural gift [45]. Often the provisions of the Working Time Act lose their practical importance, there is quite a high risk that the duration of working time is far from the legal limits. The opinions in this regard could not be more different:

Risak [46] called these changes a system of permanent "performance-comparison" between departments, teams and the individual employees. In many cases it is no longer about the question where and how long someone works. Much more important is who achieves the specified goals (or not) [47]. Traditional – based on the EC-Directive – the average working time per week is forty-eight hours, but Article 3 of the Austrian Working-Time Legislation Act statues that the daily normal working time in Austria may not exceed eight hours a day and forty hours per week, unless otherwise specified. Working time (art. 2 Z1) in the meaning of the directive 2003/88 means any period during which an employee works, acts and performs his duties. Rest period is according to art. 2 Z 2 any period of time outside working hours. These two definitions statue that this is either working time or rest, there is no intermediate category. The intensity of the work is not important [48].

One major point for the classification of modern appearances in terms

---

[43] BMAS (Hrsg.), *Mobiles und entgrenztes Arbeiten, Forschungsbericht 460*, 2015, 7 ff.

[44] R. Krause, *Herausforderung Digitalisierung der Arbeitswelt und Arbeiten 4.0*, in *NZA-Beilage*, 2017, 53 f.

[45] W. Däubler, *Challenges to Labour Law*, cit., 197.

[46] M. Risak, *Digitalisierung der Arbeitswelt*, cit., 331 f.

[47] M. Risak, *Digitalisierung der Arbeitswelt*, cit., 331 f.

[48] G. Heilegger, *Arbeitszeitrechtliche Wertung von Bereitschaftszeiten: Arbeitsbereitschaft und Rufbereitschaft vor EuGH und OGH*, in *DRdA-infas*, 2018, 259.

of the national working time legislation, such as "leisure activities" and "constant accessibility" is the strict division of time into working time on the one hand and rest time (non-working time) ("Arbeitsruhegesetz") on the other hand[49]. Furthermore, there are two different types of standby time in Austria's labour law: The Working Time Act sets important boundaries between on-call duty (§ 20a AZG) and work readiness (§§ 5, 5a AZG): On-call duty is when an employee commits to being contactable outside of the normal working hours in order to immediately start working on the employer's request. The employee has to usually go to the company to start his work there. A maximum of 10 on-call duties are allowed per month (up to a maximum of 168 hours). Within a 3-month period, on-call duty may only be agreed on 30 days, so frequency limits are provided by law.

Qualifying the smartphone accessibility as "on-call-duty" would be difficult in most of the cases, because the typical smartphone availability is not comparable with this category. The reason is that smartphone calls are very short and usually the work is not foreseeable so that the employee knows that he probably has to take up his duties immediately.

A second category is "work readiness". An essential criterion of "work readiness" is especially the regular and foreseeable work performance. Therefore the employer determines the location of the employee (usually: his presence at the workplace) in order to be able to immediately take up the work. Since the corresponding clarification by the ECJ, the time of non-use during work-readiness is also working time[50].

Resch[51] argues in that sense, so that the time of smartphone accessibility should not be pushed "microscopically to the extreme" and refers to a "ban on atomization" of working time. He is referring to *Gerhartl*[52] who references as a guideline the minimum duration of a break of 10 minutes (according to § 11 Austrian Working Time Act). According to that opinion not every "small leisure activity" is working time.

In response to this question it must be noted that the regulation of the Austrian Working Time Act is based on important objectives, which must also not be lost sight of when interpreting working time norms: One important objective is health protection, which justifies the definition of maxi-

---

[49] R. Krause, *Herausforderung Digitalisierung*, cit., 56.

[50] EuGH, Slg, 2000, I- 07963, RS Jaeger = NZA, 2000, 1227.

[51] R. Resch, *Diffusion der Leistungspflicht in zeitlicher Hinsicht*, in W. Brodil (Hrsg.), *Wiener Oktobergespräche*, 2015, *Entgrenzte Arbeit*, 7.

[52] A. Gerhartl, *Rechtsfragen der Überstundenpauschale*, in *ecolex*, 2015, 695.

mum working hours, minimum rest periods and breaks because working conditions may affect the safety and health of workers and should therefore be humanized in the sense that work organization is adapted to people and their needs[53]. Many psychological studies show that smartphone accessibility causes stress and health risks. So theoretically the European Working Time Directive as well as the Austrian Working Time Act establishes clear limits, which can be (theoretically) controlled easily. But how can one control how many hours an employee has worked at home or in a hotel room? Modern information systems possibly enable a new transparency in the enterprises, in which the individual performance becomes more and more addressable at the individual level. So technically, it would be possible to register all activities on a computer with an internet connection. But this would lead to complete monitoring of the individual[54].

As shown, the subject of working time law is working time. Anything that is not working hours is rest time (apart from breaks). There is no third category (as the ECJ also clearly points out in the case of *Dellas*)[55].

In this respect, smartphone accessibility does not (always) follow any classification in the existing system. Neither the Austrian Working Time Act ("Arbeitszeitgesetz") nor the standard workplace regulations ("Arbeitnehmerschutzgesetz") and the regulations for computer workstations ("Bildschirmarbeitsverordnung") apply to mobile work performed outside the company on smartphones. Therefore, it can be generalized that the work content, the means of work and the work organization change in some cases massively. It has been shown that we are indeed dealing with phenomena that make the current instruments insufficient.

3. Crowdwork

3.1. Definition of the term "*crowdwork*"

First the term "*crowdwork*" should be defined. Howe wrote about the phenomenon crowdwork in a technical magazine, called Wired Magazine:

---

[53] M. Risak, *Arbeitsrecht 4.0*, in *JAS*, 2017, 12; M. Risak, *Arbeiten*, cit., 296; M. Risak, *Home Office 1 – Arbeitsrecht, Vertragsgestaltung Arbeitszeit und ArbeitnehmerInnenschutz*, in *ZAS*, 2016, 204-209.

[54] W. Däubler, *Challenges to Labour Law*, cit., 197.

[55] EuGH Slg, 2005, I, 10253; Rs Dellas = NZA, 2006, 89.

"*Simply defined, crowdsourcing represents the act of a company or institution taking a function once performed by employees and outsourcing it to an undefined (and generally large) network of people in the form of an open call.*" [56] The term "*crowdsourcing*" is a combination of the words "*crowd*" and "*sourcing*" [57]. The term "*sourcing*" is a derivative of the economic term "*outsourcing*". The economic term outsourcing is to be understood as the shift of the value chain to supplying companies or individuals [58]. "*Crowd*" means a huge number of people [59].

This word composition already clarifies the difference to the usual outsourcing of work: Crowdsourcing outsources the work not to a third party but to an undefined number of people [60]. Crowdsourcing makes it possible to use the wisdom of the crowds. The underlying idea is that under certain conditions a group of people is more likely to achieve better results [61]. On one side, there are crowdsourcers placing orders and, on the other, there are crowdworkers who fulfil those assignments. Mostly these two parties are not in contact with each other, rather a crowdsourcing platform acts as an intermediary.

In the context of this article we make no distinction between cloud-work and gig-work. Both forms of digital platform work are covered equally.

3.2. Contractual relations between the parties

First we need to clarify, if any contractual relationship has been entered into. And moreover, what the nature of the contract between the respective parties is? As described above, an important function of labour law is to protect the weaker employee. It is therefore necessary to clarify whether

[56] J. Howe, in *https://crowdsourcing.typepad.com/cs/2006/06/crowdsourcing_a.html* (accessed on 06 June 2019).

[57] See J. Warter, *Crowdwork*, cit., 27.

[58] M. Rouse, outsourcing, *TeachTarget*, in *https://searchcio.techtarget.com/definition/outsourcing* (on 11 December 2018).

[59] See Oxford English Dictionary, *https://en.oxforddictionaries.com/definition/crowd* (accessed on 06 June 2019).

[60] J.M. Leimeister, *Crowdsourcing, Zeitschrift für Controlling und Management*, 2012, 388.

[61] See J.M. Leimeister, *Collective Intelligence, Business & Information Systems Engineering*, 2010, 245, in *https://link.springer.com/article/10.1007%2Fs12599-010-0114-8* (06 June 2019).

an employment contract, typically existing between an employer and an employee, has been concluded between these parties. In the absence of such an employment contract, we have to act on the assumption, that the crowdworker is a self-employed person who does not need protection under labour law in respect of pay and working conditions.

There are a few criteria which support the notion of an employed crowdworker, such as that they have no freedom of scope while service delivery, the subordination of the employee into a foreign organisation and the personal behaviour relative to instructions of the employer [62].

Labour law acts on the assumption of a two-personal relationship between employee and employer. But in the constellation of crowdwork there are three persons having a relationship with each other. The next step is, to find out which of the parties have what kind of contractual relationship [63]. It is not easy to find a general solution here, since there are very different business models in the platform economy and the organization can also be different [64].

3.2.1. Contractual relationship between users and platform workers

First, check whether there is a contractual relationship between crowdsourcer and crowdworker. Not all forms of crowdwork have such a contract. In these cases there is often a contractual relationship between crowdworker and platform. One can think of crowdwork forms where the crowdworker delivers his work results to the platform, which also carries out quality controls and pays the crowdworker [65]. If, for example, work resources were made available and conditions for the concrete execution of the task were determined, this would speak against the mediating quality of the platform [66].

Another argument against a contractual relationship between the crowdworker and the crowdsourcer is that an employment relationship would only exist for the period of order fulfilment. In many cases this would lead to a

[62] See M. Risak, in D. Lutz, M. Risak, *op. cit.*, 45 f; *OGH*, 20 September 1983, 4 Ob 102/83, *ZAS*, 1985, 18 (*Eypeltauer*); *OGH*, 19 May 1981, 4 Ob 104/80.

[63] See M. Risak, in D. Lutz, M. Risak, *op. cit.*, 46.

[64] See M. Risak, in D. Lutz, M. Risak, *op. cit.*, 47.

[65] M. Risak, *Fair Working Conditions for Platform Workers*, in *Politik für Europa # 2017 plus,* 8, 9.

[66] See M. Risak, *Crowdwork – Erste rechtliche Annäherung an eine „neue" Arbeitsform*, in *ZAS*, 2015, 15.

large number of short employment relationships (see below 3.3.4) [67]. The employment of an Uber driver would be terminated after each trip. The same applies to Book a Tiger-crowdworkers. In addition, the contractual partners would often change [68].

In practice, many platforms claim to act only as intermediaries in their collaboration with crowdworkers [69]. There is definitely crowdsourcing based on a direct contract between crowdworker and crowdsourcer. It is not necessary for these two parties to communicate with each other. However, communication can still take place via the platform [70]. For the exclusive intermediary function to be legally sustainable, the platform would always have to act as the crowdsourcer's representative. This means acting in the name of the crowdsourcer and acting on his behalf. Nevertheless, various criteria speak against the mediating quality of the platform.

It is therefore always necessary to check on a case-by-case basis how crowdsourcer and crowdworker actually interact with each other in order to establish a contractual basis. If there is a contractual basis, the next step is to clarify the nature of the contract. A distinction must be made here between a contract for self-employed persons and a contract for dependent employees.

3.2.2. Contractual relationship between platform and crowdworker

In almost all cases of crowdwork, there is a contractual relationship between the platform and the crowdworker, even if there is a contractual relationship between the crowdworker and the crowdsourcer. After all, crowdworkers have to register on a platform before they can perform individual tasks. They are also obliged to keep their data up to date. In most cases, the general terms and conditions of the platform also apply to the crowdworker. Often the crowdworkers are also obliged to give an evaluation of the crowdsourcer or the customers. Therefore, for the most part, there is a genuine continuing obligation between the crowdworker and the platform, whereby there is no obligation to provide a specific service [71]. It is common practice to exert appropriate pressure on crowdworkers to perform orders (see

[67] M. Risak, *Fair Working Conditions for Platform Workers*, cit., 9.

[68] See M. Risak, in D. Lutz, M. Risak, *op. cit.*, 48.

[69] M. Risak, *Fair Working Conditions for Platform Workers*, cit., 9.

[70] See M. Risak, in D. Lutz, M. Risak, *op. cit.*, 48.

[71] See M. Risak, in D. Lutz, M. Risak, *op. cit.*, 49.

below 3.3.3.1). For example, in the form of penalties if they refuse orders or even by deleting the account if crowdworkers have been inactive for too long [72].

If we now look at the individual orders, these are mainly offers to the crowd. The crowdworker accepts an offer by committing himself to fulfil the task. It can also be argued that the publication of the task by the platform is merely an invitation to make an offer. According to this view, a contract would only arise when the crowdworker sends the completed task to the platform. The platform accepts the offer in the form of a service, which leads to a later conclusion of the contract [73]. Whereby in our opinion the former explanations to offer and contract development apply.

In most cases of crowdwork it is therefore undisputed that a contract is concluded between the crowdworker and the platform. All that remains to be clarified is the contractual relationship, whether it is a target obligation relationship or (what kind of) a continuing obligation relationship.

3.2.3. Contractual relationship between crowdsourcer and platform

3.2.3.1. *Labour exchange?*

If there is a contractual relationship between crowdsourcer and platform, the question arises whether the platform is acting as a commercial employment agency. The legal definition for employment agency can be found in § 9 of the Labour Market Promotion Act (Arbeitsmarktförderungsgesetz) and covers all activities aimed at bringing job seekers together with employers to establish employment relationships or clients to establish homework relationships (see below 3.3.5). This excludes activities which are carried out only occasionally and free of charge or on a limited case by case basis.

Labour exchange is also the distribution and publication of job offers and job applications, provided that this is the main purpose of this company. This is not the case with newspapers, therefore job advertisements in newspapers are not to be subsumed under the term employment agency. However, the situation is different with crowdwork platforms: For platforms, the publication and dissemination of work tasks is the main purpose of their activity. After all it belongs to their tasks to offer extensive information about Crowdworker. For this they use rating systems and make

[72] See M. Risak, in D. Lutz, M. Risak, *op. cit.*, 49; J. Warter, in A. Reichel, W.J. Pfeil, S. Urnik, *Crowdinvesting und Crowdworking: Herausforderungen und Chancen*, 2018, 149.

[73] See M. Risak, in D. Lutz, M. Risak, *op. cit.*, 50.

a preselection when crowdworkers have successfully completed tasks. If the platforms mediate employment contracts, this is a labour agency.

Often the range of tasks of the platforms is even wider, as additional services are offered, such as pre-selection, assignment of tasks to smaller orders, payment processing or quality control [74].

3.2.3.2. *Supply of temporary workers?*

If no contract is concluded between crowdworker and crowdsourcer, the platform is responsible for providing the service. The platform uses the crowdworker to fulfil these obligations [75]. It is questionable whether the platform will thus leave manpower to the crowdsourcer. According to § 3 para 1 of the Law for the Supply of Personnel for Temporary Employment (Arbeitskräfteüberlassungsgesetz), the provision of temporary staff is always deemed to exist if workers are made available to third parties for the performance of work. This is a three-person relationship, whereby an employment relationship exists only between platform as hirer and crowdworker as employee [76]. Therefore, it must be clarified when an employment relationship exists and when crowdworkers are employees (see below 3.3).

3.3. Is there an employment relationship?

3.3.1. Labour contract

An employment relationship is characterised by the performance of dependent and externally determined work and is established by an employment contract [77]. But, it does not depend on the written wording in the employment contract, but on the factual exercise [78]. If the written contract refers to self-employed parties, this is irrelevant if an employment relation-

[74] See M. Risak, in D. Lutz, M. Risak, *op. cit.*, 52-53.

[75] See M. Risak, in D. Lutz, M. Risak, *op. cit.*, 53.

[76] See M. Risak, in D. Lutz, M. Risak, *op. cit.*, 55.

[77] T. Tomandl, *Welchen Nutzen bringt ein neuer Dienstnehmerbegriff?*, in *ZAS*, 2008, 100; with further references see G. Löschnigg, *Arbeitsrecht*, cit., 4/001.

[78] See *OGH*, 30 March 2016, 4 Ob 37/16v, *DRdA*, 2017, 32/3 (*R. Rebhahn/T. Dullinger*) – *DRdA*, 2017/3 (*R. Rebhahn/T. Dullinger*) = ecolex 2017/45 S 112 – ecolex 2017, 112 = ARD 6551/9/2017; R. Rebhahn, in *ZellKomm*, II ed., § 1151, *ABGB*, Rz 61 ff; M. Risak, in M. Schwimann, M. Neumayr, *ABGB Taschenkommentar*, IV ed., 2017, § 1151, Rz 16.

ship exists. Therefore the actual handling of the employment relationship is to be examined and not the written employment contract decisive for the qualification of an employment relationship.

3.3.2. Continuing obligation

An employment relationship is a continuing obligation. It is not terminated by the fulfilment of the individual tasks [79]. Nevertheless, according to case law [80] and the prevailing opinion of scholars [81], employment contracts can also be concluded for only one day or for only a few hours if the purpose of the work performance indicates it. Work achievements lasting only a few minutes, as with crowdwork, are not meant thereby. But first the component of the personal dependency of the crowdworker has to be checked before a final result can be determined (see below 3.3.4) [82].

3.3.3. Personal dependency

An employee within the meaning of Austrian employment contract law is a person who, on the basis of an employment contract, is obliged to provide a personal service to another person. The term "employee" in the relevant act is linked to the employment contract on the one hand and to the de facto employment on the other [83]. Pursuant to § 36 of the Labour Constitution Act (Arbeitsverfassungsgesetz), all persons employed in a company, including trainees and home workers, are to be regarded as employees. The prerequisite for employment in a company must not be understood locally. After all it is possible to employ employees also mainly outside of the enterprise. Therefore rather the relationship of the employee to the enterprise in the sense of an organizational integration is to be referred to as indication [84].

---

[79] G. Löschnigg, *Arbeitsrecht*, cit., 4/001.

[80] See *OGH*, 18 November 1975, 4 Ob 69/75, EvBl 1976/179 S 354 = Arb 9422 = IndS 1977, 3, 1039.

[81] See R. Rebhahn, *op. cit.*, § 1151, *ABGB*, Rz 77/1; G. Löschnigg, *Arbeitsrecht*, cit., 4/001.

[82] See J. Warter, in A. Reichel, W.J. Pfeil, S. Urnik, *op. cit.*, 148-149.

[83] G. Löschnigg, *Arbeitsrecht*, cit., 4/055, 4/056.

[84] See *OGH*, 26 March 1997, 9 ObA 88/97z, SZ 70/56.

3.3.3.1. *Personal work obligation*

Employees have to fulfil their duties personally [85]. This is the basic prerequisite for personal dependence. With a few exceptions [86], there is no employment relationship if the personal obligation to work is not given. Crowdworkers are generally obliged to perform personal work. They may neither be represented nor instruct other persons or computer programs to carry out the tasks [87].

In addition, it must also be questioned whether crowdworkers are not even obliged to work. Indeed they are not bound to certain times or a certain duration in which they have to offer their services. But it is often the case that those who frequently reject orders are no longer consulted by the platform. Furthermore, recent ratings are ranked higher compared to older ones. Some platforms even impose penalties for inactivity of the crowdworker for too long, others simply do not give attractive orders to their crowdworkers anymore. Sometimes the account is even deactivated by crowdworkers due to lack of activity. Therefore the often advertised freedom of crowdworkers to work whenever and as much as they want does not actually exist (in every case) [88]. These restrictions can certainly be compared with the personal work obligation of an employee [89].

Should this obligation already result from the framework contract to the platform, then this relationship is to be regarded as an open-ended employment contract, provided that the following characteristics of personal dependence are also given [90]. If no obligation to perform arises from the

---

[85] See W.J. Pfeil, in M. Schwimann, *Kodek ABGB*, IV ed., § 1151, Rz 15; R. Rebhahn, *op. cit.*, § 1151, *ABGB*, Rz 89; *OGH*, 23 October 1984, 4 Ob 116/84, SZ 57/159 = JBl 1986, 60 = *ZAS*, 1986, 424 (*Csebrenyak*).

[86] See G. Löschnigg, *Arbeitsrecht*, cit., 6/002; According to § 17 (1) and (2) house caretaker Act (Hausbesorgergesetz), for example, a house caretaker has to arrange for his representation himself for times when he takes up vacation or educational leave.

[87] See with further references J. Warter, *Crowdwork*, cit., 163.

[88] See J. Warter, in A. Reichel, W.J. Pfeil, S. Urnik, *op. cit.*, 149.

[89] Same opinion M. Risak, in D. Lutz, M. Risak, *op. cit.*, 50 f; J. Warter, in A. Reichel, W.J. Pfeil, S. Urnik, *op. cit.*, 149.

[90] This view was held by an English Employment Tribunal, which assumed a continuous contractual relationship with Uber drivers. This began when the app was switched on and ended when it was switched off. The court therefore ruled against individual contractual relationships of the individual journeys. Employment Tribunals 28 October 2016, 2202551/2015 & Others, *Aslam, Farrar & Others v. Uber B.V., Uber London Ltd. & Uber Britannia Ltd*,

framework agreement, the individual orders accepted shall in any case be subject to the obligation to perform them [91]. The prevailing opinion [92] and the jurisprudence [93] are of the opinion that the obligation to carry out promised works already fulfils the minimum requirements of the performance obligation. The personal work obligation therefore exists in some cases of crowdwork. If the crowdworker is also personally dependent on the platform or on the crowdsourcer, an employment relationship may exist [94].

3.3.3.2. *Organisational Subordination of the employee*

The second prerequisite for employee status is the employee's personal dependency [95]. This dependence results from the fact that the work performance benefits another person, the employer. In addition, the benefit is provided within the employer's organisational structure [96]. There are numerous criteria that indicate an employment relationship, which were largely developed by the judiciary [97]. The subordination to the operational area of order, such as the commitment to working time, place of work and work sequence, is an indication of personal dependency [98]. Another such criterion is the employee's obligation to follow instructions, in other words, the employer's disposition of the employee's work power [99]. The activity must not, however, be characterised by a particular success [100]. The employee's

---

https://www.judiciary.gov.uk/judgments/mr-y-aslam-mr-j-farrar-and-others-v-uber/ (07 June 2019); M. Risak, in D. Lutz, M. Risak, *op. cit.*, 50.

[91] See J. Warter, in A. Reichel, W.J. Pfeil, S. Urnik, *op. cit.*, 150.

[92] See R. Rebhahn, *op. cit.*, § 1151, *ABGB*, Rz 97.

[93] See *VwGH*, 20 April 2005, 2001/08/0074; 19 June 1990, 88/08/0097.

[94] See J. Warter, in A. Reichel, W.J. Pfeil, S. Urnik, *op. cit.*, 150.

[95] G. Löschnigg, *Arbeitsrecht*, cit., 4/057.

[96] See *OGH*, 20 September 1983, 4 Ob 102/83, *ZAS*, 1985, 18 (*Eypeltauer*).

[97] See *OGH*, 20 September 1983, 4 Ob 102/83, *ZAS*, 1985, 18 (*Eypeltauer*); 19 May 1981, 4 Ob 104/80; 17 November 1981, 4 Ob 51/81.

[98] See *OGH*, 19 May 1981, 4 Ob 104/80, SZ 54/75 = EvBl 1982/24 S 72 = *DRdA*, 1982, 191 (with further comments from *Strasser*) = *ZAS*, 1982, 10 (with further comments from *Tomandl*) = JBl, 1982, 50; 29 May 1979, 4 Ob 117/78, SZ 52/87 = Arb 9796 = *DRdA* 1980, 53 = *DRdA*, 1981, 232 (with further comments from *Schrammel*).

[99] See *OGH*, 10 December 1963, 4 Ob 112/63, Arb 7848 = ÖVA, 1964, 87 = SozM IA/e, 528.

[100] See *OGH*, 13 July 1976, 4 Ob 27/76, Arb 9489; 10 December 1963, 4 Ob 112/63, Arb 7848 = ÖVA, 1964, 87 = SozM IA/e, 528.

control and disciplinary responsibility would be further indications of personal dependence [101].

In many cases, economic dependence is also regarded as a characteristic of an employment relationship. There are different interpretations in this respect: On the one hand, the wage dependency of the employee [102] is understood by it, and on the other hand the lack of ownership of the work equipment [103] is interpreted as an economic dependency.

Of course, not all criteria have to be met for an employment relationship to exist. Rather, a weighing must be carried out and an employment relationship must be assumed if the essential characteristics predominate [104]. However, this refers to weighing up each individual characteristic and not to a quantitative outweighing [105].

3.3.4. Chain employment relationship (Kettenarbeitsverhältnis)

If crowdworkers are actually employees, the problem is that they usually conclude numerous short employment contracts for the many short-term tasks. According to settled case law [106] and prevailing opinion [107], it is forbidden to conclude chain labour contracts if there is no economic or social justification for the repeated conclusion of fixed-term contracts. This is intended to prevent employers from being able to circumvent protective provisions of labour law, such as protection against dismissal. The result of a chain of several employment contracts is the conversion into a continuous contractual relationship. The interest of the crowdworkers justifying a chain of employment relationships could consist in the fact that they do not want to commit themselves for an indefinite period and the conclusion of a new employment relationship is in their interest. A balance of interests must be

---

[101] See *OGH*, 29 May 1979, 4 Ob 117/78, SZ 52/87 = Arb 9796 = *DRdA*, 1980, 53 = *DRdA*, 1981, 232 (with further comments from *Schrammel*).

[102] See *OGH*, 11 May 1988, 9, ObA 48/88, Arb 10741.

[103] See *VwGH*, 23 May 1985, 84/08/0070, VwSlg 11778 A/1985.

[104] See *VwGH*, 16 June 1990, 88/08/0097.

[105] See *OGH*, 18 December 1979, 4 Ob 124/79, *DRdA*, 1982, 207 (with comment from *Rabofsky*); 23 October 1984, 4 Ob 116/84, SZ 57/159 = JBl, 1986, 60 = *ZAS*, 1986, 424 (*Csebrenyak*); *VwGH*, 23 May 1985, 84/08/0070, VwSlg 11778 A/1985.

[106] See *OGH*, 15 June 1988, 9 ObA 118/88, RdW 1989, 30 = WBl, 1989, 27; 15 March 1989, 9 ObA 268/88, SZ 62/46 = WBl, 1989, 376.

[107] See W.J. Pfeil, in M. Schwimann, *op. cit.*, § 1158 Rz 9 ff; R. Rebhahn, *op. cit.*, § 1151, *ABGB*, Rz 98.

struck between the interests of the platform and those of the crowdworkers, taking into account the duration of the periods of interruption compared to the duration of the periods of employment [108]. If the platform imposes sanctions if the crowdworker rejects orders, this is in any case an indication of a chain employment relationship, whereby a sanction-free possibility of refusal does not exclude a chain employment relationship [109].

It should be noted anyhow, that crowdwork is characterised by the flexibility of the crowdworkers. Therefore, it is to be basically assumed that there is a permissible chain of fixed-term employment relationships, which cannot be qualified as a continuous employment relationship [110].

3.3.5. Interim result

Increasingly, there is a growing unanimous opinion that the personal dependence of the crowdworker is given with these short service performances of the crowdworker. The more strongly the type of service provision is determined, with regard to working time, place of work and work sequence, the less free space is offered and the higher the control density is, the more personal dependence of the crowdworker is given. These often very short periods in which work is performed can be compensated by a strong external determination of the activity [111]. However, this always depends on the individual case.

If there is such a relationship between crowdworker and platform, the latter could be a temporary employment agency (see above 3.2.3.2). If the examination of the individual case leads to the conclusion that the criteria of personal dependence do not predominate, the crowdworker is a self-employed person. But there is a possibility that crowdworkers may be covered by norms that regulate the contractual relationships of precariously employed self-employed persons.

---

[108] See *OGH*, 28 Octber 2013, 8 ObA 50/13 f, ARD 6382/9/2014 = wbl 2014, 157/51 – wbl 2014/51 = RdW 2014/174 S 146 – RdW 2014, 146 = infas 2014, 93/A31 – infas 2014 A31 = *DRdA*, 2014, 256 = *DRdA*, 2014, 346/34 (*Risak*) – *DRdA*, 2014/34 (*Risak*) = *ZAS- udikatur*, 2014/21 = *ZAS*, 2014/51 S 316 (*Ogriseg*) – *ZAS*, 2014, 316 (*Ogriseg*) = Schrank, *ZAS*, 2015/20 S 113 (*Rechtsprechungsübersicht*) – Schrank, *ZAS*, 2015, 113 (*Rechtsprechungsübersicht*).

[109] See R. Rebhahn, *op. cit.*, § 1151, *ABGB*, Rz 98.

[110] Same opinion M. Risak, *Crowdwork*, cit., 17; J. Warter, *Crowdwork*, cit., 195.

[111] See J. Warter, *Crowdwork*, cit., 193; M. Risak, in D. Lutz, M. Risak, *op. cit.*, 51.

3.4. Self-employed persons

There are groups of self-employed persons who are on the periphery of labour law. In some cases, they are covered by labour law legislation, although they nevertheless exhibit a certain degree of autonomy and personal responsibility. An across-the-board allocation to the group of employees would not, nevertheless, be possible [112].

3.4.1. Homeworkers

A homeworker is someone who, without being a trader, is engaged in the manufacture, treatment, processing or packaging of goods in his own dwelling or self-selected place of work on behalf of and for the account of persons who perform homework [113]. They are therefore not employees because they are not integrated into a company. In spite of this, their need for protection is very similar to that of employees. Therefore, the Homeworkers Act (Heimarbeitergesetz) has been adapted to the relevant labour law provisions [114].

In this respect, crowdworkers could be subsumed under the Homeworkers Act in the event of a negative examination of an employment relationship. But, the fact that the case law only considers manual activities to be covered by the Homeworkers Act speaks against this. Thus all activities of the crowdwork, such as translation activities [115], would fall outside the scope of the Homeworkers Act. *Warter* [116] and *Trost* [117] oppose this judicature, they hold the view that mental work is the homework of the future. According to current jurisprudence, crowdworkers do not yet fall within the scope of protection of the Homeworkers Act. Therefore only the possibility of the protection of the employee-similar persons remains.

3.4.2. Employee-like persons

Employee-like persons are those persons who are employed in non-

[112] See G. Löschnigg, *Arbeitsrecht*, cit., 4/146.

[113] See § 2 Homeworkers Act (Heimarbeitergesetz); *VwGH*, 27 April 1995, 95/11/0029, *DRdA*, 1996/3, 220-224.

[114] See G. Löschnigg, *Arbeitsrecht*, cit., 4/160.

[115] See *VwGH*, 27 October 1972, 0835/72.

[116] J. Warter, *Crowdwork*, cit., 229.

[117] B. Trost, *Heimarbeit – die ideale Arbeitsform der Zukunft?*, in *DRdA*, 1992, 29.

commercial homework and who do not have an employment relationship and who perform work on behalf of and for the account of certain persons, but are to be regarded as employee-like because of economic dependence [118]. According to case law, it depends on whether they are limited to a minimum in their economic self-determination in the sense of determination-making or decision-making ability [119]. The typical criteria of an employee-like person are the absence of a permanent establishment, a longer period of employment, regular pay, the existence of only a few clients and a focus on human work performance [120]. Some provisions of labour law apply to employee-like persons, such as liability relief under the Employee Liability Act (Dienstnehmerhaftpflichtgesetz) or the Equal Treatment Right [121].

These criteria will usually be met in a contractual relationship between crowdworker and the platform. If, there is no contractual relationship with the platform, but only with the individual crowdsourcers, the qualification as an employee-like person is very difficult, because the clients are constantly changing. *Risak* [122] proposes in this case to argue with the similarity of the crowdworkers to the employees due to the strong economic dependence on the platform [123], since even in these situations the work of the crowdworkers is not directly oriented towards the market [124]. But even if this legal-political demand for the qualification of crowdworkers as employee-like persons were met, essential protection provisions for employees would still not be applied. Just think of the minimum wage provisions in collective agreements, provisions on the continued payment of wages during holidays and sickness or employment protection regulations [125].

---

[118] See § 51 Abs 3 Z 2 Labour Court Law (Arbeits- und Sozialgerichtsgesetz).

[119] See *OGH*, 16 November 1965, 4 Ob 118/65, SozM IVA, 277 = ÖBl, 1966, 95 = Arb 8159; 21 September 1976, 4 Ob 92/76, Arb 9518; G. Löschnigg, *Arbeitsrecht*, cit., 4/149.

[120] See RS0050835; *OGH*, 21 September 1976, 4 Ob 92/76, Arb 9518.

[121] See G. Löschnigg, *Arbeitsrecht*, cit., 4/148.

[122] M. Risak, in D. Lutz, M. Risak, *op. cit.*, 58.

[123] See B. Karl, in T. Tomandl, M. Risak, *Wie bewältigt das Recht moderne Formen der Arbeit?*, 2017, 96.

[124] See J. Warter, *Crowdwork*, cit., 199.

[125] See M. Risak, in D. Lutz, M. Risak, *op. cit.*, 58.

4. Summary

4.1. Delimitation of work

The current "delimitation of work" shows itself to be a far-reaching phenomenon in three main dimensions [126]:

1. the "*temporal delimitation*" ("flexibility") of almost all working relationships;
2. the "*local delimitation*" of work and employment for the increasing number of employees with changing workplaces and
3. the "*technical delimitation*" of work that is less often perceived but also a central issue. No workplace can now do without information technology.

4.4.1. Temporal Delimitation

In terms of *temporal delimitation*, the rapid technical developments in ICT have created shortcomings that open up gray areas between existing labour laws and the actual conditions in the world of work due to technological change and allow scope for circumvention strategies of the legal principles of labour law. Especially the "flexibility debate" is a point of conflict. The issue is not merely diverging interests between employers and employees, but also the different preferences, concerns and needs between employee groups. Some want a very strict separation of work and private life. Others want to decide personally when and where they work and they also have no problem with clarifying this situation with their employer. Some expect a strong state that prevents unfair working conditions. Others do not want state paternalism, telling them when and how they want to work. Socially, therefore, not a single solution is required, but rather plural offers that meet the manifold needs and demands [127]. One problem is the traditional Working Time Act and its detailed provisions. Another problem is the quantity and the intensity of work, which has to be done by an employee.

In this regard, new regulatory mechanisms are needed.

---

[126] See also K. Gottschall, G.G. Voß, *op. cit.*, 16 f.

[127] See dBMAS, *Nextpractice Study „Wertewelten 4.0*, *https://www.arbeitenviernull.de/fileadmin/Wertewelten/Wertestudie_Arbeiten_4.0-1.pdf*, 2016, 47.

4.1.2. Local delimitation

Due to the increasing number of employees with changing workplaces ("*local delimitation*") it can be stated, that the employee protection regulations no longer correspond to the reality of life. As a result, many of the provisions of the ASchG relating to the "workplace" [128] are not applicable to new forms of work. There is a need for new regulations here too. The employee protection regulations are based on a fixed computer-based workplace, as was the case in the 1980s. The new problem areas caused by mobile work are insufficiently covered. Just think of small monitors (e.g. on the smartphone or on the tablet) or the constant information overload by e-mails. The more the duty of work is delimited spatially, the greater is the importance of control. Especially modern ICT of work offer new forms of control [129]. In this context the "*technical delimitation*" of work is often less perceived but also a central issue.

4.2. Crowdwork

Because of the variety of business models in platform-economy and the different ways of organising these platforms, we cannot make a fundamental statement, if crowdworkers are protected by labour law. According to the current legal situation, there is also no general regulation in Austria according to which provisions crowdworkers are to be treated. You have to analyse each contractual relationship in two steps: The first step is to clarify which parties have a contractual relationship. Next, the legal basis of this contractual relationship has to be analysed.

The more the self-determination of crowdworkers with regard to working hours, place of work and work sequence is restricted, the more they are subject to the contractual partner's controls and are obliged to provide performance personally, the more likely a contractual relationship exists. If this is the case, the question arises as to whether the work orders are a legitimate chain of fixed-term employment relationships, since they are covered by the interests of the crowdworker, or whether they are an unlawful chain of employment contracts that is reinterpreted as a permanent em-

[128] With the exception of those relating to computer screen work in the home office as well as other workplaces chosen by the AN employees.

[129] M. Risak, *Arbeitsrecht 4.0*, cit., 25.

ployment relationship. If, on the other hand, there is no employment relationship from the outset, it must still be examined whether the crowdworker is entitled to the protection of a homeworker or an employee-like person. But that is unlikely according to the current legal situation, since mental activities are not to be classified as homeworking. An employee-like person is characterized by a small number of clients, this condition is only given with a contractual relationship between crowdworker and platform.

At the end of this chain of checks, it may be concluded that crowdworkers are neither employees nor, as homeworkers or employee-like persons, are subject to certain labour protection provisions. Nevertheless, there are case studies which show that crowdworkers are often employees according to the criteria of personal dependency explained above. It is to be hoped that the legislator will respond to the numerous legal policy demands of the literature and provides employees of the future with labour protection.

NEW FORMS OF WORK IN PORTUGAL

Mariana Pinto Ramos *

1. Introduction

The economic crisis and former society developments, such as the need for increased flexibility in the labour market, the fight against high rates of unemployment across Europe and the greater use of advanced information and communications technology ("ICT"), have resulted in the emergence of new forms of work. These have been transforming the traditional labour relationship, forcing States to adapt to new emerging labour realities that are gradually shaping the work market.

However, it still is not known enough about these "new forms of work", especially about their distinctive features and the implications they have for working conditions and the labour market in each Member-State.

Therefore, Member States have shown difficulties in regulating these new forms of work internally, which forced the EU to promote the discussion at European level, giving guidelines that, hopefully, would be adopted by each Member-State.

Portugal, in particular, has been facing changes in the work market due to the challenges related to digital platform working and the lack of sufficient regulation, which will be the main focus of these study.

* Master in Labour Law by the Faculty of Law of the University of Lisbon, Lawyer specialised in Labour Law in Vieira de Almeida Law Firm, Member participant of the Young Scholars Section of ISLSSL, Member of the Portuguese Association of Labour Law ("APODIT") and Secretary of the General Assembly of the Association for Young Portuguese Labour Lawyers ("AJJ").

2. New dimensions of work in Europe

Giving the knowledge gap regarding new forms of work across Europe, Eurofound identified, in a report of 2015, the emerging trends on the work market [1], which resulted in the categorization of nine broad types of new employment forms [2], how these new employment forms operate in Member States and their effects on working conditions and the labour market.

As said, across Europe, policy discussions on new forms of work are taking place. They revolve around the issue of how to make the labour market more flexible and inclusive; how to legalise undeclared employment practices; how to ensure sound social protection and working conditions; and how to avoid the "replacement" of standard employment by (new) employment forms that might be less favourable giving the lack of local regulation.

The debate is largely between the social partners, whereas governments, overall, do not seem to be taking an active role. Employers' representatives defend their need for flexibility, and employees' representatives raise concerns about social protection, employment rights and working conditions [3]. Governments, however, still lack a proper response to the challenges they are facing.

---

[1] Eurofound, *New Forms of Employment*, Publications Office of the European Union, Luxembourg, 2015.

[2] 1) Employee Sharing, where an individual worker is jointly hired by a group of employers to meet the HR needs of various companies, resulting in permanent full-time employment for the worker; 2) Job Sharing, where an employer hires two or more workers to jointly fill a specific job, combining two or more part-time jobs into a fulltime position; 3) Interim Management, in which highly skilled experts are hired temporarily for a specific project or to solve a specific problem, thereby integrating external management capacities in the work organisation; 4) Casual Work, where an employer is not obliged to regularly provide work to the employee, but has the flexibility of calling them in on demand; 5) ICT-based mobile work, where workers can do their job from any place at any time, supported by modern technologies; 6) Voucher-based work, where the employment relationship is based on payment for services with a voucher purchased from an authorised organisation that covers both pay and social security contributions; 7) Portfolio work, where a self-employed individual works for a large number of clients, doing smallscale jobs for each of them; 8) Crowd employment, where an online platform matches employers and workers, often with larger tasks being split up and divided among a 'virtual cloud' of workers; 9) Collaborative employment, where freelancers, the self-employed or micro enterprises cooperate in some way to overcome limitations of size and professional isolation.

[3] Eurofound, *Overview of New Forms of Employment – 2018 update*, Publications Office of the European Union, Luxembourg, 2018.

3. Digital platform work

The recent surge of digital labour platforms, has led to new forms of work organisation and tasks distribution across the workforce [4]. This has raised several questions about the functioning and the benefits deriving from the reorganisation of work that those platforms entail and the associated risks [5].

The European Commission assessed online platforms in a May 2016 communication, focusing on both their innovation opportunities and regulatory challenges [6]. In June 2016, the Commission also adopted its European Agenda for the Collaborative Economy, which clarified the concept and provided some guidance on the employment status of platform workers and the EU definition of worker.

The European Pillar of Social Rights aims to address some of the policy challenges associated to new forms of employment, including platform work. As accompanying initiatives, the Commission presented in December 2017 a proposal for a new Directive on transparent and predictable working conditions, and in March 2018 a proposal for a Council Recommendation on access to social protection for workers and the self-employed.

According to the European Commission, it has been defined labour service platforms as "providing services via online platforms, where you and the client are matched digitally, payment is conducted digitally via the platform and the work is location-independent, web-based" and "providing services via online platforms, where you and the client are matched digitally, and the payment is conducted digitally via the platform, but work is performed on-location".

The status of platform workers is probably the most complex policy issue at stake. The actual nature of the employment relationship is nebulous in most cases. This is particularly problematic because employment status is key for access to social security, training entitlements and coverage by legislation on working conditions.

---

[4] Eurofound, *Automation, Digitisation and Platforms: Implications for Work and Employment*, Publications Office of the European Union, Luxembourg, 2018.

[5] A. Boes, *Digitization: New Work Concepts are Revolutionizing the World of Work*, in *Social Europe*, 20 November 2014, available at *http://www.isf-muenchen.de/pdf/IBM-Gutachten_E-Mail.pdf*.

[6] European Commission, COM(2015)192 final, *A Digital Single Market Strategy for Europe*.

In addition, digital platforms do introduce some new dimensions to this problem regarding to its work status. Firstly, they introduce third parties into what were previously bilateral arrangements, raising the question of who should be regarded as the employer: the client, the platform, some other intermediary or the worker.

Also, the nature of digital platforms creates new asymmetries of power in the labour market, namely because the scale of the platforms, their international scope, the impersonal nature of communication with them and the use of standardised procedures present workers with a series of predetermined options. The lack of accountability of the platforms and the isolation and fragmentation of the workforce makes it difficult to apply the concept of meaningful negotiation implied in traditional concepts either of an employment relationship or of a service contract between a self-employed worker and a client [7].

The conditions of platform work are more polarised than those of regular workers. Therefore, the need for a clarification of the employment status of platform workers appears obvious [8].

4. The Portuguese reality

Given the European developments and current changes regarding new forms of work and the challenges that Member-States have been facing, the Portuguese law faced the same challenges with Uber entering the Portuguese market in 2014 [9], amongst other platform companies which came to revolutionize the traditional concept of work in our society.

In the context of new forms of work, in Portugal prevails the platform services in the transport sector (Uber, Cabify, Chaffeur Privé, amongst other). It also has been launching other platform services such as Uber Eats and Glovo where the consumer orders food from various popular restaurants in the city via the platform and received it at home. These platforms also

[7] U. Huws, *New Forms of Platform Employment or Crowd Work*, in W. Wobbe, E. Bova, C. Dragomirescu-Gaina (eds.), *The Digital Economy and the Single Market – Employment Prospects and Working Conditions in Europe*, in *FEPS*, 2016, (65-81), 77-79.

[8] A. Pesole, M.C. Urzí Brancati, E. Fernández-Macías, F. Biagi, I. González Vázquez, *Platform Workers in Europe*, in *EUR 29275 EN*, Publications Office of the European Union, Luxembourg, 2018, ISBN 978-92-79-87996-8, doi:10.2760/742789, JRC112157.

[9] Cf. *https://uberportugal.pt/portugal/*.

have delivery services for other type of products other than food, namely pharmacy or even specific delivery services under payment of a special fee.

In Portugal, the weight of employment generated directly and indirectly by digital platform businesses is expected to be one of the highest in a set of 14 European countries. According to the survey conducted by the European Commission's science service [10], 10,6% of the adult population in Portugal may be more deeply involved and have a financially relevant dependence on this type of activity. Also, there are some which carry significant platform work but not as their main occupation.

As mentioned, this percentage of adult population in Portugal is rendering work and services in various businesses such as Uber, UberEats, Glovo, Cabify, Taxify, Zomato, Booking, Airbnb, but can also involve contact centres and retailers with virtual presence (supermarkets, clothing and footwear shops and electronics, for example). According to the study, some employ people directly, but part of the statistic also counts on those who are self-employed and provide services through the platform, making use of the brand [11].

Although the Portuguese socio-economic context has now mainly recovered, these new forms of employment have been working for the Portuguese population as an escape to high rates of unemployment due to the financial crisis that endures since 2010, providing new work markets to be explored, although with unclear and mainly disadvantageous conditions of work when compared with the more traditional labour relation.

5. The Portuguese "Uber Law"

Since the transportation services through digital platforms have been the pioneers of these new forms of work in Portugal, it is also natural that they were the ones that collected more attention (and not always the best kind of attention) from the population and, therefore, from the Government. However, it took almost four years for the Portuguese law to regulate these new forms of work in the transport sector, but ultimately it had to adapt.

Although the first attempt resulted in the President's veto, in Septem-

[10] A. Pesole, M.C. Urzí Brancati, E. Fernández-Macías, F. Biagi, I. González Vázquez, *op. cit.*

[11] This is the case with local accommodation owners.

ber 2018, the law regulating electronic transport platforms ("TVDE"), such as Uber or Cabify, came into force after long months of parliamentary discussion and disputes over the taxi industry (law no. 45/2018, of 10 of August [12]). According to the new law, relevant changes are taken into force, namely the start of the TVDE operator activity being subject to a regulator licensing, which will be valid for 10 years, amongst other administrative requirements.

However, in a pure labour perspective, the "Uber law" was parse and did not provide the answer that all have been asking: are these drivers employees of the respective platforms or not?

The law defines that essential requirements of the activity of a driver of transport in vehicle decharacterized from electronic platform are the following:

a) have a written agreement/contract stating the relationship between the parties;

b) TVDE drivers may not operate TVDE vehicles for more than 10 hours within a 24-hour period, irrespective of the number of platforms on which the TVDE driver provides services, without prejudice to mandatory Labour Code, if they establish a shorter period. It is also up to the operator of the platform to ensure that drivers comply with the limits defined by law;

c) the platform operator must observe all legal and regulatory linkages relevant to the exercise of its activity, including those arising from labour, safety and health at work and social security legislation.

Regarding the first requirement, even though the text of the law implies that the driver must have a written contract with the operator, it does not state that such contract must be an employment one.

Besides, even though the Portuguese Prime-Minister, António Costa, has stated to the press in numerous opportunities that the law implies the conclusion of an employment contract between the platform and the driver, given the text of the law, we are not of the same opinion. Nothing forbids that the parties contractually define a service providers agreement instead of an employment relationship.

We must also not forget that even though many drivers would prefer to be employees of an operator, there are many others that still prefer to be

[12] Available in *Diário da República* n. 154/2018, Série I of 2018-08-10, in *https://data.dre.pt/eli/lei/45/2018/08/10/p/dre/pt/html*.

self-employed, especially because platform work may not be their primarily activity, or simply prefer the flexibility of being their own bosses.

Therefore, the law must not (and does not) bind the parties to an employment contract as a requisite of this activity.

The same argument applies to the "working time" whereas the time limits imposed for this type of activity are binding due to security and health reasons and not because the operator is the employer of the driver. This driving time limitations are due for the security of the activity, even though are not applied in similar conditions to taxis.

However, even in a service provider agreement, the beneficiary of the activity (in this case, the operator), may define some rules for the work and that does not imply, alone, that we are facing a false employment relationship.

Finally, the fact that the operator must observe all legal and regulatory linkages relevant to the exercise of its activity, including those arising from labour, safety and health at work and social security legislation, does not mean that the driver itself – when self-employed – does not.

What the law states is that the responsibility for the activity is also from the operator, in the general terms of the law.

In sum, this means that the "Uber Law" does not force the parties to conclude an employment contract but allows the parties to establish the contractual relationship they want to conclude.

However, the nature of the relationship between certain driver and the platform will be, of course, under scrutiny of the general labour law, namely the Portuguese Labour Code [13] ("PLC") and by its regulator, the Authority for Working Conditions [14] ("ACT") which has inspection powers towards labour issues.

For that, as well, the law provides us the tools to access the nature of the relationship at hands, as we will see.

6. The Portuguese legal framework

Firstly, it is worth making a distinction between an employment contract and a service agreement, according to the Portuguese legal framework.

---

[13] Law no. 7/2009, of 12 of February.

[14] *http://www.act.gov.pt.*

As previously shown, the "Uber Law" allows the parties to establish the contractual relationship as they want, which means that either an employment contract or a service agreement may be concluded between the driver and the platform. Nevertheless, one should examine whether this is in accordance to the general labour law.

In the Portuguese legal system, the contract of employment is defined in accordance with art. 1152 of the Civil Code ("PCC") and art. 11 of the PLC: a contract whereby an individual agrees to work for another person, or persons, as part of their organisations and under their direction and control, in exchange for payment. The parties to this contract are the employee and the employer, with the former being the individual under the latter's direction and control [15]. The Portuguese legal doctrine [16] tends to identify the following elements of the employment contract: labour activity, remuneration and legal subordination.

On the other hand, the legal definition of service agreement can be found in art. 1154 PCC: a contract in which the debtor must provide, through an intellectual or manual activity, a certain result to the creditor, with or without remuneration. Therefore, the main distinction between service agreement and the contract of employment is the fact that, in the former, the debtor provides its activity independently and isn't under the creditor's direction and control.

In other words, the determining factor [17] in qualifying an agreement as a contract of employment is the existence of legal subordination, in which the employee is subject to the employer's authority and management powers [18], and that involves not only obeying legitimate orders and instructions related to work performance and discipline (art. 128 PLC), but also being subject to the employer's disciplinary powers (artt. 98 and 328 PLC).

The Portuguese legal system determines the existence of legal subordination by adopting an "evidence-based method" [19], as provided by art. 12 PLC, which introduces a legal presumption whereby a contract of employ-

---

[15] F. Ribeiro Lopes, *Trabalho subordinado ou trabalho autónomo: um problema de qualificação*, in *Revista de Direito e de Estudos Sociais*, 1987, 57-80.

[16] M. Do Rosário Palma Ramalho (direito do Trabalho), *Parte II: Situações Laborais Individuais*, III ed., Coimbra Editora, Almedina, 2010, 20-58.

[17] M. Do Rosário Palma Ramalho, *op. cit.*, 32.

[18] N. De Salter Cid, *Contrato de trabalho, contrato de prestação de serviço e utilização indevida deste: problemas e soluções*, in *Revista de Direito e de Estudos Sociais*, 2017, 180.

[19] M. Do Rosário Palma Ramalho, *op. cit.*, 41-49; N. De Salter Cid, *op. cit.*, 182-191.

ment exists when: the employer owns or determines the workplace and work equipment; there are fixed daily working hours; the employee is paid a certain amount of money periodically; among others.

Apart from the established concepts of independent self-employment and subordinate employment, there is the concept of economically dependent work, provided by art. 10, which covers situation of workers who "remain economically dependent on a single principle or client/employer for their source of income" [20], despite being formally self-employed, since they do not have a contract of employment.

Art. 10 PLC extends the regime related to personality rights, non-discrimination rights and health and safety protection to economically dependent workers, besides making use of the concept of employee-like workers, which corresponds to the civil law notion of "parasubordination" in Italy [21].

It should be noted that the concept of economic dependency is not to be understood as meaning the need for labour income in order to guarantee the workers and their families' subsistence, but as referring to the situation in which the worker is integrated and exclusively engaged in an otherwise unrelated productive process [22], despite being formally independent.

Taking all the above in the account, it is important to link such concepts with these "new forms of work", such as the provision of individual transport of passengers through an electronic platform (e.g.: Uber Technologies Inc.), which is established by the recently approved law no. 45/2018 of August 10th ("Uber Law").

As far as we are concerned, these are cases of service agreements, and not contracts of employment, since the drivers provide a certain result to the users of the electronic platform without any legal subordination. We consider that there is no contract of employment for several reasons:

a) the driver owns the work equipment, *i.e.*, the car that is used to provide the transportation service to riders;

b) workplace isn't determined by the operator, which means the driver has discretion to choose where he wants to provide the service;

---

[20] Commission Of The European Communities, *Green Paper: Modernising Labour Law to Meet the Challenges of the 21st Century*, Brussels, 22 November 2006, COM(2006)708 final, 11.

[21] M. Pedrazzoli, *Prestazione d'opera e parasubordinazione*, in *Rivista italiana di diritto del lavoro*, 1985, 506-556; M. Vittoria Ballestreto, *L'ambigua nozione di lavoro parasubordinato*, in *Lavoro e Diritto*, 1, 1987, 41-67.

[22] M. Do Rosário Palma Ramalho, *op. cit.*, 83.

c) it is only legally established a maximum of 10 working hours daily and the operator cannot subject the drivers to a fixed schedule;

d) the drivers' remuneration is variable and not periodic, since it depends on the varying number and length of the trips he or she accepts.

However, we consider that there is *economic dependency*, since the driver, while formally independent, is engaged in a productive process that is organised and determined by the electronic platform operator. In fact, only drivers registered in the electronic platform may provide these services, as established by art. 10(1) of Uber Law. Furthermore, the operator must ensure compliance with operating conditions and block the access to the platform in case of non-compliance, as provided by art 14 of Uber Law.

To sum up, these 'new forms of work' in Portugal, in which an individual provides a service to consumers through an electronic platform, whose operator acts as the intermediary, rehashed the debate related to the definition of contract of employment and its difference compared to the service agreement, since they occupy a "grey area" between those two concepts. However, it is our opinion that there is no legal subordination, which means that these are not cases of contracts of employment but, at most, situations of "parasubordination", which is evidenced by art. 7 of Uber Law, providing a similar protection to the drivers in non-discrimination rights, in parallel to what is provided by art. 10 PLC to "*employee-like workers*".

7. New proposals

After the "Uber Law", and going forward on the legislative trend regarding new forms of work in Portugal, the Portuguese Conservative Party (CDS), more recently, proposed in its electoral program concrete measures to extend the current telework regime, allowing work from home to be used more flexibly and for more workers, a system they call "Smartworking" [23].

This proposal aims to create the conditions to introduce a working method that is focused in the reconciliation of work and family, and in order to regulate a broader teleworking scheme, the conservative party proposed amendments to the PLC that go towards the new trend within the European Union to guarantee legislation to accompany the labour challenges

[23] Cf. *http://www.cds.pt/smartworking.html.*

related to the introduction of new technologies, as is the case in Italy, of the regulation of lavoro agile.

Although the proposed Smart Working regulation grants autonomy in the choice of time, mode and place of work, it also leads to the emergence of problems related to the qualification of the employment contract and the indications concerning the presumption of subordination [24].

This proposed regime also entails the consecration of the "right to desconexion", *i.e.*, the establishment of the right to leave the worker to not receive telephone calls or other messages, except in situations where there is a need to prevent urgent situations.

Therefore, even though this proposal is a new initiative in regulating these new forms of work in Portugal, it is still in an embryonic state, which leads to more questions than answers.

8. Conclusion

New forms of work, and its constant evolving nature, poses important challenges for policy making. Looking forward, further analytical work to better understand this phenomenon is clearly needed.

A close monitoring of developments in this area will be crucial in the coming years to underpin the necessary policy response at both EU and national level.

In particular, digital platform work has shown great potential in flexibilizing the work market and provide new employment opportunities for those who urge to provide professional and non-professional labour services through a digital single market. In this scenario, new forms of work that transcend national boundaries represent a clear case for adapting and expanding the EU acquis in the field of employment protection and working conditions.

Furthermore, these 'new forms of work' in Portugal, in which an individual provides a service to consumers through an electronic platform whose operator acts as the intermediary, rehashed the debate related to the definition of contract of employment and its difference compared to the service agreement, since they occupy a "grey area" between those two con-

[24] J. Moreira Dias, *Smart Working,* I, *Los actuales cambios sociales y laborales*, dir. L. Mella Méndez, Peter Lang, 2017, pp. 153-184.

cepts. However, the parse legislative examples we have today (*i.e.*, the "Uber Law") do not provide the answer regarding the working status of these workers under the law. Therefore, at least in Portugal, there is still a long way to go forward regarding new forms of work, their regulation and implementation, which we hope that will continue to be under discussion in the future.

III

REGULATING WORK FROM DIFFERENT PERSPECTIVES

QUALITY INTERNSHIPS: DIFFERENT REGULATIONS IN SOME EUROPEAN COUNTRIES

Silvia Donà *

1. Introduction

Over the last few years there has been an increase in the unemployment rate in Europe and young people have been those who are affected the most [1].

As a result, it is essential for European institutions and Member States to foster youth employability through tools such as apprenticeships, internships, and work-linked training [2], which promote the transition from school to work.

An internship is a training experience in a work context, which permits the intern to acquire professional skills and encourages employment or re-

* Post-doctoral researcher at INAPP, Italian national institute for public policy analysis.

[1] M. Tiraboschi, *La disoccupazione giovanile in tempo di crisi: un monito all'Europa per rifondare il diritto del lavoro*, in *Diritto delle relazioni industriali*, 2, 2012.

[2] Law no. 28 March 2003, 53 introduces for the first time the work-linked training. See P. Pascucci, *Stage e lavoro, la disciplina dei tirocini formativi e di orientamento*, Giappichelli, Torino, 2008, 97 ss. Most recently the law 13 July 2015, no. 107 has made it compulsory. That is the so-called "Buona Scuola" School Reform which establishes a number of work-linked training hours: 400 hours in the last three years for the Technical-Professional Institutes and 200 hours in the last three years for High Schools. The work places where it is possible to do the work-linked traineeship are companies, public bodies, museums, libraries, and associations. For this reason, it was decided to establish a National Registry where companies and public bodies willing to offer work-linked training paths are enlisted.

turn-to-work – in this case it represents a training measure of active policy. In accordance with the European Commission requirements and consequently the law no. 92/2012, minimum standards are defined at the national level in order to outline a quality framework for using such tools.

Nevertheless, despite being very widespread in the European labour market, the internship has not produced positive results in fighting youth unemployment so far. Indeed, training is frequently limited to low-profile tasks and its practical implementation is not in line with the legal regulation: for instance, due to a duration longer than prescribed by the intern's status, the repetition of the same internship in the same organisation or excessive overtime work. These problematic issues do not allow internships to work properly and according to their purpose as a policy tool.

It is clear that there is a correlation between the quality of internships and consequent job opportunities[3]; in fact, those who took part in low-quality internships proved to have less employment opportunities. For these reasons, European Parliament resolution of 14 June 2012, titled "Towards a job-rich recovery", invited the European Commission to present a proposal for a Council Recommendation on a Quality Framework for Traineeships (2014/C 88/01). The recommendation proposal was submitted by the Commission on the 4th of December 2013 and, on this ground, adopted by the Council of European Union. After two years, the service Departments of the Commission submitted the working document "*Applying the Quality Framework for Traineeships*" which provides an assessment of the impact of the Recommendation on the legislative systems of Member States.

The most important points are: promoting a "standardisation" of the national regulations in accordance with common principles. Indeed, the Recommendation aims to facilitate EU interns' mobility through clearer national regulations and smoother administrative procedures; increasing the number and quality of internships; and boosting youth employment thanks to EU structural and investment funds, such as the European Social Fund and the European Regional Development Fund.

The document *Applying the Quality framework for traineeships*, presented for the first time indications on how to implement the criteria and principles set out in the Recommendation.

The document includes only extracurricular internships of two types:

[3] G. Iuzzolino, S. Lotito, B. Sofronic, G. Tosi, *L'attuazione della Raccomandazione del Consiglio dell'Unione Europea su un Quadro di qualità per i tirocini*, in *www.inapp.org*, 5 ss.

internships in the free market, based on a direct relationship between the intern and the host, and internships related to active labour market policies, such as engaging public institutions like employment services to act as a promoter who has the role of ensuring the regularity and the quality of educational training.

It emerges that only half of the EU Member States amended their national legislations or started *ad hoc* regulatory intervention to comply with the Recommendation's principles.

Therefore, the situation is still fragmented: only Poland, Belgium, Germany, Bulgaria, Lithuania, Portugal, Romania, Slovenia and Spain regulated both internships in the free market and those related to active labour market polices either with specific traineeship laws or with measures from labour laws.

In contrast, Croatia, Estonia, Denmark, Italy, Finland, Malta, Slovakia and Sweden regulated only the second type of traineeships. Other countries like France, Greece, Austria, Ireland, Cyprus, the Netherlands, Latvia, Czech Republic, Hungary possess incomplete legal frameworks: some of them did not allow internships in the free market and only implemented either specific programmes for active labour market, policy-related internships or generic rules of labour law. Luxembourg has a specific regulation for internships of the first type, but none for those of the second type.

Internships in the free market are very often considered equal to a real employment relationship; therefore, they enjoy protection through health and safety in the workplace, accident insurance, third party liability insurance and insurance covering any accidental injury or damage arising from the actions of the intern on work experience.

2. Brief overview of the regulation of internships in four different EU countries

2.1. Legal framework in Spain

In Spain there are three different kinds of traineeship: the *programa de practicas*, which consists of educational training and internship after graduation, the *practicas laborales*, and the *practicas non laborales*.

More specifically, the *practica* can be compulsory in a technical-professional educational system for people aged 16-18 and it is mandatory for obtaining a qualification. Otherwise, it can be part of the work-training pro-

gramme of the Workshop-school, the so-called *Escuela talle y Casa de Oficios, Talleres de empleo*, which are directed at unemployed young people between the ages of 16-25 years without a qualification and an aim of learning a profession. Moreover, the *practica* can be included in many graduate, postgraduate and master degree university courses with the purpose of putting into practice the knowledge acquired through university study and of facilitating the entry of young people into the labour market.

The so-called *practica extrena* is not regarded as employment, but as a training experience which does not oblige the host to pay remuneration and which is considered very useful for the students to obtain university educational credits. In relation to this arrangement, universities have been improving trilateral conventions with companies and students in order to provide internship scholarships – called *becas en empresa* or *becas de practica* – for those students who have obtained at least the 50% of their educational credits.

The traineeship duration may be up to six months maximum; if the training period is included in the academic curriculum, the traineeship is defined as curricular, otherwise it is defined as extracurricular[4].

The *practicas laborales* are regulated by the art. 13 of law no. 11/2013 and by art. 11 of Royal Decree no. 2/2015. These articles not only regulate the establishment of the internship, but also provide incentives and aim to facilitate the entry of interns into the labour market, through theoretical and practical training, and the professional re-integration of socially excluded individuals.

The contract "*de practicas*" can last from a minimum of 6 months to a maximum of 2 years with two possible extensions of the contract within this period. The traineeship is paid about 60% of the average remuneration expected for equal work in the first year and no less than 75% in the second year, but it cannot be less than the minimum wage, which in 2017 was approximately 825 euros per month. At the end of the period of *practica*, as applies to internships in Italy, the intern is given certification attesting to the activities they have undertaken and the duration of their training.

The regulations also ensure tax relief for companies or for freelance professionals who establish an employment contract with up-to-30 year old interns.

---

[4] G. Iuzzolino, S. Lotito, B. Sofronic, G. Tosi, *op. cit.*, 20 ss.

The *practicas non laborales* are internships addressed to 18-25 aged young people who have graduated from university or secondary school. If they are registered as unemployed at the Employment Services they are subject to the regulation of Royal Decree 11 July 2014, no. 592 which regulates internships for university students and substitutes Royal Decree no. 1543/2011 (varying the traineeship's duration from 3 to 9 months). This legislation is the same as that which regulates conventions between universities and companies. Under this legislation, the traineeship is regulated by the so-called *contrato en practica* contract (or *contrato para la formacio*). This kind of internship is provided by placement services of Spanish universities, public employment services, portals dedicated to employment, companies' websites, and programmes run by foundations. This type of internship ensures expenses reimbursement of about 426 euros per month. The Spanish legislation is in line with the indications presented in the EU Recommendation on the traineeship's quality, even though there are some points that could be amended to comply with the dictates of the EU. There can possibly be a limitation of the duration of the *practicas laborales*, which generally can last up to two years and do not impose tutoring. Another aspect within the Spanish Framework which could arguably be improved is the transparency of the restriction limits in the activation of training activities and with regard to recruitment.

2.2. Legal framework in France

When we talk about training we can refer to the French word *stage*; the expression "*stage d'initiation à la vie professionelle*" [5] which means exactly "traineeship", "internship" or "period of education or training" [6]. The rules that regulate the internship experience are contained in the "*Code of Education*", *Code de l'éducation*, which is supplemented and updated by laws on internships and on other kind of training contracts [7].

France has undergone a relevant legislative evolution over the last years to guarantee the quality of internships for students, to improve the legal

[5] J. Rivero, J. Savatier, *Droit du travail*, Presses Universitaires de France, Parigi, 1991, 403; M. Sala Chiri, *Il tirocinio. Artt. 2130-2134*, in *Il Codice Civile. Commentario*, diretto da P. Schlesinger, Giuffrè, Milano, 1992, 56.

[6] V.J. Pélissier, A. Supiot, A. Jeammaud, *Droit du travail*, Dalloz, Paris, 2000, 235 ss.

[7] P. Pascucci, *Stage e lavoro*, cit., 97 ss.

status of interns and to prevent abuses by companies. Traineeships are regulated by legislative acts, laws and decrees, which, starting from June 2000, have been encapsulated in the constantly updated *Code de l'éducation*.

More specifically, traineeships are regulated by the provisions of art. 124-1 to 124-20 of the Code of Education, with the exception of lifelong learning internships -which are defined in the Sixth Part of the Labour Code – and those traineeships that fall under the art. 4153-1 of the Labour Code dedicated to minors under the age of 16.

The loi no. 2014-788 of 10 July 2014, has three main goals: first of all, the creation of high quality traineeships; secondly, the prevention of abuses through the substitution of employment contracts with internships; and finally, the improvement of the legal status of trainees. These rules are aimed at the training of the intern and highlight the importance of the Convention of Internship (*Convention de stage*) concluded by the student during his/her study period before graduation.

However, Decree no. 1359 of 26 October 2015, provides for limits on the use of internships by companies and further strengthens trainees' rights. The Convention of Internship indicates the most important rights and duties of the three contracting parties and should be signed by the promoter, the host and the intern. In France, the main promoters of internships are educational institutions and vocational training centers for adults and universities. Large companies generally host the highest number of interns; however, in recent years the number of small and medium-sized companies hosting young interns is increasing steadily. Therefore, the internship in France is becoming a training experience closely connected to the working context and is only addressed to schools, universities, and professional training students. These are the so-called curricular traineeships offered to students by their educational institutes, with a view to strengthening their professional skills and facilitating school-to-work transition through on-the-job training experiences before their graduation.

The intern is frequently a student and is provided a final certification attesting the acquired competence -*Attestation de stage* – by the host at the end of training and, at the same time, the trainee produces a quality assessment of the training and tutoring.

The repetition of the same internship in the same host is not allowed and its duration can be no longer than 6 months. The traineeship's activities may not consist of repetitive tasks and should be previously defined in the training plan to be in line with the educational path.

The duration of a traineeship period can vary from 3-4 weeks to 6 months

maximum with 35-39 working hours per week. In the event that the activities of the training plan require more time commitment, derogations from that standard may be granted.

In the event that the traineeship lasts more than 2 months, a tax-free expenses' reimbursement is provided monthly, which from the 1st September 2015 is around 554 euros. Moreover, interns can take maternity, paternity or adoption leave and permissions, as well as obtain reimbursement of travel expenses and meal vouchers.

Another type of traineeships is the *ALMP-type traineeship*, which is very short training program provided by the *Pole Emploi* as a measure of active labour market policy. The *Pole Emploi* is the French public body in charge of employment and unemployment benefits [8].

Hence, in France internships are curricular, only a few are not related to active labour market policies and these are regulated by a legislation in compliance with the directives of the EU Recommendation.

2.3. Legal framework in Germany

In Germany, responsibility for education and professional training are distributed between the Federal State and the *Länder* on the basis of the *Grundgesetz*, the Federal Constitution of 23 May 1949, which represents the benchmark for the whole educational and training system. The Federal State has primary responsibility for professional training and apprenticeship.

The Federal Ministry of Education and Research, the *Bundesministerium für Bildung und Forschung-BMBF*, is the body in charge of the policy, coordination and legislation of professional training in collaboration with the Federal Ministry of the Economy and Technology, that is, the *Bundesministerium für Wirtschaft und Technologie-BMWI.*

Another important body for the development of training is the joint Commission of the Federal State and *Länder* for educational planning and research promotion, the so-called *Bund-Länder-Kommission fur Bildungsplanung und Forschungsforderung*. The Commission is composed of Federal State and *Länder* governments representatives and aimed at defining cooperation arrangements between the central and local governments on sub-

[8] G. Iuzzolino, S. Lotito, B. Sofronic, G. Tosi, *op. cit.*, 17 ss.

jects like planning and research, which fall within federal jurisdiction [9].

In Germany there are two kinds of internships. The first is the *Volontariat* for students and graduates from secondary school and university; intended to ensure they can complete their educational path with training experience in a working context. The second type is the *Praktikum* which is compulsory training directed at secondary school or vocational centre students aged 14-18, and university graduates aged 18-24. The rights and duties of the parties are stipulated in a written *traineeship agreement*, which is signed by both the intern and the host.

Since the *Praktikum* is curricular, it does not provide for compulsory compensation. On the other hand, the *Volontariat* has a duration longer than three months and provides compensation which should be proportional to the intern's qualifications and in line with the minimum wage [10]. However, interns are excluded from the minimum wage benefit in the following cases: interns under the age of 18, traineeships undertaken during tertiary education pathways or professional training, carrier guidance internships undertaken during professional training or university courses, long duration traineeships addressed to unemployed people and training or career guidance internships related to active labour market policies and addressed to those from disadvantaged backgrounds.

The *Volontariat* guarantees paid sick leave and holidays, while the compulsory curricular internship is regulated by each educational institution in relation to duration and skills that should be certified by the host, and training activities.

The German legislation mostly complies with the direction of the EU Recommendation; as a result, it was not necessary to produce new rules to improve the quality of traineeships. Nonetheless, in order to ensure improved working conditions and a higher compliance with the standards of *Quality Framework for Traineeships*, in 2015 Germany gave effect to minimum wage law for internships with a duration longer than 3 months. Since the adoption of law no. 26/2005 on professional training, the traineeship, and particularly the *traineeship agreement*, ensures protection through

[9] Cf. D. Gentilini, *Modelli di qualità dei sistemi VET in Europa, Finlandia, Germania, Romania, Austria*, in *Collana Isfol Research Paper*, 16, October 2014.

[10] In 2017 the level of the minimum wage is around 1498 euros per month. See S. Spattini, *Germania: le perplessità sul salario minimo*, in *www.adapt.it*, 3 July 2014. For further information on the Italian system, cf. M. Magnani, *Il salario minimo. Problemi giuridici del salario minimo legale nell'ordinamento italiano*, in *Giurisprudenza italiana*, 2015, 750 ss.; M. Magnani, *Salario minimo*, in *Libro dell'anno del diritto*, 2015, 375 ss.

measures like accident insurance, sick pay, health and safety standards in the work place.

However, two aspects which differ from the contents of EU Recommendation are the possibility of internships longer than 6 months (the maximum allowed by the Recommendation) and the lack of regulation in terms of learning objectives.

Further, in Germany, in contrast with the Recommendation, neither the host nor the promoter provides tutoring in either kind of internships. Furthermore, internships with a duration of less than 3 months are excluded from the minimum wage law and from the transparency requirements on the procedures for the internships implementation [11].

2.4. Legal framework in Italy

Art. 1, par. 34 of the "Fornero" Law establishes that within a standing Conference on the relations of State, Regions and Autonomous Provinces of Trento and South Tyrol, the Government and the Regions conclude an agreement for defining shared guidelines concerning educational traineeship and career guidance on the basis of certain defined criteria. These criteria are defined as follows: the revision of internships regulation (also with regard to the enhancement of other kinds of training contracts); and the implementation of measures for fighting and preventing misuse of traineeships.

These measures include the timely identification of how an intern performs training activities; the recognition of the standards which can guarantee the traineeship quality and of the consequences that flow from lack of quality; and recognition of an appropriate compensation, even in form of a lump sum proportionate to the tasks performed by an intern.

Art. 1, par. 35 of the law no. 92/2012 prescribes that the non-payment of compensation is punishable with an administrative penalty proportionate to the gravity of the infringement, ranging from 1.000 to 6.000 euros, by provisions of law of the 24 November 1981, no. 689.

Based on this directive criteria, guidelines were published by the Standing Conference of the 24 January 2013 [12] and later were integrated and re-

[11] G. Iuzzolino, S. Lotito, B. Sofronic, G. Tosi, *op. cit.*, 19 ss.

[12] For an in-depth analysis on the regulation contained in the Guidelines of 24 January 2013, see S. Vergari, *Linee guida sui tirocini e prospettive di riforma regionale*, in *Giornale di diritto del lavoro e delle relazioni industriali*, 2013, 443 ss.

formed by the Standing Conference between the State, the Regions and the Autonomous Provinces of Trento and South Tyrol of 25 May 2017. As a result, they were subsequently integrated into regional legislation, since the regulation on professional training and internship fell within the jurisdiction of Regions, pursuant to art. 117 of the Constitution [13].

The guidelines on internships from May 2017 introduced the Personal Dossier and the final certification attesting the acquired competence.

This guidance brings attention to the recognition and validation of competences, pursuant to Legislative Decree 16 January 2013, no. 13. The certificate attesting the competences represents a relevant reference for the intern's transition to employment [14].

In conclusion, in the Italian legal framework the traineeship includes both work-linked training and internships related to active labour market policies with the aim of assisting in the return to work of unemployed persons [15].

3. Conclusion

After more than four years from the Recommendation of 10 March 2014, the EU legal framework is still fragmented and diverse in terms of the implementation of *Quality Framework for Traineeships*' dictates.

In different EU States, the extracurricular internships – that is both those in the free market and the ones related to active policies – possess specific characteristics, rules, classifications, and objectives, which vary largely from one EU State to another and, in many of them, free market traineeships have not yet been regulated.

---

[13] S. Donà, *I tirocini*, in G. Amoroso, V. Di Cerbo, A. Maresca, (a cura di), *Diritto del lavoro. La Costituzione, il Codice civile e le leggi speciali. Le fondi del diritto italiano*, I, V ed., Giuffrè, Milano, 2017, 67 ss.

[14] With regard to this, see G. Bertagna, L. Casano, M. Tiraboschi, *Apprendimento permanente e certificazione delle competenze*, in M. Magnani, M. Tiraboschi (ed.), *La nuova riforma del lavoro*, Giuffrè, Milano, 2012, 392 ss.; L. Valente, *La certificazione delle competenze nel decreto legislativo 16 gennaio 2013, No. 13*, in AA.VV., *Studi in memoria di Giovanni Garofalo*, II, Cacucci, Bari, 2015, 995 ss.; S. Verde, *Apprendimento permanente e certificazione delle competenze*, in M. Cinelli, G. Ferraro, O. Mazzotta (ed.), *Il nuovo mercato del lavoro. Dalla Riforma Fornero alla legge di stabilità 2013*, Giappichelli, Torino, 2013, 739 ss.

[15] In order to be qualified as traineeship, it should pursue education objectives. Regarding this, see P. Pascucci, *L'evoluzione delle regole sui tirocini formativi e di orientamento: un'ipotesi di eterogenesi dei fini?*, in *Giornale di diritto del lavoro e delle relazioni industriali*, 2013, 413 ss.

In the EU countries considered above, there are sharp differences in the regulation of traineeships. For instance, in Germany and Spain, extra-curricular internships are well regulated and widely used; nonetheless, the German regulation of the *volontariat* and the Spanish regulation of the *practicas laborales e le practicas non laborales* differs widely in the following aspects: the target of the traineeship, the duration of traineeship and the approach to expenses reimbursement. Alternatively, in France extra-curricular traineeships are not regulated.

Moreover, in some EU countries like Spain and Germany some criteria of the *Quality Framework for Traineeships* were not implemented. Indeed, this happens because it is very difficult for the Member States to put EU principles into practice, since each State has its own national legislation. In Italy, for example, at least at the level of legislation, traineeships are not recognised as regular employment contracts; hence, the trainee cannot benefit from the protection of sick leave.

In any event, in Italy the guidelines of the Standing Conference of 25 May 2017 meet the indications of the European Union and are even more specifically defined in their approach to regulation of internships regarded only as training and not as regular employment relationships.

On one hand, it is essential to amend the guidelines and regional laws to make them better comply with the EU requirements. Specifically, the main points for improvement are limits of duration. Indeed, high profile interns, such as those who possess a degree or a certification of a higher quality training path, should be allowed to undertake an internship shorter than 12 months, which is the limit established by the guidelines of last May's Standing Conference. On the other hand, the introduction of the minimum duration (two months) represents an achievement in line with the educational aims of traineeships.

However, in the Italian regulation of traineeships, another point of weakness has emerged as a consequence of the guidelines of May 2017. This weakness is apparent in the fact that, on one hand, there is a large availability of promoters, but, on the other, their selection is not as strict as it should be. Since the promoter can be seen as the guarantor and the supervisor of the quality of traineeships, it is necessary to pay more attention to this aspect of the framework which applies to traineeships.

Further, it is desirable to place a spotlight on the importance of final certification attesting the competencies acquired by the trainee at the end of the traineeship. This is desirable in order to make a traineeship a valid tool to facilitate transition to regular employment.

Selected bibliography

Bertagna G., Casano L., Tiraboschi M., *Apprendimento permanente e certificazione delle competenze*, in M. Magnani, M. Tiraboschi (a cura di), *La nuova riforma del lavoro*, Giuffrè, Milano, 2012, 392 ss.

Donà S., *I tirocini*, in G. Amoroso, V. Di Cerbo, A. Maresca (a cura di), *Diritto del lavoro. La Costituzione, il Codice civile e le leggi speciali. Le fondi del diritto italiano*, I, V ed., Giuffrè, Milano, 2017, 67 ss.

European Commission, Eurostat, *Products Datasets*, in *http://ec.europa.eu/eurostat/data/database* (dati aggiornati al 15 settembre 2017).

Gentilini D., *Modelli di qualità dei sistemi VET in Europa, Finlandia, Germania, Romania, Austria*, in *Collana Isfol Research Paper*, 16, ottobre 2014.

Iuzzolino G., Lotito S., Sofronic B., Tosi G., *L'attuazione della Raccomandazione del Consiglio dell'Unione Europea su un Quadro di qualità per i tirocini*, in *Collana Isfol Occasional*, 16, dicembre 2014, in *www.inapp.org*.

Magnani M., *Il salario minimo. Problemi giuridici del salario minimo legale nell'ordinamento italiano*, in *Giurisprudenza Italiana*, 2015, 750 ss.

Magnani M., *Salario minimo*, in *Libro dell'anno del diritto*, 2015, 375 ss.

Pascucci P., *Stage e lavoro, la disciplina dei tirocini formativi e di orientamento*, Giappichelli, Torino, 2008, 97 ss.

Pascucci P., *L'evoluzione delle regole sui tirocini formativi e di orientamento: un'ipotesi di eterogenesi dei fini?*, in *Giornale di diritto del lavoro e delle relazioni industriali*, 2013, 413 ss.

Pélissier V.J., Supiot A., Jeammaud A., *Droit du travail*, Dalloz, Paris, 2000, 235 ss.

Rivero J., Savatier J., *Droit du travail*, Presses Universitaires de France, Parigi, 1991, 403.

Sala Chiri M., *Il tirocinio. Artt. 2130-2134*, in *Il Codice Civile. Commentario*, diretto da P. Schlesinger, Giuffrè, Milano, 1992, 56.

Tiraboschi M., *La disoccupazione giovanile in tempo di crisi: un monito all'Europa per rifondare il diritto del lavoro?*, in *Diritto delle relazioni industriali*, 2, 2012.

Valente L., *La certificazione delle competenze nel decreto legislativo 16 gennaio 2013, n. 13*, in AA.VV., *Studi in memoria di Giovanni Garofalo*, II, Cacucci, Bari, 2015, 995 ss.

Verde S., *Apprendimento permanente e certificazione delle competenze*, in M. Cinelli, G. Ferraro, O. Mazzotta (a cura di), *Il nuovo mercato del lavoro. Dalla Riforma Fornero alla legge di stabilità 2013*, Giappichelli, Torino, 2013, 739 ss.

Vergari S., *Linee guida sui tirocini e prospettive di riforma regionale*, in *Giornale di diritto del lavoro e delle relazioni industriali*, 2013, 443 ss.

THE ITALIAN LEGAL FRAMEWORK OF INDIVIDUAL DISMISSALS IN THE LIGHT OF THE PRINCIPLES' GRAMMAR

Irene Zoppoli [*]

Summary: 1. *Life Time Contracts*: a dialogue between European harmonisation's processes. – 1.1. LTC: a challenging idea beyond cages of formalism. – 2. An emblematic picture of the Constitutional Court on the Italian legal framework of individual dismissals. – 3. Good news for the principle of social rationality.

1. *Life Time Contracts*: a dialogue between European harmonisation's processes

The idea of the European Social Model as a "myth" is widespread [1] and linked to a concept of European integration as a simple market-making process. The criticism could become even worse, letting to define Europe "antisocial" [2] and the Court of Justice of the EU "accountable of social right's deconstruction" [3].

Nevertheless, several signals showing a stronger European integration capacity over time [4] are also to be considered. From this perspective, the

[*] PhD student – University "Magna Graecia" of Catanzaro.

[1] M. Kleinman, *A European Welfare State? European Union Social Policy in Context*, Palgrave, Basingstoke, 2002; C. Aubin, *L'Europe sociale entre mythe et réalité*, in *Droit social*, 2007, 618; F. Denord, A. Schwartz, *L'Europe sociale n'aura pas lieu*, Raisons d'Agir, Paris, 2009.

[2] E. Dockès, *L'Europe antisociale*, in *Revue de droit du travail*, 2009, 604.

[3] A. Supiot, *Le sommeil dogmatique européen*, in *Revue française des affaires sociales*, 2012, 185.

[4] B.P.T. Haar, P. Copeland, *What are the Future Prospects for the European Social Model? An Analysis of EU Equal Opportunities and Employment Policy*, in *European Law Journal*, 2010, 273; E. Mazuyer, *Le retour du mythe de l'Europe sociale?*, in *Revue de droit du travail*, 2017, 94.

doctrine of Life Time Contracts (LTC) should be recognized as an important cornerstone to trace a different direction.

Such a doctrine has been elaborated by the European Social Contract group (EuSoCo) since 2005, by joining forces of numerous academics of different nationalities, experts of civil law and labour law. The group's 2014 book [5] set out sixteen Principles, translated into five languages, and some applications have been collected in a second book [6], as a proof of a lively debate.

The initial context of the LTC is the process of European contract law's harmonisation and the original point consists in the abandonment of the sale's model considering that the dominating system based on spot contracts neglects a law with regard to the person. Labour contracts are qualified as LTC, namely long-term social relationships essential for the self-realization of individuals.

Especially in Italy this choice could provoke a sceptical reaction in labour lawyers, intimidated by an invasion of civil law contaminating the speciality of labour law. Actually, with a keen eye it is possible to identify similar needs and profitable connections between European processes of harmonisation of civil law and labour law.

First of all, the common basis is the feeling of dissatisfaction derived by the imperialism of market's forces, known as the "economization process" [7].

Art. 114 TFEU is the legal basis entitling the harmonisation's process in contractual matter. According to this provision, the establishment and functioning of the internal market justifies measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States. The first objection to rise with regard to this normative 'functionalisation' is political: the homologation advancing under the market's name in a key sector for national identities, as the contractual one, cannot be accepted [8]. The second objection is potentially constitutional: the techno-

---

[5] L. Nogler, U. Reifner (eds.), *Life Time Contracts: Social Long-Term Contracts in Labour, Tenancy and Consumer Credit Law*, Eleven International Publishing, The Hague, 2014.

[6] L. Ratti (ed.), *Embedding the Principles of Life Time Contracts. A Research Agenda for Contract Law*, Eleven International Publishing, The Hague, 2018. EuSoCo has become a worldwide group, hence the name of "International Social Contract Law Group".

[7] H.-W. Micklitz, *The Visible Hand of European Regulatory Private Law. The Transformation of European Private Law From Autonomy to Functionalism in Competition and Regulation*, in *Yearbook of European Law*, 2009, 10.

[8] H.-W. Micklitz, *Prospettive di un diritto privato europeo:* ius commune praeter legem?, in G. Alpa, N. Buccico (eds.), *Il codice civile europeo*, Giuffrè, Milano, 2001, 358.

cratic approach of market building forgets that private law has strong impact on social justice [9].

The market-centred approach influences deeply labour's sector too [10]. European liberalist policies changed national labour laws' structure [11]. The recurring formula denoting the change is the following: a transition from protection in the labour relation to protection in the labour market is taking place. The current relevant dichotomy is insiders/outsiders, which neglects the still existing dualism employer/employee. In recent years, this process has increased because of the constitutionalisation of austerity [12].

Therefore, LTC's doctrine should be important for both the fields of law in order to remind that "a free market is not an end in itself" [13], in so far as the economic logic does not work with all kind of goods [14].

Another link between civil law and labour law concerns the European legislative output: it is fragmented, oriented by a pragmatic and sectorial approach.

The supranational regulation's identity in contractual matter has led to a variety of projects towards a strongest integration. Institutional circuits and doctrinal contributions have followed, in a non-linear manner, three essential ways: the codification, the harmonisation and the optional discipline [15].

---

[9] Study Group on social justice in European Private Law, *Social Justice in European Contract Law: A Manifesto*, in *European Law Journal*, 2004, 653 ff.

[10] V. Speziale, *La mutazione genetica del diritto del lavoro*, in *WP CSDLE "Massimo D'Antona".IT*, 322/2017, 36.

[11] P. Tullini, *Concorrenza ed equità nel mercato europeo: una scommessa difficile (ma necessaria) per il diritto del lavoro*, in *Rivista italiana di diritto del lavoro*, 2018, 199 ff.

[12] S. Giubboni, *Europe's Crisis-law and the Welfare State- A Critique*, in *WP CSDLE "Massimo D'Antona".INT*, 109/2014, 9.

[13] H. Collins, *Book Review, Life Time Contracts: Social Long-term Contracts in Labour, Tenancy and Consumer Credit Law*, in *European Review of Contract Law*, 2014, 472.

[14] D. Satz, *Why Certain Things Should not be for Sale*, Oxford University Press, New York, 2010; L. Gallino, *Il lavoro non è una merce. Contro la flessibilità*, Laterza, Roma-Bari, 2008.

[15] See L. Antoniolli, *The Evolution of European Contract Law: A Brand New Code, a Handy Toolbox or a Jack-in-the-box?*, in L. Nogler, U. Reifner (eds.), *Life Time Contracts*, cit., 75; E. Descheemaeker, *Faut-il codifier le droit privé européen des contrats?*, in *McGill Law Journal*, 2002, 823; C. Castronovo, *Armonizzazione senza codificazione: la penetrazione asfittica del diritto europeo*, in *Europa e diritto privato*, 2013, 905; W. Kerber, S. Grundmann, *An Optional European Contract Law: Advantages and Disadvantages*, in *European Journal of Law and Economics*, 2006, 219.

The ambiguity of the targets [16] is one of the weak points for the maturation of European contract law. The result of this historical approach is a phenomenon of "pointillism", meaning an incoherent mix of European rules overlapping on national regulations [17].

Similarly, the existence of a European labour law is questioned. The principle of conferral governs the adoption of European rules in all fields; specifically, as it has been said, there is a "political decoupling of economic integration and social protection issues in Europe" [18]. Among the identified barriers to a strongest social European integration, it is worth to underline "the absence of common policies and the difficulty instituting them because of the tremendous diversity in the concepts, priorities, policy instruments and funding social security systems" [19]. However, European post-crisis governance has broken the over mentioned strict separation [20]. The result is a casual diagonal influence, particularly dangerous because of the evasion of national democratic processes [21].

Experts of labour law, searching for antidotes to this democratic deficit, are usually divided into two categories: those who follow a cosmopolitan approach, invoking a multilevel jurisprudential protection and those who take refuge in a constitutional patriotism, along the lines of the new nationalism [22].

---

[16] M. Graziadei, *A proposito dei* Life Time Contracts, in *Rivista trimestrale di diritto e procedura civile*, 2015, 1317.

[17] W.-H. Roth, *Transposing «Pointillist» EC Guidelines Into Systematic National Codes-problems and Consequences*, in *European Review of Private Law*, 2002, 761 ff.

[18] F.W. Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, in *Journal of Common Market Studies*, 2002, 645.

[19] V.A. Schmidt, *The Futures of European Capitalism*, Oxford University Press, Oxford, 2002.

[20] S. Garben, *The Constitutional (im)balance Between "the Market" and "the Social" in the European Union*, in *European Constitutional Law Review*, 2017, 23 ff.

[21] S. Giubboni, *Stato sociale e integrazione europea: una rivisitazione teorica*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 2017, 563; L. Principato, *Unione Europea e diritto costituzionale: ossimoro o sineddoche?*, in *Giurisprudenza costituzionale*, 2016, 815 ff.

[22] B. Caruso, *I diritti sociali nello spazio sociale sovranazionale e nazionale: indifferenza, conflitto o integrazione? (prime riflessioni a ridosso dei casi Laval e Viking)*, in *WP CSDLE "Massimo D'Antona".INT*, 61/2008, 5 ff.; M. Barbera, *Diritti sociali e crisi del costituzionalismo europeo*, in *WP CSDLE "Massimo D'Antona".INT*, 95/2012, 7.

1.1. LTC: a challenging idea beyond cages of formalism

In the framework as discussed above, the "principle" seems to be a useful tool to promote a process of national legislations' rapprochement. In other words, the bottom-up approach of LTC [23] mostly enhances the creation of a European culture of contracts [24], able to combine market's values with social justice and to prepare the ground for the future European integration by means of hard law. This way seems more realistic to revive the European project and to avoid its replacing with the supremacy of the intergovernmental method.

Undoubtedly the legal constraint of a similar tool is weak but its interpretative force of filling gaps – numerous because of the European normative process' nature – could reach important goals. In this kind of operation judges' activity and the role of the doctrine [25] are fundamental to build a sort of horizontal integration towards a European legal culture.

Therefore, the first big challenge set by LTC's doctrine is to promote different manners of law-making [26] emphasising that "the law is not just a technical know-how, but it's also a question of culture" [27].

This does not mean that LTC's doctrine is far from a technical approach on contracts. The aim is to demonstrate that "a social dimension is inherent in the time dimension" [28]. Actually, LTC's doctrine has set out other two technical challenges.

Firstly, it has proposed the overcoming of traditional categories [29] in or-

---

[23] L. Nogler, U. Reifner, *The contractual concept of Life Time Contracts under scrutiny*, in L. Ratti (ed.), *op. cit.*, 10.

[24] For details on the importance of cultural factors in harmonisation's processes see L. Antoniolli, F. Fiorentini, *Legal Integration of Private Law in Europe and in the United States of America. Comparative Remarks*, in *Triestine lecture*, 2012, 91.

[25] P. Ancel, *Les dynamiques d'influence dans l'élaboration du nouveau droit des contrats: quel rôle pour les efforts d'uniformation et le droit comparé dans les rèformes nationales des droits des contrats?*, in Conference "*Tendances et paradoxes du droit contemporain des contrats*", Montréal, 14 Octobre 2016; V. Rivollier, *L'influence du droit européen et international des contrats sur la réforme française du droit des obligations*, in *Revue internationale de droit comparé*, 2017, 757.

[26] G. Teubner, *Ordinamenti frammentati e costituzioni sociali*, in *Rivista giuridica degli studenti dell'Università di Macerata*, 2010, 51.

[27] Interview with Alain Supiot, *Quand les nombres nous gouvernent*, in *Études*, 9, 2016, 53.

[28] L. Nogler, U. Reifner, *The contractual concept of Life Time Contracts*, cit., 10.

[29] D. Hiez, *À propos des Life Time Contracts*, in *Revue trimestrielle de droit civil*, 2014, 817.

der to unify the contracts concerning labour, housing and consumer credit under the only label of LTC. Essential elements of this new "category" are the nature of long-term contracts [30] and the fact that one party gets from it a means of subsistence, hence the name of "crucial contracts" [31].

The second challenge along the line of the breakup with "the cages of formalism" [32] concerns the multidisciplinary approach: LTC's doctrine establishes a structural link between civil law and labour law, as a bridge to ensure more social justice.

These technical choices could improve European labour law's social nature.

There have already been projects aimed at assuring minimum standards for working people tout court [33]. Undoubtedly LTC's doctrine forms part of this logic, but the juridical tool is different: the highlighting of the contractual root, promoting "the reintegration of labour law into modern social contract law" [34].

The debate about the dialogue between these two fields of law has had more-or-less good seasons at national level [35]. In view of the analysis carried out above at European level private law could be "a cementing factor" [36] able to introduce questions of distributive justice in labour relations too.

This approach has two risks that should not been underestimated. The

---

[30] A. Luminoso, *Il rapporto di durata*, in *Rivista di diritto civile*, 2010, 501 ff.

[31] M. Fabre-Magnan, *Life Time Contracts and General Contract Law in the EU: Pour un droit commun des Life Time Contract*, in L. Ratti (ed.), *op. cit.*, 33.

[32] U. Mattei, F.G. Nicola, *A «Social» Dimension in European Private Law? The Call for Setting a Progressive Agenda*, in *Global Jurist*, 2007, 40.

[33] G. Davidov, *Who is a Worker?*, in *Industrial Law Journal*, 2005, 61; G. Lyon-Caen, *Le droit du travail non salarié*, Sirey, Paris, 1990, 302; M. Freedland, N. Kountouris, *Towards a Comparative Theory of the Contractual Construction of Personal Work Relations in Europe*, in *Industrial Law Journal*, 2008, 49 ff.; A. Supiot, *Au-delà de l'emploi*, Flammarion, Paris, 1999; T. Treu, *Statuto dei lavori e Carta dei diritti*, in *Diritto delle relazioni industriali*, 2004, 193 ff.

[34] L. Nogler, *Why do Labour Lawyers Ignore the Question of Social Justice in European Contract Law?*, in *European Law Journal*, 2008, 483.

[35] Among the numerous contributions see G. Santoro Passarelli, *Diritto del lavoro e categorie civilistiche*, Giappichelli, Torino, 1992; P. Ichino, *Il percorso tortuoso del diritto del lavoro tra emancipazione dal diritto civile e ritorno al diritto civile*, in *Rivista italiana di diritto del lavoro*, 2012, 59.

[36] R. Sefton-Green, *Social Justice and European Identity in European Contract Law*, in *European Review of Contract Law*, 2006, 285.

first one is an unconditioned spread of fundamental rights effects [37]; it is a delicate issue, especially because of the possible impact on legal certainty and the principle of equality [38]. The second one is to entrust private law with social tasks that neither Member States neither the European Union manage to accomplish. This risk is linked to another delicate issue: the difference between contractual justice and social justice [39].

This is not the adequate place to deepen these aspects thoroughly. Nonetheless, it is possible to take into account these risks, while analysing the specific aspect of the withdrawal's regulation in the light of the principle no. 11 of the LTC, insofar as it states "early termination against the will of the worker must be a measure of last resort".

2. An emblematic picture of the Constitutional Court on the Italian legal framework of individual dismissals

Searching for the place of LTC principle no. 11 within the Italian legal framework of individual dismissals, a useful starting point is the recent ruling of the Constitutional Court no. 194/2018. This judgment could be considered as an emblematic picture of the state of the art on this area. This is not the context to investigate the details of the possible consequences of the complex legal framework of individual dismissals but it is interesting to take into account some fundamental parts of the decision as a litmus test of empty spaces to be filled in with the LTC's doctrine.

The numerous reform measures of the last years have created a multiple system of regulatory regimes to be applied according to the date of hiring where the types of dismissals and sanctions differ in many essential aspects [40]. The Constitutional Court has stated that this different treatment is in line

---

[37] G. D'Amico, *Problemi (e limiti) dell'applicazione diretta dei principi costituzionali nei rapporti di diritto privato (in particolare nei rapporti contrattuali)*, in *Giustizia civile*, 2015, 443 ff.

[38] E. Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis*, Oxford University Press, Oxford, 2019.

[39] M. Barcellona, *Sulla giustizia sociale nel diritto europeo dei contratti*, 2005, in *www.astrid-online.it* (accessed on 21 December 2018).

[40] See F. Carinci, C. Cester, *Il licenziamento all'indomani del d.lgs. n. 23/2015 (contratto di lavoro a tempo indeterminato a tutele crescenti)*, Adapt University Press, Milano, 2015; M. Menegotto, P. Rausei, P. Tomassetti (eds.), *Decreto dignità. Commentario al d.l. n. 87/2018 convertito dalla l. n. 96/2018*, Adapt University Press, Milano, 2018.

with the principle of reasonableness, since "the time factor is a good element of diversification of legal situations"; the legislator has declared that behind the reduction of consequences in case of wrongful termination there is "the intent of increase chances to entry into the labour market for people seeking employment" (art. 1(7), law no. 183/2014). The Constitutional Court has considered "outside of its competences the evaluation about results of the employment policy".

Therefore, the dichotomy labour market/employment relationship is solved in the light of the primacy of market's reasons, which are moreover unproven. It is the first controversial point [41] in clear contradiction with the spirit of LTC's doctrine, insofar as the specific contractual relation seems to have been neglected.

The current system of sanctions in case of unfair dismissal is based mainly on indemnity. The Constitutional Court has recognized a compensatory nature behind the wording "indemnity". This interpretation implies that the restore, as a response to an illegal act, should: be adequate, be compensatory and have a dissuasive function [42]. In the view of the Court, the adequacy standard does not match with a fixed and automatic mechanism of quantification of damages, dependent on the only parameter of the length of service. The dismissal is defined as "a traumatic moment involving the person of the worker"; verbatim, "within a system of protection balanced with enterprise's values, the judge's discretion meets the need of personalization of damages". Then, the Constitutional Court has declared the illegitimacy of the art. 3(1), Legislative Decree no. 23/2015, even in the version amended by decree law no. 87/2018.

The line of reasoning of the Court allows assuming some important implications on the system. Firstly, the speciality of labour law should not exclude a comparison with civil law categories. The multidisciplinary dialogue should be encouraged because it could enable labour law not to lose the protective instances that have inspired its birth.

---

[41] A. Perulli, *Il valore del lavoro e la disciplina del licenziamento illegittimo*, in *Il libro dell'anno del diritto*, Treccani, Roma, 2019, 345; G. Fontana, *La Corte costituzionale e il decreto n. 23/2015:* one step forward two step back, in *WP CSDLE "Massimo D'Antona".IT*, 382/2018, 4; A. Zoppoli, *Rilevanza costituzionale della tutela reale e tecnica del bilanciamento nel contratto a tutele crescenti*, in *Diritto, Lavori, Mercati*, 2015, 301.

[42] M.T. Carinci, *La Corte costituzionale n. 194/2018 ridisegna le tutele economiche per il licenziamento individuale ingiustificato nel "*Jobs Act*", e oltre*, in *WP CSDLE "Massimo D'Antona".IT*, 378/2018, 10 ff.; O. Razzolini, *Effettività e diritto del lavoro nel dialogo fra ordinamento dell'Unione e ordinamento interno*, in *Lavoro e Diritto*, 2017, 447 ff.

Secondly, the highlighting of the nature of the worker as a person implies specific protection. Thirdly, the need of legal certainty cannot justify the reduction of protection; the legislator cannot expropriate judge's role that is the only party able to give an adequate response to the specific case.

Therefore, the market-centred premise is alarming, but the conclusions are small steps towards a different direction that can be used as a bridge to develop the LTC's doctrine and to dilute the market-centred approach. Better than nothing.

3. Good news for the principle of social rationality

On a test bench there is the chance to push the Italian legal framework of individual dismissals towards a direction of social rationality's regulation that is not a set of ethics, but a concept of legal technique [43]. In other words, it is necessary to put the focus on the relation between means and aims.

The EU rules on individual dismissals [44] do not create a solid system able to influence the legislations of the Member States. The principle no. 11 of the LTC, designing the termination of the contract as an *extrema ratio* measure, could fit into this empty space. It could have a heavy impact on employment relationships, by adopting a perspective of "a constitutional process" [45].

The consideration of the dismissal as an *extrema ratio* measure could give rise to numerous applications.

---

[43] J. Fan, *Judges' Continuing Construction in Enterprise-Conditioned Employer Dismissal in Germany: Specific Research of the Proportion Principle*, in *Beijing Law Review*, 2014, 339. For a comparative analysis see R. Santagata, *Il recente dibattito dottrinale e giurisprudenziale sui licenziamenti nel diritto tedesco*, in *Diritto, Lavori, Mercati*, 2012, 558.

[44] E. Ales, *La dimensione 'costituzionale' del Modello Sociale Europeo tra luci e ombre (con particolare riferimento ai diritti collettivi e al licenziamento)*, in *WP CSDLE "Massimo D'Antona".INT*, 129/2016, 15 ff.; M. Delfino, *The EU Rules on Individual Dismissals: A Roar or a Meow?*, in *European Journal of Social Law*, 2013, 302; M. Pedrazzoli, *'Commento all'art. 30'*, in R. Mastroianni *et al.* (eds.), *Carta dei diritti fondamentali dell'Unione Europea*, Giuffrè, Milano, 2017, 572; V. Speziale, *Il problema della legittimità costituzionale del contratto a tutele crescenti*, in Atti del seminario in previsione dell'udienza pubblica della Corte Costituzionale del 25 settembre 2018 sulla questione di costituzionalità sul d.lgs n. 23/2015 "*La normativa italiana sui licenziamenti: quale compatibilità con la Costituzione e la Carta sociale europea?*", 2018, 50.

[45] V. Bavaro, *Il diritto sociale del lavoro, i giuristi e il neo-costituzionalismo*, in *Il diritto sociale del lavoro. La funzione dei giuristi*, Cacucci, Bari, 2011, 24.

Firstly, it could increase through legislation the "social tasks" of the employer, on the basis of an allocation of risks on the strongest party. This strategy is intrinsically connected with the "obligation" of *repêchage*[46] and the role of lifelong learning in labour relations[47]. It is a declination of social justice, acceptable when it is up to the legislator in advance and in specific cases to achieve redistributive policy's objectives[48].

Secondly, it could lead to assign a more incisive role to the judicial control on the exercise of the power to dismiss[49]. This way is more controversial. Actually, a drastic reduction of judicial's discretion is considered an important axe of the tyranny of economic values[50] and the legislator does not hide it[51]. The 2018 decision of the Constitutional Court is a signal opposite to the fact that the centre of gravity is moving toward the legislative moment and it is welcomed in order to build a change of direction.

It is questionable whether the abuse of right's doctrine will fulfil an aspiration for social justice, in spite of its tormented life in the Italian legal framework.

There are two essential controversial points relating to this issue. On one side, even in civil law, its existence, or less radically, its utility is discussed. In absence of a specific provision, the abuse of right fluctuates between a denial of its existence and an overlapping with recognized categories of the good faith or the fraud to the law. There are specific regulations on abusive clauses or conducts, but there is not a general provision of this type.

On the other side, the abuse of right creates mistrust because it calls into question the legal certainty's dogma. In other words, it is considered the

---

[46] M.T. Carinci, *L'obbligo di ripescaggio nel licenziamento per giustificato motivo oggettivo di tipo economico alla luce del* Jobs Act, in *Rivista italiana di diritto del lavoro*, 2017, 203 ff.

[47] G. Merlo, *Le rôle de la formation dans le cadre des contrats à temps essentiels à l'existence de la personne*, in L. Ratti (ed.), *op. cit.*, 120.

[48] M. Barcellona, *op. cit.*

[49] V. Speziale, *Il giustificato motivo oggettivo di licenziamento tra "clausole generali", principi costituzionali e giurisprudenza della Cassazione*, in *Diritto del lavoro e di relazioni industriali*, 2018, 157; S. Giubboni, A. Colavita, *La valutazione della proporzionalità nei licenziamenti disciplinari: una rassegna ragionata della giurisprudenza, tra legge Fornero e* Jobs Act, in *WP CSDLE "Massimo D'Antona".IT*, 334/2017, 16.

[50] A. Perulli, *Il controllo giudiziale dei poteri dell'imprenditore tra evoluzione legislativa e diritto vivente*, in *Rivista italiana di diritto del lavoro*, 2015, 85.

[51] See art. 1(6) (b) law of delegation no. 183/2014; art. 6, Legislative Decree no. 23/2015; art. 30(1), law no. 183/2010.

paradigm of the legality of the case, opening a link with shared ethical values [52].

Moreover, the Italian legal framework of individual dismissals is specific and the abuse of right is not mentioned as a case of wrongful termination. However, the merit of LTC's doctrine is to suggest a more flexible regulation to take into account specific vulnerable situations. In a similar scenario, the abuse of right could be a good answer, if it is linked to the principle of social rationality. It involves proportionality's test, having regard to the magnitude of the consequences relating to advantages and disadvantages of the right's exercise [53].

The abuse of right could help to fix a scheme of the balancing judgment, that should respect a strict method of assessment of reasons [54]. In the light of the LTC principle no. 11, the power to dismiss is strongly limited, because the relational dimension is emphasized. The legal position on which the power to dismiss has an impact is questioned [55]. The LTC's doctrine leads to this change of scenario: the essential core of the protection against unfair dismissal is the protection of worker's expectation of a continuing work relationship. Thus, the power to dismiss could be considered abusive if the employer provokes a disproportionate sacrifice of the counterpart. In this light, the abuse of right is an expression of the good faith, but it is not equivalent to it, since it fulfils a task of social justice, not only contractual.

It would be necessary to develop schemes of balancing reasoning to correct market's distortions, as a means of preventing the monopoly in the judgments of the Courts of the economic efficiency' s argument [56]. It is a hard way forward, but it is a chance to nurture a new European social project.

---

[52] N. Lipari, *Ancora sull'abuso del diritto. Riflessioni sulla creatività della giurisprudenza*, in *Rivista trimestrale del diritto e procedura civile*, 2017, 1.

[53] F.D. Busnelli, E. Navarretta, *Abuso del diritto e responsabilità civile*, Giuffrè, Milano, 1998, 210. For a critical voice see F. Piraino, *Il divieto di abuso del diritto*, in *Europa e diritto privato*, 2013, 164.

[54] F.J. Urbina, *Is it Really That Easy? A Critique of Proportionality and 'Balancing as Reasoning*, in *L. & Jurisprudence*, 167, 2014, 168.

[55] P. Saracini, *Reintegra monetizzata e tutela indennitaria nel licenziamento ingiustificato*, Giappichelli, Torino, 2018, 69. The author takes into account the employment's value; S. Laforgia, *Diritti fondamentali dei lavoratori e tecniche di tutela. Discorso sulla dignità sociale*, Edizioni Scientifiche Italiane, Napoli, 2018, 204. The author defines the right to work as the right of emancipation from the need.

[56] L. Niglia, *Tra Europa e diritto privato. La questione del "bilanciamento" secondo il diritto civile comparato*, in *Europa e diritto privato*, 2018, 160.

Selected bibliography

Antoniolli L., Fiorentini F., *Legal integration of private law in Europe and in the United States of America. Comparative Remarks*, in *Triestine lecture*, 2012.

Carinci M.T., *La Corte costituzionale n. 194/2018 ridisegna le tutele economiche per il licenziamento individuale ingiustificato nel "Jobs Act", e oltre*, in *WP CSDLE "Massimo D'Antona".IT*, 378/2018.

Collins H., *Book Review, Life Time Contracts: Social Long-term Contracts in Labour, Tenancy and Consumer Credit Law*, in *European Review of Contract* Law, 2014.

Fan J., *Judges' Continuing Construction in Enterprise-Conditioned Employer Dismissal in Germany: Specific Research of the Proportion Principle*, in *Beijing Law Review*, 2014.

Micklitz H.-W., *The Visible Hand of European Regulatory Private Law- The Transformation of European Private Law From Autonomy to Functionalism in Competition and Regulation*, in *Yearbook of European Law*, 2009.

Nogler L., Reifner U. (eds.), *Life Time Contracts: Social Long-Term Contracts in Labour, Tenancy and Consumer Credit Law*, Eleven International publishing, The Hague, 2014.

Perulli A., *Il controllo giudiziale dei poteri dell'imprenditore tra evoluzione legislativa e diritto vivente*, in *Rivista italiana di diritto del lavoro*, 2015.

Ratti L. (ed.) *Embedding the Principles of Life Time Contracts. A Research Agenda for Contract Law*, Eleven International Publishing, The Hague, 2018.

THE PROTECTION OF POSTED WORKERS DERIVING FROM THE NOTION OF PUBLIC POLICY

Costantino Cordella *

Summary: 1. Internal and international public policy. – 2. Is directive 96/71 an expression of a European public policy?

1. Internal and international public policy

The economic profiles linked to the transnational posting in the European Union are governed by directive no. 96/71, according to which "Member States shall ensure, irrespective of which law applies to the employment relationship, that undertakings as referred to in Article 1(1) guarantee, on the basis of equality of treatment, workers who are posted to their territory the terms and conditions of employment [...] which are laid down in the Member State where the work is carried out" [1].

* Assegnista di ricerca presso l'Università di Napoli Federico II.

[1] Art. 3.1 of directive 96/71, as amended by art. 1 of directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018. The conditions of employment indicated in art. 3.1 are: maximum work periods and minimum rest periods; (b) minimum paid annual leave; (c) remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes; (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; (g) equality of treatment between men and women and other provisions on non-discrimination; (h) the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work; (i) allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons. On the questions linked to the economic profiles – remuneration, allowances, etc. –, before directive 2018/957, see the judgment of Court of Justice, 12 February 2015, C-396/13, *Sähköalojen ammattiliitto ry c. Elektrobudowa Spółka Akcyjna*, and the comment of it by S. Giubboni, *Salario minimo e distacco*

This is an exception to the general principle of art. 6 Rome Convention of 1980 (transposed into art. 8.2 of regulation no. 593/2008), which provides that "the contract is governed by the law of the country in which […] the employee habitually carries out his work in performance of the contract" (posting State) [2].

The legislation of the State where the employee is posted is also supported by another exception to the directive, which is specifically dealt with in this paper.

The reference is to the principle of public policy (art. 3.10 of directive 96/71), according to which "This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other Member States, on the basis of equality of treatment, of terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 [art. 3] in the case of public policy provisions".

Before analysing the regulatory power attributed by the directive to

---

transnazionale, in *Rivista giuridica del lavoro*, 2, 2015, 222-228. On the same topic, see the report of European Commission, *Study on Wage Setting Systems and Minimum Rates of Pay Applicable to Posted Workers in Accordance with Directive 96/71/EC in a Selected Number of Member States and Sectors*, Directorate-General for Employment, Social Affairs and Inclusion, UNIT D1, VC/2015/0334, EURES, January 2016. For a first comment to the directive 2018/957 from an Italian perspective, see A. Allamprese, S. Borelli, G. Orlandini, *Direttiva 2018/957, che modifica la dir. 91/71 sul distacco dei lavoratori nell'ambito di una prestazione di servizi – Primo commento*, Ufficio giuridico e vertenze CGIL, 2 September 2018. In general, on the different enforcement methods adopted by Member States for enforcing the rights of posted workers see M. Kullmann, *The Principle of Effet Utile and its Impact on National Methods for Enforcing the Rights of Posted Workers*, in *The International Journal of Comparative Labour Law and Industrial Relations*, 29(3), 2013, 283-304.

[2] On private international rules for contractual obligations, see in general T. Treves (a cura di), *Verso una disciplina comunitaria della legge applicabile ai contratti*, Cedam, Padova, 1983; B. Ubertazzi, *La legge applicabile alle obbligazioni contrattuali*, in A. Bonomi (a cura di), *Diritto internazionale privato e cooperazione giudiziaria in materia civile*, Giappichelli, Torino, 2009, 345-409; R. Brand, *Evolving Competence for Private International Law in Europe: The External Effects of Internal Developments*, in G. Venturini, S. Bariatti (a cura di), *Liber Fausto Pocar – New Instruments of Private International Law*, Giuffrè, Milano, 2009, 163-180. Specifically, on art. 8.2 of regulation no. 593/08, see G. Orlandini, *Il rapporto lavoro con elementi di internazionalità*, in *WP CSDLE "Massimo D'Antona".IT*, 137/2012, 1-74; R. Clerici, *Quale* favor *per il lavoratore nel Regolamento Roma I?*, in G. Venturini, S. Bariatti (a cura di), *op. cit.*, 215-230, and D. Diverio, *Art. 8 Regolamento (CE) 17 giugno 2008, n. 593/2008 del Parlamento europeo e del Consiglio sulla legge applicabile alle obbligazioni contrattuali (Roma I)*, in R. De Luca Tamajo, O. Mazzotta (dir.), *Commentario breve alle leggi sul lavoro*, Cedam, Padova, 2013, 987.

public policy (here in after referred to as "p.p."), it seems necessary to investigate the ontological meaning of this concept which escapes a defined delimitation and lends itself to different uses depending on the reference regulatory framework [3].

A generally accepted distinction is the one adopted by the constitutional doctrine, which distinguishes the material p.p. from the normative or "constitutional" p.p. The former is linked to law enforcement issues, related to security and peaceful coexistence in the community, and the latter is defined as "a system of values and imperative principles that inform the state community" [4].

In this perspective, the use in criminal and administrative law (material public policy) has been distinguished from the use in civil law and in private international law (normative public policy), which is the focus of this paper. This helps providing a better theoretical precision linked to the objectives to which it is destined. Nevertheless, even the analysis of the *normative* public policy is not without uncertainties. To this day, the international-private doctrine is divided in considering whether or not it is necessary to make a further conceptual division with respect to the contents expressed by the p.p. in civil law [5].

---

[3] The literature on the notion of p.p. is wide and its methods of application are varied. Here, the essay focuses on p.p. in private international law (as well as in European law), referring mostly to the Italian and French doctrine, which have investigated this area in depth. On p.p. in criminal and administrative law, see M. Di Raimondo, *Ordine pubblico e sicurezza pubblica*, Giappichelli, Torino, 2010; F. Angelini, *Ordine pubblico e integrazione europea*, Cedam, Padova, 2007; G. Corso, *Ordine pubblico nel diritto amministrativo*, in *Digesto delle discipline pubblicistiche*, 1995, IV, 441. With reference to French doctrine on p.p. in the private international law, see I. Tshilumbayi Musawu, *Vers un ordre public international? Regard sur quelques apories du discours juridique*, L'Harmattan, Paris, 2016; A. Bucher, *La dimension sociale du droit international privé*, Cours général, Les livres de poche de l'Académie de Droit international de La Haye, Adi-poche, 2011; P. Francescakis, *Ordre public*, in *Repertoire de droit international*, 1969, II, 498.

[4] In this vein, for the Italian doctrine, see O. Feraci, *L'ordine pubblico nel diritto dell'Unione Europea*, Giuffrè, Milano, 2012, 20; P. Lotti, *L'ordine pubblico internazionale*, Giuffrè, Milano, 2005, 12; N. Palaia, *L'ordine pubblico "internazionale"*, Cedam, Padova, 1974, 5; M. Magnani, *Il diritto del lavoro e le sue categorie: valori e tecniche nel diritto del lavoro*, Cedam, Padova, 2006, 41; A. Reale, *Rapporto di lavoro con elementi di internazionalità:* quid iuris*?*, in AA.VV., *Diritto e Libertà. Studi in memoria di Matteo Dell'Olio*, Giappichelli, Torino, 2008, 1396 ff.

[5] In support of the thesis which recognizes to p.p. the same function in civil law and private international law, see N. Palaia, *op. cit.*, 50, who considers that, in both sectors, the acts with a direct effect, but genetically unrelated to the will of the State – as the acts of pri-

This distinction of meanings is not only theoretical, if you consider its consequences. This generates the assumption according to which only in civil law, and therefore with respect to the acts of private individuals, it is possible to recall the contrast with *internal* state interests.

From this point of view, the foreign law could be opposed only by the principles of *international* public policy, interpreted as those referable to transnational law, resuming a recently accepted notion of "European" public policy[6].

Even though it is not possible to analyse this issue here in depth, it seems that the thesis that distinguishes the meaning based on the applicative context does not take into account the *structural unity* of the aims pursued in the two indicated fields of law, and, therefore, this distinction appears strictly functional to the "type" of rules.

The normative public policy aims to prevent that acts external to the will of the State, such as the acts of private autonomy or the rules of foreign legal orders – and, therefore, equally for both –, affect fundamental interests of the legal system where they should be grafted.

In both fields of law, therefore, the use of public policy is aimed at the same scope and for this reason it's incorrect to differentiate between principles belongings to internal or international level.

In this vein, in the next paragraph, we deals with the international labor relations and, in particular, the work performed in transnational posting, highlighting that the use of the concept of public policy is allowed even if aimed to preserve national provisions provided by the individual internal systems.

2. Is directive 96/71 an expression of a European public policy?

For the just-mentioned reasons, the plan of most current interest with regard to the concept of p.p. is the European one, which deals specifically with the case of transnational posting of workers[7].

---

vate autonomy and the foreign provisions – cannot be recognized and inserted within the legal order, whether such insertion affects the interests of the State itself. In the opposite vein, see *ex plurimis* O. Feraci, *op. cit*., 28; L. Del Vecchio, *Il lavoro italiano all'estero*, Aracne, Roma, 2017, 89.

[6] See *infra*, par. 2.

[7] On the application of p.p. in transnational posting, see *ex plurimis* S. Nadalet, *L'attua-*

The integration process of the European Union has indeed brought with it the need to re-read the function of this concept under a European perspective, supposing that the national values of the single Member States were excluded [8].

The same European institutions have moved towards this direction. For example, the interpretation of public policy mentioned in directive 96/71 by the European Commission has gone in the direction of restricting its operations, considering that it coincides only with the "supranational" or EU profiles [9].

The Court of Justice, in the well-known judgment Commission *v.* Luxembourg (C-319/06) [10], has also ruled that compliance with public policy purposes is *a priori* excluded if the rules deals with matters covered by EU legislation: in that case, in fact, the minimum protection shall be considered as already achieved [11].

Therefore, it seems that the constitutive characteristics revealed by the general theory in relation to the function of p.p. cease to exist in the restricted space in which this perspective of the concept has circumscribed it.

First of all, its main features would be questioned. These are its *inde-*

---

zione della Direttiva 96/71 sul distacco, in *Lavoro e Diritto*, 1, 2008, 39 ff.; G. Orlandini, *La libera circolazione dei lavoratori nell'Unione europea*, Il Mulino, Bologna, 2007, 118; Id., *Mercato unico dei servizi e tutela del lavoro*, Franco Angeli, Milano, 2014, 31; U. Carabelli, *Europa dei mercati e conflitto sociale*, Cacucci, Bari, 2009, 68 ff.; M. Pallini, *La tutela dell'ordine pubblico sociale quale limite alla libertà di circolazione dei servizi nel mercato UE*, in A. Vimercati (a cura di), *Il conflitto sbilanciato: libertà economiche e autonomia collettiva tra ordinamento comunitario e ordinamenti nazionali*, Cacucci, Bari, 2009, 197 ff.

[8] In this vein see P. Davies, *Posted Workers: Single Market or Protection of National Labour Law Systems?*, in *Common Market Law Review*, 34(3), 1997, 571; Id., *The Posted Workers Directive and the Ec Treaty*, in *Industrial Law Journal*, 31(3), 2002, 301; M.A. Moreau, *Le detachement des travailleurs effectuant une prestation de service dans l'Unione européenne*, in *Journal du droit international*, 4, 1996, 891.

[9] See European Commission, *Communication From The Commission To The Council, The European Parliament, The Economic And Social Committee And The Committee Of The Regions. The implementation of Directive 96/71/EC in the Member States*, Brussels, 25 July 2003 COM(2003)458 final.

[10] Case C-319/06, *Commission v. Luxembourg*, Judgment of the Court (First Chamber) of 19 June 2008, [2008] ECR I-4323, commented by S. Krebber, *Case C-319/06, Commission v. Luxemburg, Judgment of the Court (First Chamber) of 19 June 2008, [2008] ECR I-4323*, in *Common Market Law Review*, 46(5), 2009, 1725-1736; see also, J. Beckmann, *Reviewing the Posted Workers Directive Two Decades on*, in *University College Dublin Law Review*, 17, 2017, 125 ff.

[11] See par. 44 of the judgement. This point is well explained by M. Pallini, *op. cit.*, 197 ff.

terminate character and, above all, its *negative* function, which means to allow the disapplication of foreign law incompatible with the fundamental values of the national legal order [12].

Furthermore, the foreclosure for national courts to apply public policy in matters already regulated by European law would flatten its scope. This would make the latter indistinct compared to that of European secondary sources of the law, whose aim is to coordinate/harmonize national disciplines.

Finally, different signals also come from the wordings of directive 96/71. The power of the States to extend the protections of art. 3.1 for posted workers, with "provisions of public policy" (art. 3.10), confirms that the concept tends to something different from the core of protection predetermined by the European source [13].

---

[12] The indeterminacy of the concept of p.p. is due to the fact that it concerns with essential values for the internal legal order, belonging to different juridical sectors; the unanimous doctrine in this regard has specified that the extent of the contents of p.p. is due precisely to the absence of a precise limit to its application field. In this vein, *ex plurimis* P. Lotti, *op. cit.*, 43; O. Feraci, *op. cit*., 9. The negative or positive nature of public p.p. is, instead, a very controversial profile. Those who argue that the p.p. has a "negative" function also believe that it can only be useful for excluding the entrance of foreign rules, that contrast with the fundamental principles of the forum state. On the contrary, those who defend the "positive" function, believe that the p.p. can even propose an alternative solution to the conflict with foreign laws considered incompatible. In favor of the positive function of the concept, among the former, see P.S. Mancini, *Utilità di rendere obbligatorie per tutti gli Stati, sotto la forma di uno o più trattati, alcune regole del diritto internazionale privato per assicurare la decisione uniforme dei conflitti tra le differenti legislazioni civili e criminali*, testo riprodotto in *Diritto internazionale*, XIII, 1959, 375 (testo italiano della relazione in francese apparsa in *Journ. dr. int. privè*, 1897, 295); R. Quadri, *Lezioni di diritto internazionale privato*, Liguori, Napoli, 1983, *passim*; G. Sperduti, *Norme di applicazione necessaria e ordine pubblico*, in *Rivista di diritto internazionale privato e processuale*, 3, 1976, 469; for the opposite thesis instead see L. Del Vecchio, *op. cit*., 90; O. Feraci, *op. cit.*, 64; G. Badiali, *Ordine pubblico e diritto straniero*, Giuffrè, Milano, 1963.

[13] In a different perspective, it has been argued that the provision of art. 3.10 would reduce the admitted cases in which the national legislatures can extend the protective provisions for posted workers established by art. 3.1 and, in this vein, it would be in contrast to the Treaty, see U. Carabelli, *op. cit*., 132.

Selected bibliography

Allamprese A., Borelli S., Orlandini G., *Direttiva 2018/957, che modifica la dir. 91/71 sul distacco dei lavoratori nell'ambito di una prestazione di servizi – Primo commento*, Ufficio giuridico e vertenze CGIL, 2 September 2018.

Angelini F., *Ordine pubblico e integrazione europea*, Cedam, Padova, 2007.

Badiali G., *Ordine pubblico e diritto straniero*, Giuffrè, Milano, 1963.

Beckmann J., *Reviewing the Posted Workers Directive Two Decades On*, in *University College Dublin Law Review*, 17, 2017, 125 ff.

Brand R., *Evolving Competence for Private International Law in Europe: The External Effects of Internal Developments*, in G. Venturini, S. Bariatti S. (a cura di), *Liber Fausto Pocar – New Instruments of Private International Law*, Giuffrè, Milano, 2009, 163-180.

Bucher A., *La dimension sociale du droit international privé*, Cours général, Les livres de poche de l'Académie de Droit international de La Haye, Adi-poche, 2011.

Carabelli U., *Europa dei mercati e conflitto sociale*, Cacucci, Bari, 2009, 68 ff.

Clerici R., *Quale favor per il lavoratore nel Regolamento Roma I?*, in G. Venturini, S. Bariatti (a cura di), *Liber Fausto Pocar – New Instruments of Private International Law*, Giuffrè, Milano, 2009, 215-230.

Corso G., *Ordine pubblico nel diritto amministrativo*, in *Digesto delle discipline pubblicistiche*, 1995, IV, 441.

Davies P., *Posted Workers: Single Market or Protection of National Labour Law Systems?*, in *Common Market Law Review*, 34(3), 1997, 571.

Davies P., *The Posted Workers Directive and the Ec Treaty*, in *Industrial Law Journal*, 31(3), 2002, 301.

Del Vecchio L., *Il lavoro italiano all'estero*, Aracne, Roma, 2017, 89.

Di Raimondo M., *Ordine pubblico e sicurezza pubblica*, Giappichelli, Torino, 2010.

Diverio D., *Art. 8 Regolamento (CE) 17 giugno 2008, n. 593/2008 del Parlamento europeo e del Consiglio sulla legge applicabile alle obbligazioni contrattuali (Roma I)*, in R. De Luca Tamajo, O. Mazzotta (dir.), *Commentario breve alle leggi sul lavoro*, Cedam, Padova, 2013, 987.

Feraci O., *L'ordine pubblico nel diritto dell'Unione Europea*, Giuffrè, Milano, 2012, 20.

Francescakis P., *Ordre public*, in *Repertoire de droit international*, 1969, II, 498.

Giubboni S., *Salario minimo e distacco transnazionale*, in *Rivista giuridica del lavoro*, 2, 2015, 222-228.

Krebber S., *Case C-319/06, Commission* v. *Luxemburg, Judgment of the Court (First Chamber) of 19 June 2008, [2008] ECR I-4323*, in *Common Market Law Review*, 46(5), 2009, 1725-1736.

Kullmann M., *The Principle of Effet Utile and Its Impact on National Methods for*

Enforcing the Rights of Posted Workers, in *The International Journal of Comparative Labour Law and Industrial Relations*, 29(3), 2013, 283-304.
Lotti P., *L'ordine pubblico internazionale*, Giuffrè, Milano, 2005, 12.
Magnani M., *Il diritto del lavoro e le sue categorie: valori e tecniche nel diritto del lavoro,* Cedam, Padova, 2006, 41.
Mancini P.S., *Utilità di rendere obbligatorie per tutti gli Stati, sotto la forma di uno o più trattati, alcune regole del diritto internazionale privato per assicurare la decisione uniforme dei conflitti tra le differenti legislazioni civili e criminali*, testo riprodotto in *Diritto internazionale*, XIII, 1959, 375 (testo italiano della relazione in francese apparsa in *Journ. dr. int. privè*, 1897, 295).
Moreau M.A., *Le detachement des travailleurs effectuant une prestation de service dans l'Unione européenne*, in *Journal du droit international*, 4, 1996, 891.
Nadalet S., *L'attuazione della Direttiva 96/71 sul distacco*, in *Lavoro e Diritto*, 1, 2008, 39 ff.
Orlandini G., *La libera circolazione dei lavoratori nell'Unione europea*, Il Mulino, Bologna, 2007, 118.
Orlandini G., *Il rapporto lavoro con elementi di internazionalità*, in *WP CSDLE "Massimo D'Antona".IT*, 137/2012, 1-74.
Orlandini G., *Mercato unico dei servizi e tutela del lavoro*, Franco Angeli, Milano, 2014, 31.
Palaia N., *L'ordine pubblico "internazionale"*, Cedam, Padova, 1974, 5.
Pallini M., *La tutela dell'ordine pubblico sociale quale limite alla libertà di circolazione dei servizi nel mercato UE*, in A. Vimercati (a cura di), *Il conflitto sbilanciato: libertà economiche e autonomia collettiva tra ordinamento comunitario e ordinamenti nazionali*, Cacucci, Bari, 2009, 197 ff.
Quadri R., *Lezioni di diritto internazionale privato*, Liguori, Napoli, 1983, *passim*.
Reale A., *Rapporto di lavoro con elementi di internazionalità:* quid iuris*?*, in AA.VV., *Diritto e Libertà. Studi in memoria di Matteo Dell'Olio*, Giappichelli, Torino, 2008, 1396 ff.
Sperduti G., *Norme di applicazione necessaria e ordine pubblico*, in *Rivista di diritto internazionale privato e processuale*, 3, 1976, 469.
Treves T. (a cura di), *Verso una disciplina comunitaria della legge applicabile ai contratti*, Cedam, Padova, 1983.
Tshilumbayi Musawu I., *Vers un ordre public international? Regard sur quelques apories du discours juridique*, L'Harmattan, Paris, 2016.
Ubertazzi B., *La legge applicabile alle obbligazioni contrattuali*, in A. Bonomi (a cura di), *Diritto internazionale privato e cooperazione giudiziaria in materia civile*, Giappichelli, Torino, 2009, 345-409.

THE AUTONOMY OF THE INDIVIDUAL WILL IN THE LABOR REFORM. STRUCTURAL AND CONSTITUTIONAL RESTRICTIONS

Fábio Túlio Barroso [*]
Jorge Cavalcanti Boucinhas Filho [**]

1. Introduction

The labor structure is based on a perspective of improving the social

[*] Post-Doctor in Law from the University of Granada, Spain. Doctor of Law from the University of Deusto, Bilbao, Spain. Specialist in Labor Law from Universidade Católica de Pernambuco – UNICAP. Honorary President of the Pernambuco Academy of Labor Law – APDT. Member of the Brazilian Lawyers Institute – IAB. Member of the Lawyers Institute of Pernambuco – IAP (President of the Law and Labor Process Commission). Member of the Spanish Association of Health and Social Security. Professor of the Catholic University of Pernambuco-UNICAP (Undergraduate and PPGD). Professor at the Faculty of Law of Recife – FDR, Federal University of Pernambuco – UFPE. Professor of Integrated Faculty of Pernambuco – FACIPE. Member of the Latin American Studies Group on Human Rights – EELAS, UNICAP, registered at CNPQ. Lawyer.

[**] Post-Doctor in Law from the Université de Nantes, France. Doctor and Master in Labor Law from the University of São Paulo. Specialist in Labor Law from the Potiguar University. Member of the Brazilian Academy of Labor Law. Member of the São Paulo Institute of Lawyers – IASP. Professor at Fundação Getúlio Vargas – EAESP FGV. Lawyer.

condition of the worker, as long as the application of standards of this nature has, as its starting point, the constitutional prism and the norms of respect and dignity of the person, whether national or even international diplomas. It should not be different, since in the 1988 Brazilian Constitution, in its art. 7 establishes this purpose, extending a minimum condition for the thirty-four items and single paragraph inserted therein, as well as other forms not present and related to the work relationships.

The labor standards should establish a content according to the constitution and principles of Labor Law, in a construction of means to have a society with less social differences.

Therefore the purpose of Labor Law in Brazil, through the constitutional view, will always be to improve the social condition of the worker, using the structure and systematics of labor discipline, guided and formatted in the sense of social inclusion with citizenship and dignity to the worker.

In this perspective, the set of Labor Law norms, whether or not within the scope of the constitutional text (in the face of the principle of the most favorable norm), should, as a rule, be expanded to the minimum content present in the state heteronomous norms, with advances natural rights in the achievement and ratification of fundamental rights, inserted in the human rights list, with a limitation to the use of private business autonomy, unless it is to establish more favorable conditions for workers, in an expansive insertion of social constitutionalism.

This is because human rights have no limits, borders, or even definitions of particular interests to the detriment of the collective and even the public interest, all inexorably built and historically known as their evolutionary waves.

Such a condition reveals an already common reality in the social sciences, in the political sciences and in the economy itself, which is not inserted in an ultraliberal or orthodox perspective of full market use, when workers become mere inputs or commodities.

It is precisely in this context that Labor Law imposes limits on liberal counter-neutralism and the indiscriminate use of its norms, since it stems from state intervention in private relations to establish, through differentiated isonomy, the minimum of social guarantee and dignity for workers arising from standards.

That is, labor law formally equates subjects that are naturally unequal, establish limits in the exercise of the dialectic relation in which one is subordinate and another is subordinate, with inexorable asymmetry of powers between employers and employees respectively and between individual in-

terest and collective, thus imposing a public interest limit to the theory of full will.

Some of the new normative and contractual elements brought by the labor reform present in law n. 13467/2017 will be dealt with in this text, without pretending to exhaust them, however, informing and justifying the true distortion of constitutional elements, especially when it comes to of the implementation of private interest over the collective, the public and the social, and especially when empowering the autonomy of the will in the implementation of the legal condition legitimating a new working relationship, whose contractualism appears to be a supposedly just condition among the subjects of the working relationship, in line with the neoliberal and advertising discourse prevailing at the time

It is clear is the art. 7 of the Constitution of the Brazilian Republic that the prospect of improvement of the social condition will be achieved with the expansion of that minimum content provided in the norm, and may be expanded by any means, in full and unlimited potential for emancipation of fundamental rights and of course Human Rights.

Such state intervention in private activity assumes a level of limited control of actions, of a political and legal nature that improves the employee's political position. In this way, the normative system assumes a governance function of the workforce, meeting the reciprocal interests of employers and employees, determining behaviours and values of social and economic public order.

Thus, in recognizing the Conventions and Collective Agreements of work in subsection XXVI, as a secondary norm of the caput of art. 7, its mandate is that such autonomous formal sources should, as a rule, establish working conditions more favourable than the minimum required by the legislation.

In the same way, it allows not only that content foreseen in the constitutional formalism to be applied in a condition of superiority to the minimum, but also allows that other norms deriving from the peculiarities of each category and/or companies that negotiate can be created, whenever they extend the normative capital to protect the worker, as is commonly the case with the creation of institutes that only concern certain categories. As it is said by José Luis Monereo Pérez:

> (...) since the guarantees of law are presented as positive and binding rules, with binding value that ensure the dynamic application of certain rights generally recognized and imposed, in particular, the ordinary legislator and, as part of the

> Constitution shares the same legal value as this, and may be opposable to the ordinary legislator and, in particular, to individuals [1].

It was in this way that the Magna charter established the use of the autonomy of the collective will so that Labor Law could be made more flexible, or in a more modern but not less fallacious term, the "modernization of labor relations" [2]. It was also within these limits recognized by the unforgettable Arnaldo Süssekind, when he understood that "The Brazilian Constitution of October 5, 1988 made it possible to relax some of its norms" (...), "but always under trade union protection" [3], which elides the flexibilization of standards directly between employer and employee.

In turn, if the informality is allowed at the time of hiring, as it has of the caput of art. 443 of CLT [4], is only to facilitate the employment relationship, in full to the condition of improvement of the condition of life that results from employment.

The social public order establishes the protection to the hyposufficient in the relation of employment, which, as said, limits the wills and prevents the discrepancies of interests and the imposition of the strongest to the weakest. That is, it is an inalienable element for achieving a minimum of social justice, as defined by Mario Garmendia Arigón:

> (...) the set of values of life, which due to the special transcendence that they assume in a certain stage of social evolution, become part of the collective legal conscience and are construed as objects of privileged tutelage by the Law.
> (...).
> So, the fundamental materiality of public social order, is represented through a triptych consisting of the following basic values: – Work is not a commodity – Work is subject to special legal protection – The attainment of social justice is the guiding criterion of the legal regulation of work [5].

This conception of reason prevents the imposition or full contratualism in the individual and collective private autonomy. At the second case, the

---

[1] J.L.M. Pérez, *La protección de los derechos fundamentales. El modelo europeo*, Albacete, Bomarzo, 2009, 7.

[2] The term used by the defenders of the labor reform, above all, when in a fallacious justification that the CLT was old, outdated, outdated and even of fascist origin.

[3] A. Süssekind, *Direito constitucional do trabalho*, Renovar, Rio de Janeiro, 2001, 55.

[4] Art. 443 – The individual contract of employment may be tacitly or expressly agreed, verbally or in writing and for a specific or indeterminate period.

[5] *Idem*, 214.

unions are only subject to representation and no custodians two addresses, being the respective owners, due to what is stablished at the art. 8th, III of the Brazilian Constitution [6].

The Constitution also does not leave room for the use in conditions of minority of its contents by direct negotiation between employer and employee, as well as CLT itself, which in the content of art. 444 and caput of art. 468 (both of which were not attacked by the labor reform), the flexibilization envisaged, in three hypotheses, by the 1988 Constitution, art. 7, can not be effected by individual adjustment [7], in view of the labor structure and, as said, still based on social public order and the principles of Labor Law, which emphasizes protection and unavailability, within the limits of governability of the workforce.

In turn, the country's own labor structure regulated in the Romanesque-Germanic model imposes the prevalence of the state heteronomous norm [8], to the detriment of the negotiated content and that in the limit of the work contract has clear connotation of extension of its content and of restriction to the modifications harmful to workers.

In spite of this formal element of equality between the subjects of the employment relationship, the labor contract itself is characterized by the institutionalized and limited submission of the worker to a dynamic of private and systematized governance in the business sphere [9], which, for in turn, will never allow the employee to enjoy full freedom in the exercise of his employment functions, being present the subordination and legal and economic dependence, which prevents once and for all that he exercises

---

[6] Art. 8 – The professional or trade union association is free, observing the following:

I – The law may not require authorization from the State for the foundation of a trade union, except for registration with the competent body, interference with and intervention in the trade union organization is prohibited to the Government; (...) III – the union is responsible for the defense of the collective and individual rights and interests of the category, including in judicial or administrative matters.

[7] A. Süssekind, in A. Süssekind, D. Maranhão, S. Vianna, L. Teixeira, Instituiçõ in turn, the country's own labor structure regulated in the Romanesque-Germanic model imposes the prevalence of the state heteronomous norm, to the detriment of the negotiated content and that in the limit of the work contract has clear connotation of extension of its content and of restriction to the modifications harmful to workers.es de *Instituições de direito do trabalho*, XVIII ed., 1, São Paulo, LTr, 1999, 72.

[8] M.G. Delgado, G.N. Delgado, *Constituição da República e direitos fundamentais. Dignidade da pessoa humana, justiça social e direito do trabalho,* III ed., São Paulo, LTr, 2015, 131.

[9] J.L.M. Pérez, *Derechos sociales de la Ciudadania y ordenamiento laboral*, Consejo Económico y Social, Madrid, 1996, 50.

his freedom of contract fully, that in the formal scope is delimited by Labor Law by the greater principle of protection.

However, the labor reform implemented by law no. 13467/2017 has formally allowed full contractual conditions and changes in the employment relationship for the granting of the right to individuals, and ultimately detracts from structural elements of the discipline, which establishes a floor of minimum working conditions that brings dignity to the worker, in an evident attempt of total privatization of the discipline. Such modification of rules imposes the contractual dictatorship:

> The existence of a floor of minimum conditions of work, predetermined in the Law and possibly by collective bargaining, reduces the possibilities of the contractual dictatorship. The inalienability of workers' rights, recognized in the constitutions and labor laws in a very widespread way, leads to the area of autonomy being significantly limited [10].

Precisely in this perspective of a Labor Law included as a fundamental right, it has a shield, in the form of a social and political pact historically consolidated, that prevents or prevents its norms from being the object of full individual negotiation and can not diminish or even de-characterize them, without prejudice to the margins of adequacy and reasonableness that the sources allow them or even through the consideration of other fundamental rights [11]. A minimum labor contract is imposed, which is imposed at the will of the parties, and may always go beyond the minimum [12], but never go back.

The possibility of using autonomy of the will in work contracts is the very characterization of the minimum fundamental content and dignity designated in the social constitutionalism itself and in our Constitution, or in its art. 1, when establishing as the foundation of the Republic the dignity of the human person and the social value of work, as the content of art. 3, when it determines in its paragraphs the fundamental objectives of the Republic, being object of full rejection in diffuse or direct control of constitutionality any possibility of use of this instrument of imposition of economic force on the hyposufficient, as it imposes an even greater asymmetry in the

---

[10] R.M. Torraza, *Derechos fundamentales de los trabajadores y autonomía individual*, in AA.VV., *El derecho del trabajo en tiempos de cambios, en honor a Adrián Goldin*, Ediar, Buanos Aires, 2017, 513.

[11] R.M. Torraza, *op. cit.*, 513.

[12] D. Maranhão, in A. Süssekind, D. Maranhão, S. Vianna, L. Teixeira, *op. cit.*, 256.

work environment, extrapolating any limit of reasonableness and confronting these elements of constitutionality.

2. The autonomy of the will in the labor contract, new elements of the labor reform

It is precisely in the context of de-characterization of the minimum content of Labor Law and its conditions of insertion of the worker in the dynamics of capitalist society that several CLT articles were modified and others created by law n. 13467/2017, imposing a full contractualist model among subjects of inequality, a return to the liberal autonomy of supposed material equality, as an element of "freedom of relations" and "modernization of legislation", these epithets being a few that justified and criticized the reasons for implementing the reform, in addition to the supposed creation of job.

Faced with this perspective of breaking the labor order and the implementation of a neoliberal model of labor relations [13], some articles present in this labor reform that allow the use of individual private autonomy will be presented and commented.

2.1. Permissive title to extraordinary work and compensation of hours

> Art. 59. – The daily duration of work may be increased by overtime, not exceeding two, by individual agreement, collective agreement or collective bargaining agreement (…).

The formal title that allows for the use of an additional day with the necessary one paid for the extra labor received slight modification in comparison with the previous normative element. The basic difference lies in the fact that the concertation for such service provision is no longer compulsory by means of a "written agreement", becoming, without any imposition of form, only "individual agreement".

---

[13] A. Galvão, *Neoliberalismo e reforma trabalhista no Brasil*, Revan/Fapesp, Rio de Janeiro, 2007, 38. Neoliberalism becomes a dominant ideology because it appropriates and resignifies demands and aspirations of a portion of the dominated classes, reversing their meaning. In this inversion process, restricted rights are converted into "privileges" and labor conquests are considered "costs" that companies must imperiously undo.

It is not questioned that day-to-day situations of this nature no longer occur, however, in eventual questioning or doubt about the situation and the permissive title of extraordinary condition, we had the document to prove, now there is nothing, except the primacy of reality and the application of the principle in dubio pro worker, which should be defended by the worker and used by the magistrate in the face of future questions about the pact on overtime.

> Paragraph 5. – The bank of hours dealt with in § 2 of this article may be agreed by individual written agreement, provided that the compensation occurs within a maximum period of six months.
> Paragraph 6. – It is permissible for the compensation regime established by individual agreement, tacit or written, for compensation in the same month.

The wording of paragraphs 5 and 6 of art. 59 consolidated with the modifications provides for different conditions for the compensation of the day, according to the time in which such extraordinary situation should occur.

This is because for the period of compensation with a limit of six months, the permissive instrument of this contractual amendment may be formulated in writing between employer and employee. For the case of day compensation with maximum limit in the month, the instrument may be tacit.

There are actually three distinct ways of regulating the compensation of the journey. The first and by exclusion of the modified text, will be for the need of compensation of work for more than six months and up to one year, with necessary determination by means of a convention clause or collective bargaining agreement, in view of the norm of paragraph 2 of the art. 59. The others, in the terms of the respective paragraphs transcribed above.

There is no doubt here the bias given by the reformist legislator, which was to facilitate the imposition of the will of the employer on the power of resistance of the employee, legitimating this condition by means of norms that differ from the constitutional content given to the permissive instrument for the de characterization the payment of overtime and the possibility of compensation for working hours.

In all cases presented as legally fit to compensate for the journey in the consolidated environment, before this reform and even more after the content of law no. 13467/2017, the authorizing titles of the compensation of the day collide with the content of art. 7, XIII of the larger letter, since without "trade union tutelage", being subject to full unconstitutionality.

2.2. Flexible working day (Rotational shiftwork of 12 × 36 hour)

> Art. 59-A. – Except as provided in art. 59 of this Consolidation, the parties may, by means of individual written agreement, collective agreement or collective bargaining agreement, establish working hours of twelve hours followed by thirty-six hours of uninterrupted rest, observing or indemnifying breaks and rest periods.

There is a new pernicious element to the employee with the apology to contractualism, in permissiveness of modification of the labor contract, to impose a worker of 12 (twelve) hours, twelve hours of work followed, with possibility of slack in 36 (thirty six hours).

It is not excessive to remember that working conditions must be sheltered by the principle of the dignity of the worker. Nor does a greater effort need to be made to know that it is impossible for a worker to do twelve hours of continuous work without any harm to his health and dignity.

To the same extent, if one of the supposed purposes of the labor reform was the creation of new jobs, there is little credibility that the other thirty-six hours after the provision of services will serve to rest the worker, being sure to seek new professional activities, limiting access to the employment of the unemployed or even magnifying their workday absurdly and reducing their free time for society and the family, extrapolating in practice the weekly limit of hours worked established in the constitution. Likewise, when extending the journey, it is natural to restrict the possibility of new hires.

When the world discusses the reduction of the working day, Brazil takes a step backwards to allow indiscriminately that all activities can, through direct contractual alteration between employee and employer, establish a model of an extraordinary journey [14].

---

[14] S. Lee, D. Mccann, J.C. Messenger, *Duração do trabalho em todo o mundo: tendências de jornadas de trabalho, legislação e políticas numa perspectiva global comparada*, Secretaria Internacional de Trabalho, OIT, Brasília, 2009, 46. Despite the persistence of variations between countries, the dominant trend in many nations is a general decrease in the incidence of long working hours, with some notable exceptions such as Armenia, Indonesia, Panama, Peru and Poland.(...) Another way of measuring the length of long journeys is to check how many workers are exposed to potential safety and health risks related to such journeys. This concern is underpinned by most legal regulations on working hours, as well asstandards (see Chapter 2). For example, the 1993 European Union Directive on working hours stipulates in its preamble that "improving safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations". It is clear that the probability of such risks varies depending on how the workloads are organized, the nature of the work and

The text of art. 59-A of the CLT is an unimaginable social retrogression in the XXI century. First, because it supposedly allows us to think that this individual written agreement will be formulated having the employee absolute freedom and ability to understand the limits of the contract change and its repercussion on their quality of life. Accordingly, the authorization of such an extraordinary model of employment status after the 1988 Constitution was applied only to specific situations, professions and employer activities in which the need for elasticity of the journey was necessary in the face of the peculiar activities and also through convention clause or collective bargaining agreement, as set forth in the summary no. 444 of the TST [15].

Another disconcerting situation is the fact that law no. 13467/2017 created the art. 611-A, which in its section III allows that by means of convention or collective bargaining agreement the lunch rest is only half an hour. That is, in some cases for twelve hours of services will be possible a rest of half an hour. In the same way, the employee with a higher level and with a monthly salary equal to or greater than twice the maximum benefit limit of the General Social Security System may agree to change the journey in this new extraordinary context [16].

The novel text expands to any working condition the possibility of changing the work contract in a collision with the content of art. 7, XIII of the Constitution. It also imposes a situation in which it will be inexorably under the condition of work, indemnity for the provision of services when their luch break art. 611-A, III, in a further element of disrespect to the logic of Labor Law and constitutionality, when confronting art. 7th, XIII.

Notwithstanding, the de-characterization of the working regime still suffers a severe blow with this labor reform, since the content of paragraph 2, VIII [17] of art. 4, withdraws the hours available to the employer as work-

---

the characteristics of the individual workers, but there is evidence that working longer than 48-50 hours per week can expose workers to potential heatlh damages.

[15] TST, *Working day. Collective Standard. Law*. Scale of 12 by 36. Validity. – Res. 185/2012, DEJT published on 25, 26 and 27 September 2012 – republished as a consequence of the order issued in case TST-PA-504.280 / 2012.2 – DEJT released on 11/26/12. It is valid, exceptionally, the journey of twelve hours of work for thirty-six rest, provided by law or adjusted exclusively by collective bargaining agreement or collective agreement, ensuring the double remuneration of the holidays worked. The employee is not entitled to the payment of additional work related to the eleventh and twelfth hours.

[16] As it is of the sole paragraph of art. 444, discussed below.

[17] Paragraph 2. – As time is not considered available to the employer, it will not be computed as an extraordinary period that exceeds the normal day, even if it exceeds the limit of

ing hours and also paragraph 2[18] of art. 58, all of CLT and modified by law no. 13467/2017, withdraw the traveling hours as time available, respectively. Such conditions in combination could extend the time devoted to work comparable to what occurred in the period prior to the creation of Labor Law itself, in inconceivable unreasonableness and unconstitutionality, when taking into account the principle of the dignity of the person.

2.3. Teleworking

> Art. 75-D. – Provisions relating to the responsibility for the acquisition, maintenance or supply of technological equipment and the infrastructure necessary and adequate to the provision of remote work, as well as the reimbursement of expenses incurred by the employee, shall be foreseen in a written contract.

Teleworking as a way of providing services outside the business environment is an innovative condition and necessary admission by Labor Law, in accordance with the new technologies and business opportunities and services that information technology has brought to society, a path without a return and that the legal discipline tries to update itself, as it did in 2011, with the advent of law no. 12551, parameterizing the content of art. 6th consolidated with the reality of the facts, throwing aside the fallacious arguments that the CLT was old and outdated.

Law no. 13467/2017 does not modify the content of art. 6th consolidated, established through art. 75-D, implicitly, supposedly the possibility of the employee being responsible for the assembly of the space outside the company where he will provide services for it.

The right must necessarily be interpreted in a systematic way. Therefore, it is not possible to infer that in this special model of legal relationship, other consolidated and constitutional norms should be applied, in

---

five minutes provided for in paragraph 1 of art. 58 of this Consolidation, when the employee, by his own choice, seek personal protection, in case of insecurity on public roads or bad weather conditions, as well as entering or remaining in the company's premises to perform particular activities, among others:

(...) VIII – Change of clothing or uniform, when there is no obligation to make the change in the company.

[18] Paragraph 2. – The time spent by the employee from his residence to the actual occupation of the job and to his return, by walking or by any means of transport, including that provided by the employer, shall not be computed in the working day, since it is not Time at disposal of the employer.

order to limit the scope of the autonomy of the will in the content of this new norm.

This is due to telework, in which, as a form of service rendering outside the company, it must grant all the necessary means to carry out the activity, otherwise it will affect the reduction of the value of the salary, in defiance of the purpose of the norm of the art. 7, IV and VI of the Constitution, as well as, disregarding the content of art. 2, in which the employer's administration and employee salary impose on him the risk of the activity.

That is, the entire cost of assembling the workstation so that the employee provides services to the company on a teleworking basis must be borne by the company because it has the risks and the costs of the business because all the tools and inputs for production are to meet business needs.

> Art. 75-C. – The provision of telework services must be expressly included in the individual work contract, which will specify the activities that will be performed by the employee.
> Paragraph 1. – The change between face-to-face and teleworking arrangements may be made provided there is mutual agreement between the parties, recorded in a contractual addendum.
> Paragraph 2. – The teleworking regime may be changed to the face-to-face basis by determination of the employer, guaranteed a minimum transition period of fifteen days, with corresponding registration in a contractual addendum.

Equal luck will be the application of the paragraphs of art. 75-C. It should be noted that in these cases there is a change in the content of the contract of employment, and under no circumstances can there be a less beneficial condition imposed on the employee when any change that occurs in the course of the contract, even if there is agreement of the same, as condition maintained by art. 468, caput, of the CLT.

Another element that can cause damage to the employee in the exercise of teleworking is precisely the inclusion of subsection III in art. 62 of the CLT, in which employees performing activities in this modality will not be subject to overtime pay.

The presumption is that because they do not provide services within the company's internal environment, in which there is no face-to-face control of the employer, there would be no way to quantify the number of hours worked.

Notwithstanding and as stated above, art. 6 was not amended, and in particular the content of its sole paragraph. Therefore, once the activities control and dimensioning of the working day and its extrapolation exist, in spite of the novel rule of art. 62, III, the maximum time limit allowed by

the Constitution, in particular in its art. 7, and XIII, of up to eight hours a day and forty-four weekly, without possibility of extensions and modification of this radical, in view of the very extraordinary nature of the service rendering model, which even by the new rule allows control of the journey by the employer, but which did not have the power to remove the contract reality [19].

Furthermore, item XXVII of art. 7 of the Constitution is clear, when determining that there should be "protection in the face of automation, in the form of the law". Thus, it will not be the change of the condition of the work, with the use of differentiated and remote service delivery equipment that will condemn the employee to the less beneficial condition, quite the contrary.

With the automation and the possibility to size the work in hours and tasks, it will also be possible to give you the respective consideration, in everything that is not different from the other employees with similar conditions, even if they work at the company headquarters, under pain of other unconstitutionality, by the disagreement to the content of art. 5, caput, isonomia, as well as to detract from the protection standard in the face of a new technological condition in labor relations.

2.5. Fractionation of the vacation period

> Art. 134. – Holidays shall be granted by an act of the employer, in a single period, within 12 (twelve) months after the date on which the employee acquired the right. (text of CLT without amendment by law n. 13467/17).
> Paragraph 1. – As long as there is agreement of the employee, vacations may be enjoyed in up to three periods, one of which may not be less than fourteen consecutive days and the other can not be less than five consecutive days, each.

The amendment of the sole paragraph of art. 134 of the CLT allows the employee to agree to the vacation concession in up to three periods. There is clear contradiction of its content with that of the caput of the article, when it will be up to the employer to grant the period of interruption of the contract in this modality.

Initially it changed the possibility of fractionation only exceptional in

[19] As Garcia warns, G.F. Barbosa, *Labor Reform. With the Analysis of the Bill 6787/2016*, Jus Podivm, Salvador, 2017, 114. Remote work, as occurs in homework and teleworking alone, is not sufficient to exclude the rights related to the working day-job.

two periods, being one not less than ten days, as it has in paragraph 1, altered.

It is difficult to understand the possibility of the employee's refusal to accede to the employer's proposal in this fractionation, since there is no element that allows legitimate legal resistance, without retaliation by the employer, if he does not accept this proposal.

On the other hand, a period of vacation of close to five consecutive days violates the condition of sociability that the dignity of the worker demands, thus colliding with art. 1, III of the larger letter, in addition to distorting the social value of labor, inserted in item IV of the same constitutional article.

2.6. The scoring of moral and other non material damages

Another element of absolute inversion of values and potentiality of autonomy of the will in the bulge of the labor reform is inserted in the possibility of there being damage of moral nature, that in the legal text preferred in the form of sophistry, to call extra-legal damage

This is because in the scaling of the damage by the magistrate, according to art. 223-G, the magistrate should consider elements of a subjective nature, not considering the unlawful act itself, resulting from the unlawful act that the legal order imposes the punitive and pedagogic reimbursement, as has been settled in arts. 5, XX of the Constitution of the Republic, 186, 187 and 932, III of the Civil Code.

It should be noted that the objective liability of the employer for damages arising from the employment contract is not imposed, but rather, it is allowed the designation by the magistrate in the assessment of the request for compensation for moral damages elements of a subjective nature, such as the nature of the legal right, the intensity of suffering or humiliation, the possibility of physical or psychological overcoming, personal and social reflexes of action or omission, the occurrence of spontaneous withdrawal, forgiveness, tacit or expressed, and the social and economic situation of the parties involved, in evident contradiction to the content of art. 1st, 3rd and 4th of the larger card.

It should be noted that the objective liability of the employer for damages arising from the employment contract is not imposed, but rather, it is allowed the designation by the magistrate in the assessment of the request for compensation for moral damages elements of a subjective nature, such

as the nature of the legal right, the intensity of suffering or humiliation, the possibility of physical or psychological overcoming, personal and social reflexes of action or omission, the occurrence of spontaneous withdrawal, forgiveness, tacit or expressed, and the social and economic situation of the parties involved, in evident contradiction to the content of art. 1st, 3rd and 4th of the larger card.

Well, elements such as the tacit pardon granted by the employee in the face of the damage can not appear as reducing or impediment of condemnation of this nature, since the salary that receives the employee draws his subsistence and his family. It is absolutely unreasonable and legally antisystemic to impose on the magistrate the adoption of an unfair and anti-social legal norm.

Similarly, to establish as a reducer of condemnation values that take into account the possibility of physical or psychological overcoming, personal and social reflexes of action or omission, the occurrence of spontaneous withdrawal when the employee is the victim, disregards the anti-legal act which justifies the claim for compensation for moral damages, in defiance of the dignity of the worker and the legal system as a whole, since neither can the specific content of the court disregard the application of the law as a system, never [20].

Other elements of the sizing of this figure restricted to the new labor legislation also jump to the eyes, as the limitation of the rights foreseen in art. 223-C. Being human rights, there is no restrictive restriction to the normative content that will limit the responsibility of the employer in the necessary limitation.

As already mentioned in a recent book on labor reform:

> This matter is civil and was decided by the Civil Code. The Labor Matters had to include it in the CLT, with two purposes: a) to rate the value of the indemnities, with consequent reduction of the values, which, under the rules of Common Law, would be higher, as in cases of occupational accidents death or permanent incapacitation; b) objectify the right of companies also to demand compensation for moral damages against workers.
> On the other hand, the pricing of values is unconstitutional. By the way, the Federal Supreme Court has already ruled unconstitutional the pricing of moral damages amount provided in the press law [21].

---

[20] F. Meton Marques de Lima, F.P.R. Marques de Lima, *Reforma trabalhista. Entenda ponto por ponto*, São Paulo, LTr, 2017, 52.

[21] *Idem*.

In this sense, the dimension of moral damage in the employment relationship imposes the strictly contractual bias, by explaining that it may be indemnified for both subjects of the employment contract, with the same criteria, as if the powers and possibilities both of commitment, and of valuation by the magistrate, as one has of the following legal texts:

> Art. 223-A. – The provisions of this Title apply to the reparation of damages of an off-balance-sheet nature resulting from the employment relationship.
> Art. 223-B. – It causes damage of an off-balance nature to an action or omission that offends the moral or existential sphere of the natural or juridical person, who are the exclusive owners of the right to reparation.
> Art. 223-C. – Honor, image, intimacy, freedom of action, self-esteem, sexuality, health, leisure and physical integrity are the legally protected assets inherent in the individual.
> Art. 223-D. – The image, the brand, the name, the business secret and the confidentiality of the correspondence are legally protected assets inherent in the legal entity.
> Art. 223-E. – Those responsible for the off-balance damage are those responsible for the offense against the defended legal right, in proportion to the action or omission.
> (...).
> Art. 223-G. – When assessing the request, the court will consider:
> I – the nature of the legal right protected;
> II – the intensity of suffering or humiliation;
> III – the possibility of physical or psychological overcoming;
> IV – the personal and social reflexes of action or omission;
> V – the extent and duration of the effects of the offense;
> VI – the conditions in which the offense or moral prejudice occurred;
> VII – the degree of fraud or guilt;
> VIII – the occurrence of spontaneous retraction;
> IX – the effective effort to minimize offense;
> X – forgiveness, tacit or express;
> XI – the social and economic situation of the parties involved;
> XII – the degree of publicity of the offense.

Several are the elements of dissociation to the content of the reality of the facts to what is imposed as a reduction of business cost and predictability by illegality that the consolidated text harbors in this unfortunate redaction. For all of them, the reasons below are reiterated, as the Labor Judge Manoel Carlos Toledo Filho brilliantly pondered, even at the time of the bill that gave rise to the labor reform:

> Assim – e para utilizar aqui os critérios quantificadores escolhidos pelo próprio projeto – se um trabalhador, que receba salário mínimo (R$ 937,00), sofrer uma

lesão em sua saúde e integridade física, que gere um sofrimento imenso, impossível de ser superado, com reflexos pessoais e sociais superlativos, de caráter permanente, por força de condições de trabalho péssimas, com dolo ou culpa grave de empregador com capital social bilionário, que em nenhum momento buscou reparar ou minimizar a ofensa, que não fora perdoada pelo empregado, cuja imagem tenha ainda sido amplamente explorada por conta do infortúnio, tudo isso levado em conta, o valor máximo da indenização a arbitrar será de R$ 46.850,00 – que considerado o contexto descrito, não será então uma compensação, mas sim uma humilhação adicional a ser suportada pelo trabalhador. E não deixa de ser sintomático que, no âmbito das relações contratuais do direito brasileiro, somente no contrato de trabalho existirá essa esdrúxula imposição. Se querer tarifar a dor ou o sofrimento moral já é uma impropriedade, pior ainda é fazê-lo tomando por base, exclusiva e necessariamente, o salário contratual – como se a vida, a integridade física ou a honra de um operário pudesse valer menos que a de um executivo – e mais, virtualmente desconsiderando, por conta do teto imposto, a capacidade econômica do devedor, coisa que irá seguramente estimular as empresas a investir menos em segurança e planos de prevenção, quando o custo desse investimento seja estimado maior ou superior que o pagamento das eventuais indenizações decorrentes de acidentes ou enfermidades ambientais.

Alguém poderia quiçá argumentar que se estaria aqui diante de uma opção ideológica ancorada na teoria da "análise econômica do direito". Discordo: para mim, isso não tem nada a ver com possíveis elucubrações jurídico-economicistas. Fora este o caso, então, quando menos, o projeto teria escolhido para base de cálculo o "limite máximo dos benefícios do Regime Geral de Previdência Social", como fez em 06 (seis) outras situações (artigos 444, parágrafo único, 461, parágrafo 6°, 507-A, 789, caput, 790, parágrafo 3°, e 793-C, parágrafo segundo). Fica claro, assim, que a escolha do salário contratual para esse efeito não foi motivada por parâmetros jurídicos, sociais ou econômicos. Foi pura e genuína maldade mesmo.

Enfim, precisamente como ocorrera com o inciso I do artigo 39 da Lei de Riscos do Trabalho da Argentina, os dispositivos indicados transformam a pessoa humana do empregado em uma verdadeira mercadoria que já está de antemão precificada. E, justamente porque o fazem, eles colidem frontalmente com o artigo 5°, incisos V e X da Constituição Brasileira, que – como já restou expressamente decidido pelo Supremo Tribunal Federal, quando do exame de preceitos similares constantes da Lei de Imprensa (RE 348.827-A) – por garantirem uma ampla indenização ao dano moral, não podem sofrer prévia tarifação através da legislação ordinária.[5] Não bastasse, eles afrontam igualmente o inciso XXXII do artigo 7° da CRFB, na medida em que estabelecem uma óbvia distinção entre trabalhos técnicos ou intelectuais (que são notoriamente os mais bem remunerados) e os trabalhos manuais.

Isto significa, como corolário, que o projeto aprovado pela Câmara dos Deputados, no ponto em exame, como de resto em vários outros, irá criar uma ilusão de previsibilidade que será inevitável e gradualmente desconstruída pelos Tribunais do Trabalho. Realmente: por conservadores ou positivistas que estes sejam, cedo ou tarde todos irão reconhecer a necessidade irrefragável de compensar, de

modo minimamente proporcional, a multidão de trabalhadores coxos, surdos, cegos, deprimidos, dementados, deformados, mutilados, aleijados, paraplégicos, tetraplégicos, além das famílias daqueles que desgraçadamente tenham falecido, que venham bater às suas portas em busca de justiça. De sorte que, se já não fossem suficientes o sofrimento e a humilhação que essas normas, caso aprovadas, irão gerar, com elas não se irá ademais obter segurança jurídica alguma [22].

2.7. Unhealthy work for the pregnant/nursing employee

Art. 394-A. – Without prejudice to her remuneration, including the amount of the unhealthy supplement, the employee must be removed from:
I – activities considered unhealthy to a maximum extent, while gestation lasts;
II – activities considered unhealthy in medium or minimum degree, when presenting a health certificate, issued by a woman's trustworthy physician, who recommends the removal during pregnancy;
III – activities considered unhealthy in any degree, when she presents a health certificate, issued by a woman's trusted physician, who advises her to leave during lactation.
(...).
Paragraph 3. – When it is not possible for the pregnant or infants removed under the caput of this article to carry out their activities in a healthy place in the company, the hypothesis will be considered as risk pregnancy and will lead to the perception of maternity pay, under the terms of Law no. 8213, of July 24, 1991, throughout the period of remoteness (NR).

The protection of women's work is a matter of public order [23], since it also provides protection to the unborn and the child, and the legal order must establish maximum protection criteria, avoiding the possibility of expanding the worker's vulnerability, especially in times of greater need material and even psychological.

The alteration of the content of art. 394-A was to admit that pregnant and nursing mothers could provide services in unhealthy activities, in full disregard of their condition and the protection of the child.

It is a fact that the Constitution of the Republic did not prohibit the work of women in unhealthy environments, but such activity was prohibited

[22] M.C. Toledo Filho, *Quanto vale a dor indenizatória do trabalhador brasileiro?*, in *http://justificando.cartacapital.com.br/2017/05/30/quanto-vale-dor-indenizatoria-do-trabalhador-brasileiro/#_ftnref2*. Acesso em 16 de agosto de 2017.

[23] M.L. Pinheiro Coutinho, OIT, *http://www.oitbrasil.org.br/sites/default/files/topic/discrimination/pub/oit_igualdade_racial_05_234.pdf*. Acess 19 of august 2017.

in the constitutions of 1934 to 1967, enshrining the equality of rights and duties by virtue of gender [24].

Nevertheless, in spite of the legal order to determine the reduction of occupational risks, without prohibiting the provision of services in unhealthy conditions between men and women, few professions in which there is a condition more harmful to women in this comparison, evidently, to the woman in the pregnancy-puerperal cycle [25].

It can not be admitted that the possibility of the pregnant woman working in unhealthy activities of medium and minimum grade or the infant in unhealthy activities of any degree will be elements of improvement of the social condition of the worker and her offspring, of the society or, possibilities of increase in jobs, by updating working conditions, as advocated by reform advocates.

Quite the contrary, what you have is an affront to the dignity of the worker, in possible harm to the unborn child and the child, a Brazilian citizen, when exercising work activities in an environment hostile to the worker. It will not be the medical certificate that will elide the provision of services in an unhealthy place, but the need to have a job and its subsistence, in practice, that will allow the worker to provide services in such conditions. What is without is a true affront to the content of art. 7, XX of the Constitution, when it is necessary to "protect the labor market of women, through specific incentives, according to the law". In this case, the incentives are for the woman in an unequal situation in her life to be induced to work in unhealthy conditions, or to withdraw from the work at a cost to the State, if the company has no other place of health for the development of its activities. That is, if you have the incentive to work that faces your human condition, which before the labor reform and in this particular article, protected pregnant or nursing employees who could not provide services in unhealthy environments.

In addition, there is a further setback in the face of the expansion of maternity protection standards in line with the International Labor Organization (ILO) and other countries in the contemporary world [26].

Finally, there is still an affront to the principle of isonomy found in art.

---

[24] A. Monteiro de Barros, *Curso de direito do trabalho*, VI ed., LTr, São Paulo, 2010, 1.088.

[25] *Idem*, 1.088.

[26] Neste aspecto, vide: T. Rocha Proni, *Proteção constitucional à maternidade no brasil: um caso de expansão da garantia legal*, São Paulo, LTr, 2013, specially at 24-31.

5th, I of the larger letter, c/c art. 7, XXX[27], since work conditions are established for pregnant and lactating women, in equality with men, who will never go through an identical condition[28], and for the former, a medical certificate formally equating them in the exercise of their professional functions. It is a type of indirect discrimination, which translates into a formally equal treatment, but which will produce a different effect on certain groups[29].

In the same line of argument above, it is assumed that the period of breastfeeding assured in art. 396 of CLT can not be in charge of the free stipulation between employee and employer, as the paragraph 2 inserted by law no. 13467/2017 innovates.

> Art. 396. – In order to breastfeed one's own child, until the child reaches the age of six (6) months, the wife shall be entitled during the work day to two (2) special breaks of half an hour each.
> (...).
> Paragraph 2. – The timetables for the breaks provided for in the caput of this article shall be defined in an individual agreement between the woman and the employer.

Strange that the argument for labor reform has been to update legislation, but this imposition on women is in line with what is most current in International Labor Law, especially the content of ILO Convention 183, in its art. 10, 1 and 2, which is not ratified by Brazil but serves as a material source and which defines that breastfeeding schedules should be defined by legislation.

---

[27] XXX. – Prohibition of difference in salary, performance of duties and admission criteria by reason of gender, age, color or marital status.

[28] A. Sánchez-Castañeda, C.R. Castillo, *La nueva legislación laboal mexicana*, Ciudad de México, Universidad Nacional Autónoma de México, 2013, 16.(...) La noción de Igualdad substantiva o de hecho de trabajadores y trabajadoras frente al patrón, la cual supone al acceso a las mismas oportunidades considerando las diferencias biológicas, sociales y culturales de mujeres y hombres; se consegue así, eliminar la discriminación contra las mujeres, que menoscaba o anula el reconocimiento, goce o ejercício de sus derechos humanos y las libertades fundamentales en el ámbito laboral.

[29] A. Monteiro Barros, *op. cit.*, 1.132.

2.8. Contracting of autonomous and non-recognition of the employment relationship

Newness brought by art. Consolidated 442-B is the attempt to decharacterize the principle of the primacy of reality, when we have the following wording:

> Art. 442-B. – The contracting of the autonomous, fulfilled by this all legal formalities, with or without exclusivity, continuously or not, removes the quality of employee provided in art. 3of this Law.

Such a condition is of fragile juridicity. That's because the employment contract is a living contract, it does not depend on form. Once the requirements of continuity, subordination, onerousness, personality and otherness have been verified, the Judiciary will not be tolerant of the fraud that could be perpetrated under this condition, which aims to reduce working conditions and, over time, collectivization of class interests.

Likewise, do not allow discrimination in the work environment, as it has the same art. 7, XXXII, concerning the "prohibition of the distinction between manual, technical and intellectual work or between the respective professionals". This is because the autonomous can have the same activities and training of the employee when providing services to the same company, with conditions of onerosity and social protection completely disparate, thus facing isonomy.

Likewise, do not allow discrimination in the work environment, as it has the same art. 7, XXXII, concerning the "prohibition of the distinction between manual, technical and intellectual work or between the respective professionals". This is because the autonomous can have the same activities and training of the employee when providing services to the same company, with conditions of onerosity and social protection completely disparate, thus facing isonomy.

2.9. Availability of Rights for workers with higher education and differential salary

> Art. 444. – Contractual relations of work may be freely stipulated by the interested parties in any way that does not contravene the labor protection provisions, collective agreements applicable to them and the decisions of the competent authorities. (Text not changed).

> Single paragraph. The free stipulation referred to in the caput of this article applies to the hypotheses set forth in art. 611-A of this Consolidation, with the same legal effectiveness and preponderance over collective instruments, in the case of an employee holding a higher-level diploma and who perceives a monthly salary equal to or greater than twice the maximum benefit limit of the General Social Security System.

The presumption of effectiveness of the content of the sole paragraph of art. 444 with its inclusion in the world was in the sense that the employee with a higher level and with a "differentiated" salary are not susceptible to the subjugation of economic power and to corporate pressure, being absolutely able to establish working conditions without the application of the priniple of protection and, as a consequence of isonomy. Terrible mistake.

The rule of the sole paragraph of art. 444 which is applicable to all those who meet their requirements, passes on the false idea that high-ranking workers, as in the case of senior executives, cancellation amounts may correspond to a quantum that compromises the financial health of the company, to the detriment of the payment of employees, as Jorge Cavalcanti Boucinhas points out [30]:

> In fact, in addition to violating the principle of isonomy, it fails to assure the executive the same protection afforded to workers of the lower echelons implies a return to the philosophy of the patrimonialization of labor relations. It implies the unacceptable conclusion that the health, safety and dignity of these workers are for sale [31].

The Constitution itself does not allow discrimination by the type of activity or training of the employee in art. 7th, XXXIII [32].

In practice, it is impossible to establish an autonomous condition for the employee, who, due to a higher salary and superior academic background, will never cease to be an economic dependency of the employer and subordinate to him, in an intangible contractual inferiority, as in other forms of modifications of the contract content already discussed.

---

[30] J. Cavalcanti Boucinhas Filho, *A proteção trabalhista dos altos executivos*, in J. Cavalcanti Boucinhas Filho, C.F. Berardo (orgs.), *Novos dilemas do direito do trabalho, do emprego e do processo do trabalho. Homenagem ao professor Ari Possidônio Beltran*, LTr, São Paulo, 2012, 71.

[31] *Idem.*

[32] XXXII. – Prohibition of distinction between manual, technical and intellectual work or between the respective professionals.

Neither will professionals necessarily be trained in Law and specialists in Labor Law, to size the limits of availability.

Contrary to comparative law and to what the ILO itself considers to be possible a differentiating element for the worker-leader[33], who hold the power of command and corporate representativeness, or in our case, the holder of the directive power. Even so, the characteristic subordination of the employment relationship is not removed. Nevertheless, the norm of the sole paragraph of art. 444 of the CLT is, as said, general, for any employee in those conditions.

It should be noted that in order to be able to apply the availability of the right, in clear violation of the principle of unavailability, the employee must fulfill two requirements: 1) to have a higher level and, 2) to realize monthly salary higher than twice the maximum benefit limit of the General Social Security System (today, R$ 5,531.31 × 2 = R$ 11,062.62).

There is no legal definition in the legal text of whether the application of the rule will occur in the hiring or even during the course of the employment contract, which presumes that at any moment will be applied, as long as the two requirements are cumulatively present. That is, a restrictive condition becomes valid in general, once the normative formal elements have been met.

In this hypothesis, the employee can make available a series of rights, as if it were not subordinate, since the parameter of the availability of its condition is application of art. 611-A[34], also inserted in the text consolidated

---

[33] M.G. Arigón, *Orden público y derecho del trabajo*, II ed. revisada, ampliada y actualizada, La Ley, Montevideo, 2016, 251. Esto puede alentar a proponer que los trabajadores que integarn esta categoria, queden sustraídos de la tutela típica del Derecho del Trabajo, o que la aplicación de la misma a su respeto adquiera particularidades ajustadas a la condición diferencial que ostentan, tal temperamento, es el que inspira a diversas legislaciones a otorgar relevancia jurídica a esta distinción factica, y eN su mérito, a regular especificamente esta situación.

[34] Art. 611-A. – The collective agreement and the collective bargaining agreement take precedence over the law when, among others, they have: I – pact on the working day, observing the constitutional limits; II – annual hours bank; III – intrajornada interval, respecting the minimum limit of thirty minutes for days longer than six hours; IV – adhesion to the Insurance-Employment Program (PSE), dealt with in law no. 13189, of November 19, 2015; V – plan of positions, salaries and functions compatible with the personal condition of the employee, as well as identification of positions that fit as functions of trust; VI – business regulation; VII – workers' representative in the workplace; VIII – telecommuting, oversight, and intermittent work; IX – remuneration for productivity, including tips perceived by the employee, and compensation for individual performance; X – workday registration mode; XI – holiday day exchange; XII – classification of the degree of insalubrity; XIII – extension

by law no. 13467/2017 and similarly unconstitutional when facing the content of art. 8, III, when the union is merely representative of the categories and does not have the right that it represents.

In the same way that the autonomous collective labor standards, in which the Constitution limited the exercise of collective private autonomy, the infraconstitutional norm does not have the power to dispose, besides the reduction of wages in moments of crisis, compensation of work and uninterrupted shifts, art. 7th, VI, XIII and XIV respectively [35].

It is never too much to remember that the labor reform itself encouraged arbitration as a private way of solving individual labor conflicts through art. 507-A, in celebration of the autonomy of the will, when for employees whose remuneration exceeds twice the ceiling of the general social security scheme, which may fit the employee indicated in the sole paragraph of art. 444 of the CLT.

Art. 507-A. In individual labor contracts whose remuneration is more than twice the maximum limit established for the benefits of the General Social Security System, arbitration arbitration clause may be agreed, provided that at the initiative of the employee or by express agreement, under the terms provided law no. 9307 of September 23, 1996.

As is well known, arbitration is the form of conflict resolution for those who have patrimoniality and availability of rights, as it has of art. 1 of law no. 9307/1996.

In this way, the labor reform attempted to establish two types of wor-

---

of working hours in unhealthy environments, without prior permission of the competent authorities of the Ministry of Labor; XIV – incentive premiums on goods or services, possibly granted in incentive programs; XV – participation in profits or results of the company.

Paragraph 1. – In examining the collective agreement or collective bargaining agreement, the Labor Court shall observe the provisions of paragraph 3 of art. Of this Consolidation.

Paragraph 2. – The absence of express indication of reciprocal counterparts in collective agreement or collective bargaining agreement shall not invalidate it because it does not characterize a legal business vice.

Paragraph 3. – If a clause is agreed that reduces the salary or the day, the collective agreement or the collective bargaining agreement shall provide for the protection of employees against dismissal unmotivated during the term of validity of the collective instrument.

Paragraph 4. – In the event of the annulment of a collective agreement clause or a collective bargaining agreement, when there is a compensatory clause, it must also be annulled, without repetition of the indébito.

Paragraph 5. – The unions subscribing to a collective agreement or a collective bargaining agreement shall participate, as necessary colludes, in an individual or collective action, whose object is the annulment of clauses of these instruments.

[35] F. Meton Marques de Lima, F.P.R. Marques de Lima, *op. cit.*, 59.

kers, some with higher and differentiated wages, with a higher level of professional training and for those whose remuneration exceeds twice the maximum limit established for the benefits of the General Social Security System May resolve labor disputes through arbitration.

For the majority of the employees who do not have salary values at the legal level, it can only seek to resolve labor disputes before the Labor Court, in absolute discrimination between workers and an undisputed limit to access to the jurisdiction provided for in item XXXV of art. 5 of the Constitution.

Such undisguised limitation still runs the risk of even allowing the knowledge of demands of this nature, when you have in the same text of the labor reform the possibility of discharge cancels the labor funds, as will be seen below.

2.10. Term of annual discharge of labor obligations

> Art. 507-B. – Employees and employers, whether or not under the employment contract, are authorized to sign the annual disbursement of labor obligations before the union of the category employees.
> Single paragraph. The term shall disclose the obligations to give and to be fulfilled monthly and it shall include the annual discharge given by the employee, with effective release of the parcels specified therein.

As can be seen, further enhancement of individual private autonomy as a result of employment relations, in this case, to give annual discharge to the labor funds.

The question that is immediately asked is: who is interested in this annual discharge term?

In analogy to the consumerist law, law no. 12007/2009, the purpose is to avoid the imbalance of the relationship and possible improper collection to the hyposufficient pole of the relationship.

In the labor case, there is no perceived benefit to the employee, quite the contrary, because it puts him in a position of greater vulnerability to the employer, liable to abuse of the right by unscrupulous people.

In this way, it imposes a condition of objective, legal and subjective, moral vulnerability on the employee who may be coerced into signing the discharge document of what he supposedly already received monthly with the delivery of the paychecks, as required by art. 464 of CLT[36], with the

[36] Art. 464. – The payment of the salary must be made against receipt, signed by the

specification of the sums there, avoiding the salary compliant, as well defined by the summons nº 91 of the TST.

That is, it should not serve the said term of discharge for the good employer, since for the employee, the right already contains the need to receive a document of discharge of the funds received.

It should be noted, however, that the term of annual discharge of labor funds should be formalized in the union of the employees of the category, without the legislator having set a deadline. In this case, in view of the omission and the analogy, the provisions of arts. 2 and 3 of law no. 12007/2009 [37], by the permissive of art. 8, which was also amended by law no. 13467/2017 [38].

Such document can not be an instrument of discharge of any other unspecified amount, as was recently the case of the STF decision, in the well-known case BESC, Extraordinary Appeal n. 590-415 [39], paradigmatic when

---

employee; in the case of illiterate, by means of his fingerprint, or, if this is not possible, at his request.

Single paragraph. The proof of deposit in a bank account, opened for this purpose in the name of each employee, with the consent of the latter, will have force of receipt, in a credit institution near the place of work.

[37] Art. 2. – A declaração de quitação anual de débitos compreenderá os meses de janeiro a dezembro de cada ano, tendo como referência a data do vencimento da respectiva fatura.

Paragraph 1. – Somente terão direito à declaração de quitação anual de débitos os consumidores que quitarem todos os débitos relativos ao ano em referência.

Paragraph 2. – Caso o consumidor não tenha utilizado os serviços durante todos os meses do ano anterior, terá ele o direito à declaração de quitação dos meses em que houve faturamento dos débitos.

Paragraph 3. – Caso exista algum débito sendo questionado judicialmente, terá o consumidor o direito à declaração de quitação dos meses em que houve faturamento dos débitos.

Art. 3. – A declaração de quitação anual deverá ser encaminhada ao consumidor por ocasião do encaminhamento da fatura a vencer no mês de maio do ano seguinte ou no mês subsequente à completa quitação dos débitos do ano anterior ou dos anos anteriores, podendo ser emitida em espaço da própria fatura.

[38] Art. 8. – As autoridades administrativas e a Justiça do Trabalho, na falta de disposições legais ou contratuais, decidirão, conforme o caso, pela jurisprudência, por analogia, por eqüidade e outros princípios e normas gerais de direito, principalmente do direito do trabalho, e, ainda, de acordo com os usos e costumes, o direito comparado, mas sempre de maneira que nenhum interesse de classe ou particular prevaleça sobre o interesse público. (Texto original da CLT).

Paragraph 1. – O direito comum será fonte subsidiária do direito do trabalho.

[39] Ementa: *Direito do trabalho. Acordo coletivo. Plano de dispensa incentivada. Validade e efeitos*.

1. Plano de dispensa incentivada aprovado em acordo coletivo que contou com ampla participação dos empregados. Previsão de vantagens aos trabalhadores, bem como quitação

establishing general repercussion in case of impossibility to provoke specialized of work in the face of the worker joining a Voluntary Dismissal Plan with union assistance, which eventually distorted all doctrinal and jurisprudential content, especially the entries contained in Precedence n. 330[40] and

---

de toda e qualquer parcela decorrente de relação de emprego. Faculdade do empregado de optar ou não pelo plano.

2. Validade da quitação ampla. Não incidência, na hipótese, do art. 477, § 2º da Consolidação das Leis do Trabalho, que restringe a eficácia liberatória da quitação aos valores e às parcelas discriminadas no termo de rescisão exclusivamente.

3. No âmbito do direito coletivo do trabalho não se verifica a mesma situação de assimetria de poder presente nas relações individuais de trabalho. Como consequência, a autonomia coletiva da vontade não se encontra sujeita aos mesmos limites que a autonomia individual.

4. A Constituição de 1988, em seu artigo 7º, XXVI, prestigiou a autonomia coletiva da vontade e a autocomposição dos conflitos trabalhistas, acompanhando a tendência mundial ao crescente reconhecimento dos mecanismos de negociação coletiva, retratada na Convenção n. 98/1949 e na Convenção n. 154/1981 da Organização Internacional do Trabalho. O reconhecimento dos acordos e convenções coletivas permite que os trabalhadores contribuam para a formulação das normas que regerão a sua própria vida.

5. Os planos de dispensa incentivada permitem reduzir as repercussões sociais das dispensas, assegurando àqueles que optam por seu desligamento da empresa condições econômicas mais vantajosas do que aquelas que decorreriam do mero desligamento por decisão do empregador. É importante, por isso, assegurar a credibilidade de tais planos, a fim de preservar a sua função protetiva e de não desestimular o seu uso.

7. Provimento do recurso extraordinário. Afirmação, em repercussão geral, da seguinte tese: "A transação extrajudicial que importa rescisão do contrato de trabalho, em razão de adesão voluntária do empregado a plano de dispensa incentivada, enseja quitação ampla e irrestrita de todas as parcelas objeto do contrato de emprego, caso essa condição tenha constado expressamente do acordo coletivo que aprovou o plano, bem como dos demais instrumentos celebrados com o empregado".

http://stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=2629027. Acesso em 02 de novembro de 2016.

[40] Súmula n. 330 do TST

Quitação. Validade (mantida) – Res. 121/2003, DJ 19, 20 e 21.11.2003.

A quitação passada pelo empregado, com assistência de entidade sindical de sua categoria, ao empregador, com observância dos requisitos exigidos nos parágrafos do art. 477 da CLT, tem eficácia liberatória em relação às parcelas expressamente consignadas no recibo, salvo se oposta ressalva expressa e especificada ao valor dado à parcela ou parcelas impugnadas.

I – A quitação não abrange parcelas não consignadas no recibo de quitação e, consequentemente, seus reflexos em outras parcelas, ainda que estas constem desse recibo.

II – Quanto a direitos que deveriam ter sido satisfeitos durante a vigência do contrato de trabalho, a quitação é válida em relação ao período expressamente consignado no recibo de quitação. O plano de demissão voluntária implica quitação exclusivamente das parcelas e valores constantes do recibo.

in the guidance jurisprudencial n. 270[41], both of TST[42].

Tal documento não poderá ser instrumento de quitação de qualquer outra verba não especificada, como recentemente se teve da decisão do STF, no conhecido caso BESC, Recurso Extraordinário n. 590-415[43], paradig-

---

[41] 270. – *Programa de incentivo à demissão voluntária. Transação extrajudicial. Parcelas oriundas do extinto contrato de trabalho. Efeitos* (inserida em 27.09.2002).

A transação extrajudicial que importa rescisão do contrato de trabalho ante a adesão do empregado a plano de demissão voluntária implica quitação exclusivamente das parcelas e valores constantes do recibo.

[42] F.T. Barroso, *Da prevalência do legislado sobre o negociado no direito do trabalho: panorama de uma reforma trabalhista judicial*, in Id. (org.), *Direito e processo do trabalho em tempos de mudanças*, Nossa Livraria, Recife, 2016, 33.

[43] Ementa: *Direito do trabalho. Acordo coletivo. Plano de dispensa incentivada. Validade e efeitos.*

1. Plano de dispensa incentivada aprovado em acordo coletivo que contou com ampla participação dos empregados. Previsão de vantagens aos trabalhadores, bem como quitação de toda e qualquer parcela decorrente de relação de emprego. Faculdade do empregado de optar ou não pelo plano.

2. Validade da quitação ampla. Não incidência, na hipótese, do art. 477, § 2º da Consolidação das Leis do Trabalho, que restringe a eficácia liberatória da quitação aos valores e às parcelas discriminadas no termo de rescisão exclusivamente.

3. No âmbito do direito coletivo do trabalho não se verifica a mesma situação de assimetria de poder presente nas relações individuais de trabalho. Como consequência, a autonomia coletiva da vontade não se encontra sujeita aos mesmos limites que a autonomia individual.

4. A Constituição de 1988, em seu artigo 7º, XXVI, prestigiou a autonomia coletiva da vontade e a autocomposição dos conflitos trabalhistas, acompanhando a tendência mundial ao crescente reconhecimento dos mecanismos de negociação coletiva, retratada na Convenção n. 98/1949 e na Convenção n. 154/1981 da Organização Internacional do Trabalho. O reconhecimento dos acordos e convenções coletivas permite que os trabalhadores contribuam para a formulação das normas que regerão a sua própria vida.

5. Os planos de dispensa incentivada permitem reduzir as repercussões sociais das dispensas, assegurando àqueles que optam por seu desligamento da empresa condições econômicas mais vantajosas do que aquelas que decorreriam do mero desligamento por decisão do empregador. É importante, por isso, assegurar a credibilidade de tais planos, a fim de preservar a sua função protetiva e de não desestimular o seu uso.

7. Provimento do recurso extraordinário. Afirmação, em repercussão geral, da seguinte tese: "A transação extrajudicial que importa rescisão do contrato de trabalho, em razão de adesão voluntária do empregado a plano de dispensa incentivada, enseja quitação ampla e irrestrita de todas as parcelas objeto do contrato de emprego, caso essa condição tenha constado expressamente do acordo coletivo que aprovou o plano, bem como dos demais instrumentos celebrados com o empregado".

http://stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=2629027. Acesso em 02 de novembro de 2016.

mática ao estabelecer repercussão geral em caso da impossibilidade de se provocar a especializada do trabalho em face de o trabalhador aderir a um Plano de Demissão Voluntária com a assistência sindical, o que acabou por desvirtuar todo o conteúdo doutrinário e jurisprudencial, em especial os verbetes contidos na Súmula n. 330[44] e na orientação jurisprudencial n. 270[45], ambos do TST[46].

This condition recognized by the above decision was finally contemplated in the labor reform, once again honoring the collective private autonomy, allowing the full discharge of the values present in plans for voluntary dismissal, when prescribing in art. 447-B as follows:

> Art. 477-B. – Voluntary or Incentive Resignation Plan, for individual, pluiema or collective waiver, provided for in a collective agreement or collective bargaining agreement, provides for full and irrevocable discharge of the rights arising from the employment relationship, unless otherwise stipulated by the parties.

There will need to be a reservation by the worker in situations of vulnerability as to the amounts that will give discharge in this condition.

Any interpretation limiting the exercise of the right of action to discuss funds not present in said term discharge, whether for the annual discharge, even for the discussion of the proviso of art. 447-B, will be considered as an affront to the content of art. 5th, XXXV of the Constitution[47].

---

[44] Súmula n. 330 do TST

Quitação. Validade (mantida) – Res. 121/2003, DJ 19, 20 e 21.11.2003.

A quitação passada pelo empregado, com assistência de entidade sindical de sua categoria, ao empregador, com observância dos requisitos exigidos nos parágrafos do art. 477 da CLT, tem eficácia liberatória em relação às parcelas expressamente consignadas no recibo, salvo se oposta ressalva expressa e especificada ao valor dado à parcela ou parcelas impugnadas.

I – A quitação não abrange parcelas não consignadas no recibo de quitação e, consequentemente, seus reflexos em outras parcelas, ainda que estas constem desse recibo.

II – Quanto a direitos que deveriam ter sido satisfeitos durante a vigência do contrato de trabalho, a quitação é válida em relação ao período expressamente consignado no recibo de quitação. O plano de demissão voluntária implica quitação exclusivamente das parcelas e valores constantes do recibo.

[45] 270. – *Programa de incentivo à demissão voluntária. Transação extrajudicial. Parcelas oriundas do extinto contrato de trabalho. Efeitos* (inserida em 27.09.2002).

A transação extrajudicial que importa rescisão do contrato de trabalho ante a adesão do empregado a plano de demissão voluntária implica quitação exclusivamente das parcelas e valores constantes do recibo.

[46] F.T. Barroso, *op. cit.*, 33.

[47] Art. 5. – Todos são iguais perante a lei, sem distinção de qualquer natureza, garantin-

2.11. Distract

By mutual agreement employer and employee may terminate the employment contract, in full use of the autonomy of the will. Once again for the legislator, the employee ceased to be a part of the legal relationship, having full powers to terminate the contract, thus undermining the principle of continuity of the employment relationship.

> Art. 484-A. – The employment contract may be terminated by agreement between employee and employer, in which case the following labor sums will be due:
> I – by half:
> a) the prior notice, if indemnified; and
> b) the indemnification on the balance of the Guarantee Fund for Time of Service, provided for in paragraph 1 of art. 18 of Law no. 8036, of May 11, 1990;
> II – in full, the other labor sums.
> Paragraph 1. – The termination of the contract provided for in the caput of this article allows the movement of the employee's linked account in the Guarantee Fund of the Time of Service in the form of subsection I-A of art. 20 of Law no. 8036, dated May 11, 1990, limited up to 80% (eighty percent) of the value of deposits.
> Paragraph 2. – The termination of the agreement by agreement provided for in the caput of this article does not authorize entry into the Unemployment Insurance Program.

It is the record that before the validity of this norm this situation is recognized as unlawful, object of fraud to the labor legislation by the impossibility of transacting what is unavailable.

As Bomfim writes:

> It could be argued that the parties could compose interests on both sides and adjust the installments due in the face of this act. However, labor rights are inalienable and inalienable because they are characterized in rights in public order rules. The parties may adjust more than provided by law, but not less [48].

In spite of the fact that there is now a rule that allows the distract, it can not be used the employee, since it will be making the right available, re-

---

do-se aos brasileiros e aos estrangeiros residentes no País a inviolabilidade do direito à vida, à liberdade, à igualdade, à segurança e à propriedade, nos termos seguintes:

XXXV – a lei não excluirá da apreciação do Poder Judiciário lesão ou ameaça a direito.

[48] V. Bomfim Cassar, *Direito do trabalho*, XII ed., revista, atualizada e ampliada, Gen/Método, Rio de Janeiro-São Paulo, 2016, 1.021.

nouncing plots of a subsistence nature, not even under the trade union tutelage, colliding as the principle of continuity of the relationship of employment and the imperative nature of public order rules.

In this perspective, it is present that the legal order does not allow the renunciation or transaction of rights, since in disagreement with its teleological elements [49], which in the Constitution is present in the improvement of the social condition of the worker.

In this case, the unconstitutionality is perceived by the application of isonomy, in the equalitarian treatment between unequals.

3. Conclusions

Faced with the empowerment of individual autonomy in relation to employment contracts, where the employer and employee can freely negotiate working conditions, in a clear de-characterization of the principle of protection and unavailability and imposing formal equivalence of forces and conditions in the employment relationship, it is understood that all possibilities of alteration of contractual clauses or even of contracting under these conditions remain in condition precedent of validity, in the face of the assumption of coercion that the vulnerability of the employee has as nature in this business that obstinates itself to be imperfect, which proposed law no. 13467/2017, in the combined application of arts. I, III and IV, 5, I and 7 of the Constitution, 8, 9, 468, caput of CLT and 171, II of the Civil Code.

An important role will be the Advocacy, the Public Ministry of Labor and the Labor Magistracy, respectively, in the provocation and interpretation of these norms that enhance individual private autonomy, since in a clear lack of harmony with the structure of Labor Law and its necessary condition of instrument of minimum social guarantees and of improvement of the social condition of the workers that the Constitution granted. We shall wait and see

[49] G.N. Delgado, *Direito fundamental do trabalho digno*, São Paulo, LTr, 2006, 214.

Selected bibliography

Arigón M.G., *Orden público y derecho del trabajo*, II ed. revisada, ampliada y actualizada, La Ley, Montevideo, 2016.

Barbosa Garcia G.F., *Reforma trabalhista. Com análise do projeto de lei 6.787/2016*, Jus Podivm, Salvador, 2017.

Barroso F.T., *Discussão sobre a evolução do direito do trabalho e o panorama para uma reforma trabalhista e sindical*, in *Elementos doutrinários do novo direito do trabalho, estudos em homenagem ao professor Francisco Solano de Godoy Magalhães*, Organização de Fábio Túlio Barroso, Nossa Livraria, Recife, 2004.

Barroso F.T., *Da prevalência do legislado sobre o negociado no direito do trabalho: panorama de uma reforma trabalhista judicial*, in F.T. Barroso (org.), *Direito e processo do trabalho em tempos de mudanças*, Nossa Livraria, Recife, 2016.

Bomfim Cassar V., *Direito do trabalho*, XII ed., revista, atualizada e ampliada, Gen/Método, Rio de Janeiro-São Paulo, 2016.

Cavalcanti Boucinhas Filho J., *A proteção trabalhista dos altos executivos*, in J. Cavalcanti Boucinhas Filho, C.F. Berardo (orgs.), *Novos dilemas do direito do trabalho, do emprego e do processo do trabalho. homenagem ao professor ari possidônio beltran*, LTr, São Paulo, 2012.

Delgado G.N., *Direito fundamental do trabalho digno*, LTr, São Paulo, 2006.

Delgado M.G., *Curso de direito do trabalho*, XVI ed., revista e ampliada, LTr, São Paulo, 2017.

Delgado M.G., Delgado G.N., *Constituição da República e direitos fundamentais. dignidade da pessoa humana, justiça social e direito do trabalho*, III ed., LTr, São Paulo, 2015.

Galvão A., *Neoliberalismo e reforma trabalhista no Brasil*, Revan/Fapesp, Rio de Janeiro, 2007.

http://stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=2629027. Acesso em 02 de novembro de 2016.

http://www.brasil.gov.br/economia-e-emprego/2017/04/modernizacao-trabalhista-marca-novo-momento-historico-no-pais. Acesso em 20 de agosto de 2017.

http://www.ilo.org/brasilia/convencoes/WCMS_242947/lang--pt/index.htm. Acesso em 20 de agosto de 2017.

Maranhão D., in A. Süssekind, D. Maranhão, S. Vianna, L. Teixeira, *Instituições de direito do trabalho*, XVIII ed., 1, LTr, São Paulo, 1999.

Meton Marques de Lima F., Rodrigues Marques de Lima F.P., *Reforma trabalhista. Entenda ponto por ponto*, LTr, São Paulo, 2017.

Monteiro de Barros A., *Curso de direito do trabalho*, VI ed., LTr, São Paulo, 2010.

Nahas T., Pereira L., Miziara R., *CLT comparada urgente. Breves comentários, regras & aplicação e mapas conceituais dos artigos reformados*, Thomson Reuters/ Revistas dos Tribunais, São Paulo, 2017.

Pérez J.L.M., *Derechos sociales de la Ciudadania y ordenamiento laboral*, Consejo Económico y Social, Madrid, 1996.

Pérez J.L.M., *La protección de los derechos fundamentales. El modelo europeo*, Albacete, Bomarzo, 2009.

Pinheiro Coutinho M.L., OIT, *http://www.oitbrasil.org.br/sites/default/files/topic/discrimination/pub/oit_igualdade_racial_05_234.pdf*. Acesso em 19 de agosto de 2017.

Rocha Proni T., *Proteção constitucional à maternidade no Brasil: um caso de expansão da garantia legal*, São Paulo, LTr, 2013.

Sánchez-Castañeda A., Reynoso Castillo C., *La nueva legislación laboal mexicana*, Ciudad de méxico, Universidad Nacional Autónoma de México, 2013.

Sangheon L., Mccann D., Messenger J.C., *Duração do trabalho em todo o mundo: tendências de jornadas de trabalho, legislação e políticas numa perspectiva global comparada*, Secretaria Internacional de Trabalho, OIT, Brasília, 2009.

Süssekind A., *Direito constitucional do trabalho*, Renovar, Rio de Janeiro, 2001.

Süssekind A., in A. Süssekind, D. Maranhão, S. Vianna, L. Teixeira, *Instituições de direito do trabalho*, XVIII, 1, LTr, São Paulo, 1999.

Teixeira L., in A. Süssekind, D. Maranhão, S. Vianna, L. Teixeira, *Instituições de direito do trabalho*, XVIII, 2, LTr, São Paulo, 1999.

Toledo Filho, Manoel Carlos, *Quanto Vale a Dor Indenizatória do Trabalhador Brasileiro?*, in *http://justificando.cartacapital.com.br/2017/05/30/quanto-vale-dor-indenizatoria-do-trabalhador-brasileiro/#_ftnref2*. Acesso em 16 de agosto de 2017.

Torraza R.M., *Derechos fundamentales de los trabajadores y autonomía individual*, in AA.VV., *El Derecho del trabajo en tiempos de cambios, en honor a Adrián Goldin*, Ediar, Buanos Aires, 2017.

THE RE-INTERNALIZATION OF PUBLIC SERVICES: WHICH RIGHTS FOR THE WORKERS IN THE LIGHT OF THE EUROPEAN LEGAL SYSTEM?

Mirko Altimari *

Summary: 1. The Italian way to privatisation. – 2. Legislative Decree no. 175/2016: new rules for Italian public sector companies. – 3. European rules relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses and the public sector: the so called "Henke exception". – 4. The Scattolon case: will it represent a new way to interpret the transfers of undertakings in the public sector? – 5. The re-internalization of public services and the protection of workers' rights: Which equilibrium?

1. The Italian way to privatisation

Italian public administrations have historically played – and to a certain extent they still play – a fundamental role in many strategic economic areas. From post-war era to the 90s of the last Century (but its origins go back to the 30s) this role was probably unparalleled, at least with reference to the other countries of the "Western world": the State managed entire economic sectors, such as banks, railways, motorways, telephone services, airlines, but also chemical, steel and food industries [1]. In this respect it was well known the controversy over the so called "panettone made by the State", which was produced by the public sector company Motta-Alemagna and which became a symbol of the decline of the State-entrepreneur involved in non-strategic sectors. In fact "the Italian public enterprise sector was notable not just for its size, but also for the diversity and complexity of the organi-

* Assistant Professor of Labour Law, Catholic University of Milan.

[1] See, for instance, F. Amatori, *Beyond State and Market: Italy's Futile Search for a Third Way*, in P.A. Toninelli (ed.), *The Rise and Fall of State-Owned Enterprise in the Western World*, Cambridge University Press, Cambridge, 2000, 128-156.

zation of State holdings as well as its links with the political system" [2].

However, this economic function has been played in extremely heterogeneous ways: therefore, from a legal perspective, it's possible to distinguish different models.

First of all, a very peculiar position has been the one of the local public administrations: since the beginning of the XX Century, via some special structures – called municipal utilities – they have been operating in significant segments of the country's economy, such as local public transport, energy and water services.

In addition, there was also a large sector of State-holding enterprises, often controlled by IRI – a public financial holding company – which became the majority shareholder of banks and companies of many different fields, including telecommunications, steel, shipping, engineering and energy industries. Actually, "the so-called IRI formula has long been considered a model both in the European Union and outside it, with many countries setting up similar companies" [3].

After the privatisation season of the 1990's, in many cases these structures became private companies, totally or largely controlled, directly or indirectly, by public administrations. In others cases, some important economic sectors are managed by private companies on the basis of decade-long concessions. This is the case for the motorway sector [4], about which a broad debate has been launched after the dramatic Genoa highway bridge collapse in August 2018 [5].

The different effects of privatisation are also due to the peculiar approach to the issue. This was not the result of an organic political and "ideological" reflection on the role of the State in the economy, but instead the response

---

[2] J. Clifton, F. Comín, D. Díaz Fuentes, *Privatisation in the European Union: Public Enterprises and Integration*, Berlin, 2003, 53. See also P. Bianchi, S. Cassese, V. della Sala, *Privatisation in Italy: Aims and Constraints*, in *Western European Politics*, 11, 1988, 87-100, focused on the first stage of privatisation season in Italy, at the end of the '80s.

[3] C.A. Russo, *Bank Nationalizations of the 1930s in Italy: The IRI Formula*, in *Theoretical Inquiries in Law*, 13(2), 2012, 407.

[4] G. Ragazzi, A. Greco, *History and Regulation of Italian Highways Concession*, in *Research in Tranportation Economics*, 25, 2005, 121-125; see also D. Albalate, *The Privatisation and Nationalisation of European Roads. Success and Failure in Public-Private Partnerships*, Edward Elgar Publishers, Cheltenham, 2014.

[5] See, for instance, this interesting collection of articles by The Guardian: *https://www.theguardian.com/world/genoa-bridge-collapse*.

to the need for new income to face the political and economic crisis of the early Nineties.

In addition, in that period many European countries, including Italy, needed to reach strong economic results, in order to meet the euro convergence criteria required to join the so called Eurozone and to adopt the euro as their currency.

Thus, the "Italian way" to privatisation was very different from the others privatisation programmes implemented in others European countries (especially UK and France). As a matter of fact, it has been said that it was "dramatic" – because of the political crisis in 1992 – and that Italy was "the most important overall privatising country in the world" [6].

After describing this complex economic and legal framework, for a greater understanding of the current scenario, it is important to add two further annotations: (*i*) the great relevance acquired by the different models of liberalization of local public services, with the introduction of specific sector disciplines, and the issue of so-called *in-house* companies for which the European Union legal system plays an indispensable role; (*ii*) the phenomenon of the transition from municipal utilities to multi-utilities, which has had a strong impulse from the opening of national markets, primarily energy market: as a result, these companies, which have very different stories and organizations, decided to operate in several sectors as well as in the final stages of distribution and sales, with an increasing importance in terms of economic result.

2. Legislative Decree no. 175/2016: new rules for Italian public sector companies

These complex "public sector companies" are hybrid enterprises – formally private, but essentially public – and they have been the subject of in-depth legal analysis for a long time, especially by experts in administrative law and commercial law. The Italian labour law scholars have recently begun to study employment relations of these particular companies, also as a result of the approval of the Legislative Decree no. 175/2016, that includes new rules applicable to the employees of the companies controlled by public administrations.

---

[6] J. Clifton, F. Comín, D. Díaz Fuentes, *op. cit.*, 53.

This act clarifies that the employment-relationship is governed by the private labour law, with a significant exception, i.e. the rules concerning open competitions for the recruitment. Indeed, according to art. 97 of the Italian Constitution, employment in public administration is accessed through competitive examinations, except in the cases established by law. The paragraph 2 of the art. 19 of Legislative Decree no. 175/2016 provides that the public sector companies establish, with their own provisions, criteria and methods for the recruitment of personnel in compliance with the principles of transparency, publicity and impartiality and with the principles set out in art. 35, paragraph 3, of the Legislative Decree no. 165/2001, *id est* the consolidated text on organisation of employment in the public sector.

These rules actually determine a series of consequences that have not been carefully evaluated by the legislator, with reference to this type of companies. By way of example, it is not clear which rules apply in the case of fixed-term contracts: these doubts [7] concern mainly the consequences of the principle of the open competition for recruitment.

Therefore, the existence of that principle, which is intended to ensure the impartiality and the efficiency of the public service, as referred to in the first paragraph of art. 97 of the Constitution, makes it clear that the situation of public employees and the one of private-sector employees are not similar in that respect. This difference justifies the decision of the legislator to oblige the public authorities that infringe the mandatory rules on recruitment and employment to pay a compensation, but not to hire the affected worker with an indefinite duration contract.

Thus, in case of breach of the regulation regarding fixed-term, the contract shall not be considered as an indefinite duration contract, and the employee has only the right to receive a compensation [8].

In referring to public sector companies the legislator felt the need to provide open competitions both to protect the requirements of impartiality and efficiency of the public service (this concept has to be understood in a broad sense) and to prevent malpractice phenomena concerning the recruitment procedures, as has often happened also in the recent past.

---

[7] I have recently examined the issue: M. Altimari, *Assunzioni e contratti a termine nelle società a partecipazione pubblica*, in *Lavoro e Diritto*, 2018, 323-348.

[8] This legal situation is significant also from a practical viewpoint because a lot of fixed-term contract was stipulated in the past, especially in some specific public contexts, such as the public schools.

3. European Union rules relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses and the public sector: the so called "Henke exception"

The brief analysis of the impact of the principle of open and competition-based recruitment on these companies is strictly connected to the main provision of the Legislative Decree no. 175/2016, that concerns the so called "backsourcing".

This is a phenomenon that has already been examined by economists considering the private companies; now we can see the first effects also in the public sector. Indeed, the number of local public administrations that decide to re-internalize an activity, a business or a part of business is increasing, also as a consequence of the economic crisis. In case of re-internalization of a service from a public sector company to a public administration, the law safeguards workers' rights only under certain conditions: the most important is that the workers were already employees of the public administration before the outsourcing.

The essay will focus on the connection between the re-internalization and the European legal system, especially in relation to the directive 77/187/EEC (later replaced by directive 2001/23/EC) – on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses – and to the most important rulings in this area that involved public administrations (*e.g.* C-108/10 – Scattolon).

This latter statement might seem like a contradiction: historically an administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of the European Union labour law: but this exclusion concerns public administration in the strict sense [9].

With reference to this point, an example is provided by the Case 298/94 – Henke *v.* Gemeinde Schierke and Verwaltungsgemeinschaft Brocken – concerning the dismissal of Mrs. Henke, who was employed by the Municipality of Schierke as secretary of the Major. This German local public administration with others municipalities decided to create a new public body – called "Brocken" – according to Local Government Law for the Land of Saxony-Anhalt. All these municipal administrations were dissolved and their

[9] M. Roccella, T. Treu, *Diritto del lavoro dell'Unione Europea*, VII ed., Cedam, Padova, 2016, 393.

tasks were transferred to the new local administration body. Mrs Henke applied for a position in the new administration, but she was offered only a post far away and she declined for family reasons. Lastly she "claimed that her employment was protected by the Directive and that she should have been transferred to the new employer".

It is interesting to point out the opinion of the Advocate General, Mr. Lenz: he commented that "even if exercise of an economic activity were to be regarded as a precondition for the application of the directive, a municipality could definitely be treated as being an undertaking within the meaning of the directive. It is therefore questionable whether the municipality and its employees should be excluded from the scope of application of the directive simply because the municipality also acts in the exercise of powers of a public authority". Mr. Lenz added that the criterion of activity in the exercise of public powers is very difficult to pin down, since it is subject to constant change and he concluded by stating that "accordingly, the Directive is applicable whenever employees within the meaning of the national protective provisions are employed in an undertaking or in an organisational entity. It is irrelevant whether the undertaking is engaged in the sphere of public administration or in the private sector".

There is no doubt that the interpretation of the directive given by the Advocate General was extensive, aimed at offering greater protection to public sector workers' rights involved in these increasingly numerous "transfer" operations. According to him, this interpretation was based on the concept (not easy to distinguish) of undertaking or organizational entity, being irrelevant its ownership, public or private.

The ECJ rejected the Advocate General's recommendations and, first of all, it focused on the preamble of the Directive, which stated that its purpose was to protect workers against the potentially unfavourable consequences of changes resulting from economic trends at national and community level.

Consequently "the reorganization of structures of the public administration or the transfer of administrative functions between public administrative authorities does not constitute a 'transfer of an undertaking' within the meaning of the Directive". The Court also noted that the transfer was related "only to activities involving the exercise of public authority. Even if it is assumed that those activities had aspects of an economic nature, they could only be ancillary".

The so called "Henke exception" should be applied with caution: actually some subsequent decisions "confirm the limited application of the Henke exception to cases involving simply a re-organization of public adminis-

trative structures or the transfer of administrative functions between public administrative authorities": e.g. Collino *v.* Telecom Italia S.p.a.: C-343/98.

This latter case is very important because it involved the former State body that became then responsible for operating certain telecommunications services for public use in Italy.

The Court argues that the fact that the service transferred was the subject of a concession by a public body such as a municipality cannot exclude application of the Directive if the activity in question does not involve the exercise of public authority (Joined Cases C-173/96 and C-247/96 Sánchez Hidalgo and Others) and decided that the Directive may apply to a situation in which an entity operating telecommunications services for public use and managed by a public body within the State administration is, following decisions of the public authorities, the subject of a transfer for value, in the form of an administrative concession, to a private-law company established by another public body which holds its entire capital.

It is therefore reiterated, once again, that the criterion for excluding the application of the directive to the public sphere is the exercise of public authority: on the contrary, the Directive is applicable to transfers when the activities have an economic nature – or better, when this economic nature is not just ancillary, according to the mentioned case Henke –: in the latter case it is irrelevant whether the undertaking is engaged in the sphere of public administration or in the private sector.

4. The Scattolon case: will it represent a new way to interpret the transfers of undertakings in the public sector?

Another important decision of the European Court of Justice is the judgment of September 6th, 2011 (case C-108/10). This judgment concerns a proceeding between Ms. Scattolon and the Italian Ministry of Education, University and Research, regarding the non recognition by the latter of the length of service the woman had completed with her previous employer (the Municipality of Scorzè), before she was transferred to work to the same Ministry.

Until 1999, auxiliary services at Italian State schools, such as cleaning, caretaking and administrative assistance, were provided in part by State administrative, technical and auxiliary (ATA) employees and in part by local authorities, such as municipalities. The local authorities operated the services either by employing their administrative, technical and auxiliary workers

('local authority ATA employees'), or by entering into contracts with private undertakings. Law no. 124/1999 provided for the transfer, from January 1st, 2000, of local authority ATA employees in State schools, by including these workers on the lists of State's ATA employees.

Actually, the case is very similar to Henke case: both transferor and transferee are public bodies, governed by public law. But here the ECJ argued partially in a different way: as a matter of fact, the Court clarifies that "far from holding that any transfer connected with or falling within the context of a reorganisation of public administration must be excluded from the scope of Directive, the Court merely stated, in the case-law cited by the Italian Government (Henke, editor's note) that the reorganisation of structures of the public administration and the transfer of administrative functions between public administrative authorities do not in themselves and as such constitute a transfer of an undertaking for the purposes of that directive". And the Court added that "there is nothing to justify developing that case-law in the direction that public employees, protected as workers under national law and subject to a transfer to a new employer within the public administration, should not be able to benefit from the protection offered by Directive solely on the ground that that transfer falls within the context of a reorganisation of that administration".

It should be noted that there is a critical point of the judgment: the Court (par. 42) observes that the term 'undertaking' within the meaning of the Directive covers any economic entity organised on a stable basis, whatever its legal status and method of financing. Hence, any grouping of persons and assets enabling the exercise of an economic activity pursuing a specific objective and which is sufficiently structured and independent will constitute such an entity. It's important to focus on the term "independent": on the contrary, in other cases, the Court specified that the transferred entity must present only a certain degree of autonomy, without explaining the difference between the two concepts of autonomy and of independency.

For these reasons, in a recent work on the CJEU case law, it has been pointed out how flexible is the Court approach when interpreting the notion of transferred entity: "the reasoning of the CJEU has allowed the application of the Directive in situations where the transferred entity did not present organisational autonomy nor stability, thus providing a more flexible interpretation of the scope of application of the Directive. However, the CJEU's approach appears quite fragmented, and ambiguous definitions have created a certain degree of uncertainty" [10].

[10] S. Rainone, *Labour Rights in the Making of the EU and in the CJEU Case Law. A Case*

5. The re-internalization of public services and the protection of workers' rights: Which equilibrium?

However, the Scattolon judgment represents a step forward for the protection of workers involved in transfers of public bodies. The aim of this last paragraph is to analyze the compatibility of the Italian new rules on the re-internalization of services with the European legal system.

As mentioned above the new law on "public sector companies" in case of re-internalization of a service guarantees workers' involved rights but only to a certain extent: the most relevant point of criticism of this regulation is that this protection has a limited range. In case of transfer from a public sector company to a public administration of an activity that was earlier performed by the public administration its-self, no doubt it is a business transfer according to European legal system, regardless of the many facets of the notion of autonomy or independence defined by the ECJ rulings, with regard to the transferred entity. But hypothetically the workers transition from the public society to a public administration in case of "backsourcing" is guaranteed only for those who were already employed by the public administration before the outsourcing: what is the meaning of this rule?

First of all, this particular (and domestic) rule should be put in a larger scenario involving some other European countries' economic systems (and consequently legal systems).

In a nutshell: after the season begun in the Nineties, which was characterized, as mentioned above, by privatisation and, in other ways, by outsourcing of services, even after the economic crisis started ten years ago, the first effects of an equal and opposite movement can be seen in the remodeling of public services performed in the public sector [11].

Some interesting and recent studies focused on this process in Spain, from a labour law perspective [12].

Study on the Transfer of Undertakings Directive, in *European Labour Law Journal*, 9(3), 2018, 320.

[11] E.g. see H. Wollmann, H. Baldersheim, G. Citroni, G. Marcou, J. McEldowney, *From Public Service to Commodity: The De-Municipalization (and Re-Municipalization?) of Energy Provision in Germany, Italy, France, the U.K. and Norway*, in W. Hellmut, G. Marcou (eds.), *The Provision of Public Services in Europe: Between State, Local Government and Market*, Edward Elgar, Cheltenham, 2010; for the French debate see S. Saunier, *La notion de remunicipalisation du service public (étude n. 2066)*, in *La Semaine Juridique. Administrations et collectivités territoriales* (JCP A), 10, 2014.

[12] The recent Congress of *Asociación Española de Derecho del Trabajo y de la Seguridad*

Another example in terms of relevance is represented, again in Italy, by the repeal of "Equitalia" Corporation, a private company owned by two national public bodies which handled taxes collection. These complex duties are now managed by a new public body, named "Agenzia delle entrate-Riscossione" and almost eight thousand employees have been transferred directly to the new employer, as public servants.

In Italy, the implementation of directive 77/187, and subsequently of directive 2001/23 is carried out, in particular, by art. 2112 of the Civil Code, which provides that in the event of transfers of undertakings, "the employment relationship shall continue with the transferee and the employee shall retain all rights under that relationship".

The regulation on the public sector employment (d.lgs. n. 165/2001) applies this rule also in case of transfer or conferment of activities, carried out by public administrations, public bodies or by their companies, to other subjects, public or private.

Does the European legal system protect also the employees involved in a re-internalization of public service?

Another well-known EJC case would not seem to be in conflict with this setting. In C-175/99 Mayeur *v.* Association Promotion de l'Information Messine (APIM), the Court decided on a case of so called *réprise en regie* in the French legal system, and it establishes that the (old) directive may apply when a municipality takes over activities relating to publicity and information concerning the services which it offers to the public, where such activities were previously carried out, in the interests of that municipality, by a non-profit-making association, which was a legal person governed by private law, provided always that the transferred entity retains its identity.

It is possible to suppose that these cases are going to increase as a result of a trend of re-internalization of public services and, thus, an extensive interpretation of the event of transfers of undertakings, businesses or parts of businesses should be necessary in order to guarantee the rights of the workers involved.

In this regard, it can be supposed that the new abovementioned Italian

---

Social focused on productive decentralization: e.g. the report of M. Ortiz de Solórzano Aurusa, on *Subrogación de la Administración y aplicación de las normas sobre limitación de incorporación de personal al sector público en los supuestos de reversión de contratas o concesiones administrativas*. See the conference proceedings *Descentralización productiva: nuevas formas de trabajo y organización empresarial*, Ediciones Cinca, Madrid, 2018.

See also V. Ferrante, *Re-internalizzazione e successione di appalto nella gestione dei servizi pubblici*, in *WP CSDLE "Massimo D'Antona".IT*, 385/2019.

rule could be considered in contrast with the principle of equal treatment. As a matter of fact, as it has already been highlighted, the workers' transition from the public sector company to the public administration is guaranteed only for those who were already employed by the public administration before the outsourcing. In other term, some employees have some rights just because of the way in which they have been hired, or better, the date of their recruitment. Obviously, differential treatments among workers are admitted but only when they are reasonable. From this point of view, the only circumstance of being a former public servant, in the case of re-internalization, may not be sufficient.

From the public authority perspective, this rule could create several organizational problems in carrying out normal business activities.

Therefore, as things stand at present, it is necessary to continue to focus on the "Henke exclusion": it should be narrowly construed. The presence of a public body cannot exclude *a priori* the application of transfers of undertakings rules, but it is crucial to understand if the activities involved can or cannot be described "as 'economic' in the sense of involving the provision of goods and services in competition with those offered by private sector" [13].

Selected bibliography

Deakin S., Morris G.S., *Labour Law*, Hart Publishing, Oxford-Portland, 2012.

Derlén M.J., Lindholm J. (ed. by), *The Court of Justice of the European Union. Multidisciplinary Perspectives*, Hart Publishing, Oxford-Portland, 2018.

Descentralización productiva: nuevas formas de trabajo y organización empresarial, XXVIII Congreso de Derecho del Trabajo y de la Seguridad Social, Ediciones Cinca, Madrid, 2018.

Perulli A., Treu T. (ed. by), *Enterprise and Social Rights*, Wolters Kluwer, Alphen aan denRijn, 2017.

Rainone S., *Labour Rights in the Making of the EU and in the CJEU Case Law. A Case Study on the Transfer of Undertakings Directive*, in *European Labour Law*, 2018.

Toninelli P.A. (ed.), *The Rise and Fall of State-Owned Enterprise in the Western World*, Cambridge University Press, Cambridge, 2000.

[13] S. Deakin, G.S. Morris, *Labour Law*, VI ed., Hart Publishing, Oxford-Portland, Oregon, 2012, 236.

IV

THE EMPLOYER ORGANIZATION: OLD AND NEW PROBLEMS

MONITORING AND SURVEILLANCE IN THE WORKPLACE. AN OVERVIEW OF NATIONAL AND INTERNATIONAL INSTRUMENTS TO PROTECT EMPLOYEES

Alessandra Sartori *

Summary: 1. The monitoring of employees: new and more challenges in work 4.0. – 2. International instruments for the protection of the privacy: their impact on the monitoring of employees in the workplace. – 3. In particular: the case-law of the European Court of Human Rights. – 4. A brief comparative overview: models which rely only on privacy rules and models which also add collective control by trade unions or employees' representatives. – 5. Italy in the comparative context: the recent *Jobs Act* reform.

1. The monitoring of employees: new and more challenges in work 4.0

This contribution deals with the monitoring and surveillance of the employees in the workplace, and namely with those implemented through technological devices. The power of controlling the regular performance of the employee's duties is part of the employer's direction power enshrined in the employment contract [1]. In this context, technological control is one of the most intrusive forms of control, because it permits distant and even hidden surveillance of the employees [2]. It is an old issue, dating back to the

* Lecturer in the Department of Social and Political Sciences at the State University of Milan.

[1] See T. Treu, *Labour Law and Industrial Relations in Italy*, Kluwer Law International, The Netherlands, 2007, 70-71; S. Bertocco, E. Menegatti, *Employees' Obligations. Employers' Powers and Duties*, in F. Carinci, E. Menegatti (eds.), *Labour Law and Industrial Relations in Italy*, Wolters Kluwer, Milano, 2015, 112-117.

[2] F. Hendrickx, *Introduction*, in F. Hendrickx (ed.), *Employment Privacy Law in the European Union: Surveillance and Monitoring*, Intersentia, Antwerpen, 2002, 1-3.

second half of the last century, when the development of tape recorders, video cameras, and the mechanisation of the working process took place.

However, it is not an old-fashioned issue. In fact, the digitalisation and the ever-growing use of new technologies in the production process allow for new and covert ways of technological surveillance, since industry 4.0 very often combines the instrument of control and the working tool in the same device, sometimes belonging to the employee him/herself (BYOD paradigm) [3]. In addition, the development of social media, sometimes used to perform work duties, contributes to blur the boundaries between working life and private life, enabling the employer to monitor the employees not only during working time, but also beyond: the personal information so collected can even impact on crucial employment decisions (such as hiring and firing) [4]. Moreover, some innovative ways of organising the work and performing the employment duties imply remote control based on information and communication technology, because it is otherwise very difficult to determine whether or how the worker is actually working. One could think of the examples of telework and smartworking, where the employment tasks are wholly or partly fulfilled outside from the employer's premises, and usually with technological devices (for instance, personal computers, laptops, smartphones) [5]. Also in the gig economy the job is normally performed through information and communication technology, and often rated by the application used. However, the biggest problem here is not the remote control itself, but rather the circumstance that these jobs are not even considered employment relationships in many countries [6].

---

[3] On the challenges for labour law, brought about by digitisation, see M. Weiss, *Digitalizzazione: sfide e prospettive per il diritto del lavoro*, in *Diritto delle relazioni industriali*, 2016, 651 f.; P. Tullini (ed.), *Web e lavoro. Profili evolutivi e di tutela*, Giappichelli, Torino, 2017; E. Ales *et al.* (eds.), *Working in Digital and Smart Organizations: Legal, Economic and Organizational Perspectives on the Digitalization of Labour Relations*, Palgrave MacMillan, Basingstoke, 2018. On the transformations linked to the fourth industrial revolution (Industry 4.0) see K. Schwab, *The fourth industrial revolution*, Penguin, London, 2017.

[4] M. Risak, *Employer Acquisition and the Use of the Contents of the Employee Social Media: an Overview*, in *Comparative Labor Law & Policy Journal*, 2018, 441-442. On the issues arising in the employment relationship from the use of social media see the contributions collected in *Employer Access and the Use of Employee Social Media*, in *Comparative Labor Law & Policy Journal*, 39(2), 2018.

[5] See C. Spinelli, *Tecnologie digitali e lavoro agile*, Cacucci, Bari, 2018.

[6] On the problems stemming from the platform and gig economy see J. Prassl, *Humans as a Service. The Promise and Perils of Work in the Gig Economy*, Oxford University Press, Oxford, 2018.

It is clear that the transformations in the work organisation and the extensive use of IC technology are bringing about new challenges to the old problem of protecting the employees' privacy in the workplace. It is therefore important to conduct an overview on the legal available instruments, starting from the international ones [7].

2. International instruments for the protection of the privacy: their impact on the monitoring of employees in the workplace

Amongst the non-binding sources, the right to privacy emerges in two documents of the United Nations adopted by the General Assembly: the Resolution no. 45/95 containing "Guidelines for the regulation of computerised personal data" of 1990 and the Resolution no. 68/167 on the right to privacy in the digital age of 2013. However, no specific reference is made to the surveillance of employees at work. For our purposes the "Code of practice on the protection of workers' personal data", issued by the International Labour Office in 1997 is more meaningful. The monitoring of employees through technological devices is, in principle, permitted based on precise conditions: the employer must inform in advance employees and their representatives about the reasons, the time schedule, the techniques used and the collected data, and must minimise the impact of the surveillance on the privacy of workers; even secret and continuous monitoring is allowed, but only exceptionally (art. 6) [8]. Particularly relevant at the European level is the Recommendation of the Ministers' Committee of the Council of Europe on the processing of personal data in the context of employment, issued in 2015: it states that the use of ICT at work should refrain from any unjustifiable and unreasonable interference with the employee's right to private life, while stressing, at the same time, the importance of employee information regarding possible controls and the priority of pre-

[7] On the European and international sources of the right to privacy, which special reference to the workplace, see F. Hendrickx, *Employment Privacy*, in R. Blanpain (ed.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Wolters Kluwer, The Netherlands, 2014, 470 f.; L. Tebano, *Employee's Privacy and employers' control between the Italian legal system and the European sources*, in *Labour&Law Issues*, 2, 2017.

[8] More precisely, secret monitoring is permitted only in conformity with national legislation and if there is strong suspicion of criminal activity or other serious wrong behaviour. Continuous monitoring should take place only if required for health and safety, or property protection.

ventive measures, such as internet filters, to avoid infringements by workers (points 10 and 14.1-14.2). As to the use of emails, the recommendation bans any access by the employer to private communications, while allowing the monitoring of professional communications only on the condition that the employee has been previously informed and that there are security or other legitimate reasons (points 14.3-14.4).

With regard to binding international sources, a brief note should be made to the old Convention of the Council of Europe for the protection of individuals with regard to automatic processing of personal data of 1981: it states some principles of the data processing which are still up-to-date (see in particular articles 5, 8-9), but it does not contain any specific reference to monitoring and surveillance at work. The right of respect for private and family life (right to privacy) is solemnly proclaimed both in art. 8 of the European Convention of Human Rights and in art. 7 of the Charter of the fundamental rights of the European Union (so called Nice Charter); the latter includes also provisions specifically protecting personal data (art. 8)[9]. While art. 8 of the European Convention of Human Rights has originated a flourishing case-law of the European Court of Human Rights on the monitoring and surveillance of the employees in the workplace (see below, par. 3, also for references), the Nice Charter is mainly relevant for the interpretation of the General Data Protection Regulation of the EU (reg. 2016/679), which came into force on the 25 May 2018 and repealed the 95/46/EC directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data[10]. The regulation and the directive provide general principles of privacy protection which may apply also in the workplace, but the regulation recognises the specificity of

[9] For a comment on this provision see H. Kranenborg, *Article 8*, in S. Peers *et al.* (eds.), *The EU Charter of Fundamental Rights. A Commentary*, Hart Publishing, Oxford, 2014, 223 f.; O. Pollicino, M. Bassini, *Article 8*, in R. Mastroianni *et al.* (eds.), *Carta dei diritti fondamentali dell'Unione europea*, Giuffré, Milano, 2017, 132 f.; M. Otto, *Article 8 CFREU. Protection of personal data*, in E. Ales *et al.* (eds.), *International and European Labour Law*, Nomos, Baden-Baden, 2018, 937 f.

[10] On the impact of the General Data Protection Regulation on the privacy in the workplace, and namely on the surveillance of employees, see A. Ingrao, *Il controllo a distanza sui lavoratori e la nuova disciplina privacy. Una lettura integrata*, Cacucci, Bari, 2018, 83 f. In general on the 2016/679 regulation see M. Otto, *Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation – GDPR)*, in E. Ales *et al.* (eds.), *op. cit.*, 958 f. On the directive 95/46/EC see F. Hendrickx, *Employment Privacy*, cit., 472-473; M. Otto, *The Right to Privacy in Employment. A comparative Analysis*, Hart Publishing, Oxford, 2016, 88 f.

the employment relationship by conferring certain room for manoeuvre to the Member States, which can make provisions by law or collective agreements to grant employees a higher level of protection, in particular with regard to monitoring systems (art. 88) [11].

Specific suggestions for the application of the directive and of the regulation have been issued by the advisory body set up according to art. 29 of the directive (the so-called Working Party). As to the monitoring and surveillance of employees the opinion no. 8/2001 stresses the following principles: legitimacy, which requires that the purpose of monitoring responds to a legitimate interest of the employer; proportionality to the risk, which means that the monitoring must be carried out in the least intrusive way possible and targeted to the area of risk; finality and accuracy, which imply that the data collected must be adequate, relevant and not excessive for the purpose of monitoring; transparency, which requires the staff is given appropriate and previous information. The specific issue of surveillance and monitoring of electronic communications in the workplace is dealt with by the Working Document 29 May 2002: as to the monitoring of emails and internet, it is considered possible only under exceptional circumstances, for instance to obtain the proof of criminal activity, to detect viruses and to make the IT system secure, or to maintain correspondence in case of employee absence, if other ways are not possible. The last tile of the mosaic is the opinion no. 2/2017, devoted to data processing at work, which updates the above-mentioned opinions in reference to the new technological evolutions [12], by also taking into account the new context brought about by the coming into force of the General Data Protection Regulation. The opinion confirms that the legal foundation for monitoring through ICT is mainly the legitimate interest provided by art. 7, f) of the directive (now art. 6, f) of the regulation), and states that the right balance between this legitimate interest and the right to the employee privacy may be struck through the application of the principles of proportionality, data minimisation and transparency.

Not only the opinions of the Working Party, but also the European Court of Justice [13] make reference to the case-law developed by the Euro-

[11] L. Tebano, *op. cit.*, 16-17.

[12] In general, new technologies allow for a more intrusive and pervasive monitoring both in the workplace and outside it, for instance through applications (sometimes unseen software) on office, personal and wearable devices (PC, smartphone, tablets), or incorporated in the vehicles used by the employees for the performance of their tasks (GPS tracking systems).

[13] See, for instance, ECJ 20 May 2003, C-465/00, C-138/01 and C-139/01 (*Österreichischer Rundfunk and Others*).

pean Court of Human Rights through the interpretation of art. 8 of the European Convention of Human Rights on the protection of private life. Therefore, it is particularly fruitful to now give a brief overview on the decisions of the Strasbourg Judge on the monitoring and surveillance of employees at work.

3. In particular: the case-law of the European Court of Human Rights

The European Court of Human Rights has outlined the contours of the right to privacy through an extensive interpretation of art. 8, which protects private and family life [14]. According to the Court this provision not only imposes on the State the negative obligation of not interfering with the private life of the citizens, but also the positive obligation of protecting the right to privacy from illegitimate interference by other citizens: this interpretation of art. 8 lies at the root of the interesting case-law which strikes a balance between the legitimate interest of the employer to monitor its employee and the right to privacy of the latter.

Firstly, the right to privacy is extensively interpreted, so that it includes also the professional life or activities carried on in a public context. In *Antovič and Mirkovič* [15] the Court found that the lectures of university professors were covered by art. 8, so that the video recording by the university taking place through video cameras installed in an amphitheatre violated the right to privacy of those professors, in particular because there was no lawful reason for the video recording (for example, security reasons or property protection). In *Halford* [16] phone calls made from the office were

[14] On this flourishing case-law with regard to employment surveillance see F. Hendrickx, A. van Bever, *Art. 8 ECHR: Judicial Patterns of Employment Privacy Protection*, in F. Dorssemont, K. Lörcher, E. Schömann (eds.), *The European Convention of Human Rights and the Employment Relations*, Hart Publishing, Oxford, 2013, 183 f.; F. Hendrickx, *Employment Privacy*, cit., 467-470 and 477 f.; M. Otto, *op. cit.*, 73 f.; E. Sychenko, *International Protection of Employees' Privacy under the European Convention on Human Rights*, in *Zbornik PFZ*, 2017, 757 f.; F. Perrone, *La tutela della privacy sul luogo di lavoro: il rinnovato dialogo fra Corte europea dei diritti dell'uomo e giurisdizione nazionale dopo la sentenza Barbulescu 2*, in *Labor. Il lavoro nel diritto*, 2018, 283 f. See other references also in the following footnotes.

[15] ECHR 18 November 2017, *Antovič and Mirkovič v. Montenegro*, application n. 70838/13.

[16] ECHR 25 June 1997, *Halford v. the United Kingdom*, application n. 20605/92. For a

considered by the Court as protected by art. 8: the applicant had a legitimate expectation to privacy because the private use of the phone had been authorised by the employer, she had separate premises to conduct private telephone calls and she had not been previously informed of the possibility that interceptions could be carried out. In *Copland* [17] the Court confirmed these principles and also extended to the use of emails and internet.

Secondly, the principle of transparency is key to the elaboration of the Court in reference to the respect of employee privacy: as already mentioned, in both *Halford* and *Copland* the lack of previous information on the possibility of monitoring contributed to the violation of art. 8. The same holds true in *Bărbulescu 2* [18] and *López Ribalda* [19], where previous information was not completely absent, but it was incomplete and did not permit the understanding of the nature, modalities or scope of the monitoring. In the first case, the use of an internet messenger was only allowed for company purposes, and in order to verify the respect of this company policy the employer had secretly accessed and recorded the messages of the employee for a few days. In *López Ribalda* the employer was a supermarket that had installed some video cameras after suspicions of theft: some cameras were visible and employee representatives had been properly informed about them, but other hidden cameras, directed to all cash desks, had not been reported to representatives.

Thirdly, the Court emphasises in all its decisions the importance of the proportionality principle, which is paramount to strike the right balance between the legitimate interest of the employer to monitoring and the right to privacy of the employees: in other words, the employer must use the least intrusive ways of surveillance which are suitable for reaching the legit-

broad and critical comment on this decision, compared with *Niemitz v. Germany* and others, see M. Ford, *Two Conceptions of Worker Privacy*, in *Industrial Law Journal*, 2002, 135 f.

[17] ECHR 3 April 2007, *Copland v. the United Kingdom*, application n. 62617/00.

[18] ECHR (Grand Chamber) 5 September 2017, *Bărbulescu v. Romania*, application n. 61496/08. On this decision see the comments of A. Sitzia, *I limiti del controllo della posta elettronica del lavoratore: una chiara presa di posizione della Grande Camera della Corte eur. dir. uomo*, in *Nuova giurisprudenza civile commentata*, 2017, 1651 f.; C.E.M. Jervis, *Barbulescu v. Romania: Why There is no Room for Complacency When it Comes to Privacy Rights in the Workplace*, in *Industrial Law Journal*, 2018, 440 f.

[19] ECHR 9 January 2018, *López Ribalda and Others v. Spain*, application n. 1874/13. See the comments of F. Perrone, *op. cit.*, 284 f.; A. Sitzia, *Videosorveglianza occulta, privacy e diritto di proprietà: la Corte Edu torna sul criterio di bilanciamento*, in *Argomenti di diritto del lavoro*, 2018, 506 f.

imate purpose. In *Bărbulescu 2* the monitoring was too intrusive and lasted too long (the employer had recorded some 45 pages of personal messages!), also because there were no risks for the property or for the integrity of the ICT system; moreover, the disciplinary sanction adopted was also not proportional to the behaviour of the employee. In *López Ribalda* the interest of the employer was clearly legitimate (protection of the property following well-founded suspicion of theft), but the monitoring lasted too long and encompassed too many people (indistinctly all the staff, and as to the hidden cameras, all the cashiers). By contrast, in *Köpke*[20] the Court found a fair balance between the conflicting interests: in fact, the hidden video surveillance of a cashier in a supermarket had been conducted for a limited period of time (two weeks) and targeted to the employee suspected of theft; moreover, the data processing had been carefully carried out by a limited number of employees of the investigation agency and supermarket.

Last, but not least, the Court stresses in all the aforementioned cases that the monitoring must be based on a legitimate interest of the employer, for example the protection of property or of third parties, the security and integrity of the ICT systems. In *Libert*[21], however, the Court clearly states that the employer has the right to access to the PC of an employee also to ensure that computer facilities at his disposal are used in line with contractual obligations and regulations. No violation of art. 8 was found by the Court, even if no previous information of the access had been provided to the employee, because the employee was suspended from work and the file inspected had not been properly labelled as private[22]. The employee was eventually fired because almost half of the hard disk was occupied by pornographic files, and also forged documents were found on it.

4. A brief comparative overview: models which rely only on privacy rules and models which also add collective control by trade unions or employees' representatives

After the overview on the international sources and the judicial applica-

[20] ECHR 5 October 2010, *Köpke v. Germany*, application n. 420/07.

[21] ECHR 22 February 2018, *Libert v. France*, application n. 588/13. See the comment of F. Perrone, *op. cit.*, 292 f.

[22] According to French law, files clearly identified as personal may only be opened in serious or exceptional circumstances, and always in the presence of the employee concerned.

tion given by the European Court of Human Rights, it is worth narrowing the focus on domestic legislation relating to monitoring in the workplace in some selected countries [23]. It is possible to identify two main models: the first one, typical of Anglo-Saxon countries (namely the UK and the USA), tends to absorb any protection into the individual guarantees provided by privacy legislation, whilst the second one (present in Germany and France, for instance) adds a second level of protection, albeit of different intensity, managed by employee representatives (collective control).

The two countries belonging to the Anglo-Saxon model present many similarities, but also important differences. The protection of employee privacy at work is more robust in the UK, where the Human Rights Act of 1998 transposed into the national legal order most articles of the European Convention of Human Rights, including art. 8, and where the General Data Protection Regulation 2016/679 came into force, accompanied by the Data Protection Act 2018, in spite of Brexit. According to the guidelines of the Information Commissioner's Office on privacy at work (The employment practices code of November 2011), remote monitoring is possible, provided that there is legitimate business interest and the principles of transparency, necessity and proportionality are respected. It is worth noting that interceptions of phone calls, electronic correspondence and internet use may be carried out not only to protect ICT systems from viruses or other dangers, but also to verify the exact performance of work duties by the employee and the correct use of company's facilities (Regulation of Investigatory Power Act 2000 – SI 2699), so that legitimate business interest seems to prevail over the proportionality principle. Stricter rules apply to video recording [24] and hidden surveillance: the latter may be justified only when a well-founded suspicion of a criminal offence exists.

In the US, the motherland of the right to privacy [25], as strange as it may

[23] For a few comparative studies on the protection of employees against the employer's monitoring and surveillance see F. Hendrickx (ed.), *Employment Privacy Law*, cit. (the Countries in comparison are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden, The UK); M.W. Finkin, R. Krause, H. Takeuchi-Okuno, *Employee Autonomy, Privacy, and Dignity Under Technological Oversight*, in M.W. Finkin, G. Mundlak (eds.), *Comparative Labor Law*, Edward Elgar, Cheltenham, UK, 2015, 153 f. (the Countries in comparison are the US, Germany and Japan); M. Otto, *op. cit.*, 1 f. and 121 f. (The US and Canada).

[24] Video cameras must only be located in risky areas and not where employees have a reasonable expectation of privacy (like toilets and private offices); continuous surveillance through video cameras may only be justified only in exceptional circumstances.

[25] See the definition by S.D. Warren and L.D. Brandeis, *The Right to Privacy*, in *Har-*

seem, most legislations of the federated states do not set limits to the monitoring of employees at work[26]. The main principle is that every kind of surveillance regarding the employees behaviour and the fulfilment of work duties is legitimate, unless there is a reasonable expectation of privacy, which is a circumstance that very rarely occurs in the workplace and almost never when employees are performing tasks[27]. As to interceptions of phone calls or electronic correspondence, federal legislation allows them in the workplace with two conditions: the existence of a business purpose[28] and the consent of the employee, even tacit, according to part of the case-law (Wiretap Act of 1986)[29].

As already noted, in the second model a second tier of protection against the remote monitoring by the employer is also present, and it is based on collective rights conferred to employee representatives. However, these rights are quite different in the two countries under consideration. In France the Social and Economic Committee, which is composed of the employer and of representatives elected by the staff and of the employer, must be previously informed when a system of data processing is introduced or modified; a stronger right to be previously consulted is provided when there is a plan for the introduction of "means or techniques allowing a surveillance over the activity of the employees" (art. L 2312-38, Code du travail)[30]. It is interesting to mention that, according to case-law, the violation of employee representative rights implies the impossibility of using the collected evi-

vard Law Review, 4(5), 1890, 193: the right to privacy is "the right of the individual to be let alone".

[26] On the privacy in the workplace in the United States see the monumental work of M.W. Finkin, *Privacy in Employment Law*, BNA Books, Washington DC, 2016; M. Otto, *op. cit.*, 1-67.

[27] See the often-cited decision of the United States District Court for the Eastern District of Pennsylvania Michael A. Smyth v. The Pillsbury Company, 914 F. Supp. 97 (E.D. Pa. 1996). As pointed out by M. Otto, *op. cit.*, 62, "the current status quo in privacy protection in the employment context" in the US "is to a large extent derivative of a judicial activism, or rather, one should say, judicial minimalism".

[28] The business purpose exception is extensively interpreted, and it allows also the monitoring of the correct performance of job duties by the employee. Previous information, when possible, and the respect of the proportionality principle are required.

[29] See A.L. Goldman, L.R. Corrada, *Labor Law in the USA*, Wolters Kluwers, The Netherlands, 2014, 148-149.

[30] On the protection of employees against monitoring and surveillance in the workplace in France see G. Auzero, D. Baugard, E. Dockès, *Droit du travail*, Dalloz, Paris, 2017, 806-809.

dence in trial[31]; moreover, through judicial urgent procedure the Social and Economic Committee may obtain the suspension of the use of the contested monitoring systems, until the consultation has taken place[32]. As regards to the individual level of protection, the transparency principle is explicitly stated in the Labour Code (art. 1222-4)[33], and its violation makes all collected proof not usable. Moreover, the Labour Code states that individual fundamental rights, comprised the right to privacy, are also protected in the employment relationship: consequently, every limitation must be justified and proportional to the aim pursued (art. 1121-1)[34].

In Germany the collective rights of the Works Council, the body elected by the staff, are much stronger than in France, attaining the level of co-decision: this means that the employer cannot act in a unilateral way, and if an agreement with the Works Council is not reached, the decision will be made by an arbitration body[35]. In fact, when the employer is planning to introduce and use technical instruments aimed at monitoring the behaviour or the performance of the employees[36], it must previously negotiate with the Works Council and reach an agreement, otherwise the arbitration body

---

[31] Cass. soc. 7 June 2006, *Bulletin civil*, V, n. 206.

[32] Cass. soc. 10 April 2008, *Revue de droit du travail*, 2008, p. 351.

[33] "No personal information may be collected through a device that the employee is not previously informed about": the term "device" is interpreted in an extensive way by case-law (see G. Auzero, D. Baugard, E. Dockès, *op. cit.*, 807, footnote 6).

[34] According to case-law, the employer is not allowed to open emails or personal files even if he has forbidden personal use of the PC (Cass. soc. 2 October 2001, *Recueil Dalloz*, 2001, 3148, comment of P.-Y. Gautier; Cass. soc. 12 October 2004, n. 02-40.932 D. V.): access is exceptionally permitted only if there are particular circumstances or risks (for instance, informatic viruses or suspicion of unfair competition by the employee: Cass. 17 May 2005, *Droit social*, 2005, p. 789, comment of J.-E. Ray), or if it has been authorised by judge (Cass. soc. 18 October 2006, *Revue de droit du travail*, 2006, 395, comment of R. de Quenaudon). In any case, the professional nature of files and folders contained in the hard disk of a company PC is presumed.

[35] On the German experience in the employees' protection against monitoring and surveillance in the workplace see W. Däubler, *Das Arbeitsrecht 2. Das Arbeitsverhältnis: Rechte und Pflichten, Kündigungsschutz. Leitfaden für Arbeitnehmer*, Rowohlt, Reinbeck bei Hamburg, 2009, 307 f.; M.W. Finkin, R. Krause, H. Takeuchi-Okuno, *op. cit.*; V. Grentzenberg, J. Kirchner, *Data Protection and Monitoring*, in J. Kirchner *et al.* (eds.), *Key Aspects of German Employment and Labour Law*, Springer-Verlag, Germany, 2018, 135 f.; T. Klebe, M. Weiss, *Workers Participation 4.0 – Digital and Global?*, in *Comparative Labor Law & Policy Journal*, 2018, 278-279.

[36] It should be noted that the notion of "technical instruments aimed at monitoring the behaviour or the performance of the employees" is broadly interpreted in the case-law: see M.W. Finkin, R. Krause, H. Takeuchi-Okuno, *op. cit.*, 169.

intervenes (par. 87, subsection 1, n. 6 of the Act on the Plant Order of 1972)[37]. If the procedure has not been correctly carried out, the Works Council may ask the Employment Tribunal to remove the monitoring instrument, also with an urgent procedure, and the worker may refuse to use it and ask the employer to delete the data collected. Moreover, the evidence so collected cannot, in principle, be used in trial.

While in France it is mandatory to set up a body of employee representatives, in Germany it is not: as a consequence, the collective level of protection, albeit stronger than in France, is available for a lower share of employees: in fact, approximately half of German workers are not covered by Works Councils. The individual protection is based on the EU General Data Protection Regulation, as integrated by the Federal Data Protection Act[38]. Interestingly enough, before any specific domestic provision on the right to privacy at work was enacted, a flourishing case-law was developed by Employment Tribunals to balance the employer interests and the employee right to protection of the personality, enshrined in the Constitution: this body of case-law is still very important[39].

5. Italy in the comparative context: the recent *Jobs Act* reform

Finally, it is time to locate the Italian experience into the international context, in the light of the new reform brought about by the Jobs Act of 2015, which tried to modernise the provisions of Workers' Statute on technological surveillance of employees in the workplace[40].

---

[37] The arbitration body must strike a balance between the conflicting interests of employer and employees. Its decision can be appealed before the Employment Tribunal within two weeks, but, owing to the broad discretion conferred to the arbitration body, it is normally only challenged for formal inconsistencies.

[38] In particular, par. 26 deals with data processing in employment relationships.

[39] See M.W. Finkin, R. Krause, H. Takeuchi-Okuno, *op. cit.*, 168-169. In general, the employer is allowed to monitor the behaviour and activities of employees, even though continuous surveillance of all or a substantial part of workers is not permitted, unless the employer can demonstrate a particularly qualified interest (crimes prevention, property protection) (for some example of this case-law see W. Däubler, *op. cit.*, 307 f.).

[40] For a comment of the provision as amended by the Jobs Act see A. Topo, O. Razzolini, *The Boundaries of the Employer's Power to Control Employees in the ICT Age*, in *Comparative Labor Law & Policy Journal*, 2018, 389 f. See also, amongst the recent Italian monographs on the topic, at least E. Barraco, A. Sitzia, *Potere di controllo e privacy. Lavoro, riser-*

Italy is in line with continental experiences: in fact, according to art. 4 of the Workers' Statute the employee can rely on collective protection (subs. 1), which is totally absent in Anglo-Saxon countries, and on individual guarantees, contained both in art. 4, subs. 3 and in the privacy legislation of general application, to which art. 4 explicitly refers. Like in Germany, collective rights attain the maximum level (co-decision): if the employer is not able to reach an agreement with Trade Union representatives on the monitoring device, s/he cannot make the decision unilaterally, but s/he must resort to a third party, which in Italy is the Labour Inspectorate (art. 4, subs. 1). Moreover, in Italy the collective agreement or the authorisation of the Labour Inspectorate are always required [41], differently from Germany, where the employer must comply only with privacy law if no Works Council has been set up.

From a comparative point of view the scope of Italian protection against remote monitoring is still very broad: direct monitoring is forbidden, whereas indirect surveillance [42] is allowed for organisational and productive reasons, for health and safety purposes, and for the protection of company property, on the condition that a previous agreement with Trade Union representatives has been reached, or the authorisation of the Labour Inspectorate has been obtained. This strict regulation has been softened by the Jobs Act, by excluding from these rules key cards which register the entry and exit of employees, and work tools [43].

---

vatezza e nuove tecnologie, Wolters Kluwer, Milano, 2016; A. Levi (ed.), *Il nuovo art. 4 sui controlli a distanza. Lo Statuto dei lavoratori dopo il* Jobs Act, Giuffré, Milano, 2016; O. Dessì, *Il controllo a distanza sui lavoratori. Il nuovo art. 4 Stat. lav.*, Edizioni Scientifiche Italiane, Napoli, 2017; A. Ingrao, *op. cit.*; P. Tullini (ed.), *Controlli a distanza e tutela dei dati personali del lavoratore*, Giappichelli, Torino, 2017; V. Nuzzo, *La protezione del lavoratore dai controlli impersonali*, Editoriale Scientifica, Napoli, 2018.

[41] The supreme criminal court has recently stated that the consent of the employee affected by the monitoring system is not sufficient to avoid the criminal offence of the employer, if the latter has not properly followed the collective procedure. See Cass. pen., sect. III, 10 April 2018, n. 38882.

[42] Surveillance is indirect when it happens incidentally, because the monitoring system is not targeted at employees.

[43] Especially the concept of work tools could be interpreted in a very extensive way, which also includes the monitoring applications possibly incorporated in them (for instance, a geolocation app): it is clear that such interpretation would end up depriving the employee of the protection provided by art. 4, subs. 1. For possible different interpretations of the concept see R. Del Punta, *La nuova disciplina dei controlli a distanza su lavoro*, in *Rivista italiana di diritto del lavoro*, 2016, I, 99 f.; E. Gragnoli, *Gli strumenti di controllo e i mezzi di produzione*, in *Variazioni su temi di diritto del lavoro*, 2016, 651 f.

The influence of international law and comparative experience is particularly evident in the new subs. 3 of art. 4, Workers' Statute, according to which the employee must be adequately informed about the modalities through which the monitoring will be carried out. The consequences of the violation of this provision is the same as for the non-compliance with the procedure of sub. 1: the impossibility of using the collected evidence in trial. The individual protection is completed by the reference of art. 4, sub. 3 to the privacy legislation of general application (now the EU General Data Protection Act): in this way the principles of transparency, necessity, adequacy, proportionality, are properly reaffirmed [44].

In conclusion, although scholars are divided on the issue, the author's opinion is that, from an international and comparative point of view, Italy has maintained a relatively high level of double tier protection, by relaxing the collective component a little, while at the same time strengthening the individual one, based on privacy rules and strongly influenced by the aforementioned international instruments.

Selected bibliography

Ales E. *et al*. (eds.), *Working in Digital and Smart Organizations: Legal, Economic and Organizational Perspectives on the Digitalization of Labour Relations*, Palgrave MacMillan, Basingstoke, 2018.

Auzero G., Baugard D., Dockès E., *Droit du travail*, Dalloz, Paris, 2017.

Barraco E., Sitzia A., *Potere di controllo e* privacy*. Lavoro, riservatezza e nuove tecnologie*, Wolters Kluwer, Milano, 2016.

Bertocco S., Menegatti E., *Employees' Obligations. Employers' Powers and Duties*, in F. Carinci, E. Menegatti (eds.), *Labour Law and Industrial Relations in Italy*, Wolters Kluwer, Milano, 2015, 104 f.

Däubler W., *Das Arbeitsrecht 2. Das Arbeitsverhältnis: Rechte und Pflichten, Kündigungsschutz. Leitfaden für Arbeitnehmer*, Rowohlt, Reinbeck bei Hamburg, 2009.

Del Punta R., *La nuova disciplina dei controlli a distanza su lavoro*, in *Rivista italiana di diritto del lavoro*, 2016, I, 77 f.

Dessì O., *Il controllo a distanza sui lavoratori. Il nuovo art. 4 Stat. lav.*, Edizioni Scientifiche Italiane, Napoli, 2017.

[44] To accompany the coming into force of the EU Regulation Italy has recently enacted the legislative decree n. 101/2018, which has modified the so-called Code of privacy (legislative decree n. 196/2003).

Employer Access and the Use of Employee Social Media, in *Comparative Labor Law & Policy Journal*, 39(2), 2018.

Finkin M.W., Krause R., Takeuchi-Okuno H., *Employee Autonomy, Privacy, and Dignity Under Technological Oversight*, in M.W. Finkin, G. Mundlak (eds.), *Comparative Labor Law*, Edward Elgar, Cheltenham, UK, 2015, 153 f.

Finkin M.W., *Privacy in Employment Law*, BNA Books, Washington DC, 2016.

Ford M., *Two Conceptions of Worker Privacy*, in *Industrial Law Journal*, 2002, 135 f.

Goldman A.L., Corrada L.R., *Labor Law in the USA*, Wolters Kluwers, The Netherlands, 2014.

Grentzenberg V., Kirchner J., *Data Protection and Monitoring*, in J. Kirchner *et al.* (eds.), *Key Aspects of German Employment and Labour Law*, Springer-Verlag, Germany, 2018, 135 f.

Hendrickx F., *Introduction*, in F. Hendrickx (ed.), *Employment Privacy Law in the European Union: Surveillance and Monitoring*, Intersentia, Antwerpen, 2002, 1 f.

Hendrickx F., *Employment Privacy*, in R. Blanpain (ed.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Wolters Kluwer, The Netherlands, 2014, 465 f.

Hendrickx F., Van Bever A., *Art. 8 ECHR: Judicial Patterns of Employment Privacy Protection*, in F. Dorssemont, K. Lörcher, I. Schömann (eds.), *The European Convention of Human Rights and the Employment Relation*, Hart Publishing, Oxford, 2013, p. 183 f.

Ingrao A., *Il controllo a distanza dei lavoratori e la nuova disciplina* privacy*: una lettura integrata*, Cacucci, Bari, 2018.

Jervis C.E.M., *Bărbulescu v. Romania: Why There is no Room for Complacency When it Comes to Privacy Rights in the Workplace*, in *Industrial Law Journal*, 47(3), 440 f.

Klebe T., Weiss M., *Workers Participation 4.0 – Digital and Global?*, in *Comparative Labor Law & Policy Journal*, 2018, 263 f.

Kranenborg H., *Article 8*, in S. Peers *et al.* (eds.), *The EU Charter of Fundamental Rights. A Commentary*, Hart Publishing, Oxford, 2014, 223 f.

Levi A. (ed.), *Il nuovo art. 4 sui controlli a distanza. Lo Statuto dei lavoratori dopo il* Jobs Act, Giuffré, Milano, 2016.

Nuzzo V., *La protezione del lavoratore dai controlli impersonali*, Editoriale Scientifica, Napoli, 2018.

Otto M., *The Right to Privacy in Employment. A Comparative Analysis*, Hart Publishing, Oxford, 2016.

Otto M., *Article 8 CFREU. Protection of personal data*, in E. Ales *et al.* (eds.), *International and European Labour Law*, Nomos, Baden-Baden, 2018, 937 f.

Otto M., *Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation – GDPR)*, in E. Ales *et al.* (eds.), *International and European Labour Law*, Nomos, Baden-Baden, 2018, 958 ss.

Perrone F., *La tutela della* privacy *sul luogo di lavoro: il rinnovato dialogo fra Corte europea dei diritti dell'uomo e giurisdizione nazionale dopo la sentenza Barbulescu 2*, in *Labor. Il lavoro nel diritto*, 2018, 283 f.

Pollicino O., Bassini M., *Article 8*, in R. Mastroianni *et al.* (eds.), *Carta dei diritti fondamentali dell'Unione europea*, Giuffré, Milano, 2017, 132 f.

Risak M., *Employer Acquisition and the Use of the Contents of the Employee Social Media: An Overview*, in *Comparative Labor Law & Policy Journal*, 39(2), 2018, 441 f.

Schwab K., *The Fourth Industrial Revolution*, Penguin, London, 2017.

Sitzia A., *I limiti del controllo della posta elettronica del lavoratore: una chiara presa di posizone della Grande Camera della Corte eur. dir. uomo*, in *Nuova giurisprudenza civile commentata*, 12, 2017, 1651 f.

Sitzia A., *Videosorveglianza occulta, privacy e diritto di proprietà: la Corte Edu torna sul criterio di bilanciamento*, in *Argomenti di diritto del lavoro*, 2018, 506 f.

Spinelli C., *Tecnologie digitali e lavoro agile*, Cacucci, Bari, 2018.

Sychenko E., *International Protection of Employees' Privacy under the European Convention on Human Rights*, in *Zbornik PFZ*, 2017, 757 f.

Tebano L., *Employee's Privacy and Employers' Control Between the Italian Legal System and the European Sources*, in *Labour&Law Issues*, 2, 2017.

Topo A., Razzolini O., *The Boundaries of the Employer's Power to Control Employees in the ICT Age*, in *Comparative Labor Law & Policy Journal*, 39(2), 2018, 389 f.

Treu T., *Labour Law and Industrial Relations in Italy*, Kluwer Law International, The Netherlands, 2007.

Tullini P. (ed.), *Controlli a distanza e tutela dei dati personali del lavoratore*, Giappichelli, Torino, 2016.

Tullini P. (ed.), *Web e lavoro. Profili evolutivi e di tutela*, Giappichelli, Torino, 2017.

Weiss M., *Digitalizzazione: sfide e prospettive per il diritto del lavoro*, in *Diritto delle relazioni industriali*, 2016, 651 f.

THE RESPONSIBILITY OF THE EMPLOYER AND THE EFFECTIVENESS OF LABOUR LAW

Michail-Iason K. Papadimitriou *

1. Introduction

At first glance, effectiveness is not a traditional field of reflection in legal theory. Classical theory and jurisprudence have not resulted in an adequate and absolute definition, since this term has mainly concentrated the interest of sociology, political and economic science, etc. However, effectiveness is a common field of interest for the researcher who wants to convince himself that he is not confined to an "abstract universe of rules" but he is interested in their application to practice and social reality. In this sense, it is important not to get confined solely in an effort to define efficiency. When it comes to the law, effective is everything, which can function as the bridge between law and society, filling the potential gap between theory and reality [1].

This study examines in particular the effectiveness of labour law. Undoubtedly, the issue of effectiveness will never cease to directly concern labour law, as this branch of law is particularly "alive" and "sensitive" to economic, political and social fluctuations and developments.

* LLM European Economic and Financial Criminal Law – University of Luxembourg LLM Labour Law – National and Kapodistrian University of Athens, PhD Candidate Labour Law – Aristotle University of Thessaloniki.

[1] Y. Leory, *L'effectivité du droit au travers d'un questionnement en droit du travail*, L.G.D.G. textenso éditions, Paris, tome 55, 2011, 1.

1.1. The effectiveness of law

Effectiveness can be in a twofold way. On the one hand, effective is a measure that leads to a particular result and, on the other hand, said result should be the intended one[2].

Effectiveness constitutes also the foundation of the concept of legal validity in legal theory[3], which governs the enforceability of laws, but it should not be confused with its reflectivity. In this regard, the cause-effect relationship has to be clearly separated from the notion of "simple coincidence"[4]. In addition, law is, above all, a system of values, which, apart from the direct, it also has indirect and obscure effects[5] that should be identified and studied from a qualitative and quantitative separate perspective.

Furthermore, a legal rule should be perceived as part of the legal system to which it belongs, along with the other rules with which it is related and the rules it supplements or replaces[6].

1.2. The effectiveness of labour law

Effectiveness is a concern for every legal field; nevertheless, the problem is manifested with particular intensity in labour law, given that particular peculiarities exist, which relate to the inherent inefficiency characterizing this particular field of law[7]. The existence of competitive interests, combined with the inequality of power between employer and employee, contributes particularly to ineffectiveness, as is the involvement of many different actors (e.g. trade unions, employers' organisations, labor inspectorates, etc.) in its production and implementation. In this context, we should also take into account, the existence of extensive volume of labour law legislation, its particular complexity and the controversial legal concepts that are included

---

[2] Y. Leory, *op. cit.*, 8.

[3] H. Kelsen, *Theorie pure du droit*, Dalloz, Paris, 1962.

[4] S. Levitt, S. Dubner, *Freakonomics: A Rogue Economist Explores the Hidden Side of Everything*, William Morrow Paperbacks, New York, 2009, 131.

[5] Y. Leory, *op. cit.*, 430.

[6] K. Papadimitriou, *The Conditions for Strike Action and Lock-out in the European Union in the Private and Public Sector*, DEN, Athens, 2015, 465.

[7] J. Michel, *Les sanctions civiles, pénales et administratives en droit du travail*, Ministère de l'emploi, du Travail et de la Cohésion sociale, 2004, 7.

therein. At the same time, we should not fail to mention the often marginal nature of the offenses (e.g. unpaid overtime) that intensify the problem.

Voices advocating for the simplification of labour law are increasing and coming from scholars, judges as well as social partners (mainly from the employers' side, based on its interests). Market participants point out that the complexity and rigidity of labour law increases the cost of the functioning of labour market, given that it prevents growth, due to the prevailing vagueness that mitigates business strategies and, of course, discourages new investors. Based on the neoliberal approach, the economy is self-regulatory and every regulative legal provision (minimum wage, dismissal protection) is seen as a counterproductive obstacle [8].

Indeed, each transaction entails a transaction cost (monetary and non-monetary). If the transaction costs are high, a deal may be prevented, as it will become unprofitable. Law is part of transaction costs. Without the law, however, transactions would be very difficult to achieve, if not impossible. It is, thus, not a limitation but a tool to resolve the inherent problems of the market [9]. Especially in the field of labour law, effective labour standards lead to high trust relationships that promote employers' and employees' co-operation, which might in turn lead to higher productivity on the basis of a high-protection, high-productivity strategy [10].

Additionally, the complexity of labour law is not different from that encountered in other areas of law [11]. The debate over the simplification of labour law can be fruitful if it seeks to optimize it, to rationalize its complex provisions and to codify it in order to make it more accessible to recipients. However, the deregulation of labour law by invoking the need for its simplification might not be accepted.

1.3. The effectiveness of sanctions

In the traditional theory of law, a rule which does not provide for a

[8] Y. Leory, *op. cit.*, 208.

[9] A. Chatzis, *Law as a Tool for Reducing Transaction Costs. The Coase Theorem and the Economic Analysis of Law*, in *The Role of Justice in the Exercise of Business* (in Greek), Nomiki Vivliothiki, Athens, 2012, 32.

[10] I. Skandalis, *Balancing Employer and Employee Interests: Legitimate Expectations and Proportionality in the Acquired Rights Directive*, P.N. Sakkoulas, Athens, 2016, 38.

[11] Y. Leory, *op. cit.*, 128.

sanction in the event of a violation is *lex imperfecta* – an incomplete rule [12].

The primary function of the sanction is to ensure the effectiveness of rule and, vice versa, the effectiveness of the rule presupposes the effectiveness of the sanction provided for its breach. Thus, a rule which provides for a very light sanction compared to the profit obtained by the offender, does not produce the expected deterrent effect, and is, therefore, ineffective. Accordingly, a very harsh sanction may prove ineffective because of its non-enforcement by judges or authorities, or because it may lead to even greater problems, such as disrupting the functioning of the market or simply destroying the offender [13].

Of course, the existence of sanction is undoubtedly of particular concern, as it does cause damage. Moreover, the cost of the sanction is not limited to the offender but also to other parties. The cost the enforcement of a sanction entails is indirectly borne by the shareholders, the employees, the consumers, the suppliers and other lenders of a business. The cost of the enforcement and judicial mechanisms that impose the sanctions, such as the police, the labor inspection and the justice system, should also be considered [14].

In light of the above, in order to evaluate the necessity of a particular social policy, we need, at first, to identify its efficiency in achieving the socially important goal [15]. In our case, the purpose of the sanctions consists in deterring the wrongful behavior of the employer and the violation of labour law.

For most violations, simply imposing stricter penalties is totally devoid of general deterrent effect, whilst it treats the punished individual as a simple means of exemplification [16]. In addition, a long period of time intervening between the violation and the sanction removes any significant disincentive to the crime. The certainty and swiftness of the sanction is much more important than its severeness. A harsh punishment is not in itself a deterrent one if the perpetrator maintains the hope of impunity [17].

---

[12] K. Papadimitriou, *Les libertés individuelles du salarié en France, en Italie et en Grèce*, in *U.E.R. des sciences juridiques*, Université de Paris X, Nanterre, 1985, 231.

[13] Y. Leory, *op. cit.*, 74.

[14] N.K. Androulakis, *Criminal Law – General Part* (in Greek), P.N. Sakkoulas, Athens, 2000, 34.

[15] N.K. Androulakis, *op. cit.*, 40.

[16] N.K. Androulakis, *op. cit.*, 41.

[17] C. Beccaria, *On Crimes and Punishments* (in Greek), Savvalas Publications, Athens, 2009, 114.

Moreover, only direct financial sanctions can affect employers' behaviour who, in their overwhelming majority, determine their policy/behaviour on the basis of a financial "loss-profit" estimation [18]. Specific deterrence focuses on the suspension of illegal activity of captured offenders (and not potential). The sentence is intended to neutralize, intimidate, but also, to improve the offender [19].

There is no doubt that the offender is not unreasonable, especially in the area of labour law. However, we cannot accept that he is as rational as the theory of deterrence implies [20], in order to be completely certain for the outcome of a certain sanction policy. Can we therefore conclude that sanctions are unnecessary and should be abolished? Probably not. On the contrary, when repression decreases – e.g. when the presence of the police is reduced or the punishment of perpetrators is obstructed by procedural rules that delay or stop criminal proceedings, deterrence disappears, the feeling of impunity grows and crime-rates increase [21].

1.4. Alternatives to traditional sanctions

But are there other ways, beyond sanctions, with which the effectiveness of labor law can be enhanced? Means by which state interventionism and its associated costs be avoided? After all, the state guaranteeing the application of labour law may also become an offender [22].

Soft law measures, such as Corporate Social Responsibility (CSR) [23], is an expression descriptive of a new form of legal means which includes codes of conduct, directives, opinions, recommendations, etc. These measures are not strictly mandatory and are mainly characterized by the absence of penalties. By these means, a self-regulation of the social ecosystem could be achieved; the desired result could be produced by saving state resources, while the

---

[18] P. Morvan, *À quelles conditions les sanctions financières en droit social sont-elles dissuasives?*, in B. Teyssié (dir.), *La sanction en droit du travail*, Panthéon Assas, Paris, 2012, 145.

[19] N.K. Androulakis, *op. cit.*, 47.

[20] P. Morvan, *op. cit.*, 149.

[21] N.K. Androulakis, *op. cit.*, 44.

[22] *http://europa.eu/rapid/press-release_IP-13-1108_el.htm*.

[23] P. Hohnen, *Corporate Social Responsibility: An Implementation Guide for Business*, in *IISD*, 2007. *http://www.iisd.org/pdf/2007/csr_guide.pdf*.

heads of companies have begun to calculate the positive effects on company image and reputation of such practices [24]. Irrespective of the expressed doubts [25], it might not be refused that soft law reaches places, which are difficult to be covered by "hard" law measures.

Other significant alternatives to typical legislation are social reactions, by consumers or activists. Whether in the form of boycott or other actions, such as flash mob, the intention is to create a new grid of consequences for the employer [26]. By keeping aside any reservations about the legality [27] of such actions, these instruments could be characterized as effective alternatives, since they directly target the company's reputation and economic activity, thus creating the corresponding pressure on the employers' side.

Collective autonomy is a separate way of regulating labor relations and law production, recognized at both national and international level. Based on the economic analysis of law, the closer the rules are to the will of the parties, the more efficient and effective they become. Collective autonomy achieves this objective by creating rules as a result of negotiation of social partners and by balancing the inherent inequality existing in the relationship between the employer and the employee [28]. Although negotiation is not always balanced, especially at company level, collective autonomy is a sure and time-tested way of improving the effectiveness of labour law [29].

Nevertheless, the use of civil, administrative and criminal sanctions improves the effectiveness of labour law and ensures greater respect of its rules [30].

2. The responsibility of the employer

The employer is responsible for any violation of labour law rules. If the

---

[24] M. Weber, *The Business Case for Corporate Social Responsibility: A Company-level Measurement Approach for CSR*, in *European Management Journal*, 26, 2008, 247-261.

[25] K. Papadimitriou, *Internationalization of Workers' Mobility*, in *The "New" Labor Law, honorary volume for Professor Ioannis D. Koukiadis* (in Greek), Sakkoulas Publications, Athenes, 409.

[26] D. Ladas, *Boycottage* (in Greek), Nomiki Vivliothiki, Athens, 2011, 154.

[27] G. Leventis, *Collective Labour Law* (in Greek), DEN, Athens, 2007, 659.

[28] J. Malmberg, *Effective Enforcement of EC Labour Law*, Kluwer Law International, The Hague, 2003.

[29] Y. Leory, *op. cit.*, 180.

[30] Y. Leory, *op. cit.*, 47.

employer is a natural person, he faces the entire grid of responsibilities and sanctions as prescribed by law. Conversely, when the employer is a legal person, civil and administrative liability concerns that legal person, whereas criminal responsibility[31] of the employer concerns its legal representatives.

2.1. Civil responsibility

Civil responsibility aims at creating a balance between the conflicting private interests of the parties, which are, in principle, equal. The use of sanctions constitutes the fundamental element of the managerial right in the context of disciplinary law[32].

Compensation, penalties and other legal remedies, on the other hand, aim to balance a private-law relationship that has become problematic. Therefore, in labour law, there are various measures in place for the striking of a balance in the employment relationship, which is, of course, inherently imbalanced. These measures aim at preventing employers from violating labour law rules (mainly by increasing the cost of illegal behaviors)[33].

There are, therefore, provisions incorporated into legislative measures forming a more or less specific protective framework for the worker. For example, in Greece, each hour of irregular overtime work is paid by additional remuneration/compensation equal to 80% of the hourly wage[34]. The extraordinary termination of the employment contract is accompanied by the payment of increased/full severance pay[35]. In case of unlawful dismissal, the employee is entitled to claim payment of his/her salary up to his/her reinstatement or up to the (new) lawful termination of the employment contract[36]. In case of a fixed-term employment contract that is deemed to circumvent the relevant legislation, its reclassification and conversion into an open-ended contract is provided for[37].

---

[31] The Greek legal system does not provide for corporate criminal liability.

[32] Y. Pagnerre, *La sanction en droit du travail* (sous la direction de B. Teyssié), Panthéon Assas, Paris, 2012, 157.

[33] R. Vatinet, *La sanction en droit du travail* (sous la direction de B. Teyssié), Panthéon Assas, Paris, 2012, 135.

[34] G. Leventis, K. Papadimitriou, *Individual labour law* (in Greek), DEN, Athens, 2011, 422.

[35] G. Leventis, K. Papadimitriou, *op. cit.*, 840.

[36] R. Vatinet, *op. cit.*, 136.

[37] G. Leventis, K. Papadimitriou, *op. cit.*, 137.

Another part of the employer's civil responsibility is linked to procedural rules, which also affect the effectiveness of labour law. Mechanisms, such as the shifting of burden of proof, the temporary reinstatement of the worker in case of probability of unlawful dismissal are therefore important [38-39]. However, the civil liability of the employer does not always prove effective in practice, due to the delay in the administration of justice or insolvency of the employer. Furthermore, in the majority of cases the burden of proof lies with the employee, when he resorts to the court as claimant, on the basis of the relevant rules of Civil Procedure. At the same time, employers do not seem to be particularly worried, either by facing the risk of having serious – or less serious – financial consequences later rather sooner, since this risk rarely affects their decision-making process. This relative inefficiency of the civil responsibility partly explains the widespread use of administrative and criminal sanctions in the field of labour law [40].

2.2. Administrative responsibility

Administrative sanctions have the significant advantages of swiftness and simplicity, as the administrative penalty does not require the time-consuming juridical procedure. Such sanctions are also characterized by the deterrence effect, as many administrative penalties are much more dissuasive for business functioning than criminal and civil penalties. At the same time, financial sanctions create a prospect of considerable state benefit, since the revenues will be used for specific policies, instead of being lost to the labyrinth of state funds [41].

Financial sanctions usually take the form of a fine, but may also take other forms, e.g. the deprivation of state aid or financial privileges. Different but also equally dissuasive are the various acts that the administrative authorities may issue and which concern the operation of the enterprise, e.g. temporary or permanent cessation of business, prohibition of partici-

[38] D. Zerdelis, *Issues of Effective Legal Protection in Labor Disputes – Burden of Proof and Temporary Legal Protection* (in Greek), DEE (ΔΕΕ), in *Business and Company Law Journal, Nomiki Vivliothiki*, 2016, 601.

[39] K. Papadimitriou, *The Burden of Proof in Labor Disputes* (in Greek), in *Trial Law Journal Center of Juridical Studies*, 28, 1987, 210.

[40] Y. Leory, *op. cit.*, 25.

[41] A. Martinon, *Les sanctions extérieures au droit privé. La sanction en droit du travail*, Panthéon Assas, Paris, 2012, 29.

pation in public tenders etc. There is also a third category of penalties, which consists in sanctions aiming at the reputation of a business, which may prove particularly dissuasive [42].

But are there any disadvantages? Initially, it should be stressed that administrative sanctions may be "quasi-criminal" penalties and that there should be adequate safeguards when imposing them [43]. The attempt to distinguish a criminal offence from an administrative one is difficult but necessary [44]. In addition, administrative sanctions are not merged with criminal penalties and, in many cases, this may be contrary to the ne bis in idem principle. At the same time, they should be in line with the principle of proportionality [45].

On a final note, the inappropriate use of administrative sanctions, especially when they are severe, may have important side effects. Nevertheless, a parallel system of administrative and criminal responsibility can work effectively [46].

2.3. Criminal Responsibility

Criminal responsibility is certainly the greatest threat that the state reserves for potential offenders of the legal rules [47]. Criminal offenses largely outweigh other forms of harmful or divergent behaviour, such as, for example, inconsistency with contractual obligations [48].

Criminal labour law is treated with caution by legal theory [49]. For some, it is a necessary evil and sanctions need to be strengthened. On the other hand, those in support of the decriminalization of labour law, underline the legal uncertainty that criminal sanctions cause in a predominantly trading relationship and that entrepreneurship is being harmed, especially small and medium [50]. Also, the generalized and extensive imposition of criminal pe-

[42] A. Martinon, *op. cit.*, 26.

[43] C. Mylonopoulos, *op. cit.*, 27.

[44] N.K. Androulakis, *op. cit.*, 7.

[45] A. Martinon, *op. cit.*, 29.

[46] K. Sugman Stubbs, M. Jager, *op. cit.*, 168.

[47] N.K. Androulakis, *op. cit.*, 1.

[48] D. Sideris, *op. cit.*, σελ., 19.

[49] A. Lyon-Caen, *Sur les fonctions du droit pénal dans les relations de travail*, in *Droit social*, 1984, 438.

[50] Y. Leory, *op. cit.*, 44.

nalties affects negatively its deterring character and the social function it performs through exemplification[51]. The initiation of the criminal proceedings is also a very strong, if not definitive and irreversible, breach of mutual trust and confidence in the employer-employee relationship[52].

However, it is naive to "get rid of" the only powerful means of pressure to protect workers[53]. In any case, mechanisms such as criminal law should be used where tort law and administrative sanctions do not suffice, in particular as regards to provisions concerning the protection of life, health and dignity of workers[54].

Criminal law is a preference-shaping mechanism. For this reason, it should be applied in such a way as to ensure that the benefit from its use does not outweigh the cost of its application, taking into account the possible parallel administrative and civil responsibility[55]. The penal sanction is and must be, by its nature, a kind of ultima ratio, in the sense that we should not recourse to it, unless this is absolutely necessary. Direct recourse to a harsher measure, while a less intensive serious may suffice, constitutes unacceptable arbitrariness within the framework of the rule of law[56].

In conclusion, we consider that criminal responsibility constitutes an important safeguard for the protection of labour rights but can be improved[57], while it would also be useful to consider alternative sanctions, such as community service[58].

3. An international dimension

Issues relating to the effectiveness of labour law are not only confined within national law. On the contrary, they arise acutely also at an international level due to globalization.

---

[51] A. Coeuret, E. Fortis, *op. cit.*, 6.

[52] A. Coeuret, E. Fortis, *op. cit.*, 5.

[53] A. Lyon-Caen, *op. cit.*, 439.

[54] A. Coeuret, E. Fortis, *op. cit.*, 7.

[55] K.G. Dau-Schmidt, *op. cit.*, 20.

[56] N.K. Androulakis, *op. cit.*, 49.

[57] D. Sideris, *op. cit.*, 144.

[58] M. Foucault, *La société punitive*, in Id., *Résumé des Cours 1970-1982*, Juillard, Paris, 1989, 29-51 (in Greek) trans. F.G.A., 14.

National law remains, and will remain, the main legal mechanism regulating industrial relations. Its effectiveness is weakened particularly because of the inability of national regulations to follow labour market reality and developments, *i.e.* new forms (transformation) of employment, the use of outsourcing, new production models and the evolution of commerce. In other words, globalization is changing much faster and more decisively the labor relations than the available legal tools may regulate [59]. The transformation of enterprises, the way they are organized and the transnationality of their activities compose important factors concerning de facto deregulation of labour law [60].

In this context, European law is undoubtedly one of the most important legal sources, regulating a wide range of issues [61]. The principle of effectiveness of European law requires that legal provisions should be accompanied by effective, proportionate and dissuasive sanctions [62]. At the same time, the harmonization of labour law at a European level is catalytic for its effectiveness [63]. At international level, the International Labor Organization (ILO) has adopted most of the initiatives to tackle globalization consequences and ensure decent work conditions [64].

Social clauses included in international trade and contracts in order to avoid competition on the basis of the working conditions applying to each state, may prove an important tool for preventing social dumping. The most important element for the enhancement of labour law effectiveness is the development of the trade union movement at an international level [65], which has so far proved to be rather difficult [66].

---

[59] L. Wedderburn, *Common Law, Labour Law, Global Law, Social and Labour Rights in a Global Context*, Cambridge University Press, Cambridge, 2002, 29.

[60] D.A. Travlos-Tzanetatos, *The Solidarity Strike in National and Multinational Business Groups*, Sakkoulas Publications, Athens, 1998, 183.

[61] S. Laulom, *Administrative Processes, Effective Enforcement of EC Labour Law*, Iustus Förlag, Uppsala, 2004, 112.

[62] D. Zerdelis, *Labour Law – Individual Labour Relations*, III ed., Sakkoulas Publications, Athens, 2015, 290.

[63] J. Malmberg, *op. cit.*, 4.

[64] P. O'Higgins, *The Interaction of the ILO, the Council of Europe and European Union Labour Standards, Social and Labour Rights in a Global Context: International and Comparative Perspectives*, Cambridge University Press, New York, 2002.

[65] D.A. Travlos-Tzanetatos, *Financial Crisis and Labour Law*, Sakkoulas Publications, Athens, 2013, 266.

[66] N. Aliprantis, *Globalization and Labor Relations. The Law Facing the Challenge of Glo-*

4. Conclusion

The effectiveness of labour law depends on many factors, but shaping a rationalized and dissuasive framework of sanctions is certainly a sine qua non for this field of law. Also, the link between the effectiveness of labour law and labour inspection authorities with adequate funding, human resources and the constant modernization of structures and control systems is crucial [67].

The research on the effectiveness of law must aim beyond a quantitative approach, *i.e.* assessing the depth and variety of the results (legal and social, direct and indirect, material and symbolic). The effectiveness of law lies more in "gray areas" and its assessment is a complex process [68].

The point is to look for a balance point, an equilibrium in which all the set of provisions on employer responsibility will work in harmony, as opposed to an imminent and ever-present "Damoclean" peril.

Selected bibliography

Aliprantis N., *Globalization and Labor Relations. The Law Facing the Challenge of Globalization*, 2nd Congress of Greek Law Schools – Conference Records, ed. A. Kazakos, Sakkoulas Publications, Athens, 2002.

Androulakis N.K., *Criminal Law – General Part* (in Greek) P.N. Sakkoulas, Athens, 2000.

C. Beccaria, *On Crimes and Punishment* (in Greek), Savvalas Publications, Athens, 2009.

Casale G., *The Effectiveness of Labour Law and the Role of Labour Inspection Director*, Labour Administration and Inspection Programme ILO, Geneva XX world congress, international society for labour and social security law, Santiago de Chile, 25-28 September 2012. *http://islssl.org/wp-content/uploads/2013/01/TopicOneEnglish-Casale.pdf*.

Chatzis A., *Law as a Tool for Reducing Transaction Costs. The Coase Theorem and*

balization, 2nd Congress of Greek Law Schools – Conference Records, ed. A. Kazakos, Sakkoulas Publications, Athens, 2002, 208.

[67] G. Casale, *The Effectiveness of Labour Law and the Role of Labour Inspection Director*, Labour Administration and Inspection Programme ILO, Geneva XX world congress, international society for labour and social security law, Santiago de Chile, 25-28 September 2012, 5. *http://islssl.org/wp-content/uploads/2013/01/TopicOneEnglish-Casale.pdf*.

[68] Y. Leory, *op. cit.*, 434.

the Economic Analysis of Law, in *The Role of Justice in the Exercise of Business* (in Greek) Nomiki Vivliothiki, Athens, 2012.
Foucault M., *La société punitive*, in Id., *Résumé des Cours 1970-1982*, Juillard, Paris, 1989, 29-51 (in Greek) trans. F.G.A.
Hohnen P., *Corporate Social Responsibility: An Implementation Guide for Business*, IISD, 2007. *http://www.iisd.org/pdf/2007/csr_guide.pdf.*
Laulom S., *Administrative Processes, Effective Enforcement of EC Labour Law*, Iustus Förlag, Uppsala, 2004.
Ladas D., *Boycottage* (in Greek) Nomiki Vivliothiki, Athens, 2011.
Leory Y., *L'effectivité du droit au travers d'un questionnement en droit du travail*, L.G.D.G. textenso éditions, Paris, tome 55, 2011.
Levitt S., Dubner S., *Freakonomics: A Rogue Economist Explores the Hidden Side of Everything*, William Morrow Paperbacks, New York, 2009.
Lyon-Caen A., *Sur les fonctions du droit pénal dans les relations de travail*, in *Droit social*, 1984.
Malmberg J., *Effective Enforcement of EC Labour Law*, Kluwer Law International, The Hague, 2003.
Martinon A., *Les sanctions extérieures au droit privé. La sanction en droit du travail*, Panthéon Assas, Paris, 2012.
Michel J., *Les sanctions civiles, pénales et administratives en droit du travail*, Ministère de l'emploi, du Travail et de la Cohésion sociale, 2004.
Morvan P., *À quelles conditions les sanctions financières en droit social sont-elles dissuasives?*, in B. Teyssié (dir.), *La sanction en droit du travail*, Panthéon Assas, Paris, 2012, 140.
O'Higgins P., *The Interaction of the ILO, the Council of Europe and European Union Labour Standards, Social and Labour Rights in a Global Context: International and Comparative Perspectives*, Cambridge University Press, New York, 2002.
Pagnerre Y., *La sanction en droit du travail* (sous la direction de B. Teyssié), Panthéon Assas, Paris, 2012.
Papadimitriou K., *The Burden of Proof in Labor Disputes* (in Greek), in *Trial Law Journal Center of Juridical Studies*, 28, 1987.
Papadimitriou K., *The Conditions for Strike Action and Lock-out in the European Union in the Private and Public Sector* (in Greek), DEN, Athens, 2015, 465.
Skandalis I., *Balancing Employer and Employee Interests: Legitimate Expectations and Proportionality in the Acquired Rights Directive*, P.N. Sakkoulas, Athens, 2016.
Spyropoulos G., *Encadrement social de la mondialisation de l'economie: bilan et perspectives d'avenir de l'action normative au niveau international dans le domaine du travail*, in *Droit social*, 1996.
Travlos-Tzanetatos D.A, *The Solidarity Strike in National and Multinational Business Groups* (in Greek) Sakkoulas Publications, Athens, 1998.

Travlos-Tzanetatos D.A., *Financial Crisis and Labour Law* (in Greek) Sakkoulas Publications, Athens, 2013.

Vatinet R., *La sanction en droit du travail* (sous la direction de B. Teyssié), Panthéon Assas, Paris, 2012.

Weber M., *The Business Case for Corporate Social Responsibility: A Company-level Measurement Approach for CSR*, in *European Management Journal*, 26, 2008, 247-261

Wedderburn L., *Common Law, Labour Law, Global Law, Social and Labour Rights in a Global Context*, Cambridge University Press, Cambridge, 2002.

Zerdelis D., *Labour Law – Individual Labour Relations*, III ed. (in Greek), Sakkoulas Publications, Athens, 2015.

Zerdelis D., *Issues of Effective Legal Protection in Labor Disputes – Burden of Proof and Temporary Legal Protection* (in Greek), DEE, in *Business and Company Law Journal, Nomiki Vivliothiki*, 2016.

MODERN INTERNATIONAL CORPORATE SOCIAL RESPONSIBILITY INSTRUMENTS AND THE PROTECTION OF FUNDAMENTAL LABOUR STANDARDS: AN INTRODUCTION TO THE DUTCH INTERNATIONAL RESPONSIBLE BUSINESS CONDUCT AGREEMENTS

Bas Rombouts *

1. Introduction

In recent years, there has been an increased emphasis on the role corporations play in securing protection of workers' rights in the context of their transnational activities and supply chains. Especially the fundamental labour standards – the prohibition of child labour, the prohibition of forced labour, non-discrimination and equal treatment in occupation and employment, and rights to freedom of association and collective bargaining – that were created in the framework of the International Labour Organization (ILO), take a central place in international instruments that aim to regulate corporate transnational behavior. International corporate social responsibility is promoted by a mix of instruments that can have public and private features.

A recent and innovative initiative is the development of the Dutch International Responsible Business Conduct (IRBC) agreements; sectoral part-

* Associate Professor, Tilburg University, Tilburg Law School, Department of Labour Law and Social Policy.

nerships between businesses, the government, trade unions and NGOs, that aim to improve circumstances in a number of risk areas – in relation to the environment, labour and human rights – and that seek to provide solutions to problems that businesses are often unable to solve on their own, when their transnational activities may negatively impact on those areas [1]. Presently, there are agreements that cover, among others, the garments and textile sector, banking, the gold sector and sustainable forestry, while other agreements are still being negotiated. The agreements are based on an advisory report of the Dutch Social and Economic Council (SER), a central advisory body to the government on issues related to social and economic policy and legislation [2].

This chapter explores the content and functioning of these multi-stakeholder IRBC agreements and the way in which they could contribute to the protection of fundamental labour standards in a transnational setting by examining them in the context of the international regulatory framework on which they are based. To this end, the IRBC agreements are reviewed in relation to the relevant international standard-setting in the framework of the ILO and two key public instruments; the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights [3]. When implemented correctly, the result should be that the IRBC agreements promote compliance with the UNGPs and OECD Guidelines and may help to achieve the Sustainable Development Goals [4].

Therefore, the first part will briefly examine the content and development of the ILO's fundamental labour standards. Secondly, the framework of public and private instruments that aim to regulate international CSR is

---

[1] Dutch Social and Economic Council (SER), IRBC Agreements, Agreements on International Responsible Business Conduct, *https://www.imvoconvenanten.nl/?sc_lang=en* (accessed November 2018).

[2] Dutch Social Economic Council, Recommendation 14/04, "IRBC Agreements", April 2014 (Sociaal-Economische Raad, Advies 14/04, "IMVO-Convenanten", April 2014).

[3] Dutch Social and Economic Council (SER), IRBC Agreements, Agreements on International Responsible Business Conduct, *https://www.imvoconvenanten.nl/ zwhy/methods?sc_lang=en* (accessed November 2018): "The parties commit to achieving tangible results in international responsible business conduct. The agreements are based on the existing aims and standards laid down in the UN Guiding Principles on Business and Human Rights (UN GPs), the OECD Guidelines for Multinational Enterprises, and the ILO's core labour standards".

[4] Responsible Business Conduct, *https://www.imvoconvenanten.nl/why/methods?sc_lang =en* (accessed November 2018).

inspected, with an emphasis on the OECD Guidelines and the UNGPs, since these form the basis for the application of the IRBC agreements. Next, the scope, content and functioning of the IRBC agreements is examined and the place and prominence of fundamental labour standards in the agreements is explained. This way, this chapter aims to contribute to a better understanding of the IRBC agreements and more generally to the way in which modern CSR related initiatives could help in protecting workers' rights in the global economy.

2. Fundamental labour standards

The fundamental labour standards of the International Labour Organization form the core of workers' rights that the IRBC Agreements aim to protect. Since 1919 the ILO has been the primary institution for creating international instruments on workers' rights. It does so in a tripartite manner, in which governments, employers' and workers' organizations together adopt binding Conventions and non-binding recommendations.

In 1998, with the adoption of the Declaration on Fundamental Principles and Rights at Work, four areas of special concern were highlighted that correspond to four pairs of Fundamental Conventions. They concern (a) the prohibition of child labour, (b) the prohibition of forced labour, (c) non-discrimination and equal treatment and (d) freedom of association and the right to collective bargaining[5]. Considering the particular importance of these four themes, ratification of the Fundamental Conventions is promoted extensively and there is a special follow-up system in which countries that have not ratified one or more Fundamental Conventions will have to report to the ILO on any changes that may have taken place in their law or practice[6]. The regular reporting obligation for member states that have ratified a Fundamental Conventions is every three instead of the normal five years. While the Declaration has been criticized by some[7], the

[5] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998, par. 2.

[6] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998, Annex II.B.1.

[7] See: P. Alston, *"Core Labour Standards" and the Transformation of the International La-*

number of ratifications of Fundamental Conventions increased substantially after its adoption and is now at 91,4% of the total possible number of ratifications [8]. In order to know what is the content and scope of the labour rights protected under the IRBC Agreements, a short overview of the key norms in the Fundamental Conventions seems in place.

Worldwide, according to recent estimates of the ILO, 152 million children are engaged in *child labour* and about half of them in what is called 'the worst forms' [9]. Not all work performed by young people is child labour, which, according to the ILO, refers to work that "is mentally, physically, socially or morally dangerous and harmful to children" and that interferes with their education [10]. The two Conventions that cover the prohibition of child labour are the Minimum Age Convention, 1973 (no. 138) and the most recent of the Fundamental Conventions, the Worst Forms of Child Labour Convention, 1999 (no. 182) [11]. Convention 138 calls on states to progressively raise the minimum age for admission to employment and for that purpose proposes three different categories of norms. First, there is the basic minimum age, which is set at 15 years or the age of completion of compulsory schooling [12]. Secondly, 'hazardous work' which means work that "is likely to jeopardise the health, safety or morals of young persons" is only allowed for workers older than 18 years [13]. Thirdly, it is possible to make exceptions for the category of 'light work' which is permitted

---

bour Rights Regime, in *European Journal of International Law*, 15(3), 2004, 457-521. P. Alsto, J. Heenan, *Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work*, in 36 *N.Y.U. J. Int'l. L. & Pol.*, 2004, 221, 264. For a more positive appraisal of the Declaration, see: B. Langille, *Core Labour Rights – The True Story (Reply to Alston)*, in *European Journal of International Law*, 16(3), 2005, 409-437. F. Maupain, *Revitalization not Retreat. The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights*, in *European Journal of International Law*, 16(3), 2005, 439-465.

[8] ILO, Conventions and Recommendations, *http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm* (accessed November 2018).

[9] Global estimates of child labour: *Results and trends, 2012-2016*, ILO, Geneva, 2017, 8.

[10] ILO International Programme on the Elimination of Child Labour (IPEC) *http://www.ilo.org/ipec/facts/lang--en/index.htm* (accessed November 2018).

[11] C138-Minimum Age Convention, 1973 (no. 138). C182-Worst Forms of Child Labour Convention, 1999 (no. 182).

[12] C138-Minimum Age Convention, 1973 (no. 138), art. 2(3).

[13] C138-Minimum Age Convention, 1973 (no. 138), art. 3(1).

for children between 13 and 15 years [14]. In some cases, deviation from these rules is permitted [15].

Convention no. 182 has a different character and is focused on immediate and comprehensive action to effectively eliminate "the worst forms of child labour as a matter of urgency" [16]. There is no flexible minimum age, and the term child applies to all persons below the age of 18 [17]. art. 3 forms the core of the Convention and describes four categories of 'worst forms of child labour': (a) slavery, debt bondage, serfdom and forced labour; (b) child prostitution and pornography; (c) illicit activities such as drug trafficking and production; (d) hazardous work that is likely to harm health and safety of children [18].

Forced labour is prohibited under Fundamental Conventions no. 29 and 105 [19]. According to recent estimates, approximately 25 million people worldwide are trapped in forced labour [20]. The 1930 Forced Labour Convention, no. 29, aims to suppress forced or compulsory labour in all its forms and defines this as: "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily" [21]. There are five situations in which exceptions to the general prohibition are possible: (a) compulsory military service; (b) normal civic obligations; (c) prison labour; (d) work in emergency situations and; (e) minor communal services [22]. In 2014 an important protocol to Convention no. 29 was adopted, which aims to bring the old Convention more in line with modern forms of forced labour [23].

---

[14] C138-Minimum Age Convention, 1973 (no. 138), art. 7(1).

[15] Exceptions are allowed for developing countries or if certain health and safety conditions are guaranteed, see: C138-Minimum Age Convention, 1973 (no. 138), arts. 2(4), 3(3), 7(4).

[16] C182-Worst Forms of Child Labour Convention, 1999 (no. 182), art. 1.

[17] C182-Worst Forms of Child Labour Convention, 1999 (no. 182), art. 2.

[18] C182-Worst Forms of Child Labour Convention, 1999 (no. 182), art. 3, parr. a-d.

[19] C29-Forced Labour Convention, 1930 (no. 29), C105 – Abolition of Forced Labour Convention, 1957 (no. 105).

[20] Global estimates of modern slavery: *Forced labour and forced marriage*, ILO, Geneva, 2017, 5.

[21] C29-Forced Labour Convention, 1930 (no. 29), art. 2(1). Also see: ILO, *What is forced labour, modern slavery and human trafficking*, *http://www.ilo.org/global/topics/forced-labour/definition/lang--en/index.htm* (consulted November 2018).

[22] C29-Forced Labour Convention, 1930 (no. 29), art. 2(2). See ILO, *Fundamental rights at work and international labour standards*, ILO, Geneva, 2003, 39-44.

[23] P029-Protocol of 2014 to the Forced Labour Convention, 1930. Also see: R203-Forced Labour (Supplementary Measures) Recommendation, 2014 (no. 203).

The second Fundamental Convention, no. 105, emphasizes a specific set of categories of forced labour that require additional attention. It focusses on abolishing forced labour related to the use of it for: "(a) political coercion (b) economic development; (c) labour discipline; (d) punishment for having participated in strikes; (e) racial, social, national or religious discrimination" [24]. The general prohibition of Convention no. 29, coupled with the specific categories from Convention no. 105 and the protocol of 2014 form the normative framework for dealing with the persistent problem of forced labour or modern slavery.

Non-discrimination and equal treatment are a widespread themes in international human rights law and a persistent issue in relation to occupation and employment. The two Fundamental Conventions that deal with equal treatment are the Discrimination Convention no. 111 and the Equal Remuneration Convention no. 100 [25].

Convention no. 111 contains a general assignment to states to pursue a national policy to eliminate discrimination in respect of employment and occupation. Direct and indirect discrimination is covered by the Convention, which defines discrimination as: "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation" [26]. These seven specific grounds are not exhaustive and may be expanded. The Convention also applies to access to employment or vocational training [27]. Exceptions are allowed when the inherent requirements of a specific and definable job call for differential treatment [28].

Convention no. 100 deals with one, very important, principle: equal pay for work of equal value for men and women. It tries to address the gender wage gap which is a chronic problem that is difficult to monitor. Under

---

[24] C105-Abolition of Forced Labour Convention, 1957 (no. 105), art. 1.

[25] C111-Discrimination (Employment and Occupation) Convention, 1958 (no. 111). C100-Equal Remuneration Convention, 1951 (no. 100). Another important ILO instrument on equal treatment is: C156-Workers with Family Responsibilities Convention, 1981 (no. 156).

[26] C111-Discrimination (Employment and Occupation) Convention, 1958 (no. 111), art. 1(1)a.

[27] C111-Discrimination (Employment and Occupation) Convention, 1958 (no. 111), art. 1(3).

[28] C111-Discrimination (Employment and Occupation) Convention, 1958 (no. 111), art. 1(2).

Convention no. 100 states are held to "promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value" [29].

Freedom of association and its related right to *collective bargaining* are key features of any labour law regime and promote what is often called 'industrial democracy'. The two Fundamental Conventions that deal with these topics are the most controversial of the fundamental standards since not all states are keen on giving substantial decision making powers to workers' and employers' organizations. Convention no. 87 deals with guaranteeing independence for workers' and employers' organizations from governmental interference and stipulates in its key provision, art. 2, that: "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation" [30]. Additionally, workers' and employers' organizations have rights to draw up their own rules and organize their own administration and activities without any interference by the public authorities and cannot be dissolved or suspended by the government [31].

Convention 98 focuses more on the relation between management and trade unions and the protection of union members against unfair treatment. Convention no. 98 therefore prohibits acts of anti-union discrimination, especially when this would prohibit workers to join trade unions, would lead to the dismissal, transfer or demotion of the worker on the basis of trade union membership, or hinder their participation in union activities [32]. Trade unions and employers' organizations should be protected against acts of interference, especially against "acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations" [33]. Independent organi-

[29] C100-Equal Remuneration Convention, 1951 (no. 100), art. 2(1).

[30] C087-Freedom of Association and Protection of the Right to Organise Convention, 1948 (no. 87), art. 2.

[31] C087-Freedom of Association and Protection of the Right to Organise Convention, 1948 (no. 87), arts. 3 and 4.

[32] C098-Right to Organise and Collective Bargaining Convention, 1949 (no. 98), art. 1.

[33] C098-Right to Organise and Collective Bargaining Convention, 1949 (no. 98), art. 2.

zations are seen as key for a genuine exercise of the rights to freedom of association and collective bargaining. These procedural rights are at the heart of labour law protection.

The Fundamental Conventions of the ILO are the vantage point for worker' protection under the IRBC Agreements. The next paragraph will look into the other international instruments that form the normative and procedural framework underlying the IRBC Agreements.

3. International Guidance: The OECD Guidelines and the UN Guiding Principles

For a proper understanding of the IRBC Agreements, it is necessary to briefly explore two essential documents, which determine the scope, content and functioning of the agreements [34]: the OECD Guidelines for Multinational Enterprises (the OECD Guidelines) and the UN Guiding Principles on Business and Human Rights (the UNGPs) [35]. According to the Dutch Social Economic Council, the parties to the IRBC Agreements commit themselves to achieving tangible results based on the targets and norms arising out of the OECD Guidelines and the UNGPs [36].

The OECD Guidelines were created in 1976 and contain recommendations by member states to multinational enterprises that operate in or are based in states that commit to the guidelines. They include: "non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards" [37]. In 2011, they were amended to include a human rights chapter and to align the guidelines with the system of the UNGPs. The OECD guidelines refer to the content of the ILO's Fundamental Conventions and many more work related norms [38]. Supervision of the Guidelines takes pla-

[34] Dutch Social Economic Council, Recommendation 14/04, "IRBC Agreements", April 2014 (Sociaal-Economische Raad, Advies 14/04, "IMVO-Convenanten", April 2014), 13.

[35] OECD, *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011, in *http://dx.doi.org/10.1787/9789264115415-en*. Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework, HR/PUB/11/04, 2011 (UN Guiding Principles).

[36] Dutch Social Economic Council, Recommendation 14/04, "IRBC Agreements", April 2014 (Sociaal-Economische Raad, Advies 14/04, "IMVO-Convenanten", April 2014), 19.

[37] OECD, *OECD Guidelines*, cit., 3.

[38] OECD, *OECD Guidelines*, cit., Chapter V, par. 1, 35.

ce by the OECD Investment Committee [39], and on the national level National Contact Points (NCPs) are to be set up, to handle complaints and solve conflicts through mediation and conciliation [40]. The Guidelines include a risk based due diligence system, based on the UNGPs, to which we will turn now.

The UNGPs are considered a groundbreaking instrument in the field of ascribing responsibilities for human rights violations to corporations. They include the "protect, respect, remedy" framework developed by John Ruggie [41]. Under this system, states have the duty to protect human rights and to facilitate adequate and accessible remedies for violations, while corporations have the duty to respect human rights and make sure that they address violations in which they are involved. The foundation for the UNGPs is the international bill of rights and the ILO's fundamental principles and rights [42]. They consist of 31 foundational and operational principles, followed by guidance on their implementation. Corporations should commit publicly to the UNGPs and should implement procedures to "enable the remediation of any adverse human rights impacts they cause or to which they contribute" [43]. An essential feature of the principles is that corporations are to conduct a human rights due diligence process to "identify, prevent, mitigate and account for how they address their impacts on human rights" [44]. This process has been integrated in the OECD Guidelines and also forms the basis for the IRBC Agreements, which are discussed in more detail presently [45].

---

[39] *http://www.oecd.org/daf/inv/oecdinvestmentcommittee.htm* (accessed November 2018).

[40] *https://www.oecdwatch.org/oecd-guidelines/ncps* (accessed November 2018).

[41] A/HRC/8/5, Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Human Rights Council, 7 April 2008.

[42] *UN Guiding Principles*, 13/14.

[43] *UN Guiding Principles*, Pillar II, Principle 15, 15-16.

[44] *UN Guiding Principles*, Pillar II, Principle 15, 15-16.

[45] Noteworthy, the ILO "MNE Declaration" – another important instrument for labour rights and multinational enterprises – has also been amended recently to incorporate the UNGPs system of due diligence. ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy Adopted by the Governing Body of the International Labour Office at its 204th Session(Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions, V ed., March 2017, International Labour Office, Geneva.

4. Fundamental labour standards and the IRBC agreements: scope, content and functioning

International CSR started out with the development of unilateral corporate codes of conduct in the 1980s that provided "insulation against bad publicity" [46]. From the 1990s onward more and more of these CSR codes were developed and most of them presently include references to the fundamental labour standards [47]. Additionally, other international CSR instruments are developed and adopted, that are supported and supervised by different stakeholders, and not solely devised by company management. Examples are multi-stakeholder initiatives – such as the Worker Rights Consortium, the Fair Wear Foundation and the Ethical Trading Initiative – in which third parties monitor compliance, and Global Framework Agreements (GFAs); instruments negotiated between a transnational corporation and a Global Union Federation (GUF) with regard to labour standards [48]. The way in which these instruments are created and supervised, grants them more democratic legitimacy. While Multi-stakeholder initiatives and GFAs are still exclusively private instruments, the IRBC Agreements have a more mixed nature, since the Dutch government and public advisory bodies have an important role in implementing and facilitating their creation and implementation.

The innovative character of the IRBC Agreements is that they are partnerships between businesses, governments, trade unions and other civil society organizations, and are created through an intensive dialogue between all these stakeholders [49]. All of the IRBC Agreements take the ILO's fundamental standards as a key point of reference and they include a risk-based due diligence system based on the OECD Guidelines and the UNGPs [50].

---

[46] M. Taylor, *Race you to the Bottom … and Back Again? The Uneven Development of Labour Codes of Conduct*, in *New Political Economy*, 16(4), 2011, 445-462, 448.

[47] R. Zandvliet, P. van der Heijden, *The Rapprochement of ILO Standards and CSR Mechanisms: Towards a Positive Understanding of 'Privatization', Global Governance of Labour Rights, Assessing the Effectiveness of Transnational Public and Private Policy Initiatives*, in *Leuven Global Governance*, series edited by Axel Marx, Jan Wouters, Glenn Rayp, Laura Beke, 2015 (Zandvliet and van der Heijden 2015), 177.

[48] *http://www.industriall-union.org/what-is-a-global-framework-agreement* (accessed November 2018).

[49] *https://www.imvoconvenanten.nl/?sc_lang=en* (accessed November 2018).

[50] Dutch Social and Economic Council (SER), *IRBC Agreements, Agreements on International Responsible Business Conduct, methods*, in *https://www.imvoconvenanten.nl/why/methods?sc_lang=en* (consulted November 2018).

By concluding these agreements per sector, a tailor-made approach to the specific risks in that sector is possible. Currently there are IRBC Agreements concluded in the garments and textile sector[51], the banking sector[52], the gold sector[53], sustainable forestry[54], vegetable protein[55], insurance[56] and food products[57]. There is a pilot for natural stone[58] and for pensions[59], agriculture[60], floriculture[61] and metallurgy[62] there are agreements being negotiated and developed[63].

Although the agreements are voluntary, they do involve a strong commitment of the parties involved. Their scope includes businesses' own activities but also business relationships throughout the value chains. The overall goals of the agreements are firstly, to improve the circumstances in a number of selected risk areas and secondly, to offer collective solutions to specific issues related to e.g. labour rights violations, that corporations cannot deal with on their own[64].

Although the agreements differ per sector the general way they work is that they propose a risk based due diligence system that is based on the OECD guidelines and the UNGPs. Risk-based due diligence refers to the steps businesses should take to identify and address risks in order to prevent or mitigate adverse impacts associated with their activities or sourcing decisions. According to the OECD Guidelines, enterprises should conduct risk-based due diligence to "identify, prevent and mitigate actual and potential

---

[51] *https://www.imvoconvenanten.nl/garments-textile?sc_lang=en* (accessed November 2018).

[52] *https://www.imvoconvenanten.nl/banking?sc_lang=en* (accessed November 2018).

[53] *https://www.imvoconvenanten.nl/gold?sc_lang=en* (accessed November 2018).

[54] *https://www.imvoconvenanten.nl/agreements/forestry?sc_lang=en* (accessed November 2018).

[55] *https://www.imvoconvenanten.nl/agreements/proteinsector?sc_lang=en* (accessed November 2018).

[56] *https://www.imvoconvenanten.nl/insurance?sc_lang=en* (accessed November 2018).

[57] *https://www.imvoconvenanten.nl/foodproducts?sc_lang=en* (accessed November 2018).

[58] *https://www.imvoconvenanten.nl/natuursteen?sc_lang=en* (accessed November 2018).

[59] *https://www.imvoconvenanten.nl/pensioensector?sc_lang=en* (accessed November 2018).

[60] *https://www.imvoconvenanten.nl/land-tuinbouw?sc_lang=en* (accessed November 2018).

[61] *https://www.imvoconvenanten.nl/sierteeltsector?sc_lang=en* (accessed November 2018).

[62] *https://www.imvoconvenanten.nl/metallurgisch?sc_lang=en* (accessed November 2018).

[63] *https://www.imvoconvenanten.nl/agreements?sc_lang=en* (accessed November 2018).

[64] *https://www.imvoconvenanten.nl/why?sc_lang=en* (accessed November 2018).

adverse impacts" and "account for how these impacts are addressed" [65].

Importantly, the enterprise also should prevent and mitigate adverse impact when an actor directly linked to "their operations, products or services by a business relationship" [66] caused this, and encourage suppliers, business partners and subcontractors to apply those same principles of responsible business conduct. Additionally, most agreements include mechanisms for complaints or grievances.

Application of the IRBC agreements is guided by a five-step due diligence process consisting of (a) establishing strong company management systems, (b) identifying and assessing the risks in the supply chain, (c) designing and implementing a strategy to respond, (d) carrying out independent, third-party audits, and, (e) public reporting on the due diligence process [67]. Companies will have to prioritize the risks according to severity and likelihood of occurrence and the remedial action that is to be taken depends on its involvement in the violation. If a company directly caused or may cause a violation, it should mitigate or prevent the negative impact and remedy the harm that has been done. If it indirectly contributes, for example through a subcontractor, it should use its leverage to prevent or remedy the situation. If there is only a commercial link, there's no responsibility to remedy the situation, although action is of course encouraged [68]. The overall aim is to bring about substantial improvements for groups that experience a negative impact, to contribute to sustainable growth and thereby to help achieve the UN Sustainable Development Goals [69].

While all of the IRBC Agreements take the Fundamental Conventions of the ILO as their normative basis for protecting labour rights in their supply chains, a number of Agreements make explicit references to one or more of the core standards. The Agreement on Sustainable Garment and Textile contains detailed guidance on all fundamental standards [70]. The Banking agreement refers to freedom of association and the right to collective bar-

---

[65] OECD, *OECD Guidelines*, cit., Chapter II, par. 10, 20.

[66] OECD, *OECD Guidelines*, cit., Chapter II, par. 12, 20.

[67] OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, II ed., OECD Publishing, 2013, in *http://dx.doi.org/10.1787/9789264185050-en*, Annex I, 17-19.

[68] *UN Guiding Principles*, Pillar II, Principle 13, 14-15.

[69] *https://www.imvoconvenanten.nl/why/methods?sc_lang=en* (accessed November 2018).

[70] *Agreement on Sustainable Garment and Textile*, Appendix 1, 26-32.

gaining [71], and the Gold Sector Agreement to the prohibitions of forced and child labour [72]. The Agreement on sustainable forestry emphasizes the importance of freedom of association [73] and the Vegetable Protein Agreement contains references to all four fundamental standards [74]. The Food Products Agreement also refers explicitly to all fundamental labour rights [75], the Insurance Agreement to "human and labour rights" [76], and, finally, the Pilots Natural Stone emphasize the importance of preventing child labour in its sector [77].

5. Concluding remarks: a new model for international CSR?

The Dutch IRBC agreements can be seen as a next step in promoting international responsible business conduct. They differ in terms of their scope and support from more common CSR instruments such as corporate codes of conduct. The IRBC agreements are sector based and created by different stakeholders, who are also involved in the implementation. Considering their broad support and close cooperation between different relevant actors, the IRBC Agreements may serve as a catalyst for improving fundamental labour standards in developing countries. All IRBC agreements are based on respect for the fundamental principles and rights at work of the ILO, while a number of them refer additionally to specific risks and measures related to fundamental labour standards in the text of the agreement. While the IRBC agreements are voluntary instruments, there seems to be a strong commitment from all stakeholders to uphold them. The sector-based approach allows for tailor-made solutions to specific problems and al-

[71] *Dutch Banking Sector Agreement on international responsible business conduct regarding human rights*, October 2016, 27.

[72] *Dutch Gold Sector IRBC Agreement on international responsible business conduct of companies in the Netherlands with gold or gold bearing materials in their value chains*, June 2017, Annex I, 45.

[73] *Agreement to Promote Sustainable Forestry*, March 2017, 9.

[74] *IMVO Convenant Plantaardige Eiwitten, Internationale bevordering duurzame productie en consumentenvoorkeur plantaardige eiwitten (Vegetable Protein IRBC Agreement)*, 13.

[75] *IMVO Convenant Voedingsmiddelen (Food Products IRBC Agreement)*, May 2018, 42.

[76] *Agreement on International Responsible Investment in the Insurance Sector*, July 2018, 7.

[77] *https://www.imvoconvenanten.nl/natuursteen/organisatie/wat-zijn?sc_lang=en* (accessed November 2018).

lows for flexibility. The risk based due diligence approach derived from the OECD guidelines and the UNGPs forms the basis for implementing the IRBC agreements. The international framework of instruments relevant to the IRBC agreements is diverse and complex, and corporations and other actors will have to direct substantial efforts to properly implementing the agreements. If they do so successfully, the IRBC agreements may be considered an interesting and innovative way to improve respect for fundamental labour standards when Dutch companies do business internationally, and they may be at the forefront of a new model of international corporate social responsibility.

TECHNOLOGY AND PRODUCTIVITY AT THE COMPANY. A NEW PARADIGM WITHOUT CLEAR ANSWERS?

Rafael Moll Noguera *

Summary: 1. Approach: re-emergence of freedom of enterprise. – 2. Freedom of enterprise in the Spanish labour relations system. – 2.1. Is it an authentic fundamental right? – 2.2. ... and therefore, which can be its essential content in the workplace? – 3. The balance between the fundamental rights of workers and free enterprise in the case law of the Spanish Constitutional Court. – 4. Pending for a general update on the doctrine of the Constitutional Court in relation to the power of control and surveillance. – 5. Present and future new technologies in the Spanish labour relations system. – 5.1. The control of the work activity through tags of identification by radiofrequency and GPS. – 5.2. The new technology arriving to the workplace.

1. Approach: re-emergence of freedom of enterprise

The power of control and surveillance is one of the multiple faculties that integrate the power of management and organization of the company. In turn, this power constitutes one of the manifestations of freedom of enterprise protected in art. 38 of the Spanish Constitution. Thus far, when labour courts brought that power into relation with the fundamental rights of the workers, with which they are usually in conflict, the workers' interests automatically came first against the employee`s interests. This is achieved on the one hand, due to a small and weak legal regulation that leaves a large margin of decision in the hands of the courts and, on the other hand, disconnecting the power of management from the freedom of enterprise, and justifying it exclusively in the job contract. As a result, the freedom of enterprise is a denaturised, relegating this right to a mere institutional gua-

* Researcher at the Department of Labour Law and Social Security at the University of Valencia.

rantee. However, this scenario seems to be changing after the last legal reforms and above all due to the canon of constitutionality that the Spanish Constitutional Court, in a very incipient way, uses for its analysis. The Court rediscovers the freedom of enterprise and its role in the current system of labour relations, bringing with it a rebalancing of interests in the labour relationship.

2. Freedom of enterprise in the Spanish labour relations system

2.1. Is it an authentic fundamental right?

As a starting point, it should be clarified that the right to freedom of the enterprise is an authentic fundamental right. Although part of the Spanish doctrine, and also the Constitutional Court for some time [1] identified the notion of fundamental right with those which are protected by the constitutional remedy, currently there is a pacific [2] doctrine – and without any doubt doctrine of the Constitutional Court [3] – that we must include in the notion of fundamental right all those which the Spanish Constitution subtracts from the free decision of the ordinary legislator, which must respect "its essential content".

Thus, all the rights of Chapter 2 of the First Title of the Spanish Constitution are fundamental rights insofar that they enjoy the three characteristics that define a right as fundamental, wich are enunciated in the art. 53.1 EC: 1.- direct applicability (binding all public powers), 2.-reservation of law for the regulation of its exercise; 3.- essential content to be respected by the legislator. In this sense, freedom of enterprise is, without doubt, a fundamental right to the extent that the art. 38 EC is located in Section 2 of Chapter 2 of the First Title EC [4].

For this reason, the freedom of enterprise is protected by art. 53 EC,

---

[1] Vid. STC no. 111/1983, FJ. 8 and in a opposite meaning STC no. 166/1986, FJ 11.c.

[2] F. Rubio Llorente, *La libertad de empresa en la Constitución*, in J.L. Iglesias Prada (coord.), *Estudios jurídicos en homenaje al profesor Aurelio Menéndez*, 1, Civitas, Madrid, 1996, 435; J. Rivero Lamas, *La democracia en la empresa*, Comares, Granada, 2010, 13.

[3] Vid., for example, STC no. 37/1987 and all the previuos doctrine.

[4] M. Aragón Reyes, H. Losada González, *La libertad de empresa*, in *Revista del Ministerio de Empleo y Seguridad Social*, 108, 2014, 17-18; y A. Cidoncha Martín, *La libertad de empresa*, Civitas, Madrid, 2006, 175.

that is, the regulation of its exercise must be carried out only by Law, which must respect its "essential content". All of them are protected by constitutional jurisdiction, although those which are listed in Section 1 of Chapter 2 count with constitutional remedy, meanwhile for those included in Section 2, such protection can only be sought through the question of unconstitutionality. In addition, regarding its location, it has rightly been pointed out that only the freedom of enterprise within the framework of the market economy is included in the second Chapter of Title I; the rest of the economic principles are listed in the third chapter of Title I or do not even appear in this title. In this sense, the only basic and cardinal economic principle is free enterprise and market economy[5].

Secondly, the Constitutional Court has expressly recognized that the freedom of enterprise is a fundamental right. In STC no. 46/1983 of May 27, FJ 6, Constitutional Court affirmed that "freedom of enterprise is certainly a fundamental right, but it does not enjoy the protection of the constitutional remedy". But above all, the most recent doctrine of the Constitutional Court and the Supreme Court seem to opt for the consideration of freedom of enterprise as a fundamental right[6].

Thirdly, its character of fundamental right has also been defended no because its location in the constitutional text, but its own nature. In this sense, its connection with the free development of the personality has led some doctrine to support this idea[7], in the sense that it is a manifestation of the human personality and, as such, guarantees its exercise. The company is unequivocally considered as a legitimate instrument for the realization of individual interests in a market economy[8]. To a greater extent, the

---

[5] R. Entrena Cuesta, *El principio de libertad de empresa*, in F. Garrido Falla (dir.), *El modelo económico en la Constitución española*, 1, Instituto de Estudios Económicos, Madrid, 1981, 134.

[6] Vid. STC no. 109/2003, 5/6, FJ 15; STC no. 124/2003, 19/6, JF 12, insists on the doctrine of STC no. 226/1993, FJ 3B; STC no. 112/2006, 5/4, FJ 12; STC no. 16/2011, 3/3, FJ 9; STC no. 35/2012, 19/6, FJ 5; and STC no. 96/2013, 23/4, FFJJ 4 y 6. Also STS 24 November 2006, 2007/262, FJ 2.

[7] Its is interesting the contribution of Alvarez Conde in the sense that "the notion of fundamental right contains a certain dose of iusnaturalism or of external or metajuridical fundamentality, which reaches the contemporary constitutional texts, understood by those that correspond to the development of human dignity, which are essential to the human being, to be inherent in the development of his personality". Vid. E. Alvarez Conde, *El sistema constitucional de derechos fundamentales*, in *Anuario de derecho parlamentario*, 15, 2004, 116.

[8] U. Romagnoli, *Estructura de la empresa*, in G. Lyon-Caen *et al.*, *Los trabajadores y la*

link between the freedom of enterprise, in a similar way that the right to work or the free exercise of a profession, with the principle of self-determination and self-realization of the person is therefore close and manifest.

For this reason, freedom of enterprise serves the free development of the personality in the economic sphere, and satisfy the need to allow citizens to freely decide how to earn a living and project their capacity in the commercial and industrial sphere [9].

Consequently, the fundamental value of freedom of enterprise lies largely in its instrumental character with respect to the free development of personality, as it requires aspects of ability, capacity or creativity for the exercise of business activity. Ultimately, economic freedoms would guarantee to the individuals a control over a series of resources that are necessary to be able to develop for the protection of the individual's self-realization [10].

It should be emphasized that the relation between freedom of enterprise and the free development of personality is not constant in all cases. Industrialization has led to the protagonism of the great capitalist companies. This has in many cases blurred the personal element in the exercise of this right. In this sense, some authors propose a diversification of the content and effectiveness of the right depending on the structure of the company. So, the proximity to the sphere of self-realization of the individual is grea-

---

Constitución, Sociedad de Estudios Laborales, Madrid, 1980, 75-81. In a similar way, J.M. Martínez Val, *El contenido esencial de la libertad de empresa*, in *Revista general de derecho*, 493-494, 1985, 3186.

[9] C. Paz-Ares Rodríguez, J. Alfaro Águila-Real, *Artículo 38. Libertad de empresa*, in M.E. Casas Baamonde, M. Rodríguez-Piñero y Bravor-Ferrer (dirs.), *Comentarios a la Constitución española*, Fundación Wolkers Kluwer, Toledo, 2009, 980. To the contrary, B. Agra Viforcos, *Libertad de empresa*, in A.P. Baylos Grau, C. Florencio Thomé, R. García Schwarz (coords.), *Diccionario internacional de derecho del trabajo y de la seguridad social*, Tirant lo Blanch, Valencia, 2014, 1309-1315 o O. De Juan Asenjo, *La Constitución económica española*, Centro de Estudios Constitucionales, Madrid, 1984, 153: "It is not part of the structure of the human personality, but even tought it was, it would appear that only a very small proportion of the inhabitants of the country would be enjoying the proper conditions for the development of their personality". Faced with this criticism has been answered that this author "is based, on the one hand, on the prejudice that attributes greater dignity to dependent work than to the independent". Vid. C. Paz-Ares Rodríguez, *El derecho a la libertad de empresa y sus límites. La defensa de la productividad de acuerdo con las exigencias de la economía general y de la planificación*, in J.L. Monereo Pérez, C. Molina Navarrete, Mª.N. Moreno Vida, *Comentarios a la Constitución socio-económica de España*, Comares, Granada, 2002, 360.

[10] I. García Vitoria, *La libertad de empresa: ¿un terrible derecho?*, Estudios Constitucionales, Madrid, 2008, 111, 112, 113, 114.

ter when the right is exercised by individuals or small businesses, whereas for the case of large corporations, the personal element of freedom of enterprise is in the background, and the objective or institutional dimension becomes more relevant [11].

On the contrary, it must be denounced that when protection of the freedom of enterprise is carried out under the guiding criterion of institutional guarantee, and not of fundamental right, the bar of protection is much lower than when it is interpreted as a fundamental right. Hence there has been an abuse of the institutional understanding of fundamental rights, to the point of provoking a mutation of their nature: they have come to be seen as institutes rather than as rights of citizens. Therefore, it is important to highlight that fundamental rights are not exhausted in their objective dimension: they also have, and above all, an individual dimension, in this case entrepreneurial.

2.2. ... and therefore, which can be its essential content in the workplace?

If we conclude that freedom of enterprise is – or at least should be a fundamental right, thereupon we need to ask about its essential content. Its general content (freedom of access to the market, freedom to organize and develop productive resources and freedom to leave the market totally or partially) shall be reflected in the workplace in a set of rights and powers of the employer in the management of the employment relationship. In terms of the Constitutional Court in STC no. 208/1993 of 28 June 1993 (FJ4): "freedom of enterprise is an area of exercise of powers and faculties for the management of the enterprise, including measures concerning the so-called personnel management that affect the development of the employment contract".

However, despite the fact that neither the Constitutional Court nor the Supreme Court have given a complete and closed definition of the essential content of freedom of enterprise, they have occasionally voted about it. Thus, free competition is a structural element of freedom of enterprise that allows entrepreneurs exercise their powers and faculties [12]. The Supreme

[11] I. García Vitoria, *op. cit.*, 274.

[12] A. Rivas Vaño, M.C. Rodríguez-Piñero Royo, *Relaciones laborales y libertad de empresa: algunas reflexiones*, in M.E. Casas Baamonde, F. Durán López, J. Cruz Villalón (coords.), *Las transformaciones del derecho del trabajo en el marco de la Constitución española*, La Ley, Madrid, 2006, 762.

Court, in this sense, has stated that freedom of competition forms part of the essential content of the constitutionally proclaimed freedom of enterprise [13].

Perhaps, the reason of not having a clear concept in the case-law on the essential content of freedom of enterprise is that the wording of art. 38 EC is so brief that, beyond its incardination in the market economy system, it can be interpreted with great elasticity according to the economic and social values of each moment [14].

Consequently, it seems that Spanish courts do not opt for an absolute or relative conception of the content of fundamental rights, at least in relation to freedom of enterprise, but they apply an "absolute relativized theory" [15]. According to this vision there must be a temporal understanding of what is the essential content, determinable by the legal culture and legal tradition, not for all time, but for each moment. It leads to a living and current meaning, recognized by the Constitutional Court weighing permanence and change in the framework of legal tradition. Thereby the concept of essential content is relativized, but not thanks to the principle of proportionality, but due to the rooted and alive legal culture within which rational communication is possible and, therefore, a certain control of the argumentation that leads to the decision. That is, the essential content is not predeterminable *ex ante*, but is determined by the Constitutional Court in each case that applies the law [16].

In this context, we must point out that the current economic system in which firms operate is no longer stable, as it used to be with the Fordist model of mass production. It has been moving since the 1970s forward to a dynamic system that needs constant adaptations to the demands of a competitive and globalized economy [17]. So that, the labour market cannot fail

---

[13] Vid. STS 3 February 2005 (RJ 2005/1458) FJ 3.

[14] A. Blasco Pellicer, *La extinción del contrato de trabajo en el sistema constitucional de relaciones laborales*, in A.V. Sempere Navarro (dir.), *El modelo social en la Constitución española de 1978*, Ministerio de Trabajo y Asuntos Sociales, Madrid, 2003, 456.

[15] J. Jiménez Campo, *Derechos fundamentales. Concepto y garantía*, Trotta, Madrid, 1999, 33 y M. Aragón Reyes, H. Losada González, *op. cit.*, 22.

[16] Although the Constitutional Court applies both theories exposed, it sometimes also uses this third option, eg in the early STC no. 11/1981, it was stated that the search for the essential content "should be weighed the historical moment in which each case is treated and the conditions inherent in democratic societies when it comes to fundamental rights".

[17] M. Castells, *La era de la información. La sociedad en red*, I, Alianza, Madrid, 1996, 129-134.

to adapt to the changes that are taking place in the economic and productive structures [18].

Hence the express reference to the market economy in our Constitutional text clarifies the reason of constitutionalising the freedom of enterprise: producing goods and services for the market [19]. Thus, freedom of enterprise responds to a particular legal interest, which is the one that encourages individuals to undertake business activities and the one that the market economy maintains. Both of these interests lead to the right of obtaining benefits, from which arises the guarantee of the right to the economic benefit, or, in negative, the guarantee of the non-prohibition of the economic benefit [20]. In this sense, it is affirmed that every company has the right to have its activity developed under criteria of productivity and in a competitive market. It implies the right of the company to develops its activity in a productive way, that is to say, efficient and with the maximum possible yield [21].

To a certain extent, the Constitutional Court pointed out, in the judgment already commented (STC no. 225/1993 [FJ 3]), to this position: "freedom of enterprise implies in the *framework of a market economy*, where this right operates as a institutional guarantee, the right to decide freely not only to create companies and therefore to *act in the market*, but also to establish the company's own objectives and to direct and plan its activity in response to its resources and according the *conditions of the market itself*".

On the other hand, all these powers and faculties have been traditionally redirected in the labour law field to the management powers of the employer. These powers have been approached doctrinally from the point of view of the labour contract, granting it a purely contractual nature, but they can also be analysed from a constitutional perspective, since they find their last ratio in the freedom of enterprise [22].

---

[18] M. Rodriguez-Piñero, *Racionalidad empresarial y mercado de trabajo*, in *Relaciones Laborales*, 2, 1993, 16.

[19] A. Cidoncha Martín, *op. cit.*, 309.

[20] *Ibídem*, 314.

[21] P. Brosa Ballesteros, *El estatuto de la empresa*, in R. Entrena Cuesta *et al.*, *La empresa en la Constitución española*, Aranzadi, Navarra, 1989, 93. The author points out that, "as productivity looks at the internal, technological and rationalizing aspect of the company, competitiveness looks towards its projection in the market, its confrontation with other competitors. While it is true that competitiveness presupposes internally a cost adjustment, it should not be confused with productivity".

[22] A. Rivas Vaño, M.C. Rodríguez-Piñero Royo, *op. cit.*, 758.

Indeed, at the jurisprudential level, the Constitutional Court in STC no. 92/1992 (JF3) reinforces this idea by stating: "Article 38 EC ... recognizes freedom of enterprise and *the inherent power of business management*". Likewise, the Supreme Court in STS 8 July 2010 (FJ 3, rec. no. 248/2009) pointed out the same: "the measure is fully justified by the managerial power, since Article 38 EC recognizes the freedom of enterprise within the market economy and guarantees to be capable to establish the own objectives of the company and to manage and plan its activity in attention to its resources and the conditions of the own market".

As a necessary consequence of the foregoing, part of the freedom of enterprise is the set of rights of the employer to decide on the objectives of the company and establish a plan capable of meeting the current and future demands of the market according his resources [23].

It is in this aspect that freedom of enterprise imposes the attribution of an organizational and managerial power in the labour relationship [24]. Through them it becomes possible to coordinate the set of labour services in accordance with the expected productive and organizational purpose of the company. As a legal corollary, it includes the power of monitoring and control the workers, and the disciplinary power as well.

In this sense, the power of management finds in the new technologies a key instrument to improve the effectiveness of the organization and the performance of the workers [25]. The technological progress enable new possibilities of supervision that allow the reconstruction of productive profiles of the worker. This is how the more traditional methods of the Fordist production system, based on direct and immediate personal supervision of the execution of the work, are gradually displaced for the new technological developments which allow a more penetrating and incisive control [26].

In line with this, the introduction of new technologies into the daily life of companies has been justified mainly because it allows monitoring the development of daily activities of workers, and in this way to be able to adapt

---

[23] J. Rivero Lamas, *La movilidad funcional en la empresa en la Ley 11/1994*, in *Civitas. Revista española de derecho del trabajo*, 67, 1994, 700.

[24] M. Rodriguez Piñero, *La movilidad del trabajador dentro de la empresa*, in *Documentación laboral*, 9, 1983, 21.

[25] J.A. Fernández Avilés, V. Rodriguez-Rico Roldán, *Nuevas tecnologías y control empresarial de la actividad laboral en España*, in *Labour & Law Issues*, 2(1), 2016, 46.

[26] J.L. Goñi Sein, *El respeto a la esfera privada del trabajador: un estudio sobre los límites del poder de control empresarial*, Civitas, Madrid, 1988, 147.

and improve the organization to the needs of the company and the workers too [27]. Employers, by having exhaustive information on the training of workers, physical and mental skills, work rhythms, relationships with colleagues, greater or lesser vulnerability to diseases, are in conditions to achieve the maximum productivity and profitability. At the same time, it allows a more appropriate adaptation of each worker to their job [28].

This would involve that the employer could be able to perform an efficient management of their companies obtaining data from the workers: the more complete and accurate the better. In sum, with computer technology, the capacity to accumulate data is multiplied and the entrepreneur for first time in history is capable to reconstruct the productive profile of each worker based on apparently innocuous data [29].

3. The balance between the fundamental rights of workers and free enterprise in the case law of the Spanish Constitutional Court

The rhythms of technological progress and legislative process are not the same. Certainly the law does not always arrive, and even sometimes when it does, it arrives too late. In this sense, the legal solutions given today to legal disputes between fundamental rights of workers and free enterprise will be sooner rather than later outdated in the framework of new technologies [30].

As a sign of this, we only can find a single precept in Spanish labour law which approaches this problem. Furthermore, it is extremely imprecise because it is so poorly developed, while it is quite out of date because it omits any reference to the technological implementation that characterises the new forms of corporate control [31].

Thus, art. 20.3 of the Workers' Statute recognizes and defines the powers of control and supervision of the employer. It states that *The employer may adopt the measures of supervision and control that s/he deems most fitt-*

---

[27] A. Llamosas Trapaga, *Relaciones laborales y nuevas tecnologías de la información y de la comunicación. Una relación fructífera no exenta de dificultades*, Dysinson, Madrid, 2015, 140.

[28] S. Rodriguez Escanciano, *Innovación tecnológica y productividad empresarial: posibilidades y límites en un contexto económico de crisis*, in *Diario La Ley*, 8094, 2013, 10-36.

[29] M.B. Cardona Rubert, *Las relaciones laborales y el uso de las tecnologías informáticas*, in *Lan Harremanak*, 2003, 157-173, 160.

[30] *Íbidem*, 48.

[31] J.A. Fernández Avilés, V. Rodriguez-Rico Roldán, *op. cit.*, 50.

ing in order to verify compliance by the worker of his/her working obligations and duties, observing, in such adoption and application, the due consideration for his/her human dignity and bearing in mind the real capacity of handicapped workers, as applicable.

Consequently, there are only two limits that emerge from the norm. The first one is the purpose of control. It can only serve to verify the compliance by the worker of his labour obligations. The second limit is the dignity of worker. Without entering into the concept of dignity as limit to entrepreneurial power, suffice it to say that we are witnessing a constant evolution of Spanish jurisprudence in the direction of weighting workers' rights with employer's interests under the conception of work as a productive resource, reintroducing schemes of equality between unequal subjects [32]. And, perhaps, from the point of view of the employer, work is indeed a productive factor to manage within the organization of productive activity and denying it would simply deny reality [33].

In any case, the lack of a legislative response could make arise alternative regulations coming from other instances, and particularly from collective autonomy. The reality, however, is characterized by the scarcity of collective agreements that pick up these new problems and when they do so, with few exceptions, they usually offer little fortunate regulations [34]. For this reason, the present context undoubtedly favours the protagonism of individual autonomy and unilateral codes of conduct as the preferred method by some companies when it comes to their regulation. It should be noted, as the Supreme Court pointed out (STS of March 7, 2007), that these codes are a manifestation of the managerial power and an expression of freedom of enterprise of art. 38 EC, and as such, within the limits of that power, it is not mandatory to negotiate its content with the representatives of the workers.

From this perspective, freedom of enterprise, understood as a fundamental right, not only reinforces the material lawfulness of the method of control itself, but also the formal lawfulness either through an individual or collective order or a code of conduct, in the extent both manifestations belong to the essential content of freedom of enterprise.

---

[32] H. Babace, *El juicio de ponderación en la relación de trabajo*, in *Derecho laboral*, tomo LVII, 256, 2014, 590.

[33] F. Pérez De Los Cobos Orihuel, J. Thibault Aranda, *La visión legal del empresario laboral*, in L.M. Camps Ruiz, J.M. Ramírez Martínez, T. Sala Franco, *Crisis, Reforma y Futuro del Derecho del Trabajo*, Tirant lo Blanc, Valencia, 2010, 90.

[34] M.B. Cardona Rubert, *Las relaciones laborales*, cit., 157-173, 159.

Nevertheless, for the reasons set out above, jurisprudence plays a decisive role in building legal criteria, mainly due to the wide casuistry [35], which has led to courts to develop creative rulings, quasi-legislative work, which on the other hand, may generate a remarkable degree of legal insecurity [36]. In this regard, the Constitutional Court has played an important role in balancing the competing interests [37].

On this point, the collision between the power of management and organization of the employer, in relation to the right to free enterprise (art. 38 Spanish Constitution), with some fundamental rights of workers is evident. In particular, the right to privacy (arts. 18 and 19.1 Spanish Constitution); the right to secrecy of communications (18.3 Spanish Constitution) and the right of computer self-determination (art. 18.4 Spanish Constitution).

Bearing in mind the character of fundamental right of freedom of enterprise, the weighing between rights must be based on a situation of conflict between fundamental rights at the same level.

However, the traditional constitutional jurisprudence since STC no. 99/1994 has not accorded the same value to the interests of the workers and to the interests of the enterprise, so that the balance between their rights is lopsided in favour of workers' rights [38]. This makes us think that the Constitutional Court does not know or want to ignore its own doctrine on the character of fundamental right of freedom of enterprise. Perhaps, another possible explanation for this is that there is in fact a hidden hierarchy of fundamental rights that is implicit in the Constitutional Court's reasoning that it would be desirable that the Court explains in its pronouncements.

In contrast to this doctrine, in the last rulings of the Constitutional Court regarding the constitutionality of the new Workers' Statute, it defends that the balance between the conflicting interests – that links, respectively, with the principles of stability in employment and business viability – should be carried out taking into account that such balance cannot be static but that it is extremely vulnerable to the environmental situations that affect the labour relations system, especially the underlying socio-economic situation

---

[35] J.A. Fernández Avilés, V. Rodriguez-Rico Roldán, *op. cit.*, 71.

[36] T. Sala Franco, *El derecho a la intimidad y a la propia imagen y las nuevas tecnologías de control laboral*, in AA.VV. (E. Borrajo Dacruz dir.), *Trabajo y libertad públicas*, La Ley, Madrid, 1999, 205.

[37] M.B. Cardona Rubert, *Intimidad del trabajador y comunicaciones electrónicas según el Tribunal Constitucional*, in *Lex Social*, 5(2), 2015, 33.

[38] J.A. Fernández Avilés, V. Rodriguez-Rico Roldán, *op. cit.*, 56.

and the prevailing political options in each moment [39].

Perhaps this initial imbalance in the weighting of fundamental rights at stake can be explained by the fact that the constitutional doctrine on the position of the entrepreneur in labour relations has been very scarce until now.

Among the reasons that we may find that have contributed to this, it is the systematic location in the constitutional text of art. 38, which is therefore excluded from constitutional remedy. It should be pointed out that, although the freedom of enterprise in any case has the sustaining power of the constitutional remedy, it does indirectly in conflict processes eminently of fundamental rights of workers. Through this procedure, the Constitutional Court has been able to delimit narrowly specific spaces for the freedom of enterprise, despite it has been more concerned with setting limits and restrictions (in order to preserve the fundamental rights of workers); and not so much to preserve its own space. As a result, it has led to the limitation of the management powers.

Secondly, its possible entry into the judicial assessment of the Constitutional Court has usually been done by distant approaches from the particular scope of labour relations, since they are procedures of unconstitutionality referred to legal norms for the organization or planification of economic or productive activities [40].

Thirdly, a collateral way for the Constitutional Court to rule on freedom of enterprise is to bring it into line with another fundamental right. In this sense, mention should be made of STC no. 192/2003 where the Constitutional Court indirectly addresses freedom of enterprise through a constitutional remedy based on the violation of art. 24 EC because of an unfounded or manifestly irrational judicial resolution.

However, as we said, recently the freedom of enterprise has gained more interest for the Constitutional Court in the pronouncements on the latest labour reforms.

In contrast to the traditional doctrine, it is interesting to note how the Constitutional Court, as well as the Spanish legislator, relates the particular interest of the employer with the general interest of improving the national economy and creating employment. In this sense the art. 38 of Spanish Con-

---

[39] A. Blasco Pellicer, *op. cit*., 434.

[40] J. García Murcia, *La libertad de empresa en la jurisprudencia constitucional*, in A. Baylos Grau e*t al.* (coords.), *La jurisprudencia constitucional y social en el período 1999-2010, libro homenaje a María Emilia Casas*, La Ley, Madrid, 2015, 449.

stitution in addition to recognizing freedom of enterprise, it sets a mandate for the public authorities to protect the productivity of companies.

Therefore, freedom of enterprise is understood as an instrument of competitiveness that has repercussions in the general economic context and in the rate of employment in particular, which legitimises, ultimately, the exercise of management powers [41]. From this vision, through the improvement of the companies' competitiveness, the degree of efficiency of the economic system increases and thus the level of employment. In this sense the Constitutional Court points out that defending the viability and productivity of the company is to defend the workers' own interests STC no. 119/2014 of July 16).

For all that, I share the view that economic rationality does not imply the suppression or alienation of any other non-economic criteria, but it does not mean that the interest of the worker must automatically prevail over other legitimate interests in which viability of the productive organization is at stake [42]. That is to say, the protective character of the labour law in favour of the worker's position, both in the individual and in the collective sphere, must complement and balance increasingly with other objectives that are equally present in the Spanish industrial relations system [43].

As a general conclusion, we are currently witnesses of a new configuration of labour relationships with a greater space for free market and freedom of enterprise as a result of a change of the legislative criterion in the weighting of values and interests, highlighting the competitiveness of the company and the levels of employment [44].

4. Pending for a general update on the doctrine of the Constitutional Court in relation to the power of control and surveillance

However, because this conception of freedom of enterprise and its role in the Spanish labour relations system is so recent, the Constitutional Court has not yet projected it to the proportionality trial when it collides with the fundamental rights of workers, although this will be clarified later.

---

[41] Vid. STC no. 92/1992, 11/06.

[42] M. Rodriguez-Piñero, *Racionalidad empresarial*, cit., 16.

[43] C.L. Alfonso Mellado *et al.*, *Políticas Sociolaborales*, Aranzadi, Navarra, 2014, 117.

[44] M. Rodriguez-Piñero, *La difícil coyuntura del Derecho del Trabajo*, in *Relacionales Laborales*, 20, 2011, 2, in *www.laleydigital.es*.

For this reason, we have to refer to the classical doctrine of the Constitutional Court on this subject, pending a possible turnaround, which seems has already begun as we will comment further on.

Thus, the proportionality test, settled in the jurisprudence of the ECHR and proclaimed at European Union Law in the art. 52 CFREU, has become a sort of legitimacy axiom of the employer decision [45], by virtue of which interests in conflict are weighed and it is decided whether the control method is lawful or not. This hermeneutical canon is composed of three cumulative controls of the measure, which are:

1. The necessity: it is necessary to prove a true entrepreneurial interest, that is to say, the existence of an objective and productive necessity in installing the methods of control. In addition, it must be demonstrated that they are indispensable and strictly necessary to satisfy a business interest worthy of protection, so that if there are other possibilities of satisfying that interest less aggressive, they will have to be preferably employ (STC no. 98/2000).

2. Adecuacy: it is a question of ascertaining whether the restrictive measure that is taken is adequate to contribute to the achievement of a constitutionally legitimate purpose, that is, it is likely to achieve the goal that has been proposed.

3. Proportionality strictly speaking: trough this the Constitutional Court studies if the advantages obtained by the interference in the fundamental right must compensate the sacrifices that it implies for the workers and for the society in general.

Within this context, in accordance with the proportionality test, the Constitutional Court has reached the following conclusions:

1. The control should be limited to the work activity within the working time and only in the workplace (STC no. 186/2000). However, even when they are in the workplace, these controls on workers' activities that are totally foreign to their labour services are rejected too, as might be the case of sound or image recording devices located in common areas or transit points, such as hallways, toilets, dining rooms, etc.

2. The Constitutional Court has understood that it is necessary to consider not only the workplace, but also other relevant elements: whether the

[45] M. Miñaro Yanini, *Las facultades empresariales de vigilancia y control en las relaciones de trabajo: especial referencia a las condiciones de su ejercicio y a sus límites*, in *Tribuna Social*, 158, 2004, 13.

installation of the control devices is done indiscriminately and massively; whether the systems are visible or have been installed surreptitiously; the real purpose; if there are safety reasons, etc. It must be determined in each specific case if these control devices are respectful with the right to privacy of workers (STC of 14 September 2000).

In addition, it requires that the own nature of the contract work implies the restriction of the right (STC no. 106/1996). In this sense, surveillance and entrepreneurial control beyond working time and workplace is admitted in very exceptional cases, for example, for security reasons: because it can affect the performance of employees, or because their private behaviour can violate good contractual faith, or imply an abuse of business confidence, as might be the cases of pilots of area lines, surgeons, transporters of dangerous goods, etc. [46].

An exhaustive and permanent control that foreclose any iota of intimacy and autonomy in the workplace would collocate the power of surveillance in an inhuman dimension, capable of endangering not only the freedom and dignity of work, but also their own psychic balance [47].

3. The decision STC no. 29/2013, in accordance with art. 5 LOPD, pointed out the need for prior, explicit, precise, clear and unequivocal information to the workers about the purpose of controlling the work activity of each control device. This information must include the specify characteristics and the scope of the data processing, and furthermore in which situations these recordings could be examined, for how long and specifying in particular about the possibility of the imposition of disciplinary sanctions in cases of breach of labour contract.

It follows that that workers' consent is not necessary, only their knowledge is required. So, it means that the agreement is not a requirement for the lawfulness of the control [48] method. In this sense, the constitutional doctrine understands that in the labour field the workers' consent falls into a second position because, as a general rule, the consent is understood implicit in the labour relationship.

Nevertheless, the decision STC no. 39/2016 changes its previous and traditional doctrine regarding the control and surveillance devices. Perhaps this

---

[46] Vid. F.M. Ferrando García, *Vigilancia y control de los trabajadores y derecho a la intimidad en el contexto de las nuevas tecnologías*, in *RTSS*, 399, 37-68.

[47] S. Rodriguez Escanciano, *op. cit.*, 8-36.

[48] J.A. Fernández Avilés, V. Rodriguez-Rico Roldán, *op. cit.*, 64.

turn comes from the hand of the new conception of the labour relations system in which freedom of enterprise and the defense of productivity, as we already said above, are gaining weight and are consolidated as fundamental rights. Thus, it is sufficient that the workers are aware of the installation of the devices through the corresponding information badge located in the shop window. In other words, it is no longer necessary for the employer to inform workers in the terms that the constitutional jurisprudence has indicated about the installation of control devices because, among other reasons, in this way it contributes to the productivity improvement of the company.

Recently, this case-law doctrine has been assumed by the Supreme Court. In this way, the Court rectifies its previous stance about the need to inform to the workers' representatives about the means of control and its purpose. Thus, the Supreme Court embraces the new vision about this issue established by the Constitutional Court.

In this regard, the first judgement of the Supreme Court was 7 July 2016 (rec. no. 3223/2014). The legality of the video surveillance means installed without express communication in writing to the workers is sustained because: 1. "their presence was well known by the workers"; 2. "because there were some panels adverting about their presence". 3. an this is the most interesting reason, because "there was a generalised mistrust situation in the company" caused for the theft of cold cuts, which "made every worker in suspect"; and in those circumstances "random checks would bring more inconveniences for the workers not involved in the events", and consequently the installation of control means without express notification is legal because "it has a protective purpose for the corporate assets", which forms part of freedom of enterprise.

The second judgement of the Supreme Court regarding this topic was 31 January 2017 (rec. no. 3331/2015). In this new ruling, the Court qualifies its new doctrine highlighting that surveillance means without express communication must be justified for "security reasons". According to the Court, this generic concept integrates "the control of illicit facts of the workers", but it "cannot be referred to any other labour control external beyond security, such as effectiveness in the daily performance, absences from workplace, the conversation between workers, etc.".

It is curious that Supreme Court underpin its new doctrine with a legal undetermined concept, such as "illicit facts", without providing a useful meaning. At best, the Court offers two practical examples which are not "ilcit", adding two consecutives "etc.". Ultimately, the Supreme Court not only has failed to clarify its doctrine, but has actually generated more legal insecurity.

Similarly, the regional courts have also assumed this new perspective. For instance, the judgment of 7 September 2016 of the High Court of Justice of Valencia (rec. no. 1819/2016). According to this, "it is necessary to balance the privacy right of workers and the managerial power of the employer. This is indispensable to the positive performance of the business, which is reflection of the freedom of enterprise". Therefore, the Court understands that is "not compulsory to specify, beyond security reasons, the concrete purpose of the control mean".

5. Present and future new technologies in the Spanish labour relations system

With this new scenario of the industrial relations system that seems to have started with the recent constitutional jurisprudence in which freedom of enterprise, productivity and business viability are called to occupy a preeminent place, the labour jurist answer to the entrance of new technologies becomes more complex than ever.

We may be witnessing an ontological turn of the labour relations system which is also projected in the classical theory of the lawfulness of the methods of control and surveillance of workers.

As an indication of this change, we can, on the one hand, pay attention to the judicial pronouncements on the new technological methods that have already been introduced and, on the other hand, try to approach those which are about to come.

5.1. The control of the work activity through tags of identification by radiofrequency and GPS

This type of technology allows the individual identification and the possibility of transmitting information remotely in real time. Companies often use it to locate their products, such as stock management of wholesale companies. In this way, employer could associate the label to an object, product or document and measure the time of production, manipulation and shifting of it inside.

As it is known, GPS (Global Positioning System) constitutes a geolocation system that can be inserted in company vehicles, smartphones, tables and other devices, allowing to determine the location of the vehicle and the

worker any moment. So, it could also be used to monitor the work activity carried out by the workers. And if this information was related to a database, then the employer could obtain the productivity profile of a specific worker in a specific workplace [49].

Consistent with the old constitutional doctrine explained, and with the report no. 0193/2008 of the Spanish Association of Data Protection, the use of GPS will be lawful to the extent that the worker has been informed both of his placement, and of the purpose of its use [50]. Secondly, as regards the proportionality of the measure, the courts [51] have understood that it will pass this test if the activity is carried out outside the work centre; and furthermore, if it only records the moments that the vehicle starts and when it stops, and performed exclusively during the working day.

The above guarantees could be applied, with the necessary adaptations, to the use of radio frequency identification tags to control both workers' access to the company and their work activity, since they allow individual identification of workers, record data and transmit information at a distance [52].

Against this background, we can conclude that the Spanish courts are trying to maintain the traditional doctrine of the Constitutional Court in matters of control and surveillance, resisting to echo the recent constitutional pronouncements and disregarding the relevance of freedom of enterprise. And this, despite being new technological devices in which such doctrine can sometimes be complex to apply. We will need to be very vigilant, in any case, to the future pronouncements of the Constitutional Court in this matter to see if it continues the path begun with its last pronouncements.

5.2. The new technology arriving to the workplace

Nowadays new technological means allow a more intense control over the activity of the workers in the performance of their services. They make us reconsider the solution given by our legal system and above all rethink about the utility of the proportionality test in these cases.

Although on the other hand, bearing in mind the new constitutional doc-

---

[49] C. Gala Durán, A. Roig Batalla, *El uso de las etiquetas de identificación y radiofrecuencia en las empresas ¿un nuevo riesgo para los derechos de los trabajadores*, in *AL*, 8, 2010, 3.

[50] F.M. Ferrando García, *op. cit.*, 49.

[51] STS 21 June 2012, STSJ Galicia (rec. no. 903/2014).

[52] C. Gala Durán, A. Roig Batalla, *op. cit.*, 1 ss.

trine based on freedom of enterprise, it seems easily defensible that the latest technological devices are, from the point of view of the entrepreneur, an organizational innovation tool that improves productivity.

In this regard, it should be noted that there are some authors that disagree about the use of the proportionality test by the Constitutional Court already analysed. Firstly, because it is insufficient and does not address the real problems deeply. They point out that there is a certain deterioration in the judicial application, which means that it is being applied by ordinary judges and courts in a superfluous and, ultimately, more formal than real way[53]. Secondly, because it suffers from a great inaccuracy and is condemned to the casuistic search to know when the restrictive measure of the right is necessary, appropriate and proportionate[54]. And thirdly because the Constitutional Court does not rigorously apply the triple test of proportionality, since it only uses the sub-principle of suitability. This implies that the principle of proportionality could lead to the complete sacrifice of the freedom of enterprise or the fundamental right of the worker[55].

And therefore, in cases in which this technology may collide with the fundamental rights of workers, the court must do a real work of legal argumentation in order to safeguard both interests, since it will no longer sufficient to privilege in any case the interests of workers. Nor shall the court use the rhetorical application of the proportionality test, but it will require the construction of a reasoned theory of which fundamental right must prevail over.

As sample of this technology, we can mention the new computer applications, among which we can highlight those that record the activity that each worker has in all applications, both work and leisure ones[56]. Also, another monitoring application is *keylogging*, which records the number of keystrokes on the keyboard, even it can reveal what has been written[57]. On the other hand, we find the trend of wearables or mobile bracelets. These devices monitor the physical activity of workers, who they speak to, what tone of

---

[53] J.L. Goñi Sein, *Controles empresariales: geolocalización, correo electrónico, Internet, videovigilancia y controles biométricos, Justicia Labora*, in *Revista de Derecho del trabajo y de la Seguridad Social*, 39, 2009, 15.

[54] J.A. Fernández Avilés, V. Rodriguez-Rico Roldán, *op. cit.*, 71.

[55] M. Aragón Reyes, H. Losada González, *op. cit.*, 22.

[56] A. Pérez, *Tu empresa te vigila*, in *Quo*, 02 July 2013.

[57] I. Gil, *Saben lo que haces: las 10 formas legales con las que te controlan en el trabajo*, in *El confidencial*, 11 October 2013.

voice they use or their body movements throughout the day. Besides, it allows the assignment of specific tasks based on the worker location [58]. Finally, we can find more advanced techniques such as social sensors that monitor the social interaction of employees [59], portable monitoring of brain waves or even brain implants. It is said that they are part of a next step in the progress and evolution of human beings [60] and will improve memory, mental concentration, perception, mood, and ultimately worker productivity.

[58] *http://m.xataka.com/wearables/los-wearables-como-monitores-de-nuestro-trabajo-dilema-a-la-vista*.

[59] *http://m.xataka.com/wearables/los-wearables-como-monitores-de-nuestro-trabajo-dilema-a-la-vista*.

[60] K. Warwick, M. Gasson, *The Application of Implant Technology for Cybernetic Systems*, in *Archives of Neurology*, 60(10), 2003, 52.

V

GENDER DISCRIMINATIONS AND LABOUR LAW

THE RESPONSIBILITY OF THE PREVENTION OF SEXUAL HARASSMENT IN THE WORKPLACE FOR THE EMPLOYERS IN TAIWAN

Yueh-Hung Hou*

1. Introduction

In 1975, United Nations launched the campaign Decade for Women (1976-1985), instructing its member states to spare no effort in enhancing the women's rights. It further enacted the *Convention on the Elimination of All Forms of Discrimination Against Women* (*CEDAW*) in 1979. The convention aims at eradicating the stereotyped division of labor between men and women, imposing obligations on its contacting states to eliminate all forms of discrimination in the field of political and civil matters, international organizations, nationality, education, employment, rural women, health care, economic and social life, law, marriage and family relations. The convention requires the contracting states to take all appropriate measures, including legislation, to abolish or modify the existing laws and regulations which constitute discrimination against women as well as those discriminative customs and practices (art. 2, (f)), in order to reach an essential equality. Hence, the convention and the campaign are not only eliminating any possible discrimination against women in public sectors, but also those by any person, or-

* Professor, National Taipei University; PH.D., Hitotsubashi University, Japan. Part of this article is research results of the special research project of the Ministry of Science and Technology, R.O.C. (MOST 106-2628-H-305-001).

ganization or enterprise (art. 2, (e))[1]. As for the sexual harassments in the workplace, CEDAW regulates contracting states to take all appropriate measures to ensure female workers the right to protection of health and safety in working condition, including the safeguarding of the function of reproduction (art. 11, (1)(f)). Furthermore, it also indicates in CEDAW Generation Recommendation no. 19 that sexual harassment may constitute a health and safety problem. Also, female workers have reasonable grounds to believe that their objections would disadvantage them in connection with their employment, including recruitment or promotion, or when it creates a hostile working environment, which can be discriminatory to them (Generation Recommendation no. 19/18), and can seriously impaired the equality in employment (Generation Recommendation no. 19/17). Furthermore, according to CEDAW Generation Recommendation no. 12, contracting states should protect women against sexual harassment in the workplace (Generation Recommendation no. 12/1), adopting other measures to eradicate this kind of violence (Generation Recommendation no. 12/2) and offer support services for women who are the victims of sexual aggression or abuses in the workplace (Generation Recommendation no. 12/3).

Regarding the individual development of each country, the United States of America legislated the *Civil Rights Act of 1964*, establishing the Equal Employment Opportunity Commission (EEOC) based on VII of the Act. Being responsible for the execution of all federal laws related to equal employment opportunity, which includes sexual harassment, EEOC also enacted all sorts of enforcement guidance including measures to prevent sexual harassment[2]. The current *Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment* of Japan regulates "Employers shall establish necessary measures in terms of employment management to give advice to workers and cope with problems of workers, and take other necessary measures so that workers they employ do not suffer any disadvantage in their working conditions by reason of said workers' responses to sexual harassment in the workplace, or in their working environments do not suffer any harm due to said sexual harassment (art. 11, par. 1)[3]. The Minister of Health, Labor and Welfare shall formulate guide-

[1] Please see Y. Yamashita, *Josei sabetsu teppai jōyaku no kenkyū (女性差別撤廃条約の研究)*, March 1997, 17-20.

[2] For the system adopted in the United States, please see Cing-Kae Chiao, *A Study of Remedies for Sex Discrimination in Employment in the United States*, in *Taipei University Law Review*, 47, December 2000, 98-134.

[3] Original title in Japanese is: 雇用の分野における男女の均等な機会及び待遇の確

lines required for appropriate and valid implementation of measures to be taken by employers pursuant to the provisions of the preceding paragraph" (art. 11, par. 2).

Under the impetus of women's group, the government of Taiwan has passed many laws and regulations to prevent, handle and solve sexual harassments. In January 2002, the Taiwanese government enacted the *Act of Equality in Employment for Both Sexes*, which was later renamed as the *Act of Gender Equality in Employment* in 2008. The act forbids gender discrimination, encouraging equality in employment as well as regulating the prevention of sexual harassment in the workplace[4]. The *Gender Equity Education Act* that was enacted in 2004 regulates the prevention of sexual assault and sexual harassments in school and on campus. The 2005 *Sexual Harassment Prevention Act* extends the prevention of sexual harassment to not be confined only in school and in workplace, ensuring the protection of the victim's right[5].

Over the course of the evolution of the prevention of sexual harassment, the harassments at workplace receive greater attention. From the employers' perspective, the accusation of sexual harassments in workplace will cause hostility and suspicion among employees, bringing out many unfavorable consequences, which will have an impact on the operation of the enterprise. Hence, there is a chapter in the *Act of Gender Equality in Employment* about the prevention and correction of sexual harassment, requesting employers to prevent sexual harassment from its occurrence by implementing preventive measures, complaint procedures and disciplinary measures, as well as taking immediate and effective correctional and remedial measures.

保等に関する法律. For the Chinese introduction of this law, please see S. Mori, *The Development of Legislation of the Gender Equality in Employment in Japan (Yueh-Hung Hou Trans.)*, in *The Taiwan Law Review*, 181, June 2010, 180-187.

[4] For the context of legislation, please see Ling-Hwei Kuo, *Gender Equality in Work – A Study of Jurisprudence and Judgment*, II ed., 2005, 1-38. For the development of legislation in sexual harassment, please see Cing-Kae Chiao, *The Legal Countermeasure for Sexual Harassment in the Workplace*, April 2002.

[5] For the sexual harassment in the "Gender Equity Education Act", please see Tsun-Yin Luo, *Sexual Assault and Sexual Harassment Prevention Policies and Practices in School: Take "Gender Equity Education Act" as an Example*, in *Taiwan Bar Journal*, 10(10), May 2006, 18-34. For the content of the "Sexual Harassment Prevention Act", please see Fehng-Shian Gau, *The Normative Spirit and Implementation Vision of "Sexual Harassment Prevention Act"*, I, in *Taiwan Law Journal*, 79, February 2006, 32-34. For the examination, critics and review of the "Sexual Harassment Prevention Act", please see Cing-Kae Chiao, *Prevention and Treatment of Sexual Harassment Disputes – On the Relevant Provisions of "Sexual Harassment Prevention Act"*, in *Socioeconomic Law and Institution Review*, 38, July 2006, 293-299.

Of all the cases of sexual harassment in the workplace, some of the complaints that the victimized employees file at the Committee on Gender Equality in Employment will be ultimately brought into administrative court. Sometimes, victimized employees will treat the complaints as civil litigations and claim compensation from the tortfeasors and the employers based on the provisions stipulated in art. 27 to art. 29 of the *Act of Gender Equality in Employment*. Therefore, there are substantial amount of sexual harassment cases handled at court in the past 10 years, which make the court an important role in explaining and applying the *Act of Gender Equality in Employment* to sexual harassment at workplace. This article is on one hand introducing the relevant laws and regulations of Taiwan's current *Act of Gender Equality in Employment* on the prevention and correction of sexual harassment that should be done by the employers; while on the other hand, investigating the processing pattern of the administrative and civil court on the issue of the employers' roles and responsibilities in prevention of sexual harassment in the workplace.

2. The prevention of sexual harassment in the *Act of Gender Equality in Employment*

2.1. The definition of sexual harassment

It is written in art. 1 of the *Act* of *Gender Equality in Employment* (hereinafter referred to as the Act) that the main purpose of the Act is to protect gender equality in right-to-work, implement thoroughly the constitutional mandate of eliminating gender discrimination, and promote the spirit of substantial gender equality. The main content includes general provisions, prohibition of gender discrimination, measures for promoting gender equality in employments as well as the prevention and correction of sexual harassment, which is highly pertinent to this article.

According to art. 12 of the *Act of Gender Equality in Employment*, the definition of sexual harassment can be divided into two circumstances, which are "In the course of an employee executing his or her duties, any one makes a sexual request, uses verbal or physical conduct of a sexual nature or with an intent of gender discrimination, causes him or her a hostile, intimidating and offensive working environment leading to infringe on or interfere with his or her personal dignity, physical liberty or affects his or her job performance (subparagraph 1)" and "An employer explicitly or implicitly makes a sexual request toward an employee or an applicant, uses verbal or

physical conduct of a sexual nature or with an intent of gender discrimination as an exchange for the establishment, continuance, modification of a labor contract or as a condition to his or her placement, assignment, compensation, evaluation, promotion, demotion, award and discipline (subparagraph 2)". The former circumstance is also known as "Hostile Environment Sexual Harassment" while the latter "Quid Pro Quo Sexual Harassment". Based on these definitions, we could know that the Act has set the scope for the prevention of sexual harassment in forbidding anyone to commit any act of sexual harassment to the employees while they are executing their duties, as well as prohibiting employers to use sexual harassment as an exchange condition with the employees and job applicants, to create a safe and friendly working environment for the employees.

2.2. The employer's obligations of the prevention of sexual harassment

The main traits of the prevention of sexual harassment regulated by the *Act of Gender Equality in Employment* are the obligations of prevention and remedy imposed on the employers. It is stipulated in the Act "Employers shall prevent and correct sexual harassment from occurrence" (art. 13, par. 1), the paragraph ensues with the employers' obligations of prevention "For employers hiring over thirty employees, measures for preventing, correcting sexual harassment, related complaint procedures and disciplinary measures shall be established. All these measures mentioned above shall be openly displayed in the workplace". The complaint (grievance) procedures are the special regulation of art. 32 of the Act to conciliate and handle the complaint filed by employees; it shows that the Act values the prevention and remedy of sexual harassment[6]. As for the obligation of remedy, it is stated in the Act "When employers know of the occurrence of sexual harassment mentioned in the preceding article, immediate and effective correctional and remedial measures shall be implemented" (art. 13, par. 2). The legislation of art. 13 mainly refers to the law that the western countries have taken. Due to their experience, employers are the ones who are the most capable of preventing sexual harassment from taking place, or the ones who are able to seek a solution to satisfy the parties involved after its occurrence. Moreover, this Act contains the provisions about "liability-free defense", encouraging employers to take all sort of preventive procedures

[6] Chih-Poung Liou, *The Complaint and Remedy System of The Act of Equality in Employment for Both Sexes*, in *Taipei Bar Journal*, 271, April 2001, 68.

actively in order to prevent the incident from happening[7].

Based on art. 13, par. 3 of the *Act of Gender Equality in Employment*, the Ministry of Labor also stipulates the *Regulations for Establishing Measures of Prevention, Correction, Complaint and Punishment of Sexual Harassment at Workplace* (hereinafter referred to as the Regulations), instructing employers to provide employees and job applicants a working environment free of sexual harassment, adopting appropriate measures to prevent, correct, punish and handle this conduct and protect the privacy of the parties involved (art. 3). It further regulates that the measures for the prevention and correction of sexual harassment shall include: Implement educational programs for the prevention and correction of sexual harassment; Announce and publicly present a written policy for the prohibition of sexual harassment in the workplace; Promulgate complaint procedures for handling sexual harassment incidents and designate specific personnel or organization in charge of these procedures; Handle these complaints in confidentiality and protect complainant from any retaliation or other adverse treatment and; Establish measures for punishing those who are proven to be perpetrators after formal investigation (art. 4).

The Regulation also has specification on the complaint and investigation procedures. Firstly, it requests the employer to set up designated telephone, telex, special mailbox or e-mail addresses to handle the complaints concerning sexual harassment. The related information shall be openly displayed at a noticeable place in the workplace (art. 5). Secondly, the complaint of sexual harassment shall be filed orally or in writing. For orally filed complaints, the personnel or unit in charge of receiving these complaints shall put them in record (art. 6). The employer who deal with the complaints concerning sexual harassment shall cope with the matters in secret (art. 7, par. 1), the right of privacy and other legal rights concerning personality of the parties involved shall be protected and respected throughout the investigation process (art. 8). Further on, the employer and the employee representatives shall organize a committee for handling sexual harassment complaints (art. 7, par. 2). When the complaint committee for handling sexual harassment is in session, it may inform the parties involved and other related persons to be present and make statements. It may also invite other persons with related expertise and experience to provide assistance (art. 9). The

[7] Please see Cing-Kae Chiao, *Analysis of the Sexual Harassment Related Provisions of The Act of Equality in Employment for Both Sexes*, in *Taipei Bar Journal*, 271, April 2001, 68.

committee shall render its decision with grounded reasons. It may also offer punishment or other proposals for solving the complaint; the decision shall be informed to the complainant, the respondent of the complaint and the employer in writing (art. 10).

It also regulated that a complaint shall be decided in three months after it is filed (art. 11). After a conduct of sexual harassment is investigated and proved to be a fact, the employer shall make an appropriate punishment or render other corrective measures to the respondent of the complaint in accordance with the seriousness of the incident. If the fact of false reporting is proved, the employer shall make an appropriate punishment or render other corrective measures to the complainant (art. 12). Besides, it is also regulated in art. 36 of the *Act of Gender Equality in Employment* that "Employers may not terminate, transfer or take any disciplinary action that is adverse to employees who personally file complaints or assist other persons to file complaints pursuant to the Act".

3. Administrative liability & administrative litigation

3.1. Administrative liability

In order to make sure that the employers will carry out the regulations stipulated in art. 13 and other related art. of the *Act of Gender Equality in Employment*, the Act also has external complaint procedures and punishments. According to art. 34 of the Act, the external complaint procedures enable employees and job applicants to file a complaint to the local competent authorities once the employers contravene the stipulations of art. 13 or art. 36 of the Act. If the parties involved are not satisfied with the decisions made by the local competent authorities, they may apply to the Committee on Gender Equality in Employment of the Central Competent Authority for reviewing or filing an administrative complaint directly. If they are still unsatisfied with the outcome, they may further file administrative complaints and proceed with administrative litigations.

As for the penal provisions, during its first enactment in 2002, it was stipulated in art. 38 of the Act "Employers who violate the second half of Paragraph 1, Paragraph 2 of Article 13 ... or Article 36 shall be fined no less than NT$10,000 but not exceeding NT$100,000". The 2008 amendment added art. 38-1, indicating "Employers who violate Articles 7 to 10, Paragraphs 1 and 2 of Article 11 shall be fined no less than NT$100,000 but

not exceeding NT$500,000". It caused differences in penalty standards between the prevention of sexual harassment and the prevention of gender discrimination in the workplace. However, being as a pattern of gender discrimination, sexual harassment has a significant impact on women's personal safety[8]. In order to urge the employers to prevent sexual harassment, the amendment in November 2008 has raised the fine of violating the obligation of preventing sexual harassment to the same as violating other gender discrimination, rectifying art. 38 to "Employers who violate Article 21 or Article 36 of the Act shall be fined no less than NT $10,000 but not exceeding NT$100,000" and art. 38-1 to "Employers who violate Articles 7 to 10, Paragraphs 1 and 2 of Article 11 or the second half of Paragraph 1, Paragraph 2 of Article 13 shall be fined no less than NT$100,000 but not exceeding NT$500,000"[9]. The fine for violating the second half of par. 1, and the whole par. 2 of art. 13 is clearly higher after the amendment.

3.2. The investigation of the judgment of administrative litigation

Among all the cases in which administrative litigations are filed for violation of the above-mentioned provisions, the most common cases are the disputation of employers being fined for violating the provisions of par. 2 of art. 13. The questions of "Whether the employers know of the occurrence

[8] For example, *Taipei High Administrative Court Judgment*, 457 (2008), has stated, "*The Act of Equality in Employment for Both Sexes* is enacted for the elimination of gender discrimination (refer to in Article 1 of the Act). The provisions of prohibition of gender discrimination in chapter II and the prevention and correction of sexual harassment in chapter III shall all under the realm of gender discrimination in Article 1 of chapter I – General Provisions. The term 'constitution of gender discrimination' mentioned previously indicates the need to eliminate gender discrimination in this case. The plaintiff's claim of this case for not having any involvement with the provisions from Article 7 to Article 11 of chapter II of the *Act of Equality in Employment for Both Sexes*, and the inappropriate adjudication of the original punishment and petition's identification on the 'constitution of gender discrimination' is thus considered as a misunderstanding, and will not be adopted by the judge".

[9] *Legislative Yuan Gazette*, 93(19), 73-76. Considering the differences of penal provisions between the *Act of Gender Equality in Employment* and the *Employment Service Act* for the employers' gender discriminative conduct to the employees and the job applicants, the legislature has rectified par. 1 of art. 38 of the *Act of Gender Equality in Employment* in November 2014. The new provision regulates that "Employers who violate Articles 7 to 10, Paragraphs 1 and 2 of Article 11 shall be fined no less than NT$300,000 but not exceeding NT$1,500,000". Also, after the amendment in May 2014 and May 2016, the current par. 1 of art. 38 of the Act has been changed into "Employers who violate Article 21, Paragraph 4 of Article 27, or Article 36 of the Act shall be fined no less than N.T.$20,000 but not exceeding N.T.$300,000".

of sexual harassment or not?" and "What are the immediate and effective correctional and remedial measures?" are often the focal point throughout the debate. It is also highly related to the way that the employers handle complaint and investigation. The explanations are in below.

Prior to requesting the employers to take immediate and effective correctional and remedial measures, the employers should be known of the occurrence of sexual harassment. Taipei High Administrative Court Judgment no. 466 (2003) indicates "Based on Article 38 of the *Act of Equality in Employment for Both Sexes*, it has to be that the employer know the occurrence of sexual harassment while the employee is executing on his/her duties that the employer will be punished for not taking immediate and effective correctional and remedial measures. If the employer is not informed about the incident of the sexual harassment, it is hard to punish him/her for not taking any correctional and remedial measures solely based on the fact that the employee is sexually harassed".

However, we should also noticed that it will also be considered as a violation of art. 13, par. 2 of the Act if the employers fail to process any investigation and take any related measures before identifying the complaint that the party involved filed to not be a conduct of sexual harassment. Taichung High Administrative Court Judgment no. 61 (2009) has pointed out "The plaintiff advocates that according to Article 13, Paragraph 2 the *Act of Gender Equality in Employment*, the employer should take effective correctional and remedial measures, which means that after the investigation is closed and the conduct of sexual harassment is constituted, the employer could start taking effective correctional and remedial measures. Based on the description above, the fact that the plaintiff doesn't take any of those measures after the complainant file a complaint in November 2007 can be seen as a violation of Article 13, Paragraph 2 of the Act. As for deciding whether the conduct of sexual harassment is constituted or not after the investigation, the plaintiff should follow the stipulations in art. 12 of *the Regulations for Establishing Measures of Prevention, Correction, Complaint and Punishment of Sexual Harassment at Workplace*, to make an appropriate punishment or render other corrective measures to the respondent of the complaint in accordance with the seriousness of the incident. It does not affect the fact that the plaintiff should take immediate and effective correctional and remedial measures after knowing the occurrence of sexual harassment filed by the complainant".

As for the definition of "immediate and effective correctional and remedial measures", The Supreme Court of the Republic of China no. 2082

(2009) has elaborated that "According to Article 13, Paragraph 2 the *Act of Gender Equality in Employment*, the employers should take immediate and effective correctional and remedial measures after knowing the occurrence sexual harassment, in hope of rendering the employees an working environment free of sexual harassment which will not infringe on their personal dignity, physical liberty or affect their job performance. The so-called 'immediate and effective correctional and remedial measures' are not simply defined by the subjective feeling of the victim. It is hard to acknowledge that a government sector, school, group or enterprise has conformed to this regulation if they fail to treat a complaint regarding sexual harassment with a prudent attitude, which disable them from empathizing with the victims, to show consideration towards them and to activate an established processing mechanism for taking the appropriate measures in order to free the victims from a long-term hostile, threatening and offensive working environment" [10]. Also, since the term "effective correctional and remedial measures" is counted as an indefinite legal concept, Taipei High Administrative Court Judgment no. 457 (2008) has an explanation to the examination standard, "The term 'effective correctional and remedial measures' is an indefinite legal concept, which means that we could learn about its concrete meaning only after the evaluation of law applicants. Whenever the executive authorities explain and apply this indefinite legal concept, the administrative courts shall still examine its legitimacy. In view of the way in which these indefinite legal concepts are examined; however, based on the constitutional allocation of the executive and the judiciary functions, the court does not replace the judgment of the executive authorities with its own opinions. The function of the court is to examine the executive authorities' accuracy of usage based on these criteria: The legitimacy of the organization formed by the administrative decisions, the necessary relevance of the considered factors to the event and the conformity with the general evaluation standards".

Once the employee files a complaint, the employer should process with the measures of prevention, correction, complaint and punishment of sexual harassment as soon as possible. Taipei High Administrative Court Judgment no. 64 (2005) has stated, "Even though the plaintiff has learned about the incident in February 2004, he/she does not face its seriousness and handle it properly. It is until April 23, 2004 that the plaintiff organized a

[10] For example, *Taipei High Administrative Court Judgment*, 247 (2008), also has an elaboration on the immediate and effective correctional and remedial measures.

committee for handling the sexual harassment complaint. Also, the female members of the committee is less than a half, which violates the provisions 'attention shall be paid to an appropriate proportion of committee members' gender' in Paragraph 2 of Article 7 of the *Regulations for Establishing Measures of Prevention, Correction, Complaint and Punishment of Sexual Harassment at Workplace*. Moreover, the committee did not investigate on the incident. The alleged sexually harassed conducts includes a hostility and offensive working environment created by the chairman's sexual harassing speech and other male employees' sexually implicit, gender discriminative words. These conducts infringe on female employee's personal dignity and affect her performance at work. According to the 8th Meeting Minutes of Taipei City's Committee on Gender Equality in Employment, it is clear that the plaintiff was aware of the fact that some female employee is being sexually harassed in a hostile working environment and didn't take any immediate and effective correctional and remedial measures. It is sure that the plaintiff violates the provisions of Paragraph 2 of Article 13 of the *Act of Gender Equality in Employment*".

There have also been disputes over whether the handling procedures conform to the definition of "immediate and effective correctional and remedial measures" if the employers doesn't activate a formal investigation but to only change seats and to transfer the parties involved to another position. Taipei High Administrative Court Judgment no. 978 (2006) has pointed out "Of course the definition of 'effective correctional and remedial measures' is not solely based on the subjective feeling of the victim of sexual harassment. However, if an enterprise fails to treat a complaint regarding sexual harassment with a prudent attitude, activating an established complaint processing mechanism for taking appropriate measures in order to free the victims from a long-term hostile, threatening and offensive working environment, it is hard for us to identify it for conforming with the provision ... After the conversation, the employer only transfers the perpetrator's position to another department and changes his/her seat without activating a formal investigation ... It is obvious that the employer doesn't fulfill the remedial obligation stipulated in Article 13, Paragraph 2 of the *Act of Equality in Employment for Both Sexes*".

Even if the employees ask to not publicize about the incident after the sexual harassment has taken place, it is still mandatory for the employers to handle the incident based on the measures of prevention, correction, complaint and punishment of sexual harassment. For example, Taipei High Administrative Court Judgment no. 744 (2007) says, "Even though the victim

has told his/her supervisor about the unwillingness to make public; however, since the incident involves sexual harassment, instead of considering as the victim's privacy and handling it inactively, the supervisor still needs to handle the situation with confidentiality and take effective remedial measures based on 'Cathay Life Insurance Measures of Prevention, Correction, Complaint and Punishment of Sexual Harassment', which the plaintiff has stipulated and promulgated".

Also, throughout the investigation, the identities of the parties involved should be kept confidential in order to maintain their privacy. Taipei High Administrative Court Judgment no. 457 (2008) has pointed out "The plaintiff has stated that the investigation had conformed to the related non-disclosure provisions, and the so-called 'principles of confidentiality, non-retaliation or other unfavorable treatment' elements weren't included in Article 13, Paragraph 2 of the *Act of Equality in Employment for Both Sexes* at time when the incident happened; however, even though the plaintiff thinks that the truth of the incident is still under investigation, he/she still has to be confidential to the identity of the parties involved in order to protect their privacy. It is also prohibited to abuse the plaintiff's position and power by conducting any improper interference, retaliation or unfavorable treatment to the parties involved to affect their performance and infringe on their right to work. These are the employers' duties that the previously mentioned provisions expected, and are apparently the substantial meanings of the effective remedial measures and the relevant consideration to the event. Even though the plaintiff has referred to the previously mentioned provisions for taking necessary measure during the investigation, the fact that he/she failed to explain the laws and principles of management that the school referred to, which leads to the argument of the parties involved on the event is clearly not an effective remedial measure and an implement of the gender equity education. Thus, it is hard to take the plaintiff's verdict of thinking that he/she has not violated the Paragraph 2 of Article 13 of the *Act of Equality in Employment for Both Sexes*, and the defendant has involved into some irrelevant consideration to the event, as a proof".

Except for all the examples mentioned above, we should also notice that the provisions of art. 13, paragraph of the Act has regulated "When employers know of the occurrence of sexual harassment mentioned in the preceding article, immediate and effective correctional and remedial measures shall be implemented" does not apply only to employers who have hired more than thirty employees as it is regulated in par. 1 of art. 13 of the Act.

Therefore, even the employer has only one employee; he/she should still take immediate and effective correctional and remedial measures after the occurrence of sexual harassment. Taipei High Administrative Court Judgment no. 590 (2006) has pointed out "The plaintiff has legally hired an Indonesian care worker 'S' for domestic care services for her mother-in-law. 'S' has filed a complaint to the Department of Labor of Taipei City Government, stating that she has undergone sexual harassment and harm from the plaintiff's husband. 'S' also stated that she has sought help from the employment agency, but has not received any assistance. During its 15th meeting on January 20, 2006, Taipei City's Committee on Gender Equality in Employment has adjudicate the constitution of sexual discrimination based on the fact that the employer has failed to prevent the incident from happening, and has not handled the situation properly after knowing its occurrence. Even though the plaintiff has asked the care worker 'S' to come back to work, she still failed to offer a friendly working environment for 'S'. Taipei City Government then considers this case as a sexual harassment, and fines the plaintiff NT$100,000 for the violation of Article 13, Paragraph 2 and Article 38 of the *Act of Equality in Employment for Both Sexes*, and Paragraph 8 of the Uniform Punishment Standard ... Based on Article 13, Paragraph 2 of the Act, even though the employer has less than 30 employees, he/she still have the obligation to take immediate and effective correctional and remedial measures as long as he/she has learnt about the occurrence of sexual harassment happened to the employees. If the employer fails to do so, based on Article 38 of the Act, they will face a fine no less than NT $10,000 but not exceeding NT$100,000. The penal provisions that the defendant sentenced to the plaintiff are the provisions in Article 38 of the Act for the violation of Paragraph 2 of Article 13, not the violation of Paragraph 1 of Article 13. Thus, the statements that the plaintiff claimed for 'having less than 30 employees should not violate Paragraph 1 of Article 13', and that 'the defendant should not refer to as Article 38 of the Act regarding this incident' were not taken into account".

4. Civil liability

In order to implement the above-*mentioned* preventive measures for sexual harassment in the workplace, the *Act of Gender Equality in Employment* has not only imposed administrative liability, but also civil liability on the employers. It means that the laws will not only punish the employers

for the violation of the Act, but also compensate the damage that the victimized employees received.

4.1. The civil liability in the *Act of Gender Equality in Employment*

Before the enactment of the *Act of Gender Equality in Employment*, the victim would claim for compensatory damages from the tortfeasors (based on art. 184 of the Civil Code) or joint compensatory damages from the employers (based on art. 188 of the Civil Code) [11]. Since it is stipulated in par. 1 of art. 188 of the Civil Code that "The employer shall be jointly liable to make compensation for any injury which the employee has wrongfully caused to the rights of another in the performance of his duties"; therefore, sometimes the court would identify the conduct of sexual harassment to be no have taken place during the performance of the duties, making it hard for the victim to claim for compensation. Tainan District Court Judgment no. 1912 (2002) exemplifies, "Defendant Liu is the General Manager of the co-defendant TaiHung (the company). However, the conduct of sexual harassment is not an original duty of the General Manager and a misconduct he starts to commit after his incumbency, which means that he could commit the same kind of misconduct to other female individuals at other places even if he is not working in TaiHung. It is hard to ask the co-defendant TaiHung Company for joint compensatory damages since the conduct of sexual harassment of defendant Liu is simply his own misbehavior and has nothing to do with his position as a General Manager".

After its enactment, the *Act of Gender Equality in Employment* has stipulated special regulations on civil liability and compensatory damages. The content can be divided into three kinds of circumstances. The first one is "When employees or applicants suffer damages from employment practices referred to in Article 12 of the Act, the employers and the harassers shall be jointly and severally liable to make compensations. However, the employers are not liable for the damages if they can prove that they have complied with the Act, have provided all preventive measures required, and have

[11] For the civil liability, please see Chyi Chou, *A Research on the Civil Liability of Sexual Harassment in the Workplace*, in *National Taiwan University Law Journal*, 34(2), March 2005, 181-213; Chih-Poung Liou, *The Legal Remedy of Sexual Harassment in the Workplace-Explanation on Banqiao District Court Judgment, no. 774 (2007)*, in *Labor Law Journal*, 8, December 2009, 109-146; Yueh-Hung Hou, *The Employer's Civil Liability for Sexual Harassment in the Workplace in Act of Gender Equality in Employment*, in *The Taiwan Law Review*, 196, September 2011, 214-220.

exercised all necessary care in preventing damage from occurring (art. 27, par. 1). If compensations cannot be obtained by the injured parties pursuant to the stipulations of the preceding paragraph, the court may, on their application, take into consideration the financial conditions of the employers and the injured parties and order the employers to pay for a portion of or for the entire damage (art. 27, par. 2). The employers who have made compensations can seek claims against the harassers" (art. 27, par. 3). The second one is "When employees or applicants are damaged because employers contravene the obligations referred to in Paragraph 2 of Article 13 of the Act, the employers shall be liable for any damage arising therefrom" (art. 28). The third one is, "employees or applicants may claim reasonable amounts of compensation even for such damage that are not pecuniary losses. If their reputations have been damaged, the injured parties may also claim the taking of proper measures for the restoration of reputations" (art. 29). Also, in order to establish the right and interest of both parties as early as possible, the legislature has further regulated two-year and ten-year statues of limitation in art. 30 of the Act.

From the above-mentioned provisions, we could learn that the Act has imposed double liability for compensatory damages on the employers towards the conduct of sexual harassment, which are stated in art. 27 or art. 28. The liability stated in art. 27 of the *Act of Gender Equality in Employment* is similar to the employer's liability stipulated in art. 188 of the Civil Code [12]. From these provisions, we could learn that once the employee or job applicant encounters hostile environment sexual harassment or quid pro quo sexual harassment [13], the employers and the perpetrators are jointly liable for the compensation. However, the employer can bring up the so-called "liability-free defense", which means that if the employer can prove

[12] For the relation between art. 27 of the Act and the infringement of Civil Code, please see Chih-Poung Liou, *The Legal Remedy of Sexual Harassment in the Workplace-Explanation*, cit., 133-140.

[13] The law in the United States has imposed joint liability on the employers for the occurrence of the quid pro quo sexual harassment, which means that the employers are responsible of it regardless of the fact that whether have they known of the occurrence of the event. For the environmental hostile sexual harassment, it has to be depended on the fact that whether have the employers taken the necessary preventive measures to decide their liability. For the discussion of the American laws, please see Chyi Chou, *op. cit.*, 15; Cing-Kae Chiao, *Analysis of the Sexual Harassment*, cit.; Chey-Nan Hsieh, *Viewing the Identification of the Employer's Liability in Taipei High Administrative Court Judgment no. 64 (2005) Based on the Identification of the Employer's Liability for Sexual Harassment in the United States*, in *Labor Law Journal*, 8, September 2011, 147-195.

that he/she has conformed to all the preventive measures which are stipulated in the Act, and has done his/her best to prevent the incident from occurring, the employer does not have to be liable with the compensation.

Take Taipei District Court Judgment no. 6336 (2007) as an example, "In order to respect gender equality, YaYung (the company) has promulgated prohibition notices on April 12, 2007, and has followed the suggestion from the undertaker of the Department of Labor of Taipei County Government to participate in the lessons on gender equality in the workplace and the seminar on the prevention of employment discrimination organized by Taipei County Government, and has eventually issued a formal admonition to Chi (the perpetrator) on April 20, 2007. However, the plaintiff chose to quit his/her job and terminated the employment with YaYung. Also, according to the transcript of the recorded conversation offered by the plaintiff, we could learn that two other employees had persuaded the plaintiff to ignore the dismissal Chi had requested and keep working for YaYung. After receiving the complaint filed by the plaintiff, the responsible person of the company has appointed employees to investigate into the event as well as taken the above-mentioned relevant correctional and remedial measures. Since the plaintiff has decided to leave his/her position in YaYung on his/her own, and the company has conformed to the relevant provisions, the liability of compensation of YaYung Company should be exempted based on Paragraph 1 of Article 27 of the *Act of Equality in Employment for Both Sexes*".

Also, the liability mentioned in art. 28 of the *Act of Gender Equality in Employment* is the employers' independent civil liability, it occurs after the violation of the obligations in par. 2 of art. 13. If the employers conform to the remedial obligations stipulated in par. 2 of art. 13, they are not liable for compensatory damages. It is stated in the above-mentioned judgment Taipei District Court Judgment no. 6336 (2007) that "The responsible person of YaYung was abroad when the event of sexual harassment happened. Though he/she cannot deal with the incident personally, he/she has appointed other employees to look into the event, and sent out legal attest letter to the plaintiff for the cooperation of investigation. The responsible person has further promulgated prohibition notices, participated in the lessons and seminar on gender equality organized by Taipei County Government, and issued a formal admonition to the defendant Chi. We could see that the company has put all the efforts to conform to the regulations of the *Act of Equality in Employment for Both Sexes*. Since the plaintiff refused to respond and to return to his/her position, it is hard to expect YaYung for

rendering a better way of handling the situation. Therefore, it is invalid to demand YaYung for fulfilling the liability for compensatory damages stipulated in Article 28 of the *Act of Equality in Employment for Both Sexes*".

4.2. The liability of non-performance

Even though the *Act of Gender Equality in Employment* does not define clearly in the contractual liability, scholars has pointed out that when employers cannot protect employees from sexual harassment at work, they have violated their responsibilities in the prevention of occupational injury and the establishment of appropriate working environment and welfare measures. Also, if the duties in labor contract have potential damages to the employees' health, the employees could terminate the contract without notice once the situation failed to improve after notifying it to their employers [14]. It is stipulated in art. 483-1 "The employee performs the services, under circumstances his life, body, health may be endangered, the employer shall prevent by necessary means according to such circumstance". Therefore, the sexually harassed employees can advocate that the employers are bound to the liability of non-performance of incomplete performance based on the provisions in art. 483-1 of the Civil Code. At this point, based on par. 2 of art. 227 of the Civil Code, the employers have to be bound to the liability for compensatory damages claimed by the victimized employees. If the personality rights of the victimized employees are infringed, the employers are also bound to the liability for non-pecuniary compensatory damages according to the provisions stipulated in art. 227-1 in compliance mutatis mutandis with art. 195 [15].

5. Conclusion

From the paragraphs above, we *could* learn that the enactment of the *Act of Gender Equality in Employment* is based on the notion that the em-

[14] Please see Ling-Hwei Kuo, *Review on the Effectiveness of the Implementation of Act of Gender Equality in Employment – Take Judicial Practice as the Core*, in *National Policy Qartlerly*, 4(1), April 2005, 17; Chih-Poung Liou, *The Legal Remedy of Sexual Harassment in the Workplace-Explanation*, cit., 142.

[15] Chih-Poung Liou, *The Legal Remedy of Sexual Harassment in the Workplace-Explanation*, cit., 142. This judgment of civil litigation (*Banqiao District Court Judgment no. 774 (2007)*) also cites the provisions stipulated in art. 483-1 and art. 487-1 of the Civil Code.

ployers are the most capable of fulfilling the prevention and the correction of sexual harassment. Thus, the legislature has referred to the methods western countries have applied and regulated the preventive and remedial obligations of the employers, rendering the employees a working environment free of sexual harassment as well as an immediate and appropriate remedy after its unfortunate happening. When employers failed to fulfill their legal liability, aside from the penal provisions stipulated in art. 38-1, the Act also includes the compensatory damages in art. 28 once they violate the obligations stipulated in par. 2 of art. 13.

The responsibilities of employers are significant. Therefore, no matter whether the accusation that the complainant filed has sufficient supportive evidence or not, the employers should still activate the established complaint investigation and processing mechanism immediately, handling the incident of sexual harassment in the workplace prudently and effectively to conform to the provisions stipulated in the Act.

According to the summary of the *Survey on Equality in Employment and Management (2017)* conducted by the Ministry of Labor, there were 4,4% of female employees suffering from sexual harassment at workplace last year, higher than their male counterpart by 0,4%. The perpetrators of such conduct were mostly their colleagues (2,1%) or clients (1,7%), and then their supervisors (1,1%). There were 1,1% of women filed complaints over sexual harassment, most of which were ameliorated afterward. 3,3% of victims didn't file any complaints, the main reason being the assumption that "they would be taken as a joke and not treated seriously" (1,8%)[16]. From the survey, we can see that sexual harassment is still a significant issue for companies in Taiwan. The summary analysis of the same survey also pointed out that in 2017, 86,0% of enterprises, which comprised of more than 30 people, established "measures of prevention, correction, complaint and punishment of sexual harassment". Furthermore, 82,2% of these companies have announced the measures publicly in the workplace while the other 3,8% has not. And the remaining 14% of the surveyed companies haven't done so. Since the *Act of Gender Equality in Employment* has taken effect, the percentage of enterprises that has established "measures of prevention, correction, complaint and punishment of sexual harassment" has risen from 35,5%

[16] For the summary of *Survey on Equality in Employment and Management (2017)* conducted by the Ministry of Labor, please visit the following website: *http://statdb.mol.gov.tw/html/svy06/0624summary.pdf* (July 17th, 2018).

(2002) to 86,0%, increasing by 50,5 percentage points[17]. From the report, we can derive that most of the enterprises have conformed to the *Act of Gender Equality in Employment* to establish certain measures, but there is still room for improvement. We expect that there will be more employers that are capable of offering the employees a safe working environment. To free the female employees from the fear of undergoing sexual harassment while executing their duties and to reach the purpose of the prevention of sexual harassment in the workplace in the *Act of Gender Equality in Employment.*

[17] For the summary analysis of *Survey on Equality in Employment and Management (2017)* conducted by the Ministry of Labor, please visit the following website: *http://statdb.mol.gov.tw/html/svy06/0624analyze.pdf* (July 17th, 2018).

GENDER WORK DISCRIMINATION, VIOLENCE AND FEMINIZATION OF MIGRATION

Andrea Isabel Franconi [*]
Mariela Ines Laghezza[**]

1. Introduction

The object of this publication is to consider the different areas where women have to face up discrimination and violence at the work place, taking a special attention in the study of migration from a gender perspective, since it has a profound impact in the development of a group in situation of vulnerability.

Oppressions operate in all areas: economic, political and cultural processes that have been the product of the capitalist system and Western colonial modernity. We need to take care of the current scenario of gender gaps, violence and harassment at the work place and their reflection in migration trajectories and the complex social reality experienced by women in a situation of mobility.

The freedom to work – by choice, in conditions of dignity, safety and fairness – is integral to human welfare. Guaranteeing that women have access to this right is an important end in itself.

[*] Labour and Social Security Law Especialist and Assistant Professor – University of Buenos Aires – Violence and Gender Issues Researcher Universitas Fundación.

[**] Labour and Social Security Law Specialist and Assistant Professor – University of Buenos Aires – Migrant Issues Specialist University of Lanús, Complutense University of Madrid.

In countries at all levels of economic development, a woman's personal preference is the key factor in determining whether she will seek out and engage in paid work. However, this preference is heavily influenced by socio-economic constraints and pressure to conform to traditional gender roles. In fact, there are persistent challenges, such us; work-family balance; lack of transport; lack of affordable care, sectorial and occupational segregation; gender wage gaps and gaps in the policy framework for work/family integration.

To achieve equal opportunities for men and women at work, we have to pay special attention to a delicate subject: the violence and harassment in the world of work.

Violence and harassment is a human rights violation and a threat to the dignity, health and security of individuals. Although it can affect everyone, women and particularly those who are in a context of mobility, are in a greater risk. For this reason, gender dimensions of violence and harassment need to be addressed specifically.

Another matter into consideration, is the gender perspective in human mobility. The man moves and so does the women. However, through the migration cycle, women migrant workers face the risk of violence and trafficking, and discrimination that limits their access to fair recruitment and decent work, with little access to protection and support services.

Whether migrating through regular or irregular channels, women migrants can face the risk of violence and abuse from intermediaries and employers, as well as from partners and others. As we said before, violence against women migrant workers, and trafficking, are part of the broader spectrum of violence against women, and the cultural norms that drive it.

Therefore, it is relevant to investigate the different areas that affect work life, from a gender perspective, in order to achieve a real comprehension of the phenomenon that involves women's participation – and its cultural, economic and social restrictions – in the world of work.

2. Real women's global labour force participation. Gender gaps

The past 20 years have witnessed some progress for women in the world of work and in terms of gender equality in society. Today, more women than ever before are both educated and participating in the labour market, and there is greater awareness that gender equality is of paramount importance in efforts to reduce poverty and boost economic development.

The adoption of the 2030 UN Agenda for Sustainable Development and

the resolve of world leaders "*to achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value*" [1] and "*to achieve gender equality and empower all women and girls*" [2] by 2030 are proof of that awareness. Yet, despite the progress made thus far and the global commitments to secure further improvement, women's prospects in the world of work are far from being equal to men's.

The current global labour force participation rate for women is close to 48,5%. For men, it's 75%. That's a difference of 26,5 percentage points, with some regions facing a gap of more than 58 percentage points [3].

Not only are women less likely than men to participate in the labour force, but those who do are also less likely to find employment. As of 2018, the global unemployment rate of women, at 6%, is approximately 0,8 percentage points higher than that of men. This translates into a ratio of female-male unemployment rates of 1.2 in 2018. By 2021, this ratio is projected to remain stable in developed countries and to increase in both developing and emerging countries, mirroring the deterioration in the relative position of women in terms of global unemployment observed over the past decade.

When it comes to define women's participation in the labour market, according to the World Employment and Social Outlook: Trends for Women 2018, it is relevant to highlight that:

– while vulnerable employment is widespread for both women and men, women tend to be overrepresented in certain types of vulnerable jobs (this is called sectorial and occupational segregation): men are more likely to be working in own-account employment while women are more likely to be helping out in their households or in their relatives' businesses. Nearly 15% of employed women – compared with 5,5% of employed men – are contributing family workers (i.e. self-employed in a business owned or operated by a relative). Such workers are likely to be poorly paid (if at all) and living in poverty, with no employment contract and little access to social protection. This gap is even more pronounced in developing countries.

– women in paid jobs are more likely to work fewer hours than men, but usually not by choice, mainly because of the lack of family-work balance that increases the number of unpaid work hours carry out by women. In

[1] Sustainable Development Goal (SDG) 8, target 8.5.

[2] SDG 5.

[3] World Employment and Social Outlook: Trends for Women 2018.

developing countries, rates of "time-related underemployment" among women can be as high as 50% [4].

In addition to this, women continue to be paid approximately 20% [5] less than men per month across the world, even when they do the same work or work of equal value. This phenomenon is what experts usually referred to as "Gender Gaps". The ILO took into consideration this matter during the Convention 100 on Equal Remuneration Convention (1951) for men and women workers for work of equal value that refers to rates of remuneration established without discrimination based on sex.

3. Gender disparities

Gender disparities in the selected labour market indicators presented here capture only partially the complexity of both the labour market challenges faced by women and the improvements that women have achieved thanks to conducive conditions in the specific economic and institutional context.

In its wider approach to understanding the issues surrounding women and work, it becomes necessary to identify many structural and cultural factors, ranging from occupational and sectorial sex segregation to workplace discrimination and gender stereotyping.

Such a wide-ranging approach is essential for providing a more comprehensive picture of gender inequalities in the labour market, including variation in gender disadvantage by region, socio-economic class, ethnicity and age, among other factors.

Indeed, many complex factors contribute towards making the world of work unfair to women in varying degrees according to circumstances.

The Gallup-ILO survey shows that both women and men, in all regions, identified work-family balance and affordable care as one of the biggest challenges women face in the world of work.

Across the board, both women and men report that the biggest barrier for women in paid work is the struggle to balance it with family responsibi-

[4] World Employment and Social Outlook: Trends for Women 2018.

[5] ILO, *Report of the Director-General: The Women at Work Initiative: The Push for Equality*, ILC.107/DG/IB. This is a preliminary estimate of the weighted average based on the mean of 71 countries, which comprise 79.7 per cent of the world's wage earners (forthcoming ILO Global Wage Report 2018/19).

lities. Work such as childcare, cleaning and cooking is necessary for a household's welfare – and therefore for the well-being of societies as a whole – but women still shoulder the brunt of this often invisible and undervalued workload.

Family-supportive polices, which enable women to remain and progress in paid employment and encourage men to take their fair share of care work, are crucial to achieve gender equality at work.

For example, the labour legislation in many countries recognize the women's right to have a maternity leave after childbirth, however it doesn't recognize a paternity leave with a length that enable an equal family responsibilities distribution. That regulation responds to a certain gender role, where women have to face up the entire family care duties on their own, and therefore implies a lack of labour market integration opportunities and an impediment for women to continue their own professional careers.

Over the past 50 years, when women started entering formal labour markets steadily and in large numbers, the world of work did not adjust to women, but rather required women to adjust to it – a world originally shaped by men for men –. At the same time, paid employment was simply added to the women's "to-do list". The traditional "gender order", which saw women as the "caregivers" and men as the "breadwinners", was not questioned. Women's time was regarded as "elastic", unlike that of men, and their time less precious than men's. This still continues to be very much the case, 50 years later.

On average, women spend nearly three times more hours on unpaid household and care work than men. This invisible labour often eats into the time they could spend doing paid work. Overall, when both paid and unpaid work are taken in account, women frequently work longer hours than men.

Therefore, and consequentially, women were, and still are, regarded as "secondary" workers, even when they are the only or main source of household income. A corollary is that women can also be regarded as disposable workers to be called upon and stood down as required.

Last but not least, the lack of affordable care for children or family members is an obstacle for women, both for those looking for a job and those in paid work.

In fact, it decreases a woman's participation chances by almost 5 percentage points in developing countries, and 4 percentage points in developed countries.

These systemic or structural obstacles to equality at work are just some

of the most intractable and resistant ones to the different policies adopted by many countries. There is good reason to suppose that simply persisting with the approaches of past decades, despite the real progress they have generated, will not be sufficient. There is a need to shine a spotlight on those often hidden barriers and apply innovative approaches to overcome them.

4. The invisible limitation: violence and harassment in the world of work

Violence and harassment in the world of work is a human rights violation and a threat to the dignity, health and security of individuals. However, it is relevant to emphasize that violence, sexual harassment and harassment must be seen from a gender perspective, as their root causes, forms and consequences are different for women and men.

Workplaces must enable women to emancipate themselves and to gain autonomy and independence and should promote women in hierarchy positions.

While violence and harassment in the world of work affects everyone, women and those who do not conform to societal perceptions of gender roles and norms are at greater risk.

It is relevant to highlight, that while several ILO international labour standards refer to various forms of violence and harassment, none defines any of its forms, and no international instrument addresses violence and harassment in the world of work in a comprehensive way. The creation of a holistic instrument or instruments is necessary to protect against human rights abuses.

Therefore the work that the ILO has been developing in this subject, from the office and during this year Conference, is fundamental.

At its 325th Session (October-November 2015), the Governing Body of the International Labour Office decided to place a standard-setting item on "Violence against women and men in the world of work" on the agenda of the 107th Session (June 2018) of the International Labour Conference (ILC) [6].

[6] ILO, *Minutes of the 325th Session of the Governing Body of the International Labour Office*, GB.325/PV, par. 33(a).

The Governing Body also agreed to the holding of a tripartite Meeting of Experts on Violence against Women and Men in the World of Work, to provide guidance on the basis of which the Governing Body would consider[7]. This tripartite Meeting, produced a set of conclusions, in which the experts suggested replacing the term "violence" with "violence and harassment" in the title of the item "*to ensure the range of unacceptable behavior is adequately understood and addressed*"[8].

Therefore, particular behaviors and practices constitute violence and harassment in the world of work, including the following: sexual violence, such us rape and sexual assault; physical abuse; verbal abuse; psychological abuse and intimidation, bullying and mobbing; sexual harassment; threats; stalking; and domestic violence, where it impacts the world of work.

Violence and harassment affects workplace relations, worker engagement, health, productivity and may prevent access to, remaining in and advancing in, the labour market, particularly for women. For this reason, the ILO tripartite Meeting of Experts underscored that the gender dimensions of violence and harassment need to be addressed specifically.

Addressing gender workplace violence and harassment calls for an integrated approach which requires joint responsibilities where all actors intervene to prevent and mitigate acts of violence in the workplace. All actors in the world of work should abstain from, prevent and address violence. Prevention of violence and mitigation when it occurs are the basic pillars of an efficient and effective approach.

5. Labour migration

We live in a world on the move. Current estimates[9] are that there are 244 million international migrants globally (or 3,3% of the world's population). While the vast majority of people in the world continue to live in the country in which they were born, more people are migrating to other countries, especially those within their region. Many others are migrating to high-income countries that are further afield.

---

[7] GB.325/PV, *op. cit.*, par. 33(b).

[8] ILO, *Report of the Director-General: Fifth Supplementary Report: Outcome of the Meeting of Experts on Violence against Women and Men in the World of Work*, GB.328/INS/17/5, par. 12, and Appendix I, par. 33.

[9] World Migration Report 2018, OIM.

Work is the major reason that people migrate internationally, and migrant workers constitute a large majority of the world's international migrants, with most living in high-income countries and many engaged in the service sector. Global displacement is at a record high, with the number of internally displaced at over 40 million and the number of refugees more than 22 million [10].

Global migration governance has not kept pace the growing challenges of international migration, with the result that many migrants continue to be vulnerable to significant rights violations in transit, at their destination, and during of following their return.

In the context of migration, the International Organization for Migration (IOM) defines vulnerability as "*the diminished capacity of an individual or group to have their rights respect, or to cope with, resist or recover from exploitation or abuse*". It is characterized by "*the presence or absence of factors or circumstances that increase the risk or exposure to, or protect against, exploitation, or abuse*".

On this matter, the International Labour Organization (ILO) conventions require employers to pay all of the cost associated with recruiting foreign workers. As recruitment cost are often high and lack transparency, the international community is striving to reduce them by introducing increased regulation and monitoring practices, educating migrants about their rights, and increasing cooperation between origin and destination countries. Reducing recruitment costs has the potential to benefit employers, migrants and migrants' families alike, and also encouraging more regular migration.

In this context of migration and its own internal complexity, it is important to understand how "women workers" – as a particular group in a vulnerability situation –, face up difficulties to access and remain in the labour market.

6. Women's labour migration

Women's labour migration is an important aspect of labour mobility and can be a crucial source of empowerment for women, with women migrant workers making vital social and economic contributions to their communities and countries of origin and destination.

Labour migration may benefit women through economic as well as so-

[10] World Migration Report 2018, OIM.

cio-cultural empowerment. Unfortunately, the migration experience is not always safe for women migrant workers. Due to their dual vulnerability as migrants and women, they are still disproportionately affected by a variety of risks arising from their mobility. During every stage of their migratory experience, women migrant workers may be more exposed to human rights violations compared to their male counterparts.

Indeed, female migrants often suffer 'triple discrimination': as women, as unprotected workers, and as migrants. This threefold discrimination of gender, class and nationality often compounded by race or ethnicity, has a major impact on women migrants well-being – or lack of it [11]. It also determines their marginalization from labour market participation, or for that matter from any participation in society.

They frequently have to deal with difficult living and working conditions, increased health risks, a lack of access to social security, health coverage and other social protection provisions such as maternity protection. Indeed, women migrant workers usually enter gender-segregated sectors that are largely informal and unregulated and therefore offer them little or no protection. These women often have limited or no bargaining power and few or no opportunities for establishing networks to receive information and social support.

In addition to this, women migrant workers are exposed to a various forms of abuse such as the confiscation of passports by their employers.

Migrant women are particularly vulnerable to trafficking for the purpose of labour exploitation. The multiple opportunities for exploitation of women migrant workers engaged in work in low-skilled sectors mean that common hazards and occupational health risks specific to the sector are likely to be exacerbated.

7. Migration is a gendered phenomenon

Gender norms for migration in countries of origin affect migratory decision-making. Women usually have less control over the decision to migrate

[11] P. Taran, *Speech on Migrant Women, Women Migrant Workers Crucial Challenges for Rights-based Action and Advocacy*, side event to 64th Session of the UN Committee on the Elimination of Discrimination Against Woment (CEDAW): "Promoting and Protecting Women Migrant Workers' Labour and Human Rights through CEDAW and CMW", Palais des Nations, Geneva, 2016.

than men – a decision more likely to be taken by their family –, perhaps based upon gendered beliefs, including that women are more likely to send home regular remittances [12].

Societal expectations of gender roles might limit the extent to which women migrate, prescribing that women should remain at home to look after the children while men ought to be the ones migrating for work [13]. However, women and girls may also make the decision to migrate to escape traditional gender norms and practices, for example, forced marriage or female genital mutilation.

In response to risks of exploitation faced by women migrant workers, several governments have legislated gender-based migration bans and restrictions on female emigration. However, as well as infringing women's human rights, banning women's mobility often increases risks for women as they instead turn to irregular migration channels and also impact the migration opportunities available for them, restricting their ability to access regular migration into skilled, safe and well-paid employment.

This is despite the fact that women generally tend to be more risk-averse than men, preferring to migrate through regular channels, and when social networks are in place.

8. Gender violence and migration

Violence against women continues to play a significant role in migration, both in driving women into precarious migration pathways, and as part of migration and labour itself.

Women migrant workers may be disproportionately vulnerable to abuse and violence at all stages of migration, based on multiple and intersecting forms of discrimination. This includes the specific discrimination faced by migrant women with disabilities who may encounter structural, physical and attitudinal barriers.

Violence and discrimination in the public sphere are acts of physical, sexual and psychological violence occurring within the receiving society. Migrant women are at risk from physical violence by state actors, such as

[12] B.S.A. Yeoh, E. Graham, P.J. Boyle, *Migrations and Family Relations in the Asia Pacific Region*, in *Asian and Pacific Migration Journal*, 11(1), 2000, 1-11.

[13] J. Hagen-Zanker, R. Mallett, *Journeys to Europe: The Role of Policy in Migrant Decision-making*, ODI, London, 2016.

police officers, customs officers or workers in detention centres, throughout the migration cycle. Acts of violence may also be committed by intermediaries, employers or by members of the general population. When travelling, women may be compelled or forced to exchange sex for transportation, food or accommodation, which puts them at increased risk of violence.

Irregular women migrant workers are particularly vulnerable to harassment, intimidation or threats as well as economic and sexual exploitation including trafficking and racial discrimination. Often times, they face incarceration and/or deportation if they attempt to leave their employer.

Because many potential migrants lack access to information about legal channels to migrate for work purposes, some fall prey to traffickers who exploit them. In transit or at their destination, trafficked victims are exposed to severe forms of exploitation, including forced labour, sexual exploitation, begging, forced marriage and other practices similar to slavery.

It is within the commercial sex industry that the intersection between migration and trafficking is most pronounced. Many cases of trafficking start with migrant women who unwittingly utilize the services of traffickers posing as smugglers. On arrival, traffickers leverage the fear of deportation to place these migrant women in exploitative situations. Research conducted with women in the sex industry in Mexico found that the economic vulnerabilities of irregular migration contributed to women being forced to exchange sex for room and board.

Women migrant workers are also vulnerable to domestic violence and stigmatization after the trafficking experience. Trafficked women often experience severe physical violence and need specialized assistance and (re)integration options, including access to medical services, psychosocial support, legal counselling, training and/or educational support.

In addition to this, it is interesting to highlight that women migrants' ability to address their situations and to defend their rights is further suppressed in situations where freedom of association and collective bargaining rights guaranteed under international law are denied in national legislation and policy or in practice. All member states of the ILO are bound to implement ILO Convention 87 on Freedom of Association and ILO Convention 98 on rights to collective bargaining; their protections apply to all migrant workers.

9. Conclusion

In the past decade, a number of measures have been implemented to overcome the challenges that women face in the world of work. Especially notable is progress on family support provision and measures taken to attend horizontal and vertical sex/gender segregation, particularly in areas where reform has the potential to reduce this type of discrimination.

However, as this paper highlights, current attempts by social partners to reduce the gender gap in labour market participation, while meaningful, are not sufficient. The difference in access to decent work opportunities between men and women is a main obstacle in achieving a more equitable and inclusive world of work, and is expected to remain so in the coming years, unless additional efforts are made to address the persistent disparities outlined above.

The overwhelmingly unequal demands that women face with regard to household and care responsibilities continue to manifest themselves as labour market inequalities in terms of the types of jobs which women can both access and in which they can enjoy sustained employment.

Indeed, the global challenges of informality and working poverty are also rooted (often organizationally and culturally) in patterns of sectorial and occupational sex/gender segregation, which systemically constrain the opportunities open to women to gain access to better jobs.

Cases of sexual harassment against women have made the headlines in the past months. They have shown that violence and abuse are endemic, that no single country or industry is spared, and that all women, regardless of their place in the hierarchy, are vulnerable to unfair and abusive treatment at work.

They reveal how pervasive and tolerated violence and abuse are and demonstrate what many women around the world have to endure to obtain or keep a job, to get their salary paid, to be promoted and when commuting to work. In addition to the harm done to the direct victims, the overall effect is to create a widely pervading context of hostility and discomfort for women at work [14].

The creation of a holistic international instrument or instruments is necessary to protect against these human rights abuses. Therefore the work that the ILO has been developing in this subject, from the office and during this year Conference, is fundamental to remove the structural barrier

[14] ILO, *Report of the Director-General: The Women at Work Initiative*, cit., par. 3.

that violence and harassment opposed to an effective and equal participation of women in the world of work.

Furthermore, the demand for women migrant workers in destination countries is defined by labour market segmentation in those markets: opportunities are primarily available in low-skilled jobs considered "suitable for women". In fact, the growing prevalence of economically active migrant women is often characterized as the feminization of migration.

These job opportunities for women migrants are predominantly in unregulated sectors: domestic work, services, and the sex industry. Labour standards are usually weak or non-existent in these sectors, while labour inspection enforcement is often absent where migrant women are working.

As concerns about the human effects of global trade, increasingly mobile and precarious labour forces and extreme levels of exploitation – including human trafficking – have become more prominent in international dialogues, there is now a need for a stronger evidence base to understand the links between low-skilled labour migration and human trafficking and health in order to feed into appropriate and effective responses.

The brief appraisal offered in this publication is designed to focus on key patterns of progress and regression. Where challenges and obstacles to women's equal participation persist, societies will be less able to develop pathways for economic growth combined with social development.

Closing gender gaps and guarantying an equal access to the labour market for women and particularly for women migrant workers thus remains one of the most pressing labour market and social challenges facing the global community today.

Therefore, expanding women's work paid participation in the labour market; adopting policies to balance work-family responsibilities; removing sex/gender stereotypes and discrimination; ending violence and harassment against women – and particularly against women migrant workers- become necessary measures to bring us closer to achieve real empowerment for women, enabling them to fulfill all their capabilities as drivers of growth and development in a more inclusive and equal world of work.

Selected bibliography

Castells M., Portes A., Benton L., *The Informal Economy: Studies in Advanced and Less Developed Countries*, The Johns Hopkins University, Baltimore, 1989.

Courtis C., Pacecca, M., *Género y trayectoria migratoria: mujeres migrantes y*

trabajo doméstico en el Área Metropolitana de Buenos Aires, in *Revista Papeles de Población*, 16, 2010.

Ehrenreich B., Arlie H., *Global Woman: Nannies, Maids and Sex Workers in the New Economy*, Metropolitan Books, New York, 2003.

Gallup, International Labour Office (ILO), *Towards a Better Future for Women and Work: Voices of Women and Men*, Geneva and Washington DC, 2017.

Grieco E., Boyd M., *Women and Migration: Incorporating Gender into the International Migration Theory*, in *WPS*, Center for the Study of Population, 2003, 98-139.

Grimshaw D., Rubery J. *The Motherhood Pay Gap: A Review of the Issues, Theory and International Evidence*, ILO, Geneva, 2015.

ILO, *Conditions of Work and Employment Series*, in ILO, *Women in Business and Management: Gaining Momentum, Global Report*, Geneva, 2015.

ILO, *Minutes of the 325th Session of the Governing Body of the International Labour Office*, GB.325/PV, par. 33(a).

ILO, *Report of the Director-General: Fifth Supplementary Report: Outcome of the Meeting of Experts on Violence against Women and Men in the World of Work*, GB.328/INS/17/5, para 12, and Appendix I, par. 33.

ILO, *Report of the Director-General: The Women at Work Initiative: The Push for Equality*, ILC.107/DG/IB, 2016, par. 3.

Maclean K., *Capitalizing on Women's Social Capital? Women-Targeted Microfinance in Bolivia*, in *Development and Change*, 41(3), 2010, 495-515.

Oishi N., *Gender and Migration: An Integrative Approach in Working*, paper n. 19, Center for Comparative Immigration Studies, University of California, San Diego, 2002.

Press H., Sotelo P., *Immigrant Workers Cleaning and Caring in the Shadows of Affluence*, University of California Press, Los Angeles, 2001.

Taran P., *Migrant Women, Women Migrant Workers Crucial challenges for Rights-based Action and Advocacy*, side event to 64th Session of the UN Committee on the Elimination of Discrimination Against Woment (CEDAW): "Promoting and Protecting Women Migrant Workers' Labour and Human Rights through CEDAW and CMW", Palais des Nations, Geneva, 2016.

VI

THE METAMORPHOSIS OF INDUSTRIAL RELATIONS

NOTES ABOUT THE ART. 51, LEGISLATIVE DECREE 15 JUNE 2015, NO. 81: TRADE UNION REPRESENTATIVENESS AND NEGOTIATION OF RIGHTS

Flavio Vincenzo Ponte *

Summary: 1. Art. 51, Legislative Decree 15 June 2015, no. 81: the functionalization of bargaining "over" the stipulating parties. – 2. The homogenization of bargaining levels and the downsizing of representativeness. – 3. The dogma of the mandatory law: negotiation of rights and transaction costs.

1. Art. 51, Legislative Decree 15 June 2015, no. 81: the functionalization of bargaining "over" the stipulating parties

Art. 51, Legislative Decree 15 June 2015, no. 81, states that "Unless otherwise specified, for the purposes of this decree, collective agreements are understood to mean national, territorial or company collective agreements stipulated by trade unions that are comparatively more representative at national level and the company collective agreements stipulated by their company union representatives [RSA] or unitary union representation [RSU]".

Preliminarily, it seems useful to question the function of art. 51 [1] and, in particular, as provided for in the first part of the article (the one referring to the "national level").

The Legislator has long preferred the adverb *comparatively* to the traditional one anchored to the *greater representativeness* [2]. The *ratio* for this

* Researcher – Università della Calabria.

[1] U. Gargiulo, *Rappresentanza e contrattazione in azienda*, Padova, Cedam, 2017, 101 ss.

[2] G. Pera, *Note sui contratti collettivi "pirata"*, in *Rivista italiana di diritto del lavoro*, 1997, I, 381 ss.; A. Lassandari, *Pluralità di contratti collettivi nazionali per la medesima categoria*,

predilection is commonly attributed to the need to govern phenomena that have nothing or little to do – at least directly – with the government of the rules set up to protect the trade union dialectic and/or the relationship between different unions.

We have to refer to art. 1, law 7 December no. 389 (conversion of Law Decree 9 October 1989, no. 338), which would later become a real defensive bulwark to be opposed to a certain liveliness of the bargaining: in accordance with art. 1 of the Law Decree of 1989, "The remuneration to be used as a basis for the calculation of social security contributions can not be less than the amount of wages established by laws, regulations, collective agreements, stipulated by the most representative trade unions on national basis, or by collective agreements or individual contracts, if there is a pay of an amount higher than that provided for by the collective agreement".

As is evident, the norm even evokes a pseudo-definitive judgment ("more representative").

Because of this difficult reference, the Legislator was forced to return to the subject: in 1991, with the art. 7, par. 1, Law Decree of March 23, no. 103, concerning the taxable salary for prisoners and interns admitted to work in prison[3] and, above all, in 1995, with the law no. 549 of 28 December, whose art. 2, par. 25, clarifies that "the art. 1 of the Decree-Law of 9 October 1989, n. 338, converted, with modifications, from the law 7 December 1989, n. 389, is interpreted as meaning that, in the case of a plurality of collective agreements intervening for the same category, the remuneration to be used as a basis for the calculation of social security contributions is established by collective agreements stipulated by the trade unions of workers and employers comparatively more representative work in the category".

The reference to collective agreements stipulated by comparatively more representative trade unions has a different function from that traditio-

---

in *Lavoro e Diritto*, 2, 1997, 261 ss.; A. Di Stasi, *Il potere sindacale nell'ordinamento (debole) del lavoro. Vicende e prospettive*, Giappichelli, Torino, 2012, 21 ss.; P. Tomassetti, *La nozione di sindacato comparativamente più rappresentativo nel decreto legislativo n. 81/2015*, in *Diritto delle relazioni industriali*, 2, 2016, 367 ss.

[3] "Article 1, paragraphs 1 and 2, second sentence, of the Decree-Law of 9 October 1989, n. 338, converted, with modifications, by law 7 December 1989, n. 389, is interpreted as meaning that for prisoners and inmates working for the prison administration, the calculation of social security contributions is carried out on the determination of the amount established pursuant to art. 22 of the law of 26 July 1975, n. 354, in the text modified by the art. 7 of the law of 10 October 1986, n. 663".

nally carried out by the reference to the most representative organizations: it is a useful reference to select a "reliable" contract from the point of view of protecting – above all – reasons that transcend the immediate interest of the stipulating parties (and of the "weak" part of the contract).

According to the *ratio* animating the rules of authentic interpretation cited above, in fact, it can be appreciated the protection of general interests and, in particular, of reasons attributable to the public law of the economy. The identification of a particular collective agreement, in a pluralistic context and characterized by the existence of different contracts, stipulated by different subjects, under a regime of almost total (or poor) measurability (with reliable instruments) of trade union representation, represents a decisive operation for the determination of the salary [4] for the calculation of social security contributions and, therefore, for the calculation of sums that are collected by the State to finance, for the most part, a system based on solidarity.

This is also confirmed by the interpretation offered by the jurisprudence called to scrutinize the boundaries of the reference to the comparatively more representative trade union organizations.

The italian Supreme Court has stated on several occasions that "... the amount of remuneration to be taken as the basis for calculating social security contributions can not be less than the amount that the workers in a given sector would be due under the collective agreements stipulated by the most representative trade unions on a national basis (so-called minimum contributory), according to the reference made to them – with exclusive impact on social security – by art. 1 of the Legislative Decree no. 338/1989, converted into law no. 389/1989, without the limitations deriving from the application of the criteria set forth in art. 36 Cost. (so-called minimum constitutional retribution), which are relevant only when such contracts are used – with consequent influence on the distinct employment relationship – for the purpose of determining the correct remuneration" [5].

This argomentations allowed the same jurisprudence to exclude the circumvention of art. 39 of the Constitution because of the assumption – al-

---

[4] M. Barbieri, *In tema di legittimità costituzionale del rinvio al CCNL delle organizzazioni più rappresentative nel settore cooperativo per la determinazione della retribuzione proporzionata e sufficiente*, annotation to C. cost. 26 marzo 2015, n. 51, in *Rivista giuridica del lavoro*, 2015, II, 493 ss.

[5] Cass. 5 January 2012, n. 16, in *Giustizia civile. Massimario*, 1, 2012, 6; Cass. 8 February 2006, n. 2758, *ivi*, 2, 2006.

beit only on the theoretical level – of *erga omnes* effectiveness of the national collective agreements stipulated by the associations considered comparatively more representative, considering the limit of this extension to the economic part of the contracts and with the sole function of a minimum common contribution, suitable to achieve the aims of the social security system and to guarantee a substantial equality of employers in the financing of the system itself[6].

Therefore, following the legislative approach and its endorsement of the jurisprudence, it does not seem possible to affirm that the reference to the comparatively more representative trade unions is useful to select – at least directly – the stipulating trade union. This selection seems to occur only in terms of consequences, because of the choice of a specific collective agreement that is stipulated by some and not by others.

It is true that the reference to the comparison moves, in the course of time, also in another direction, that is, in the sense of allowing some collective agreements (and, upstream, a certain bargaining mechanism) the production of particular effects, according to the referral technique as a *supplementary*, *authorizing*, *derogatory*[7] function: even in these cases, however, it does not seem that the referral is useful to "select" a particular association, being quite evident that the "referring" Legislator's attention is rather focused on the tool (*id est*: on the "type" of collective agreement) and on its application/applicability to a certain context[8].

If the art. 51 would be used to "select" the stipulating association[9] we

[6] On the subject, however, the Constitutional Court had the opportunity to rule – albeit with reference to the issue of the determination of the cc.dd. unified contributions in agriculture – in 1992, declaring the manifest groundlessness of the question of constitutional legitimacy of art. 28, parr. 1 and 2 of the d.P.R. April 27th 1968 n. 488 (increase and new system of calculation of the pensions to load of the obligatory general insurance) with reference to the arts. 3, 24 and 39 Cost. "... because the criterion of the average taxable remuneration adopted for the determination of the unified agricultural contributions allows, unless proven otherwise, to take sufficient account of the various provincial entities and to effect a balancing of interests as a result of the use of collective agreements as parameters valid for the generality of employers": cf. C. cost. 20 July 1992, n. 342, in *Rivista giuridica del lavoro*, 1992, II, 731 with note of Gatta.

[7] G. Santoro-Passarelli, *Diritto dei lavori e dell'occupazione*, Giappichelli, Torino, 2017, 99.

[8] Among the many referral rules we see provisions that entrust an integration, an authorization, a derogation to national collective agreements, depending on the scenario and the interests at stake (*i.e.*, cases provided by art. 2, Legislative Decree 15 June 2015, no. 81 and art. 4, law 23 July 1991, no. 223).

[9] U. Gargiulo, *op. cit.*, 103.

would probably find ourselves before a "short circuit" which should face the obvious objection of unconstitutionality linked to the substantial circumvention of art. 39 of the Constitution and should face, on the merits, other objections essentially linked to: a contrasting effect with the substratum in which the rules adopted over time and containing the reference to the comparison are rooted; an ungovernable expected effect that – and the same could be said in general with reference to any adverb used by the Legislator regarding the "measurement" of representativeness – representativeness in a comparative sense is in itself meaningless given that the measurement of the trade union capacity to represent anyone discounts the duty of the exquisitely sociological dimension of the concept itself of representativeness; an effect potentially able to determine a "short-circuit" since the reference to the comparison is traditionally made by the Legislator to protect general interests that transcend the interests of the parties and, therefore, even the interest of the trade unions stipulating a contract.

Therefore, it comes out just the useful dimension for the selection of a particular collective contract: which does not facilitate the systematic interpretation of the art. 51 and, if possible, complicates it.

Art. 51 is packaged pursuant to the provisions set by law December 10th 2014, no. 183 (delegation regarding the reform of social safety nets, employment services and active policies, as well as the reorganization of the regulations governing employment and inspection activities and the protection and reconciliation of the needs of care, life and of work – so called *Jobs Act 2*).

Well, the delegating law makes explicit reference to collective bargaining only in the following cases: art. 1, par. 7, lett. e), regarding the further hypothesis of downgrading; art. 1, par. 7, lett. g), regarding the minimum hourly compensation [10]; art. 1, par. 9, lett. d) on the subject of incentives for collective agreements aimed at favoring the flexibility of working hours and the use of productivity bonuses [11]; art. 1, par. 9, lett. e) on the sale of weekly rest and annual vacation.

No reference can be seen to the meaning of the phrase used in the art. 51 and no restrictions on the use of this phrase; indeed, on closer inspec-

[10] In this case, with reference to the possibility of identifying a minimum hourly remuneration, the standard also refers – in addition to the trade unions of workers and employers – to the "... consultation of the comparatively most representative social partners at national level".

[11] In order to facilitate the reconciliation between the exercise of parental responsibilities and assistance to non self-sufficient persons and work, also through the use of teleworking.

tion, there is no reference (and the absence of reference also seems to characterize the parliamentary work sessions [12]) to the role of collective bargaining in the management of the various cases subject to delegation.

Nevertheless, in the Legislative Decree n. 81 the references to collective bargaining are numerous and, in some cases, transcend the provisions of the delegation: it is the case of coordinated and continuous collaborations and the case of the discipline dedicated to part-time, temporary work, intermittent work, apprenticeships.

These are references that in various ways evoke the functions mentioned above (*supplementary*, *derogatory* and *authorizing*) and that, for the most part, allow either a lowering of protections or the production of ablative effects.

In essence, although carving out a space that does not seem to be identifiable in the delegated law of 2014, the art. 51 – first part – refers to the comparison with the main purpose of entrusting a reliable collective agreement with *integrations/derogations/authorizations*, thus excluding – and in this case a sort of (indirect) selection of the unions would finally be identifiable – unreliable subjects or "convenience trade unions".

But the art. 51 also hosts a second part, expressly addressed to the "collective labor agreements stipulated by their company union representatives or the unitary union representation" and expressly linked to the first part of the article by the conjunction "and", which equates the effects produced by national collective agreements, territorial or company contracts stipulated by the trade unions that are comparatively more representative to the effects produced by company collective agreements stipulated by their company union representatives or by unitary union representation.

The equalization of the levels of bargaining, which is substantially reflected in the law, appears to be an "original" initiative and, moreover, not very manageable without special measures that could lead, however, to a real operation of legal engineering.

At first reading, in fact, it seems that the Legislator wanted (although "for the purposes of this decree", as stated in the beginning of art. 51) to create a discipline aimed at shifting the center of gravity of trade union relations to the benefit of the company, perhaps considered *tout court* more

[12] *http://www.senato.it/japp/bgt/showdoc/17/DOSSIER/0/913708/index.html*; *http://documenti.camera.it/apps/nuovosito/attigoverno/Schedalavori/getTesto.ashx?file=0158_F001.pdf&leg=XVII#pagemode=none*; *http://documenti.camera.it/apps/commonServices/getDocumento.ashx?sezione=lavori&tipoDoc=attoGoverno&atto=158&tipoatto=Atto&leg=17&tab=3#inizio*.

suitable to manage those – as said before – *supplementary*, *derogatory* and *authorizing* functions.

Otherwise arguing, we should try to make sense – even on the logical-grammatical level – to the formulation of the article (first and second part are linked by the conjunction "and") and we should equip for to attribute to the current link between the trade unions (referred to in the first part of art. 51) and "their representations" (in the second part) a different meaning from that which literally emerges from the text.

The two parts, then, must be read together and, therefore, one must confront a *revirement* (it is not clear whether conscious or involuntary) that recalls the centrality of the company bargaining of the first half of the 1900s and with the urgency of reconsidering the concept of representativeness on a par with – on the one hand – the peer-ordering of the levels of bargaining and – on the other hand – the encouragement of a peripheral negotiation.

2. The homogenization of bargaining levels and the downsizing of representativeness

The equalization of the two levels of bargaining necessarily determines the downsizing of the problem of representativeness on the national level considering that the so-called *integrative*, *authorizing* and *derogating* functions can be carried out by contracts stipulated by two subjects: the employer and the RSA (company union representatives) or the RSU (unitary union representation) [13].

The power of the trade union association to exercise controls and pressures on employers through the union representatives (especially if we talk about the corporate level) remains firm; but it is also true that the game is now played – and this is the point – on the contents of the contract and no longer on the appeal of the trade union that signs it or on the ability to attract consents and demonstrate – in fact – reliability.

In other words, using a particular adverb to choose the collective agreement to be applied ever implied a positive prejudice: over time, in the absence of certain tools to measure the representativity, we have recourse to a datum partly historical and partly verifiable on the political-relational level to identify the negotiating discipline to which reference should be made.

[13] For another point of view see U. Gargiulo, *op. cit.*, 107, who hypothesizes the existence – at corporate level – of two types of trade union representatives.

Moreover, jurisprudence has had to rely on these elements to orient itself in contexts populated by a high number of contracts and participated, therefore, by different trade unions, adding, moreover, concrete informations: substantial number of members; balanced distribution within represented categories; significant territorial presence at the national level; conducting self-protection activities with continuity, systematic and balanced diffusion, vertical and horizontal, consistent, in particular, in the signing of collective agreements [14].

This being the case, then, the problem of representativeness appears to be resizable and the plan of discussion inclines to the benefit of the contents of the collective agreement: the employer's part is not considered by art. 51; what matters is only the accreditation by the union or the negotiation and, at company level, the existence of RSA/RSU.

Which means – arguing otherwise – that the national collective agreement stipulated by a trade union association that can be defined as comparatively more representative with an organization that can not be defined in such way, can be surely considered for the purposes of art. 51, since the law does not involve organizations that protect the interests of employers.

In other words, the accreditation mechanism could well work in reverse: it would be the employer's organization to benefit from the effects deriving from the stipulation of the contract, both on the political and on the reliability level, since it has been chosen by an accredited trade union association and regardless of a value judgment that could be applied to it.

And then, in the art. 51 – which selects the contract and not, at least directly, the trade union and which does not (always directly) select the employer's organization – the concept of representativeness takes on a different connotation with respect to the past. The contract (at the corporate level) occupies a central position and appears to be increasingly beneficiary of legislative attention (in continuity with what was already stipulated in 2011, with the art. 8 of the Law Decree of 13 August 2011, no. 138, converted into law September 14, 2011, no. 148); in this context the theme of the inactuation of the art. 39 of the Constitution also seems to be reduced because the measurement of representativeness has traditionally been anchored to the need to implement a mechanism (alternative/complementary to that envisaged in the constitutional project) for the governance of trade union pluralism; the problems connected to this pluralism fade in the presence of highly

[14] Cass. 1 March 1986, n. 1320, in *Diritto del lavoro*, 1986, II, 410 and Cass. 9 January 2008, n. 212, cited above.

localized bargaining and developed within production contexts.

Of course, diametrically opposed considerations could be elaborated by entrusting the fulcrum of reasoning to another point of view: it is clear that in a system strongly influenced by the application of the interconfederal rules (above all, the so-called "Testo Unico" approved on January 2014 [15]) the link between the national level bargaining and the corporate one could be suitable to reinvigorate the issue of representativeness, given the rules set up to guard the relationship between different levels of bargaining and considering the ability of the confederations to affect the elections of the RSU [16].

The point is that in a highly pluralist context, the smaller trade unions (but with particular ability to penetrate in certain contexts and/or on behalf of certain categories) who are able to get accredited and who are able to participate in separate negotiating tables, would not join the system created by the great confederations and, therefore, would hardly apply the rules established by them. And the "autonomist" chance seems to draw nourishment from the reasoning conducted by the Constitutional Court in 2013 [17] considering that the establishment of RSA is not bound to the signing of a contract.

This could obviously advantage a parallel national bargaining to the one developed by the comparatively more representative trade unions or – more profitably – for the benefit of a company bargaining that does not suffer from the application of any adverb for the measurement of reliability of the contract concluded.

This should not lead to consider – overvaluing it – the art. 51 as a rule having a "purgative" effectiveness: there is still to be noted that the mechanisms of accreditation are rooted in mutual recognition which, if founded on good faith and correctness [18], rests in the ability to represent trade union's

---

[15] G. Santoro-Passarelli, *Il contratto aziendale in deroga*, in *WP CSDLE "Massimo D'Antona".IT*, 254/2015, 6. See also A. Di Stasi, *Il Testo Unico sulla rappresentanza del 10 gennaio 2014 stipulato da Confindustria e Cgil, Cisl e Uil. Una riflessione critica*, in *Rivista giuridica del lavoro*, 2014, I, 631.

[16] G. Zilio Grandi, *Ancora sui rapporti tra contratto collettivo nazionale di lavoro e contratto aziendale: autarchia, legge o solo passato che non passa?*, in L. Calcaterra (a cura di), *Studi in onore di Raffaele De Luca Tamajo*, Editoriale Scientifica, Napoli, 2018, *https://iris.unive.it/retrieve/handle/10278/3660855/45768/Scritti%20De%20Luca%20Tamajo%20 rev.pdf*.

[17] C. cost. 23 July 2013, n. 231, in *Foro italiano*, 2013, I, 3368, with notes be De Luca and Santoro-Passarelli.

[18] That is an interlocution that does not exclude the "inconvenient" counterpart, under penalty of the application of art. 28 of the Workers' Statute.

own associated, first of all, on a numerical level and, then, "weighed" on the basis of the parameters mentioned above to which the jurisprudence has long been entrusted.

However, there is that art. 51 opens a certain breach in the reasoning concerning the representativeness and in the centrality of the same in the debate: the equalization of the levels of bargaining could absorb, overcoming it, the interconfederal system (which – instead – is firmly anchored to the principle of competence) and could allow, evidently, to a "homemade" bargaining.

3. The dogma of the mandatory law: negotiation of rights and transaction costs

The concept of representativeness needs the verification of the capacity of a representative association to stipulate a collective agreement.

This ability – and this is precisely the point – must still be measured by firmly holding the constitutional principle contained in art. 39 which – although not implemented – still admits, on the one hand, the existence of a complementary system and requires – on the other hand – the full application of the majority principle.

This is a question that must be dealt with, except for wanting to make a real overcoming of the (granitic) principle according to which the trade unions protect collective interests.

In essence, it does not seem risky to state that the problems created by art. 51 are greater than those that the same article could solve: the substantial equalization of bargaining levels perhaps simplifies the matter and – as we said – perhaps encourages the substantial overcoming of the historical controversy around the concept of representativeness, making it more "practical" in a context (the company level, in fact) in which it is possible to negotiate; the substantial equation of bargaining levels, however, could trigger a sort of confusion, with consequences that should be evaluated.

In other words, equating the effects produced by different levels of bargaining means in some way to assume that the subjects operating on different levels have, in fact, the same capacities and offer – consequently – the same guarantees.

In my opinion, this is a gamble that does not take into account the value of the non-transferability of certain labor standards and the size that should

host/contain the legislative references to collective bargaining [19].

There is no doubt whatsoever about the centrality of the topic in the more recent doctrinal debate: it is quite widespread the fear that the mandatory law has become a real cost, which is paid – at the systemic level – with the currency of inefficiency [20].

And then, proceeding with order, we can express some considerations.

Probably the dogma of the mandatory law still exists, but it behaves differently from the past.

The legislative intervention of the '60s/'70s and the "emergency" legislation of the '80s may be considered, probably, phenomena due to a certain paternalism [21] of the Legislator.

These phenomena are perhaps referable more to an attempt to reaffirm that social and economic equality – in the context of the relationship – for workers [22] than to a choice aimed at confining private autonomy in a corner for macroeconomic reasons [23].

Nonetheless, these interventions have also marked the path taken by the Legislator of the 1990s and 2000s (and beyond): keeping a general look at the most important reforms of this period (starting from the 1997 with the so-called "Treu Law"), it does not seem exaggerated to grasp – albeit in the awareness of the evident heterogeneity that has characterized the diffe-

---

[19] R De Luca Tamajo, *L. Barassi e la norma inderogabile*, in M. Napoli (a cura di), *La nascita del diritto del lavoro. Il «contratto di lavoro» di Lodovico Barassi cent'anni dopo*, Vita e Pensiero, Milano, 2003, 547 and, Id., *La norma inderogabile nel diritto del lavoro*, Jovene, Napoli, 1976; see also C. Cester, *La norma inderogabile: fondamento e problema del diritto del lavoro*, in *Diritto del lavoro e di relazioni industriali*, 2008, 344 ss.; G. Santoro-Passarelli, *La funzione del diritto del lavoro*, in *Rivista italiana di diritto del lavoro*, 2018, I, 339.

[20] P. Ichino, *Inderogabilità della norma nel mercato del lavoro bipolare*, in *Rivista italiana di diritto del lavoro*, 2008, I, 407.

[21] V. Ferrari, *Consumatore, utente e paternalismo del Legislatore*, in *Corti calabresi*, 2, 2006, 443.

[22] P. Costa, *Cittadinanza sociale e diritto del lavoro nell'Italia repubblicana*, in G. Balandi, G. Cazzetta (a cura di), *Diritti e lavoro nell'Italia repubblicana*, Giuffrè, Varese, 2008, 21 and 67.

[23] Reasons that, even if subsisted, would certainly be blamed by who criticize the imposition of rules of conduct whose effects are distributed indiscriminately among the players animating the market. On the subject the literature is wide, we refer – without pretension of exhaustiveness – a: R. Pardolesi, *Analisi economica del diritto*, in *Digesto*, *sezione civile*, 1987, I, 309 ss.; G. Calabresi, *Il futuro dell'analisi economica del diritto*, in *Società e Diritto*, 1990, 48; R.A. Posner, *Economic Analysis of Law*, Little Brown and Company, Boston-Toronto, 1992.

rent regulatory interventions (led, moreover, by different political groups, alternating with increasing frequency from 1994 onwards) – a common thread that has tied the normative production, given the constant attempt to deconstruct the apparatus of rules posed – in the previous 30 years – to oversee the employment relationship.

In other words, it seems quite evident that the reaction of the Legislator to the increasingly frequent moments of global economic crisis has taken place in more or less successful deregulations, on one side, and deconstruction of the protections, on the other side.

So, the dogma of the mandatory law probably assumes a different connotation: it is no longer the monolith opposed to the attempts of private autonomy to grab space in the area traditionally occupied by the law but, rather, the monolith to be sacrified on the altar of efficiency.

And yet the times of crisis of the imperative norm seem to be punctuated by robust injections of rules characterized, however, by a certain orientation and/or purposees.

The reformist period begun (and, apparently, not yet completed) in 2003 with the well-known Legislative Decree n. 276 has inserted into the system dozens of new rules, all oriented to solve the problems afflicting the labor market.

These rules are rooted in what may perhaps be called a "new dogma": the Legislator seems to be deeply convinced that the forces that animate the labor market are trapped by the rules imposed on the market and little (or not at all) influenced by other factors. The norm afflicts the market; the norm, however, is the remedy, with a peculiarity: in the logic of alternation, the remedy is identified in the thaumaturgical function which is performed by the rule that eliminates/modifies the previous legislation, for various reasons imputed to have contributed to implement the inefficiency of the system.

Art. 51 of the Legislative Decree n. 81/2015, however, contemplates a further element: it appears, in fact, a certain confidence nurtured also in relation to private autonomy, exercised collectively.

It could be seen a sort of return to the past: the most recent legislative season seems to favor a sort of revival of the private and voluntary conception of labor law, typical of the beginnings of 20th century, with the addition of a particular attention to the collective dimension.

Yet, if this were so and wanting to cultivate such an idea to the limits of paroxysm, it should be noted that even the doctrine conditioned by the ancient principles (and deprived of that extraordinary instrument that is the Republican Constitution) stated that the integration of the contract by the law

is only a compulsory enrichment of its content and that "... once the need for State intervention is felt, it is useless to discuss its categorism: for consistency, if it must be effective, it will almost always have to be categorical" [24].

And then, returning to a more concrete plan, the return to private autonomy does not seem to be the result of an ideological choice (ontologically connected to overcoming the socio-economic inferiority of the workers) but, rather, is proposed as a merely practical remedy, to be set against the misfunctions afflicting the labor market: where the State has failed, the collective bargaining could work as a remedy.

On the basis of this option, there seems to be a reflection anchored to a certain theorizing of the centrality of private autonomy in the market (which could be actually referred to other cultures) [25]; the point, however, is that the centrality of private autonomy is encouraged as a reaction to the inefficiency of the market and not as the physiological condition of a relationship no longer conditioned by the asymmetry of the parts that animate it.

Well, if the mandatory rule is a "virus" [26], the collective agreement – in this case and in particular: at the corporate level – is used as a sort of "pickguard" [27] to facilitate the deactivation of its effects.

In essence, the hypothesis is that the overcoming inefficiency could/should occur by compressing the space occupied by the mandatory rule; from such compression it would inevitably derive the attribution of new spaces to private autonomy, to be practiced at the corporate level.

It is an operation that – as has been observed – determines a shift in the center of gravity of the protection afforded by labor law: already traditionally focused on the protection of the individual worker as a weak contractor, it seems to move towards a collective dimension "... aimed at maintaining employment levels even at the cost of selling something on the level of individual guarantees" [28].

---

[24] See L. Barassi, as cited by R. De Luca Tamajo, *L. Barassi e la norma inderogabile*, cit., 548 and 549.

[25] M. Foucault, *Nascita della biopolitica. Corso al Collège de France* (1978-1979), tr. it. Feltrinelli, Milano, 2005; R. Plant, *The Neo-Liberal State*, Oxford University Press, Oxford, 2009; A. Garapon, *Lo Stato minimo*, Raffaello Cortina, Milano, 2012. See also P.B. Helzel, *Il recupero del binomio sovranità-autorità alla luce della tradizione giuridica*, in P.B. Helzel, A.J. Katolo (a cura di), *Autorità e crisi di poteri*, Cedam, Padova, 2012, 15.

[26] R. De Luca Tamajo, *L. Barassi e la norma inderogabile*, cit., 548.

[27] U. Gargiulo, *op. cit.*, 101, who talks about "pickguard-rule".

[28] G. Santoro-Passarelli, *Autonomia privata individuale e collettiva e norma inderogabile*, in *Rivista italiana di diritto del lavoro*, 2015, I, 66 ss.

At this point, it is appropriate to be clear: it does not seem useful to marry an ideologically point of view since it can no longer be assumed that the instruments set forty years ago are still able to meet both the need for worker protection and the need for certainty of employers. The dynamics of work relations are intertwined with those conditioning the markets in a context that is anything but unmodifiable [29].

However, it is not useful to ride the idea of total deconstruction of existing rules, since – as has been effectively noted – "... the full freedom of labor relations emptied of guarantees would probably end up drugging the market itself" [30].

Obviously, we are not dealing with freedom in the absolute sense: it has been said that the instrument to which the Legislator entrusts is the collective agreement and, in particular, the collective agreement at the corporate level. Which means, even in the face of what seems a certain injection of subsidiarity, that the protections are far from being dismantled.

The references change, the actors who have the task of building the protections change, the contexts change, but it does not seem possible to eliminate protection: it would be alarming to hypothesize that overcoming the mandatory rule is prodromal to the "far west".

So we have to focus on other points.

The substitutive effect does not seem affordable: the collective agreement, traditionally classified among the sources in a substantial sense (or, "extra-ordinem" [31]) and, in particular, the collective agreement at the corporate level, can not work as the mandatory rule: as has been effectively noted with regard to the relationship between the national collective agreement and the company contract, "... the ever more extensive faculty to waive the national contract by the company in the name of the fight against 'oppressive' uniformity risks to undermine, in fact, the solidarity function that the national contract traditionally assumes. In fact, the minimum conditions

---

[29] Cfr. L. Galantino, *Il diritto del lavoro fra valori della tradizione ed esigenze di modernità*, in *Diritti Lavori Mercati*, 1-2, 2008, 5 s.

[30] C. Cester, *op. ci.*, 39.

[31] Cfr. A. Pizzorusso, *Lezioni di diritto costituzionale*, Il Foro Italiano, Roma, 1984, 669; see also G. Pera, *Fondamento ed efficacia del contratto collettivo di diritto comune*, in AA.VV., *Scritti giuridici in memoria di Pietro Calamandrei*, V, Cedam, Padova, 1958, 133; A. Cessari, *L'interpretazione dei contratti collettivi*, Giuffrè, Milano, 1963; M. Persiani, *Saggio sulla autonomia privata collettiva*, Cedam, Padova, 1972; L. Mengoni, *Legge e autonomia collettiva*, in *Massimario della giurisprudenza del lavoro*, 5, 1980, 692; G. Ghezzi, U. Romagnoli, *Il diritto sindacale*, Zanichelli, Bologna, 1987.

established in the national contract, precisely because they are uniform, are determined taking into account the different socio-economic contexts of the Italian territory. The expansion of the company contract by way of derogation, especially if released from the upstream control by the national contract, inevitably risks blowing up the first level of bargaining and the related solidaristic logic, to the full advantage of business disciplines in which the union can be more conditioned by the counterpart" [32].

Which means, according to the relationship between law and collective contract (in particular, corporate collective agreement), that the overcoming of immovability as a tool for governing the genetic moment of the relationship is not feasible with tools that do not have in their genetic heritage the vocation to uniformity/equality and solidarity.

Then, perhaps, we can hypothesize a middle way contemplating some alternatives: as has been argued, "... at least for an essential and characterizing part, labor law must continue to turn against the market" [33].

The mandatory rule can not be identified as the sole responsible for creating/destroying jobs and, therefore, as the only instrument influencing market performances: rules represent an ingredient of a more complex mix and, as structures placed at the foundation of the legal system, they contribute to the maintenance of the *kósmos*, that is, that order which must be guaranteed in the management of the different forces (and the various tensions) that animate/intercept the relationships [34].

Therefore, the de-structuring of the rules does not seem a value in itself and it is not said that it actually serves the market place that – even in times of crisis and in the face of sudden changes – does not appear to overcome the subjective weakness of the worker in the negotiation relationship and, therefore, the problem of "guarding" the worker through the appeal "even if tempered, to the technique of mandatory legislation" [35].

From this it follows that it is not possible to proceed without a uniform system of protection based on certain rules.

The crisis of mandatory law, therefore, is due to a more general crisis of the means deemed useful as a certain goal.

---

[32] G. Santoro-Passarelli, *Diritto dei lavori*, cit.

[33] R. Del Punta, *Ragioni economiche, tutela dei lavori e libertà del soggetto*, in *Rivista italiana di diritto del lavoro*, 2002, I, 401.

[34] Id., *ibidem*.

[35] G. Santoro-Passarelli, *La funzione del diritto del lavoro*, in *Rivista italian di diritto del lavoro*, 2018, I, 353.

Goal that, however, must always be coordinated with the needs of workers.

At the beginning of the 20th century every limitation of the liberal principles was suffered and its compression was admitted only by virtue of a public interest [36]; today, continuing on the wave of reasoning conducted more than one hundred years ago, it does not seem possible to affirm that the the mandatory rule is unavoidable.

It is perhaps possible to affirm that at the center of the debate the general interest linked to the need to protect the weak contractor must remain the same: private autonomy does not seem to offer adequate guarantees. It is not a matter of considering the worker a mere *minus habens*; it is a question of giving due weight to the socio-economic aspect which is at the basis of the concept of subordination.

Which brings us back to art. 51 of the Legislative Decree n. 81/2015 and its placement in the system: the equalization of the levels of bargaining produces – borrowing the expression from the law and economics literature – a saving on the front of the so-called "transaction costs", understood as costs affecting the production of rules [37].

The point is that the need for homogeneity in the regulation of rights and the solidarity to be impressed on the system require "transaction costs" [38] that, from a neoliberal [39] point of view, might be considered high: however, it should be changed the lenses that can be used to measure costs and it has to be considered that the price to pay due to the deconstruction of the protection could be much more unbearable, especially considering that the phenomenon of peripheral trading of rights is not easily controllable.

Nevertheless, there could be joined a different point of view: several years ago, Harbison and Coleman supported that – although in a context

---

[36] L. Barassi, *Il contratto di lavoro nel diritto positivo italiano*, Società Editrice Libraria, Milano, 1901, 427.

[37] R.A. Epstein, *Regole semplici per un mondo complesso*, Liberilibri, Macerata, 2012, 219.

[38] G. Calabresi, *Il mestiere di giudice. Pensieri di un accademico americano*, Il Mulino, Bologna, 2013, 75.

[39] Is well-known the debate which took place years ago between Croce and Einaudi: see L. Einaudi, *Dei concetti di liberismo economico e di borghesia e sulle origini materialistiche della guerra*, in *La Riforma sociale*, 1928, 501 and B. Croce, *Liberismo e liberalismo*, 1927, both cited by M. Montanari, *Croce ed Einaudi: un confronto su liberismo e liberalismo*, in *Enciclopedia Treccani online*, *www. treccani.it*.

that is entirely different from the italian one [40] – the collective agreement is always aiming at "... progress [to] economic equality, promote freedom, the dignity and value of every individual [and] the strengthening of political and democratic institutions" [41].

These are particularly stimulating reflections that, however, do not seem adaptable – looking for saving points – to the italian case because of the differences between the legal systems and the considerable differences between the contexts: in the 50s Harbison and Coleman studied the so-called mass-production and focused on particularly production systems, in order to define a real model of interaction between the company and the union. The result of their investigation (concerning about 100 different types of contractual relationships), led them to strongly support the centrality of the "... collective agreement in modern society" [42]: the point is that the observed system (*id est*: the north-american system) did not ever impose a precise choice regarding the technique to be used for the protection of the weak contractor.

[40] Cfr. M. Faioli, *Sindacato statunitense*, in *Digesto delle discipline privatistiche, sezione commerciale*, *Aggiornamento*, 2015, 498.

[41] F.H. Harbison, J.R. Coleman, *Il contratto collettivo nella società moderna*, F.lli. Bocca Editori, Milano, 1955, 12.

[42] F.H. Harbison, J.R. Coleman, *op. cit.*, 13.

THE TRANSFORMATION IN THE SWEDISH INDUSTRIAL RELATION SYSTEM CAUSED BY THE ECONOMIC CRISIS AND THE ROLE PLAYED BY GOVERNMENT AND TRADE UNIONS

Federico Fusco *

Summary: 1. The main features of the Rhen-Meidner model and its effects on how to deal with companies in crisis. – 2. The Governmental refusal to rescue private companies during the last crisis. – 3. The crisis agreements introduced by IF Metall. – 4. The lesson learned from the crisis and its immediate impact on the Swedish way to cope with enterprises' crisis. – 5. The ongoing debate. – 6. Conclusion.

1. The main features of the Rhen-Meidner model and its effects on how to deal with companies in crisis

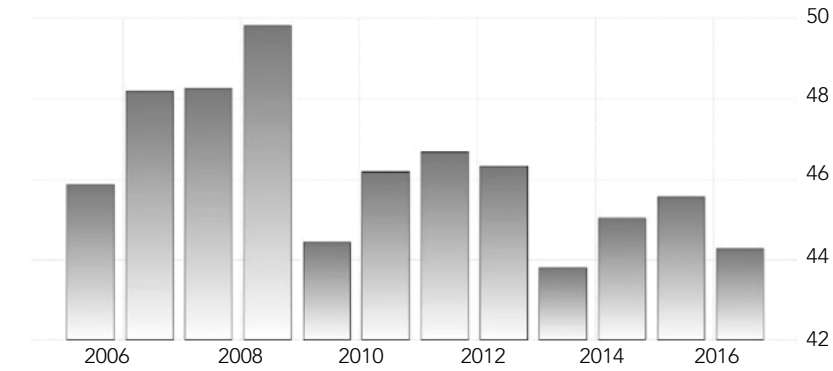
The Swedish economy is mainly dependent from its exports because, a cause of the relatively low population, it has a small internal market that is not able to absorb the national production. For this reason, it is very sensitive to the shifts of the external demand and, thus, has developed an economic system specifically aimed to better exploit the foreign trade. This feature is one of the core elements of the so-called Rhen-Meidner model that aims to attract wealth thanks to a strong exporting industry and then redistribute it within the country using the tax system.

In order to achieve this goal one of the most important elements is the solidaristic wage: wages are parametrized on a leading sector (generally the major export industry), so to keep the labour cost equal among the different areas of the economy. Thus companies with better performances face a lower labour cost compared to the one that they would be able to pay, so gaining a competitive advantage (useful to boost exports). On the other hand, less

* Post doc, Department of Business Law Lund University, Sweden.

productive firms are bound to higher costs than the one that they can afford, and, so, they are pushed out of the market. This is a very important element of the model that, in order to maximize the productivity, makes of the structural change a fundamental part of itself. Restructuring is, thus, accepted as "a normal and fundamental principle" [1] and less efficient companies or are able to restructure and rationalize themselves or must shut down [2].

Figure 1. – *Sweden: exports of goods and services (% of GDP)*



Source: World Bank, Elaboration from: *tradingeconomics.com*.

A strong welfare state, together with employment services and strong trade unions, makes it possible to take care of the dismissed workers that are moved to more competitive companies that can valorize their expertise and pay them the standard salary.

For those reasons no direct public support is then generally provided to private companies and trade unions are traditionally hostile in negotiating any kind of wage reduction (even if in the form of a cut of both working time and global wage), which is perceived as the potential cause of a chain reaction that can create a race to the bottom within different companies and sectors [3].

---

[1] O. Bergström, *Anticipating and Managing Restructuring. Sweden*, XXVII National Seminars on Anticipating and Managing Restructuring, ARENAS, National background paper, Sweden, 2009, in *https://goo.gl/q7WZOH*, 7.

[2] *Ibidem*, 18 ss.

[3] See O. Bergström, *Managing Restructuring in Sweden. Innovation and Learning After*

The described system implies that social partners (and especially trade unions) do not aim to preserve a specific productive structure, but, with a more farsighted vision, are open to those changes that can lead to better economic performances, which are the unavoidable premise to assure higher working conditions.

2. The Governmental refusal to rescue private companies during the last crisis

The economic crisis of 2008-2010 put under pressure the Swedish system, forcing it to test its boundaries. The sharp slowdown of the international trade, in fact, caused severe consequences for the Nordic country, whose leading economic sector faced a sudden drop in the (international) demand. This situation forced entire sectors of the economy – and especially the exporting manufacturing industry – to quickly downsize themselves, thus causing a sudden increase of redundancies. In the last quarter of 2008, in fact, the monthly number of notices of termination of employment grew from about 4.000 to almost 20.000 and in the period between September 2008 and June 2009 almost 150.000 people were declared redundant[4]. Focusing on the industrial sector between 2007 and 2009 the production fell by 65% and one of the most hit market was the automotive one, whose output was almost halved between 2008 and 2009[5].

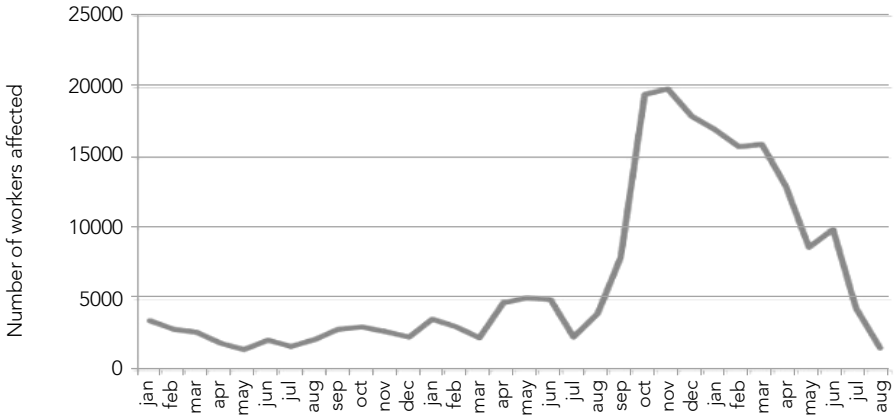
In order to save the national economy several measures were quickly putted in place: it has been estimated that between 2008 and 2010 the global value of all the interventions amounted to 733 billion Sek, of whom 25 billion were allocated during the acute phase of the crisis (15 billion were

the Financial Crisis, in *Irene*, 2014, 12, *www.responsible-restructuring.eu*, 5: "In Sweden restructuring is typically managed by adapting the size of the workforce through dismissals and by supporting the dismissed workers to find new jobs with the help of a system of job security councils, which are governed by collective agreements between social partners".

[4] Datas from Tillväxtanalys, *Näringspolitik i kriser – vad kan vi lära av finanskrisen 2008-2009?*, 2013, 11 ss. See also O. Bergström, *Anticipating and Managing Restructuring. Sweden*, cit., 29: "Sweden was the country with the largest number of announced job losses in Europe during the period 2008-2009 if calculated by the size of the labour force".

[5] For the extent of this paper it is interesting to notice that in that years Volvo Car production in Sweden decreased by 62,19%. Among the causes of this dramatic drop must be highline that in that period the firm was owned by Ford and, so, got affected by its policy to protect in the first stance the American production. Elaboration on OICA data, *http://www.oica.net/category/production-statistics/*.

Figure 2. – *Announced redundancies per month, January 2007-August 2009*



Source: Arbetsförmedlingen.

destined to industrial policy). Anyway the actual cost of the economic intervention was significantly lower and around 600-700 million Sek [6]. A closer analysis of the composition of this expenditure confirms that the public policy was in line with the basic features of the Swedish model. The public intervention was, in fact, focused on the labour market, with a wide set of measures aimed to retrain the dismissed workers and to help them to find new jobs [7]. No money, instead, was used in order to directly support companies in crisis [8]. This feature is even more remarkable if we take into account that, because of the dimension of the crisis, such kind of public intervention was demanded by several actors [9]. The business-oriented initiatives, instead, were encompassed in four major categories aimed to: avoid a liquidity crisis granting loans to financial institutions; grant support to di-

[6] Tillväxtanalys, *op. cit.*, 11 ss.

[7] The analysis of the impact of the interventions on public costs shows that the only certain one (and that represent almost the totality of the global cost) are the one related to the advice services for the companies (20 million Sek) and to the competence development measures for dismissed workers (650 million Sek). See Tillväxtanalys, *op. cit.*, 44.

[8] See O. Bergström, *Anticipating and Managing restructuring. Sweden*, cit., 8: "There is in general a political agreement that industrial policies should not be focused on keeping up the existing production structure. Instead, 'taxpayers money' should be used for developing the infrastructure and resources that stimulate and attract new industries and investments".

[9] See Tillväxtanalys, *op. cit.*, 13.

smissed workers via employment services and retraining; provide advice to companies in crisis and support restructuring and development of the automotive industry [10].

It could anyway be argued that, among the initiatives addressed to the automotive firms, there were some addressed to publicly finance them. Nevertheless, a deeper analysis of those solutions shows that the practical outcome has been different. Even if companies within automotive sector had the possibility to obtain loans up to 5 million Sek in order to counter the crisis, the conditions in terms of payback time and warranties were so strict that no one used them.

More in detail in December 2008 the debate concerning the role of the government in managing the crisis interested also the automotive sector. Before the crisis it accounted the 15% of the Swedish exports, directly employing over 140.000 people and with and important net of sub-contractors and suppliers, but already at the early stages of the crisis it got its production halved [11]. For this reason and also moving from the fact that governments in several EU Countries were putting in place different measures in other to save the national automotive companies, in autumn 2008 and winter 2009 IF Metall (the blue-collar trade union) formally asked to the government financial measures and a similar request was submitted in February 2009 by Volvo as well. Both the proposal aimed to introduce a form of layoff supported by public funds in order to permit vocational education and training as an alternative to dismissal [12]. The IF Metall suggestion was to share the cost of salary between the companies and the unemployment fund, while Volvo's one split the wage cost between government (70%) and firm (30%) [13]. However, the conservative Government preferred to stick to the classic Swedish restructuring model and none of the proposal was accepted (even if in March Volvo got at least a public guarantee for a loan from the European Investment Bank) [14].

---

[10] For a comprehensive analysis of those initiatives see Tillväxtanalys, *op. cit*., 37-44.

[11] Between 2007 and 2009 the number of cars sold by Volvo decreased from 458.323 to 334.808 (data from Volvo Cars Newsroom; Volvo 2013:7).

[12] It should be noted that layoff were theoretically possible in Sweden, but moving from the fact that in 1995 it was abolished the public grant (equal to the 45% of the salary), employers stopped to use them because they would have been obliged to pay the full salary.

[13] K. Lovén, *Social Partners in Motor Industry Seek to Bring Back Layoff Pay*, in *Eurofound*, 2009, 23 March, *www.eurofound.europa.eu*, 1-2.

[14] See O. Bergström, *Anticipating and Managing restructuring. Sweden*, cit., 61-62.

3. The crisis agreements introduced by IF Metall

The contest described above is essential in order to fully understand the importance of the autonomous strategy followed by part of the trade union movement (with the support of the manufacturing industry and of Volvo cars in particular). Those actors were, in fact, far-sighted enough in order to understand that the classical Swedish model, even if it was still vigorously defended by both the Government and a great part of the trade unions (firstly white collar union), was not fitted to cope with that kind of crisis, which, instead, required a new type of approach specifically designed for the situation.

They, in fact, realized that the labour market would have not been able to offer a sufficient amount of new jobs to the exceptionally high number of workers that would have been dismissed [15]. Moreover, being a financial crisis, it could have led to bankruptcy companies still profitable [16] or, at least, once it would have been passed, it would have been difficult and expensive for the firms to select and train new staff in order to comply with the growing production [17]. For those reasons on March 2nd 2009 they signed a temporary framework agreement on temporary layoffs allowing the single employer to stipulate with the shop stewards agreements to reduce, until March 31st 2010 (deadline later extended to October 31st 2010), working time and wage by maximum 20% [18]. With this solution the workers could keep their job and get an income greater than the unemployment benefit. The agreement was shaped on the model of several foreign experiences

[15] 25.000 IF Metall members were, in fact, unemployed and other 40.000 were facing the risk of dismissal. See O. Bergström, A. Broughton, C.E. Triomphe, *EU Synthesis Report*, XXVII 27 National Seminars on Anticipating and Managing Restructuring – ARENAS, 2010, *ec.europa.eu/social/BlobServlet?docId=6149&langId=en*, 49.

[16] See S. Murhem, *Security and Change: The Swedish Model and Employment Protection 1995-2010*, in *Econ Ind Democracy*, 2012, 4, 629 where the A. also points out that the lack of a short-term work scheme was seen as a competitive disadvantage of the Swedish system compared to other European countries.

[17] It should be point out that the crisis quickly blew over: between 2009 and 2011 the automotive sector in Sweden grew by 150% and in 2011 Volvo sold almost as many cars as in 2007 (449.255 *vs*. 458.323 – data from Volvo Cars Newsroom; Volvo 2013:7).

[18] The agreement was signed between IF Metall and Teknikarbetsgivarna (engineering employers), Metallgruppen (metal employers) and Industri and Kemigruppen (Industry and chemical employers). Another agreement was signed on March 10th 2009 between IF Metall and representatives of the transportation sector. For an extensive analysis see O. Bergström, *Anticipating and Managing restructuring. Sweden*, cit., 62.

(and of the German *Kurtzarbeit* in particular), but one of its key features was that it did not rely on any kind of public funds.

Thanks to this framework agreement Volvo Car Corporation was the first company to sign on April 2009 a local agreement in order to avoid redundancies. Instead of dismiss workers the company (between April 1st and December 31st 2009) got the faculty to layoff them, stopping production for a maximum of 6 days every wage period. For the non-working employee the wage reduction was at most up to 4% every month. Another important point for the firm was the postponement of wage revision process. On the other hand, Volvo took the obligation to do not dismiss any worker during the period covered by the agreement, under the sanction of having to pay them the lost wages.

This restructuring strategy turned out to be very effective: it has been estimated that the agreement saved 1.000 jobs in Volvo [19] and the firm was able to quickly increase the production once the crisis had passed. At sectorial level the agreement covered more than 50.000 workers and the over 400 local hang-on agreements saved between 10.000 (Teknikföretagen's employers association estimation) and 12.000 jobs (IF Metall estimation), with an average working time reduction of 18% and a pay decrease of 13% [20].

The described process, however, was not easy to put in place: as mentioned the strategy followed by IF Metall and Volvo was totally "against the Swedish model, with its wage policy of solidarity, which meant that companies that were unable to pay the normal wages should go into bankruptcy, and thus enforce technological change" [21]. For those reasons the conclusion of the agreement met numerous critics both from IF Metall members, both (and especially) from the white-collars union Unionen [22]. Following its opinion, in fact, it entailed the risk of an "internalization" of the restructuring costs: instead of resort to the public system (assistance to the dismissed

[19] K. Lovén, *Agreement on Temporary Layoffs Reached in Manufacturing*, in *Eurofound*, 2009, April 29, *www.eurofound.europa.eu*, 1.

[20] See S. Demetriades, M. Kullander, *Social Dialogue and the Recession*, in *EurWORK*, 2009, 107, *www.eurofound.europa.eu*, 12; Teknikforetagen, *Lokala krisöverenskommelser i teknikföretag – utvärdering av avtalsenliga krisåtgärder*, in *www.teknikforetagen.se*, 2010, 4; S. Clauwaert, I. Schömann, N. Büttgen, Z. Rasnaca, *The Crisis and National Labour Law Reforms: A Mapping Exercise*, in Country Report, *Sweden*, *European Trade Union Institute*, 2016, *www.etui.org*, 1; OECD, *Back to Work: Sweden: Improving the Re-employment Prospects of Displaced Workers*, OECD Publishing, 2015, *http://dx.doi.org/10.1787/9789264246812-en*, 68.

[21] S. Murhem, *op. cit*., 629.

[22] O. Bergström, *Anticipating and Managing restructuring. Sweden*, cit., 62.

workers payed by the State [23]) it would have pinned the restructuring costs to the employee that, in practice, would have face a wage reduction, with possible bad outcomes in future wage bargaining rounds [24]. Moreover, this could have led to a domino effect, forcing other firms to lower wage costs in order to remain competitive [25]. Finally it was stressed that it was not only a short-term solution, unable to solve the problems that led to the crisis, but also that it entailed the risk of becoming a permanent arrangement [26], without any proof of its positive effects on the employment rate [27].

For all of those reasons the IF Metall and Volvo agreements represent an important milestone in the Swedish restructuring model because, breaking with the previous tradition, they inaugurate a new path specifically designed for the existing needs.

4. The lesson learned from the crisis and its immediate impact on the Swedish way to cope with enterprises' crisis

It is important to point out that the described process did not remained a stand-alone case, but it trigged an intense debate that led to a reformation process of the entire Swedish system of crises' management. The good performance of the agreements of 2009, in fact, pushed several trade unions and employers' organizations to publish, in 2012, a joint proposal for a short-time work scheme in Sweden [28]. This draft was accepted by the government and, after other consultations, it became law in 2013 [29].

On the other hand, however, because of the strict conditions required from this law, within the metal sector IF Metall and Teknikföretagen signed in late 2013 a different agreement (entirely bipartite) which, on the model of the 2009 one, allows layoffs without the support of public money.

---

[23] Highlights this feature of the Swedish system O. Bergström, *Managing Restructuring in Sweden*, cit, 7.

[24] See C. Axelsson, *Facklig vånda efter krisavtal*, in *Svenska Dagbladet*, 18 May 2009, *https://www.svd.se/facklig-vanda-efter-krisavtal*.

[25] K. Lovén, *White-collar Unions Under Pressure to Sign Agreement on Temporary Layoffs*, in *Eurofound*, 2009, June 14, *www.eurofound.europa.eu*, 1.

[26] K. Lovén, *Agreement on Temporary Layoffs Reached in Manufacturing*, cit., 2.

[27] O. Bergström, *Managing Restructuring in Sweden*, cit., 22.

[28] *Ibidem*.

[29] See *Lag 2013:948 om stöd vid korttidsarbete*, *www.riksdagen.se*.

From an ante-crisis situation in which Sweden was devoid of any solution in order to layoff workers there are now two different schemes, governed by different rules.

Table 1. – *Subsidised short time work*

Working time reduction (% of normal hours)	Time worked (% of normal hours)	Short time salary (% of normal salary)	Short time subsidy by government (% of normal salary)	Short time subsidy by employer (% of normal salary)
20	80	88	7	1
40	60	84	13	11
60	40	80	20	20

Source: EIRO, *New Short-Time Working Model*, Dublin, 2012.

The scheme designed by act 2013:948 aims to limit the support only in cases of very deep recession linked to a fall in demand, in other to avoid helping companies whose troubles depend on internal structural problems. This assessment is mandated to the Swedish National Institute of Economic Research (*Konjunturinstitutet*) who should determine if there are the general economic conditions to resort to the subsidized short time work[30]. When this preliminary condition is fulfilled are, then, necessary two collective agreements: a first one must be signed at central level and should "give the permission" to use the short time work. The second one must be concluded between the single firm and the worker representatives and should regulate time reductions, periods and workers involved. The max length of the program is 12 months that can be extended only once for other 12 months and must be followed by a cool down of 24 months. Concerning the levels of working time reduction and pay cut the law sets down three options. For time reductions up to 20% the worker gets a pay cut of 12%, so that the short time subsidy is equal to 8% of normal salary (7% paid by government and 1% by employer). For time reductions up to 40% the pay cut is equal to 16% of normal salary. The subsidy is, so, equal to 24% (13%

[30] This role of the *Konjunturinstitutet* is not specified by the second paragraph of section 5 of act 2013:948, but is clearly stated in paragraph 14, section 1 of the regulation defining the tasks and structure of the Institute (SFS n. 2007:759).

by Government and 11% by employer). Finally, for time reductions up to 60% the pay cut is 20% and the subsidy is 40%, paid in equal amount by Government and employer. The employee can, so, get a wage cut of 20% maximum, while the share of the subsidy paid by the Government is inversely proportional to working time reduction. On the other hand the cost paid by the employer increase with the augmentation of layoff hours and this should discourage an abusive use of the tool[31].

The second model, which is entirely bipartite and is binding solely for whom who have signed it, is much leaner[32]. First it can be used even without a statement from the *Konjunturinstitutet* ascertaining a deep crisis. The decision concerning in which cases activate it is, then, entirely left to the social partners. However also under this aspect there is an important difference from the legal model. The bilateral one is, in fact, strongly decentralized: in order to reduce the working time it is not needed any kind of preliminary agreement, authorization or approval by the central level of the trade union or of the employers' organization. The local trade union is free to directly bargain with the company and the only requirement is, once the agreement has been signed, to notify it to the central parties. Focusing on the content of the short time work program it should be noted that also under this aspect the bilateral model is simpler than the legal one. The only provisions are, in fact, that the wage reduction can be maximum equal to 12%, whatever would be the working time reduction and that the maximum duration should be 9 months[33]. Of course, being a "private" model there is not any public allowance or support.

Because of the abovementioned changes it is, then, possible to state that the innovative strategy experienced during the crisis left a deep mark in the Swedish restructuring system, even modifying one of its fundamental pillars. The importance of this innovation lies not so much in the practical use of the new tools (the one based on act 2013:948 has not so far never been activated), but in the ideological change that led to it. In an overall perspective, the Swedish social parties proved, in fact, to be able to discuss even about the most deep-rooted principles of their restructuring system and, conscious

[31] See, also for the table, European Trade Union Confederation Collective Bargaining Committee, *Short-timework in Sweden*, *www. collective.etuc.org*, 2.

[32] As already mentioned the first agreement was signed between IF Metall and Teknikföretagen, but similar agreements have been signed with other employers' associations.

[33] However, the agreement could be renovated indefinitely times, even without a cool down period.

that new scenarios can require new remedies, were brave enough to experiment a new solution, which in the end proved to be successful. On the other hand, however, it should be noted that in the new context a greater responsibility and pressure is putted on the local trade union. Especially if we consider the contractual model the lack of any type of preventive authorization nor from a public body, nor from the central social partners, put the local trade union in a more sensitive situation. Being its the whole power to decide if to accept or not a short time work scheme it could be putted under pressure by the firm, which could announce redundancies as a way to be allowed to lay off workers even when not strictly necessary. However, if we consider the characteristics of the Swedish trade union movement in general and of IF Metall in particular, this increased responsibility of the local trade union should not weaken the level of protection of the workers. The high degree of unionization, together with the important role that IF Metall has always played in the industrial relations scenario, are clear indexes of a trade union strong enough to wisely wield this new form of power.

5. The ongoing debate

It is important to mention that the impact of the crisis agreements did not limited its effects to the abovementioned measures, but on the contrary it seems to have given the start to a deeper reformation process. The main feature of this process is the shift of the main focus from the concerns regarding the moral hazard liked to the expenditure of public money in private companies, to the competitive (dis)advantage suffered by the Swedish economy because of the lack (or limited use) of such tools in comparison with other countries. In the last years, in fact, it arose a growing debate concerning the risk that the Swedish economy could be damaged not by the fact of not supporting companied in needs "per se", but by the circumstance that other nearby European countries do so.

For this reason on 15 February 2018 the Government appointed a special investigator in order to analyze in which way the short-term work scheme introduced in 2013 could be made more competitive. At the moment no action has been taken, but the preliminary report shows a major concern because of the fact that a great majority of EU countries use public money to support their companies in crisis. Those schemes are more flexible and easy to access compared to the Swedish one and this imbalance could lead to a disadvantage for the Swedish firms.

In order to fill this gap the investigator proposes to amend act 2013:948 in order to introduce a new hypothesis of support addressed to single employers [34]. The existing system, in fact, is hindered by the inclusion among the requirements for its activation of the abovementioned deep crisis as ascertained by the *Konjunturinstitutet*. This requirement links the intervention to the global economic situation, thus to ignore cases in which single companies suffer for a temporary and external-driven crisis which, however, does not affect the national economy generally conceived.

In the new scheme it is, than, introduced an additional case of intervention in behalf of single employers which are facing temporary but fierce and serious economic difficulties, which could have not been foreseen or avoided. Thanks to those different requirements companies are eligible for support in relation to their specific situation and, therefore, it is not required a general decision from the *Konjunturinstitutet*, which is, instead, replaced by an approval from the *Tillväxtverket* (Swedish Agency for Growth).

It is, however, important to point out that the measure is intended as a last resort one and, than, can be implemented only if there are no other means to adjust the workforce [35].

This new scheme is a clear sign of the new way of conceive the role of public bodies and trade unions in relation to enterprises' crisis and, even if it has been argued that any interference with the economy is against "the foundation of a liberal marker economy" [36], the size of the intervention appears to be in line (or even lower) with the ones successfully used in nearby European countries and, thus, it seems reasonable to exclude that it will have a negative impact of the free market.

6. Conclusion

In a comparative perspective it can be argued that the solutions adopted in Sweden are devoid of any innovativeness and this statement is con-

[34] See SOU 2018:66, 15 ss.

[35] Concerning the other features the proposed scheme is similar to the already existing one and, thus, requires an agreement between the social partners on how to implement it, even if the maximum duration is limited to six months, with the possibility of extension for other three. The share of the public allowance and of the working time reduction is, instead, identical to the already existent one.

[36] Altinget, *Statligt stöd för korttidsarbete snedvrider konkurrensen*, 26 November 2018, *www.altinget.se*.

firmed by the fact that both the tools realized by the social partners and the ones implemented (or under implementation) by the law are admittedly inspired to legal institutes of some others EU counties.

In spite of this, however, their importance is represented by the process that led to their implementation. In a model that was conceived in order to sustain the change and where the Governmental intervention, even if important in terms of expenditure on the labour market, did not provide any support to private companies, those actors were brave enough to embrace a common bet for a better future of companies and workers, thus to deviate from the traditional economic remedies and to experiment innovative solutions.

In our opinion this process, even if very different for its outcomes compared to the previous way of handling the crises, share with the "classical" Swedish model a fundamental feature. As we have pointed out at the beginning of this chapter the Rhen-Meidner model conceives the restructuring processes of the firms as an important aspect, thus realizing a "magmatic" system that, with a constant movement, reshapes and adapts itself. For this reason workers and trade unions are used to the idea of "change", which implies that during a crisis both of them should activate themselves in order to find some solution. In this perspective the merit of the Volvo experience was, then, "only" to have shifted this active role of employee and trade unions from the labour market (after the dismissal), to the labour relation (so to avoid the dismissal).

The Swedish case represent, then, a good example of the key role that nowadays can be played by the trade union: in a globalized economy in which firms (and workers) of very different countries compete against each other the competitiveness of the firm does not regard anymore only the entrepreneur, but concerns the employees too. It is, then, an essential part of the trade union duties to be able to tackle together with the firm those challenges and changes that, enhancing the competitiveness, result in an improvement of the workers' condition.

In conclusion, the Swedish system proved to be able to quickly adjust itself to the shifting economic. In an era of steady and quick changes, that often deeply affect the labour market, this represent one of the most valuable assets of a system of industrial relations.

Selected bibliography

Altinget, *Statligt stöd för korttidsarbete snedvrider konkurrensen*, in *www.altinget.se*, 26 November 2018.

Axelsson C., *Facklig vånda efter krisavtal*, in *Svenska Dagbladet*, 18 May 2009.

Bergström O., *Anticipating and Managing Restructuring. Sweden*, XXVII National Seminars on Anticipating and Managing Restructuring, ARENAS, National background paper – Sweden, 2009.

Bergström O., Broughton A., Triomphe C.E*., EU Synthesis Report*, XXVII National Seminars on Anticipating and Managing Restructuring – ARENAS, 2010.

Bergström O., *Managing Restructuring in Sweden. Innovation and Learning after the Financial Crisis*, in *Irene*, 2014, 12.

Clauwaert S., Schömann I., Büttgen N., Rasnača Z., *The Crisis and National Labour Law Reforms: A Mapping Exercise*, Country report, *Sweden, European Trade Union Institute*, 2016.

Demetriades S., Kullander M., *Social dialogue and the recession*, in *EurWORK*, 2009, 107.

European Trade Union Confederation Collective Bargaining Committee, *Short-timework in Sweden*, in *www. collective.etuc.org*, 2.

Lovén K., *Agreement on Temporary Layoffs Reached in Manufacturing*, in *Eurofound*, 2009, April 29.

Lovén K., *Social Partners in Motor Industry Seek to Bring Back Layoff Pay*, in *Eurofound*, 2009, 23 March.

Lovén K., *White-collar Unions Under Pressure to Sign Agreement on Temporary layoffs*, in *Eurofound*, 2009, June 14.

Murhem S., *Security and Change: The Swedish Model and Employment Protection 1995-2010*, in *Econ Ind Democracy*, 2012, 4.

OECD, *Back to Work: Sweden: Improving the Re-employment Prospects of Displaced Workers*, OECD Publishing, 2015.

Teknikforetagen, *Lokala krisöverenskommelser i teknikföretag – utvärdering av avtalsenliga krisåtgärder*, 2010, 4.

Tillväxtanalys, *Näringspolitik i kriser – vad kan vi lära av finanskrisen 2008-2009?*, 2013.

Printed by Stampatre s.r.l.
Torino – Italy
June 2019