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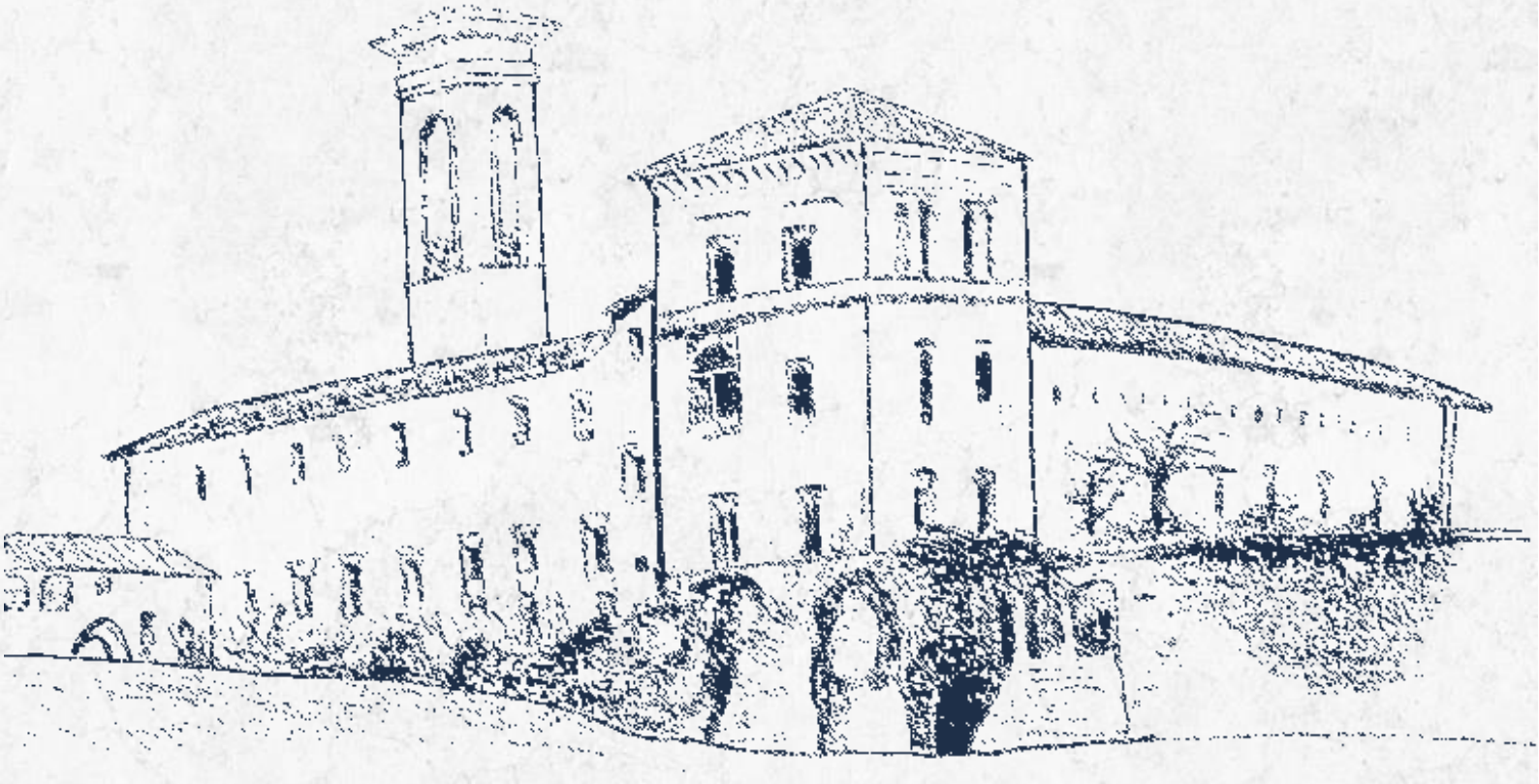

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Telework in Belgium: a Patchwork of Legal Regimes

Stan Bruurs, Sara Huybrechts [*]

Abstract

The regulation of remote work in Belgium entails four different arrangements. The regime on homework in the Employment Contract Act is distinguished from the one for structural teleworkers in CLA no. 85 by the use of information and communication technologies. In order to create a framework for non-regular telework, the Workable and Agile Work Act provided in 2017 specific provisions for occasional telework. The COVID-19 pandemic led to the revival of old discussions on the distinction between the different regimes and the various rights associated with them. Moreover, a new CLA no. 149 regarding telework due to the pandemic, added another unclear regime for telework. This contribution provides a critical overview of the cluttered Belgian legal framework for remote work by examining the specific provisions and differences regarding the principle of non-discrimination, the work accident, the well-being, the work-life balance, the working time, the employer's authority and the costs.

Keywords: Telework; Homework; COVID-19 telework; Belgium; Structural telework; Occasional telework; well-being; work-life balance, working time; authority; costs

1. Introduction

The regulation of telework in Belgium has followed a long trajectory, resulting in four teleworking arrangements. In the 19th century, homework was already popular in Belgium and in 1986 involved 15% of the active working population

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operating away from the company's office.[1] The fourth industrial revolution ushered in the digital era, enabling workers to work from home by means of ICT.[2] Belgium was no exception: smart devices and easy access to Internet facilitated telework. The physical presence of workers at the employer's premises is no longer necessary due to a number of innovations. New technologies enable employees to connect with the workplace, allowing them to work anytime, anywhere. Both employers and employees strive for more flexibility and autonomy in work organisation.[3] Furthermore, telework is claimed to be part of the solution for the numerous traffic jams in Belgium and to provide a better work-life balance.[4]

A maze of legal approaches and regulations characterises telework in Belgium. The first provision regulating homework in this country was the Law on Domestic Labour of 6 December 1996, through which a new title to the Employment Contract Act (hereafter: ECA) was added regarding homework. Working from home – or away from the employer's premises, more generally – has been a widespread phenomenon in Belgium.[5] Nevertheless, it took the legislator until 2005 to finalise specific legislation regarding structural telework, namely Collective Labour Agreement (hereafter: CLA) no. 85.[6] This regulation did not envisage occasional telework. For that reason, the Workable and Agile Work Act (hereafter: WAW) of 2017 laid down specific measures for this form of telework. More recently, the National Labour Council promulgated a fourth piece of legislation concerning telework – i.e. CLA no. 149 – recommending or obliging people to engage in telework because of COVID-19. It was a necessary move, taking into account that more than 50% of the total workforce in Belgium is currently teleworking.[7]

Since the beginning of 2020, the virus has spread significantly across the European Union. The same happened in Belgium, which has reported a

[1] K. GOOSSENS, "Werken op pantoffels voor het scherm? Vergelijking van de rechtstoestand van de telewerkende werknemer met die van de buitenshuiswerkende werknemers en de telewerkende zelfstandige", *Or.* 2004, no. 10, (253) 253.
[2] F. ROBERT, *Le télétravail à domicile,* Limal, Anthemis, 2020, 15.
[3] L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 2.
[4] *Ibid.,* 1-2.
[5] F. ROBERT, *Le télétravail à domicile,* Limal, Anthemis, 2020, 17.
[6] M. WOUTERS, "Nieuwe vormen van arbeid" in F. HENDRICKX and C. ENGELS (eds.), *Arbeidsrecht,* part I, Brugge, die Keure, 2020, (355) 365.
[7] EUROFOUND, *Living, working and COVID-19,* Luxembourg, Publications Office of the European Union, 2020, 33.

significant number of fatalities due to COVID-19.[8] The pandemic has had an unprecedented impact on the labour market. On the 23rd of March 2020, the National Security Council announced several extraordinary measures to limit the spread of COVID-19, e.g. school closures and travel restrictions.[9] In the context of labour law, the Group of 10[10] released a joint statement stating that workers had to carry on working from home as much as possible[11], though there were some who argued in favour of going to the workplace in these uncertain times.[12] Nevertheless, telework has been made compulsory for non-essential businesses, when compatible with working task and regardless of company size.[13] If telework is not possible for specific staff, they should respect social distancing, otherwise the business must close.[14] Besides, telework is recommended for crucial sectors and essential services, such as colleges and universities.[15]

The immediate and involuntary transition to telework has posed many challenges. It soon became apparent that the Belgian legal framework governing telework was not suitable to deal with this new state of affairs. This situation revived long-standing debates on the distinction between homework and telework and the rights these forms of employment entail. Even though telework has a voluntary character, the employer can now unilaterally impose

[8] A. SCHAUS and V. LETELLIER, "Les droits et libertés à l'épreuve de la crise sanitaire (Covid-19) Comment gérer la sortie du confinement?" in Y. MOREAU (ed.), *Déconfinement sociétal. Rapport d'expertises académiques,* 2020, (78) 80.

[9] Ministerial Decree of 23 March 2020 on urgent measures to limit the spread of the coronavirus COVID-19, *O.G.* 23 March 2020; EU FUNDAMENTAL RIGHTS AGENCY, *Coronavirus COVID-19 outbreak in the EU Fundamental Rights Implications, Country Report: Belgium,* 23 March 2020, https://fra.europa.eu/sites/default/files/fra_uploads/belgium-report-covid-19-april-2020_en.pdf, 3.

[10] This group consists of the Belgian trade unions, employers and the Federation of Belgian Enterprises.

[11] EU FUNDAMENTAL RIGHTS AGENCY, *Coronavirus COVID-19 outbreak in the EU Fundamental Rights Implications, Country Report: Belgium,* 23 March 2020, https://fra.europa.eu/sites/default/files/fra_uploads/belgium-report-covid-19-april-2020_en.pdf, 8.

[12] F. LAMBOTTE and L. TASKIN, "Stratégie de déconfinement: le cas des télétravailleurs" in Y. MOREAU (ed.), *Déconfinement sociétal. Rapport d'expertises académiques,* 2020, (142) 143.

[13] Art. 2 and 3 of Ministerial Decree of 23 March 2020 on urgent measures to limit the spread of the coronavirus COVID-19 and the other consecutive ministerial decrees.

[14] J. GILMAN, V. GUTMER, F. LAMBINET and J.-F. NEVEN, "Covid-19 et télétravail obligatoire: réflexions autour d'un paradoxe", *JTT* 2020, no. 11, (215) 217.

[15] Art. 2 and 3 of Ministerial Decree of 23 March 2020 on urgent measures to limit the spread of the coronavirus COVID-19 and the consecutive ministerial decrees.

telework upon his employees because of the pandemic.[16] Consequently, employees who have no experience with telework are compelled to work from home. Furthermore, other practical issues arose, e.g. the presence of children at home during work due to the closure of schools and the lack of appropriate equipment.[17]

This contribution aims to provide a critical overview of Belgium's cluttered legal framework governing telework, consisting of four different regulations dealing with homework, 'structural' telework – i.e. work performed at regular times in a place other than the standard workplace – occasional telework and 'tele-homework' during COVID-19. This analysis is limited to the private sector and does not examine the legal framework of homework and telework for self-employed workers. Consequently, this paper does not look into the telework legislation applicable to the public sector[18]. It is argued that Belgium needs a comprehensive and sustainable legal framework for teleworkers, as the overlaps between the applicability of these provisions make this topic a complex matter.

2. The Regulation of Telework in Belgium

The first part of this contribution examines the different provisions governing telework in Belgian legislation: homework, structural and occasional telework and compulsory tele-homework following the pandemic. Each section provides the definition, the context and the regulatory framework for each of the working arrangements referred to before.

[16] J. GILMAN, et al., "Covid-19 et télétravail obligatoire: réflexions autour d'un paradoxe", *JTT* 2020, no. 11, (215) 216.
[17] *Ibid.,* (215) 215.
[18] In short, this legislation can be summarised as follows. Royal decree of 22 November 2006 regarding telework and satellite work in the federal administrative public office applies to the staff of the federal government services. This decree entails a legal framework both for regular as well as occasional telework. The Flemish government, the Brussels Capital Region, the French Community and the Walloon government established their own modalities for implementing telework in the public sector. See: L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 11 and following.

2.1. Homework

2.1.1. Definition and Context

CONTEXT – Homework is the oldest form of telework in Belgian legislation. Homeworkers were manual workers, mainly from the textile industry, who worked from home in the 19th century.[19] From the very beginning, discussions took place on the legal status of homeworkers and whether they were subject to labour laws.[20] As early as 1934, provisions concerning minimum wages and employment conditions were laid down for homeworkers.[21] With the introduction of the new version of the ECA[22] in 1978, the discussion on the applicability of general labour provisions gained fresh momentum. The Court of Cassation settled the discussion in 1992 by ruling that, although homeworkers were employees, the general version of the ECA did not apply to their specific situation.[23] Therefore, the Belgian legislator in 1996 added a specific title to this provision aimed at regulating homework.[24] Title VI of the ECA is still in force and defines the specific rules that apply to homework.

DEFINITION – Article 119.1 of the ECA defines the employment contract of homeworkers as a contract under which the employee is committed to performing work under the employer's authority, in exchange for remuneration, at the employee's house or at any other place chosen by the employee and without the employer's supervision and direct control. Significantly, and contrary to what the name might suggest, homework is not necessarily performed at home.[25] The only situation that does not fall under this broad definition is work carried out in a satellite office, as the employee

[19] L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 14.
[20] K. GOOSSENS, "Werken op pantoffels voor het scherm? Vergelijking van de rechtstoestand van de telewerkende werknemer met die van de buitenshuiswerkende werknemer en de telewerkende zelfstandige", *Or.* 2004, (253) 253.
[21] Law of 10 February 1934 regulating homework in terms of wages and hygiene, *O.G.* 25 March 1934.
[22] Employment Contract Act of 3 July 1978, *O.G.* 22 August 1978.
[23] Cass. 30 November 1992, *Soc.Kron.* 1993, 115.
[24] Implemented by Law on Domestic Labour of 6 December 1996, *O.G.* 24 December 1996.
[25] O. RIJCKAERT, "'Loin des yeux, loin du compteur?' – Essai de clarification du temps de travail des travailleurs à domicile, des télétravailleurs et des travailleurs nomades" in L. DEAR and S. GILSON (eds.), *La loi sur le travail. 40 ans de la loi du 16 mars 1971*, Limal, Anthemis, 2011, (309) 311.

does not choose this location.[26] Besides, Articles 119.3 to 119.12 of the ECA do not apply to workers covered by the CLA governing telework.[27]

2.1.2. The Regulatory Framework

RULES APPLICABLE TO HOMEWORKERS – Article 119.2 of the ECA provides that the specific rules applicable to homeworkers are listed under Title VI of this act. In the absence of a specific rule under Title VI, the general legal framework for regular employees will apply. When an employee works partly from home and partly from the employer's premises under the same employment contract, this employee will be subject to the specific rules for homework when he works from home and to the general rules of the ECA when he is at the company's premises.[28]

TITLE VI – Title VI of the ECA lays down specific rules applying to homeworkers. First of all, the employer and the employee must conclude a specific employment contract in writing before starting to work.[29] This document must detail:

- 1° the personal information of the employer and the employee;
- 2° the wage;
- 3° the reimbursement of the costs related to homework;
- 4° the place(s) chosen by the homeworker to perform work;
- 5° a short description of the work to be performed, the agreed working arrangement, the work schedule, or the agreed minimum amount of work; and
- 6° the relevant joint committee.[30]

If no agreement is in force, the employee can terminate employment without providing notice or a termination fee.[31] The employment agreement is presumed to be of an indefinite duration. Besides, the employer must provide proper equipment, unless the circumstances require to act differently or a provision stating otherwise is in place.[32] In addition, Title VI of the ECA envisages an exception to rules concerning the suspension of the employment

[26] L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 15.
[27] Art. 119.1, §2 ECA.
[28] Art. 119.2, §2 ECA.
[29] Art. 119.4, §1 ECA.
[30] Art. 119.4, §2, 1°-8° ECA.
[31] Art. 119.5 ECA.
[32] Art. 119.3, 1° ECA.

contract of homeworkers and their daily wage, making provisions for homeworkers who are unable to perform work. However, the provisions under Title VI of the ECA are neither comprehensive nor detailed. Consequently, this title might not apply to occasional homework.[33]

2.2. Structural Telework

2.2.1. Definition and Context

CONTEXT – Though outdated, the working arrangement discussed above is clear and straightforward. The confusion started when other working schemes were implemented. In 2002, the European Framework Agreement on Telework stood out as the first agreement negotiated by the social partners at the European level.[34] The agreement laid down the essential principles for the implementation of telework. It was implemented in Belgian legislation in 2005 by CLA no. 85 (later further amended by CLA no. 85bis) and only concerned the private sector.[35] This CLA created a set of rules similar to those governing homeworkers and is declared universally applicable through Royal Decree of 13th June 2006.

DEFINITION – A lot of confusion arises when using the term 'telework' in relation to the concept of homework. Besides, the teleworker who works at home is referred to as 'home-based telework' or 'telehomework'. This terminology generates turmoil as even the legislator uses these terms inconsistently to indicate homework or telework.[36] In general, telework is defined as "*working in a geographically flexible manner, outside of the company's premises, by using information and communication technology*".[37] Article 2 of CLA no. 85 supplies a more detailed definition of 'telework', which replicates the definition included in the European Framework Agreement: *"a form of organising and/or performing work, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employer's premises, is carried out away from those premises regularly"*. Two elements stand out and should be emphasised. Firstly, there are information and communication technologies

[33] F. HENDRICKX and S. TAES, "Telewerk tijdens en na pandemie: kwalificatie van een uitdagende arbeidsrelatie", *ArbeidJ* 2020, no. 12.
[34] European Framework Agreement on Telework of 16 July 2002.
[35] F. ROBERT, *Le télétravail à domicile,* Limal, Anthemis, 2020, 50-51.
[36] L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 9-10.
[37] P. MAERTEN, "Telewerken: juridische aspecten van een virtuele arbeidsorganisatie", *Or.* 2000, (173) 173.

which indisputably characterise telework and distinguish it from homework. Secondly, the definition of CLA no. 85 emphasises that work should be performed outside those premises *regularly*, and thus neither incidentally nor occasionally. For this reason, this type of telework is called 'structural telework' in Belgian legal discourse, as opposed to 'occasional telework', which will be discussed later.

TELEWORK AND HOMEWORK – It is clear that telework and homework are closely related and associated almost spontaneously, given that their definitions are rather similar. The only element that distinguishes these forms of work is that telework requires an additional condition, namely the use of technology. Telework can therefore be a form of homework, but homework is not necessarily comparable to telework.[38] The scope of application of CLA extends to telework, including work performed at home or at any other location chosen by the employee.[39] CLA no. 85 explicitly excludes work performed in a satellite office and 'mobile teleworkers', e.g. sales representatives.[40] The employee should decide the work location, which is a condition common to telework and homework. Working in a satellite office or in a telecentre organised by the employer will neither qualify as homework nor as telework, whereas working in a co-working space can be qualified as homework and telework.[41] Homework cannot only be performed at home, and telework can also be performed at home, creating an overlap between the two concepts.[42]

2.2.2. The Regulatory Framework

TELEWORK VS. HOMEWORK – The determination of the applicable regulatory framework for structural teleworkers is closely related to the definitions of telework and homework. This distinction is relevant because different rules apply. Although the National Labour Council has stated that telework may not be viewed as a form of homework, the legislator did not share this view.[43] A specific provision was added to Article 119.1, §2 of the ECA, stating that

[38] K. GOOSSENS, "Werken op pantoffels voor het scherm? Vergelijking van de rechtstoestand van de telewerkende werknemer met die van de buitenshuiswerkende werknemer en de telewerkende zelfstandige", *Or.* 2004, (253) 255.
[39] Art. 4 CLA no. 85.
[40] Art. 2 and 4 CLA no. 85.
[41] L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 9 and 15.
[42] *Ibid.*
[43] NATIONAL LABOUR COUNCIL, *Advies omtrent de uitvoering van het Europese vrijwillige kaderakkoord van 16 juli 2002 over telewerk, 9* november 2002, no. 1.528, http://www.cnt-nar.be/ADVIES/advies-1528.pdf, 4.

workers who fall under the scope of CLA no. 85 are excluded from certain provisions of Title VI of the ECA regarding homework. This stance confirms the position of many legal scholars that telework is a specific form of homework.[44] The conflicting views of the National Labour Council and the legislator have made this regulatory puzzle even more confusing. Ultimately, the legislator had his final say: teleworkers are regarded as a particular category of homeworkers, whose rights are provided by CLA no. 85.

APPLICABLE RULES – CLA no. 85 includes the essential principles of the European Framework Agreement on Telework. The fundamental principles concern the voluntary character of telework[45] and the equal treatment between teleworkers and regular workers. Moreover, the employer must inform and consult with the employee representatives when implementing telework.[46] In addition, some formal steps need to be complied with. First of all, a separate written agreement must be concluded for each teleworker before engaging in work.[47] This document must provide the following information:

- 1° the frequency of telework and the days on which the worker will be at the employer's premises;
- 2° the hours during which the teleworker is on-call;
- 3° the hours when the teleworker can call technical support;
- 4° the reimbursement policy concerning a number of items;
- 5° the policy regarding the return to the employer's premises; and
- 6° the place(s) chosen by the teleworker to perform work.[48]

The only sanction in case of non-compliance with this formal aspects is that the teleworker can return to work at the employer's premises.[49] Nevertheless, the written agreement prescribed by Article 6, §1 of CLA no. 85 for structural telework is not required.[50] The teleworker must be informed, amongst others, of his applicable working conditions, the tasks to be performed and the policy regarding the reporting.[51] Furthermore, the employer must ensure the

[44] NATIONAL LABOUR COUNCIL, *Advies omtrent de uitvoering van het Europese vrijwillige kaderakkoord van 16 juli 2002 over telewerk, 9* november 2002, no. 1.528, http://www.cnt-nar.be/ADVIES/advies-1528.pdf, 4.
[45] Art. 5 CLA no. 85.
[46] Art. 17 section 2 CLA no. 85.
[47] Art. 6, §1 CLA no. 85.
[48] Art. 6, §2, 1°-6° CLA no. 85.
[49] Art. 6, §3 CLA no. 85.
[50] Cass. 5 October 2020, AR S.19.008.N., juridat.be.
[51] Art. 7 CLA no. 85.

necessary equipment, as well as its installation, maintenance[52] and technical support.[53] The teleworker has to use the equipment carefully, and the information collected shall not be disseminated for reasons other than those detailed in the job description.[54] Moreover, the teleworker must inform the employer immediately of any defect to the equipment or any force majeure event that prevents him from working.[55] All the rules and principles established in CLA no. 85 can be clarified or adapted by collective agreements at a sectoral level, an aspect which might affect consistency.

2.3. Occasional Telework

2.3.1. Definition and Context

CONTEXT – As discussed above, CLA no. 85 only regulates the work of those operating remotely on a regular basis, consequently excluding individuals performing remote work now and then. Therefore, occasional teleworkers do not fall within the scope of homework[56] regulation, leaving a legal gap and creating uncertainty. Before laying down ad-hoc legislation, employers allowed their employees to work from home on an occasional basis as it provided them with more flexibility and a better work-life balance.[57] Starting from 2017, Section 2 of the much-discussed WAW regulates occasional telework by adding specific provisions without affecting existing working conditions.[58] The number of occasional teleworkers also expanded from 8.2% in 2008 to 16.1% in 2018.[59] Besides, occasional telework is also the most flexible and the easiest-to-implement form of telework.[60]

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[52] Art. 9 CLA no. 85.
[53] Art. 10 CLA no. 85.
[54] Art. 12 CLA no. 85.
[55] Art. 13 CLA no. 85.
[56] Labour Court of Brussel, 12 November 2008, *Soc.Kron.* 2010, afl. 1, 34.
[57] Explanatory memorandum regarding the draft of the act on agile work, *Parl.Act.* Chamber 2016-17, no. 2247/001, (7) 20; S. DE GROOF, "Wetsontwerp werkbaar en wendbaar werk: een leeswijzer", *Arbeid]* 2016, no. 2, (4) 4-5; S. RAETS, "Kostenvergoedingen voor thuiswerk: onderscheid tussen huisarbeid en telewerk" in I. VERHELST (ed.), *Arbeidsovereenkomstenwet na 40 jaar... opnieuw anders bekeken,* Mortsel, Intersentia, 2018, (303) 306.
[58] Act of 5 March 2017 regarding agile work, *O.G.* 15 March 2017.
[59] M. WOUTERS, "Nieuwe vormen van arbeid" in F. HENDRICKX and C. ENGELS (eds.), *Arbeidsrecht*, part I, Brugge, die Keure, 2020, (355) 365.
[60] F. HENDRICKX, S. TAES and M. WOUTERS, "Corona en het arbeidsrecht: een Q&A", *Arbeid]* 2020, 52; C. PERSYN, "Telethuiswerk: wetgever maak uw huiswerk!", https://sentral.kluwer.be/NewsView.aspx?id=VS300764416&contentdomains=SentralNEWS&lang=nl, SenTRAL, Kluwer, 18 mei 2020.

DEFINITION – Article 23 1° of the WAW defines occasional telework as "*a form of organisation and/or execution of work in the context of an employment contract through which, with the utilisation of information technology, activities that can also be performed at the employer's premises are carried out outside these premises on an incidental and a non-regular basis*". The place where the teleworker performs work can be his residence or any other place chosen by him.[61] Besides, work must be in line with telework, which means that many employees – e.g. receptionists – cannot engage in occasional telework.[62] This definition is almost identical to that of structural telework, as the only difference lies in the frequency work is performed away from the office.[63] Consequently, to be qualified as occasional telework, this shall not take place on a regular basis but be exceptional. The line between what is considered regular and non-regular is blurred, so the legislator should clarify this point.[64]

EMPLOYMENT CONTRACT ACT – The specific characteristics of occasional telework justify the separate regulation contained in the WAW. Because the employment contract binds the parties during the period in which occasional telework is implemented, the ECA still applies. However, unclarity remains regarding the applicability of Title VI of the ECA because Article 119.1, §2 is not adapted to the new WAW. The problematic consequences of this state of affairs are discussed below.

2.3.2. The Regulatory Framework

WAW – Section 2 of the WAW provides a legal framework for occasional teleworkers, laying down some specific requirements. This section concerns the private sector only[65], and applies retroactively to working schemes concluded before 1st February 2017.[66] It states that occasional telework is justified only in two situations.[67] The first is a force-majeure event, i.e. a situation in which the employee cannot perform at the place he usually works

[61] Art. 24 WAW.
[62] J. DE MAERE, "De nieuwe wet werkbaar en wendbaar werk: wat verandert er op het vlak van de arbeidsduur?", *Or.* 2017, no. 6, (2) 9.
[63] J. CLESSE, A. FARCY and R. LINGUELET, "Quelques nouveautés législatives en droit du travail" in J. CLESSE and H. MORMONT (eds.), *Actualités et innovations en droit social,* Limal, Anthemis, 2018, (221) 248.
[64] M. WOUTERS, "Nieuwe vormen van arbeid" in F. HENDRICKX and C. ENGELS (eds.), *Arbeidsrecht,* part I, Brugge, die Keure, 2020, (355) 366.
[65] Art. 22 WAW.
[66] Art. 28 WAW.
[67] C. SCHREURS, "De nieuwe wet werkbaar en wendbaar werk – een overzicht", *Soc.Weg.* 2017, Vol. 13, no. 1, (8) 8.

for reasons outside his control, for example because of troubles with his car or an unexpected train strike.[68] The situation must be unforeseeable and happen independently of the employee's will.[69] The second situation that may justify occasional telework concerns personal reasons. The legislative text did not provide a description or interpretation of 'personal reasons' deliberately, given that they intended to cover various situations.[70] For the same reason, it is not recommended for employers to present an exhaustive list of accepted personal reasons.[71] However, the text does provide several examples, such as a dentist appointment or the visit of a technician.[72] Even though the WAW uses the notion of 'force majeure' and 'personal reasons', it fails to provide their definition or clarification.[73]

PRIOR REQUIREMENTS – The employee who wants to use occasional telework must priorly inform the employer and submit a request within a reasonable timeframe, mentioning the specific reasons therefor.[74] Unfortunately, the WAW does not clarify the length of the 'reasonable timeframe'. In case of a force-majeure event, the reasonable timeframe can be understood as a very short one. On the contrary, if the employee wishes to engage in occasional telework for personal reasons, he can inform the employer way in advance.[75] A reasonable timeframe can thus be interpreted differently, depending on the context.[76] No other formal requirements regarding the request need to be

[68] Art. 26, §1 WAW.
[69] J. CLESSE, A. FARCY and R. LINGUELET, "Quelques nouveautés législatives en droit du travail" in J. CLESSE and H. MORMONT (eds.), *Actualités et innovations en droit social,* Limal, Anthemis, 2018, (221) 249.
[70] L. BALLARIN, M. DE GOLS, M. KOWALSKA, B. LANTIN, J. ROOBAERT, A. VAN DE GEUCHTE, C. VANDERSNICKT and C. VANLAERE, *De wet van 5 maart 2017 betreffende werkbaar en wendbaar werk,* Mechelen, Kluwer, 2017, 148.
[71] J. DE MAERE, "De nieuwe wet werkbaar en wendbaar werk: wat verandert er op het vlak van de arbeidsduur?", *Or.* 2017, no. 6, (2) 8; J. GILMAN, et al., "Covid-19 et télétravail obligatoire: réflexions autour d'un paradoxe", *JTT* 2020, no. 11, (215) 223.
[72] Explanatory memorandum regarding the draft of the law on workable and agile work, *Parl.Act.* Chamber 2016-17, no. 2247/001, (7) 22.
[73] L. BALLARIN, et al., *De wet van 5 maart 2017 betreffende werkbaar en wendbaar werk,* Mechelen, Kluwer, 2017, 148.
[74] Art. 26, §2 WAW.
[75] Explanatory memorandum regarding the draft of the law on agile work, *Parl.Act.* Chamber 2016-17, no. 2247/001, (7) 22; A. BRIES, S. HAMAEKERS, N. MERTENS, K. VERVLOES and I. VERDONCK, "Werkbaar en wendbaar werk: focus op maatregelen buiten arbeidsduur", *Soc.Weg.* 2017, Vol. 13, no. 3, (2) 6.
[76] L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 30.

fulfilled.[77] The request can occur in writing or electronically,[78] and the approval of occasional telework must be explicit.[79] Thus, tacit consent is not allowed.

HOMEWORK ALARM – Although the notion of an 'homework alarm' might be confusing, this alarm is intended for occasional teleworkers. This system entails a warning to notify the risk of unfavourable weather conditions because that can be considered as a force-majeure event.[80] This alarm encourages both the employer and the employee to resort to occasional telework to avoid traffic and other risks related to bad weather. The procedures concerning prior requests and approvals are time consuming and counterproductive, considering the number of workers concerned.[81] A written document – e.g. a company CLA, internal company rules or some relevant policies – can simplify this process. Nevertheless, legal uncertainty remains when the warning sign is produced in the province where the employee lives and not in the one where the employer's company is located, or vice versa. It is unclear whether the employee can implement occasional telework in that case.

NO ABSOLUTE RIGHT – Just like structural telework, occasional telework is based on the principle of voluntariness. Neither the employer nor the employee has an absolute right to occasional telework.[82] Consequently, the employer cannot oblige the employee to occasional telework, and he can refuse the employee's request. Examples of a justified refusal are the necessary physical presence of the employee in the workplace or the improper use of this way of working by the employee, e.g. numerous requests of occasional telework.[83] Although the legislative text mentions as a justification 'business operations', it is debatable what it actually means.[84] Overall, it is unclear which

[77] J. DE MAERE, "De nieuwe wet werkbaar en wendbaar werk: wat verandert er op het vlak van de arbeidsduur?", *Or.* 2017, no. 6, (2) 9.
[78] A. BRIES, et al., "Werkbaar en wendbaar werk: focus op maatregelen buiten arbeidsduur", *Soc.Weg.* 2017, Vol. 13, no. 3, (2) 6.
[79] L. BALLARIN, et al., *De wet van 5 maart 2017 betreffende werkbaar en wendbaar werk,* Mechelen, Kluwer, 2017, 150.
[80] M. HEMELEERS, "Thuiswerkalarm bij slecht weer: bent u er klaar voor?", *Soc.Weg.* 2018, Vol. 14, no. 21, (7) 7.
[81] *Ibid.*
[82] A. BRIES, et al., "Werkbaar en wendbaar werk: focus op maatregelen buiten arbeidsduur", *Soc.Weg.* 2017, Vol. 13, no. 3, (2) 6.
[83] S. DE GROOF, "Wetsontwerp werkbaar en wendbaar werk: een leeswijzer", *ArbeidJ* 2016, no. 2, (4) 5.
[84] Explanatory memorandum regarding the draft of the law on workable and agile work, *Parl.Act.* Chamber 2016-17, no. 2247/001, (7) 22.

reasons the employer can wield to refuse the request.[85] The refusal must be accompanied by the reasons in writing, which are shared with the employee as soon as possible.[86] This form is an additional administrative burden for the employer, while the WAW is explicitly intended not to increase these burdens.[87] Conversely, if the employer accepts the request, an oral agreement is sufficient.[88] Nevertheless, the WAW does not provide any sanction for the employer in case he does not provide the refusal in writing.[89]

ARRANGEMENTS – If the employer accepts the request of the employee, certain written or oral[90] arrangements must be made according to Article 26, §3 of the WAW for the regulations of several practical elements of occasional telework, including:

- 1° the equipment and technical support required for occasional telework which the employer made available;
- 2° the time the employee might be contacted when engaged in occasional telework, which the employer might require;
- 3° the possible reimbursement by the employer of the costs deriving from occasional telework (for example, if the employee uses his laptop and Internet connection).

The WAW does not provide any sanction if no arrangements are made. It must be emphasised that Article 26, §3 of the WAW does not include an obligation for the employer to provide the occasional teleworker with equipment and technical support.[91] For example, the arrangements might stipulate that none

[85] *Ibid.*

[86] Art. 26, §2, section 2 WAW.

[87] Explanatory Memorandum Regarding the Draft of the Law on agile work, *Parl.Act.* Chamber 2016-17, no. 2247/001, (7) 20; NATIONAL LABOUR COUNCIL, *Advies omtrent Rondetafel "Werkbaar werk" – Voorontwerp van wet betreffende werkbaar en wendbaar werk,* 7 december 2016, no. 2.008, http://www.cnt-nar.be/ADVIES/advies-2008.pdf, 12.

[88] J. CLESSE, A. FARCY and R. LINGUELET, "Quelques nouveautés législatives en droit du travail" in J. CLESSE and H. MORMONT (eds.), *Actualités et innovations en droit social,* Limal, Anthemis, 2018, (221) 250.

[89] L. BALLARIN, et al., *De wet van 5 maart 2017 betreffende werkbaar en wendbaar werk,* Mechelen, Kluwer, 2017, 150.

[90] L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 32.

[91] K. REYNIERS, "Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse" in K. REYNIERS and A. VAN REGENMORTEL (eds.), *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 99.

of them will be provided.[92] This does not happen in the event of structural telework, where the employer must reimburse certain costs and provide the employee with the equipment needed.[93]

PRIOR ARRANGEMENTS – In case of force majeure, it might not always be possible to make prior arrangements. To counter this situation, the employer and the employee can agree upon certain aspects featuring occasional telework. Article 27 of the WAW allows the employer to lay down a particular framework for occasional telework via CLA or a corporate policy document.[94] This framework must refer to the elements of Article 26, §3 of the WAW and the functions and or activities within the company that can be performed through occasional telework and the procedure to request and grant occasional telework.[95] This allows the employees to refer to the applicable framework in each case.[96] The inclusion of these elements in a company's policy document is disputable because this might not be considered an agreement between the employer and the employee. This provision thus eliminates the possible arbitrariness of the employer regarding occasional telework.

2.4. Telehomework during COVID-19

2.4.1. Context

COVID-19 PANDEMIC – The federal government had to take several measures to limit the spread of COVID-19. For example, the Ministerial Decree of 1 November 2020 imposes telework on companies, associations and services for staff members, unless this is impossible due to the nature or the continuity of the business, the activities or the provision of services.[97] Thus, the government obliges the workers of non-essential sectors to telework. Additionally, essential sectors are encouraged to telework as much as possible. On 26 January 2021, Belgian social partners agreed upon a new version of CLA no. 149 regarding telework implemented because of the pandemic. The intervention of the

[92] This does not contradict art. 20 1° of the ECA, which obliges the employer to provide the equipment necessary to perform work, because that provision allows a derogation by mutual agreement. See: L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 42.
[93] Art. 9 CLA no. 85.
[94] L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 32.
[95] Art. 27, section 2, 1°-2° WAW.
[96] L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 49.
[97] Art. 2 of Ministerial Decree of 1 November 2020 amending Ministerial Decree of 28 October 2020 regarding urgent measures to limit the spread of the coronavirus, *O.G.* 1 November 2020.

National Labour Council was necessary given that almost 50% of the companies did not provide guidance for telework when the pandemic started. Even though the ministerial decrees use the notion of 'telehomework', this concept cannot be found in CLA no. 149. Consequently, it is unclear what 'telehomework' actually means.

APPLICABILITY – CLA no. 149 applies to all workers and their employers for whom telework is compulsory or recommended to counter the spread of COVID-19,[98] though this obligation clearly goes against its voluntary character.[99] Nevertheless, HENDRICKX and TAES argue that because of COVID-19, a new contractual situation arises. In their view, the voluntariness of telework is neither a condition for its existence nor its application, as it features the contractual freedom of the parties.[100] Thus, this CLA obliges companies which as of 1 January 2021 did not have a teleworking policy under CLA no. 85 or the WAW to establish one.[101] Consequently, the CLA does not apply to agreements which already existed at that date, including CLAs, individual agreements or teleworking policies,[102] indicating the supplementary character of this provision. CLAs established on company level, labour regulations, individual agreements or shared teleworking policies can provide specific rules regarding the application of CLA no. 149.[103] Lastly, this CLA is temporary as, starting from 31 December 2021, this provision no longer applies.[104]

2.4.2. The Regulatory Framework

CLA NO. 149 – The goal of the new legal framework provided by CLA no. 149 is twofold. On the one hand, it offers some principles and a reference framework to clarify certain aspects to safeguard legal certainty and ensure a smooth introduction of telework, both when is recommended or required by public authorities to counter the spread of COVID-19. On the other hand, it

98 Art. 1 and 2 CLA no. 149.
99 Labour Court of Brussel, 18 December 2012, no. 2011/AB/1116; F. HENDRICKX and S. TAES, "Telewerk tijdens en na pandemie: kwalificatie van een uitdagende arbeidsrelatie", *ArbeidJ* 2020, no. 30.
100 F. HENDRICKX and S. TAES, "Telewerk tijdens en na de pandemie: kwalificatie van een uitdagende arbeidsrelatie", *ArbeidJ* 2020, no. 26-31.
101 Art. 3 CLA no. 149.
102 Art. 3 CLA no. 149.
103 Art. 4 CLA no. 149.
104 NATIONAL LABOUR COUNCIL, *Advies omwille van de Covid-19-crisis verplicht gemaakt telewerk – ad hoc kader,* 26 januari 2021, no. 2.195, http://www.cnt-nar.be/ADVIES/advies-2195.pdf, 5.

aims to provide some guidelines regarding occupational well-being in the event of telework.[105] Compared to CLA no. 85, the requirements of CLA no. 149 are easier to meet, as no supplementary annexes are needed to the individual employment contract. Furthermore, the agreement to perform telework under CLA no. 149 can be outlined in a company CLA, a labour regulation, an individual agreement or a teleworking policy.

CONTENT – The CLA lays down provisions which are similar to those set out in CLA no. 85. It also comprises a specific regulation for occupational well-being, which summarises the existing rules supplemented with some elements specific to the context of the pandemic, such as psychosocial risks. In addition, the employer must inform the teleworkers and, if necessary, provide them with training regarding the particulars of telework.[106] Several specific agreements must be entered into regarding the timetable if necessary[107], the control on the results to be achieved and/or the assessment criteria[108] and the (un)reachability of the teleworker.[109] Furthermore, the employer takes appropriate measures to ensure the interaction between the teleworkers and their colleagues and prevent isolation, by organising some meetings in line with anti-COVID-19 measures.[110]

2.4.3. Homework, Structural or Occasional Telework?

UNCLARITY – Both the ministerial decrees and CLA no. 149 fail to clarify which type of telework was compulsory or recommended during COVID-19. Nevertheless, applying the correct legal framework is of the utmost importance, considering the differences and consequences set out above. Hereafter, the different teleworking arrangements will be examined in order to assess their suitability to deal with COVID-19, though structural or occasional telework appears to be the best option.[111]

HOMEWORK – Because homework does not rely on information and telecommunication technology, it is not the appropriate regulatory framework

[105] Art. 5 CLA no. 149.
[106] Art. 16 CLA no. 149.
[107] Art. 11, §1 CLA no. 149. Lacking this agreement, the teleworker follows the timetable he would have followed at the employer's premises.
[108] Art. 11, §2 CLA no. 149.
[109] Art. 11, §3 CLA no. 149.
[110] Art. 15 CLA no. 149.
[111] F. HENDRICKX and S. TAES, "Telewerk tijdens en na pandemie: kwalificatie van een uitdagende arbeidsrelatie", *ArbeidJ* 2020, no. 23.

for telehomework during COVID-19. Besides, the mandatory nature of the teleworking schemes used during COVID-19 contradicts the voluntary character of homework. Moreover, homework requires the conclusion of a contract, and in the absence thereof, the employer can terminate the contract without notice or compensation, which is not in line with this way of working used during COVID-19.[112] Finally, occasionally working from home does not make the employee a homeworker, as this shall take place on a regular basis.[113]

STRUCTURAL TELEWORK – CLA no. 85 regarding structural telework is not fully appropriate either in the current pandemic, because the type of telework implemented during COVID-19 arises from an occasional and not a routine situation. Besides, working away from the office has been imposed on employees and does not provide them with any choice. Qualifying those who telework during COVID-19 as structural teleworkers is contradictory, because those workers are most likely to return to their employer's premises at the end of the emergency.

OCCASIONAL TELEWORK – Legal research seems inclined to accept occasional telework as the legal basis for telework implemented during COVID-19.[114] This pandemic qualifies as a force-majeure event, but the requirement of temporariness does not mean that it cannot cover a more extended period.[115] Thus, because the COVID-19 pandemic has persisted for quite some time, it is not an obstacle for occasional telework to apply to telework implemented during the pandemic. Nevertheless, for the employment contracts concluded during or after 2020, it is difficult to prove the existence of an unforeseeable situation. The COVID-19 pandemic as such does not necessarily or always constitute a force majeure situation anymore.[116] The specific circumstances

[112] J. GILMAN, et al., "Covid-19 et télétravail obligatoire: réflexions autour d'un paradoxe", *JTT* 2020, no. 11, (215) 222.
[113] *Ibid.*
[114] E. VAN GRUNDERBEEK, "Telewerk tijdens en na de coronacrisis", *Soc.Weg.* 2020, Vol. 16, no. 19, (6) 6; F. HENDRICKX and S. TAES, "Telewerk tijdens en na pandemie: kwalificatie van een uitdagende arbeidsrelatie", *ArbeidJ* 2020, no. 33-35 and 42. Nevertheless, K. REYNIERS emphasises that incidental can be understood as 'now and then', and thus aims at a shorter time frame. This reasoning is backed up by the governmental website regarding occasional telework. See: K. REYNIERS, "Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse" in K. REYNIERS and A. VAN REGENMORTEL (eds.), *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 100.
[115] F. HENDRICKX and S. TAES, Telewerk tijdens en na de pandemie: kwalificatie van een uitdagende arbeidsrelatie, *ArbeidJ* 2020.
[116] A. HOET and S. VOET, "Overmacht door corona in contractuele relaties", *RW* 2020-21, no. 6, (203) 212.

must be considered, and qualification will always depend on facts. For example, if the government obliges the company to pursue their activities while taking into account the measures, but these measures cannot be implemented in that specific sector or company, then a force majeure situation arises.[117] However, if a company can continue their activities (with some adjustments, e.g. telework), they cannot rely on a force majeure situation because reasonable alternatives exist. The choice of the company to close temporarily – not out of necessity – does not constitute a force majeure situation and then telework qualifies as structural telework. The employer concludes separate and written agreements for each structural teleworker.[118] This transition to structural telework after a certain period of time might be recommended.[119] Finally, once the measures are repealed, the occasional teleworker can no longer rely on provisions governing occasional telework.[120] Consequently, occasional telework is the most suitable legal framework to regulate telework due to COVID-19. According to the general rules applicable to structural telework, occasional telework can be converted to structural telework.

3. Particularities, Overlaps and Gaps of the Provisions governing Remote Work

PART TWO – The first part of this contribution has provided an overview of the different types of teleworking arrangements in the Belgian legal system. Arguably, the regulations of homework and telework overlap, even though they have some specific rules. This second part of this paper is devoted to the particularities, overlaps and gaps marking these regulations. The pandemic made them more evident, though many of the issues that will be outlined already existed before.

3.1. Non-discrimination

EQUAL TREATMENT AND NON-DISCRIMINATION – Article 4 of the ILO's Convention no. 177 was ratified by Belgium and aims to ensure equal treatment between homeworkers, teleworkers and other wage earners. This means that teleworkers enjoy the same rights and obligations as onsite workers in terms of labour conditions. The principle of equal treatment and non-

[117] *Ibid.*
[118] Art. 6 CLA no. 85.
[119] F. HENDRICKX, S. TAES and M. WOUTERS, "Corona en het arbeidsrecht: een Q&A", *ArbeidJ* 2020, no. 44
[120] *Ibid.,* no. 43.

discrimination of teleworkers can also be found in the Belgian Constitution.[121] The same holds true for structural teleworkers.[122] Furthermore, additional agreements can be entered into taking into account the specific characteristics of telework.[123] For occasional teleworkers, Article 25, §1 of the WAW lays down the principle of non-discrimination, so they feature the same working conditions, performance standards and work pressure as comparable onsite workers.[124] Therefore, there can be no difference regarding the rights and obligations of the employees working at the employer's premises and those who telework. As for telework implemented during COVID-19, the equal treatment principle is included in Article 6, §1 of CLA no. 149. However, the teleworker must be informed of the specific or additional labour conditions, especially when they are distinct from those of workers performing work at the employer's premises[125]. Moreover, those who telework during the pandemic enjoy the same collective rights as onsite workers.[126]

3.2. Work-related Accidents

DEFINITION – In Belgium, an accident can only be qualified as a work-related one when it occurred during and because of the execution of the employment contract[127] or if the accident took place on the way to or when returning from work[128]. In the case of telework, it is hard, if not impossible, to prove that the accident took place during and because of the execution of the employment contract, since the teleworker does not work at the employer's premises.[129] Consequently, legal changes were made to the Work Accident Act (hereafter: WAA) to counter this uncertainty. However, a legal gap exists regarding work-related accidents for homeworkers, as the following rules do not cover them.[130]

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121 Art. 10 and 11 Belgian Constitution.
122 Art. 7 CLA no. 85.
123 Art. 7 CLA no. 85.
124 This is also true for structural teleworkers. See: art. 8 CLA no. 85.
125 Art. 6, §2 CLA no. 149.
126 Art. 10 CLA no. 149.
127 Art. 7, section 1 Work Accident Act of 10 April 1971, *O.G.* 24 April 1971.
128 Art. 8, section 1 WAA.
129 F. ROBERT, *Telewerk. Juridische aspecten en recente ontwikkelingen*, Brussel, Larcier, 2008, 101; W. VAN EECKHOUTTE, *Sociaal compendium. Arbeidsrecht 2018-2019 met fiscale noties, III*, Mechelen, Kluwer, 2018, 2934.
130 M. DENIS and P. DION, "Telewerk of thuiswerk? Een praktische analyse", *Or.* 2020, no. 7, (244) 247.

LEGAL PRESUMPTION – Article 7, section 3 of WAA entails a rebuttable legal presumption, which considers the accident of the teleworker[131] to have happened during the execution of the employment contract if the episode took place at the place(s) referred to in writing as the place of work in a telework agreement or in any other document that allows telework.[132] Besides the place of work, the accident must have occurred on the days indicated in these documents as those on which work had to be performed. The written agreement can take the form of a company CLA, a labour regulation, a policy document or an annex to the individual employment contract applying to telework.[133] With this agreement, the teleworker can prove that the accident happened while executing the employment contract and under the employer's supervision.[134] The written agreement should also be entered into by structural teleworkers, who need to conclude a telework agreement prior to commencing work.[135] However, occasional teleworkers do not need to enter into an agreement in writing.[136] Consequently, if the places or days were not mentioned in a written agreement, then the presumption applies to the place where the teleworker resides or the place(s) where he regularly teleworks[137], and only to the working hours which the teleworker would have performed if he had been employed at the employer's premises.[138] Thus, the level of protection of structural and occasional teleworkers is the same regarding the legal presumption according to which the accident took place during the execution of the employment contract. Nevertheless, in the latter case the presumption is rebuttable only for structural teleworkers, i.e. the work-related accident occurred because of the execution of the employment contract.[139] The National Labour Council emphasised that all accidents occurring while engaging in compulsory or recommended telework because of COVID-19

131 For structural telework: CLA no. 85bis of 2008. For occasional telework: Art. 21, 25 and 26 of the law of 21 December 2018 regarding various provisions of social affairs, *O.G.* 17 January 2019.
132 Art. 7, section 4, 1° WAA.
133 L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 73.
134 Explanatory memorandum regarding the draft of the law on various provisions of social affairs, *Parl. Act.* Chamber 2018-19, no. 3355/001, (5) 52.
135 *Ibid.,* (5) 53.
136 *Ibid.*
137 Implemented by art. 26 1° law of 21 December 2018 regarding various provisions of social affairs.
138 Art. 7, section 4, 2° WAA.
139 F. HENDRICKX, S. TAES and M. WOUTERS, "Corona en het arbeidsrecht: een Q&A", *ArbeidJ* 2020, no. 61.

must be covered by the work-related accident legal system.[140] It is for the employer to inform his teleworkers of this aspect.[141]

TO AND FROM WORK – Article 8, §2, 1° and 12° of the WAA provides that the legal presumption also applies if the accident occurs on the way to and while returning from work. However, a teleworker is supposed to work at the location of his choice, most frequently his home, so there is no such a thing as 'to and from work'.[142] Nevertheless, the WAA equates 'to and from work' with the way from the teleworker's residence (if he teleworks there) to the place where he takes a meal or purchases one, and *vice versa*.[143] This also applies to the way from the residence of the teleworker to the school or day-care of their children and *vice versa* if the teleworker is at his place of residence.[144]

ACCIDENT DURING A BREAK – Depending on the sector, the general principle is that accidents which occurred during a rest break can qualify as work accidents. However, because diverse situations can arise during the break of the teleworker, only those similar to the situations which could have occurred at the employer's premises should be taken into account.[145] Eventually, it is up to the court to decide whether the accident qualifies as a work-related one.[146]

3.3. Well-being

DEFINITION – Well-being is defined as the conditions in which work is performed, e.g. security, workers' health protection, psychosocial aspects, ergonomics, labour hygiene, the embellishment of workplaces and actions concerning the living environment.[147] Thus, well-being entails more than merely health and safety at work.[148] The Well-Being Act applies to employers

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140 NATIONAL LABOUR COUNCIL, *Advies omwille van de Covid-19-crisis verplicht gemaakt telewerk – ad hoc kader,* 26 januari 2021, no. 2.195, http://www.cnt-nar.be/ADVIES/advies-2195.pdf, 4.
141 *Ibid.,* 5.
142 Explanatory memorandum regarding the draft of the law on various provisions of social affairs, *Parl.Act.* Chamber 2018-19, no. 3355/001, (5) 50.
143 Art. 8, §2, 1° Work Accident Act.
144 Art. 8, §2, 12° Work Accident Act.
145 Explanatory memorandum regarding the draft of the law on various provisions of social affairs, *Parl.Act.* Chamber 2018-19, no. 3355/001, (5) 51.
146 *Ibid.,* (5) 52.
147 Art. 4, §1 Well-Being Act of 4 August 1996, *O.G.* 18 September 1996.
148 K. REYNIERS, "Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse" in K. REYNIERS and A. VAN REGENMORTEL (eds.), *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 103.

and employees, including homeworkers, structural and occasional teleworkers.[149] Additionally, the Code of Well-Being at Work (hereafter: the Code) applies to the different types of remote work in place.[150] Unfortunately, these regulations are mostly concerned with large-sized companies in the private sector, while its implementation in SMEs is more complicated. Besides, the rules are neither meant for nor adapted to teleworkers.[151] Consequently, the specific situation of teleworkers executing their employment contract outside the employer's premises challenges the application of relevant legislation. Although the King can take into account the specific situation of teleworkers by issuing a royal decree, the attempts made so fare were unsuccessful.[152] It is for the employer and the employee to ensure the well-being of all workers at the workplace, but it is the employer who bears ultimate responsibility for this aspect.[153] In this respect, the employer must use a dynamic risk assessment system, out of which preventive measures can be taken.[154] Thus, when telework is available at the company, the employer must take the specific risks of telework into account during risk assessment and inform the teleworkers.[155]

APPLICABLE RULES – Teleworkers are subject to the Well-Being Act and the Code. Several books and chapters in these provisions target teleworkers. The employer must avoid any risk which might harm the well-being of workers.[156] For example, telework can be considered a strategy of the employer to avoid

[149] Art. 2, §1, section 1 Well-Being Act.
[150] K. REYNIERS, "Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse" in K. REYNIERS and A. VAN REGENMORTEL, *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 109.
[151] K. REYNIERS, "Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse" in K. REYNIERS and A. VAN REGENMORTEL, *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 110.
[152] Art. 4, §1 section 3 Well-Being Act; C. PERSYN, "Telethuiswerk: wetgever maak uw huiswerk!", https://sentral.kluwer.be/NewsView.aspx?id=VS300764416&contentdomains=SentralNEWSS&lang=nl, SenTRAL, Kluwer, 18 mei 2020; K. REYNIERS, "Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse" in K. REYNIERS and A. VAN REGENMORTEL, *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 109.
[153] Art. 17, 4° ECA; art. 20, 2° ECA, art. 5, §1 section 1 Well-Being Act, art. 6 Well-Being Act; Art. I.2-13 Codex Well-Being at Work of 28 April 2017, *O.G.* 2 June 2017; Art. I.2-2 and art. 2.2-6 section 2 Codex Well-Being at Work.
[154] Art. I.2-2 and art. 2.2-6 section 2 Codex Well-Being at Work.
[155] K. REYNIERS, "Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse" in K. REYNIERS and A. VAN REGENMORTEL, *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 110.
[156] Art. 5, §1 section 2, a Well-Being Act.

the spread of COVID-19. The Well-Being Act and the Code lay down rules regarding the prevention of, and protection against, professional and psychosocial risks, such as stress, burn-out and social isolation.[157] Furthermore, Book III, Title 1-3 of the Code comprises, amongst others, rules regarding equipment, lighting and temperatures. The employer cannot be held responsible for these issues regarding his employees who work in locations other than the employer's premises.[158] For example, at least every five years, the employer must undergo risk assessment for workers using displays, evaluating for each of them the dangers arising from the excessive time spent in front of the screen (e.g. physical strain and mental pressure).[159] The employer must also take measures to prevent or limit these issues.[160] Thus, the specificity of telework complicates the employer's effort to implement health and safety rules.

STRUCTURAL TELEWORK – CLA no. 85 only lays down few provisions regarding the well-being of teleworkers. Article 15 of CLA no. 85 compels the employer to inform the teleworker of the company's policies concerning health and safety, especially due to the use of display screens. The teleworker must implement these policies.[161] Additionally, health and safety officers can access the workplace to assess the application of the OHS policies. If the teleworker performs work in an inhabited place, then this visit must be arranged and approved in advance. If the employee refuses to do so, the employer will not be held responsible.[162] Besides, the employer must avoid the social isolation of the teleworker, for example through meetings with colleagues.[163]

OCCASIONAL TELEWORK – The WAW does not contain specific provisions regarding the well-being of the occasional teleworker. Nevertheless, the occasional teleworker enjoys the same working conditions and is subject to the same pressure as onsite workers.[164] Even though no explicit provisions regarding occasional teleworkers are supplied, these workers are subject to the general Well-Being Law and the Code.

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157 Chapter Vbis of the Well-Being Act and Book I, Title 3 of the Codex.
158 *Ibid.*, (93) 112.
159 Art. VIII.2-3, §1 1° Codex Well-Being at Work.
160 Art. VIII.2-3, §1 2° Codex Well-Being at Work.
161 L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 71.
162 K. REYNIERS, "Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse" in K. REYNIERS and A. VAN REGENMORTEL, *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 111.
163 Art. 8, §3 CLA no. 85.
164 Art. 25, §1 WAW.

TELEHOMEWORK DURING COVID-19 – Many companies complied with the ministerial decree making telework compulsory, while the Well-Being Act requires risk assessment or consultation of the employees before implementing telework.[165] The move to allow telework has led employees to face unfavourable working conditions, more stress and new risks.[166] Consequently, the aspects of article 4 of the Well-Being Act are not intended to safeguard teleworkers.[167] For example, around 40% of teleworkers did not have a decent office chair during COVID-19, and around 30% of them claimed not to own an area dedicated to work at home.[168] Moreover, teleworkers are often socially isolated.[169] In comparison with CLA no. 85 and the WAW, CLA no. 149 does contain provisions regarding the well-being of the teleworker. It provides a policy for well-being at work related to telework by thoroughly summarising existing OHS legislation.[170] For example, the teleworker must receive information regarding the company's rules on well-being at work specifically targeting telework and about preventive measures, e.g. the proper use of displays.[171] The information, guidance and preventive measures should be based on a multidisciplinary risk assessment, which considers the psychosocial dimension and the health aspects inherent to telework, including the possibility of resorting to psychological support and an occupational doctor.[172] Besides, the teleworkers should be informed of the support offered by the direct supervisor, prevention advisors and occupational doctors, and their contact details.[173] Considering the current health crisis, the teleworkers can approach them via online platforms to propose adjustments to their workspaces.[174] Regarding the current COVID-19 pandemic, an inspection of those in charge of prevention is not appropriate. Furthermore, the employer should take appropriate measures to ensure the interaction between teleworkers and avoid

165 J. GILMAN, et al., "Covid-19 et télétravail obligatoire: réflexions autour d'un paradoxe", *JTT* 2020, no. 11, (215) 221.
166 *Ibid.,* (215) 225.
167 K. REYNIERS, "Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse" in K. REYNIERS and A. VAN REGENMORTEL (eds.), *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 94.
168 www.vias.be/nl/newsroom/22-van-de-telewerkers-werkt-elke-dag-van-thuis/.
169 K. REYNIERS, "Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse" in K. REYNIERS and A. VAN REGENMORTEL, *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 94.
170 Art. 5 CLA no. 149.
171 Art. 12, §1 CLA no. 149.
172 Art. 12, §2 CLA no. 149.
173 Art. 13 CLA no. 149.
174 Art. 14, §2 CLA no. 149 and comment.

social isolation.[175] For example, the employer can arrange in-person meetings or coffee breaks whenever possible. Therefore, particular attention must be paid to the most vulnerable teleworkers, namely those who have to deal with additional tensions due to their personal situation during telework. The Generic Guide, established during the pandemic, mentions the need for specific guidance regarding the ergonomic and psychosocial aspects of telework.[176]

3.4. Work-life Balance and Working Time

WORK-LIFE ELEMENTS – Working time and work-life balance are closely connected. According to DE GROOF, there are three key elements in working time regulation that severely impact the work-life balance: the amount of work, the organisation of working time, and the intensity of work.[177] Therefore, employees are expected to experience less work-life conflict when their working time regulation includes, amongst others, provisions limiting working hours, the possibility to take longer breaks, regular and predictable timetables, little overtime and constraints regarding the workload or intensity of work.[178] Although telework is often presented as an instrument to enhance the work-life balance – i.e. it offers to organise work based on personal needs – it seems that teleworkers too experience conflicts between work and private life.[179] Working from home entails a greater risk of being engaged during leisure time because both activities occur in the same physical space, thereby blurring the boundaries between work and family life. Even before COVID-19, already 60% of workers were busy sending e-mails after their working hours, and the number of teleworkers increased because of the pandemic.[180] It should be noted that the work-life balance is not solely related to working time. There are

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[175] Art. 15 CLA no. 149.

[176] SOCIAL PARTNERS OF THE HIGH COUNCIL FOR PREVENTION AND PROTECTION AT WORK AND FPS EMPLOYMENT, *Generic guide for combatting the spread of COVID-19 at work,* https://employment.belgium.be/sites/default/files/content/documents/Coronavirus/Genericguide.pdf, 2021, 24 and 39.

[177] S. DE GROOF, *Arbeidstijd en vrije tijd in het arbeidsrecht. Een juridisch onderzoek naar work-life balance,* Brugge, die Keure, 2017, 85 e.v.

[178] S. DE GROOF, Arbeidstijd en vrije tijd in het arbeidsrecht: een juridisch onderzoek naar work-life balance, Brugge, die Keure, 2017, 93-109.

[179] H. DELAGRANGE, Connectiviteit tijdens de lockdown, SERV – Stichting Innovatie en Arbeid, https://www.serv.be/sites/default/files/documenten/STIA_20200504_connectiviteit_tijdens_lockdown_artikel.pdf, mei 2020, 2.

[180] *Ibid.*

also many personal factors to take into account when identifying boundaries and preferences regarding the separation or integration of work and private life.[181] The relation between teleworking arrangements and the applicability of working time regulation is complex.

HOMEWORK – The working time regulation laid down in the Labour Act does not apply to homeworkers.[182] Consequently, homeworkers can perform labour at night and on Sundays and are covered neither by rules concerning overtime nor by that governing the daily, weekly, minimum and maximum limits of working time.[183] Thus, homeworkers can work all day long, which might have a detrimental effect on their work-life balance. Besides, the employer risks facing criminal liability for non-compliance with working time regulation, whilst he has only limited control over the hours worked by the teleworker.[184]

STRUCTURAL TELEWORK – Another thorny issue that has already caused controversy is the applicability of working time regulations on structural teleworkers. According to the National Labour Council, the Labour Act fully applies to structural teleworkers because this way of working should not be regarded as homework.[185] Nevertheless, the previous amendments to the ECA by the legislator have shown that structural telework under CLA no. 85 should be equated to homework, so the working time regulation laid down in the Labour Act does not apply. Another relevant argument is the absence of a royal decree that states the contrary, namely the applicability of working time regulation.[186] Consequently, structural teleworkers are excluded from working time regulation, therefore ignoring the position of the social partners.

OCCASIONAL TELEWORK – As explained above, occasional telework is only allowed in a limited number of circumstances. Therefore, the occasional use of telework does not change the elements that influence the work-life balance.

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[181] E. KOSSEK, B. LAUTSCH and S. EATON, "Telecommuting, control and boundary management: correlates of policy use and practice, job control and work-family effectiveness", *Journal of Vocational Behavior* 2006, (347) 362-363.
[182] Art. 3bis Labour Act of 16 March 1971, *O.G.* 30 March 1971
[183] L. SMETS and N. THOELEN, "Thuiswerk en telewerk: nog ver van huis", *Or.* 2006, (83) 92; K. SALOMEZ, "Telewerk een bijzondere vorm van huisarbeid: naar geldend en komend recht?", *Soc.Kron.* 2006, (121) 127; M. WOUTERS, "Nieuwe vormen van arbeid" in F. HENDRICKX and C. ENGELS (eds.), *Arbeidsrecht,* part I, Brugge, die Keure, 2020, (355) 370.
[184] L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 60.
[185] NATIONAL LABOUR COUNCIL, *Advies omtrent de uitvoering van het Europese vrijwillige kaderakkoord van 16 juli 2002 over telewerk, 9* november 2002, no. 1.528, http://www.cnt-nar.be/ADVIES/advies-1528.pdf, 4.
[186]L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 59.

The task, the organisation of working time and the intensity of work will remain the same, even in this exceptional situation. Personal reasons, e.g. taking care of a sick child, allowing for the implementation of occasional telework may even contribute to a better work-life balance. The occasional teleworker must deal with these exceptional circumstances in addition to daily work commitments. Consequently, the effect of occasional telework on the teleworker's work-life balance is disputable. Furthermore, it is unclear whether the occasional teleworkers fall within the scope of the working time regulations laid down in Chapter III of the Labour Act, given that there is no specific provision on this matter. Many legal scholars as well as the Federal Public Service for Employment, Labour and Social Dialogue state that occasional teleworkers do not qualify as homeworkers because the regular character of this way of working is missing.[187] The WAW did not change Article 119.1, §2 of ECA and does not include any reference to occasional telework, implying that the legislator did not intend to consider occasional teleworkers as homeworkers. Besides, the legislator refrained from excluding occasional teleworkers from the scope of application of the Labour Act, thus the provisions regarding working time apply to occasional teleworkers.[188] The legislative text of the WAW clarifies that occasional teleworkers are not subject to the direct control of their employer and have significant autonomy regarding work organisation.[189] They must abide by the same working hours, but they do not have to follow the work schedule strictly.[190] Thus, they can work voluntarily outside standard working hours (without this time being considered overtime), yet respecting the maximum number of hours worked on a daily

[187] FPS EMPLOYMENT, LABOUR AND SOCIAL DIALOGUE, Advice of 6 November 2017, IAB/40110(2)/AO/SD; L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 13; K. REYNIERS, "Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse" in K. REYNIERS and A. VAN REGENMORTEL (eds.), *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 98 en 104. Nevertheless, DE MAERE argues that both occasional and structural teleworkers must be considered homeworkers. See: J. DE MAERE, "De nieuwe wet werkbaar en wendbaar werk: wat verandert er op het vlak van de arbeidsduur?", *Or.* 2017, no. 6, (2) 8 and further.

[188] M. WOUTERS, "Nieuwe vormen van arbeid" in F. HENDRICKX and C. ENGELS (eds.), *Arbeidsrecht,* part I, Brugge, die Keure, 2020, (355) 365.

[189] F. HENDRICKX and S. TAES, "Telewerk tijdens en na pandemie: kwalificatie van een uitdagende arbeidsrelatie", *ArbeidJ* 2020, no. 20.

[190] Art. 25, §2 WAW.

and weekly basis.[191] If teleworkers are considered homeworkers, then agreements regarding the disconnection should be concluded.[192]

TELEHOMEWORK DURING COVID-19 – Just like the occasional teleworker, those engaged in telework during COVID-19 organise their work autonomously within applicable working hours.[193] The workload and performance standards are the same as those faced by onsite workers[194], and so are the elements contributing to a better work-life balance. Contrary to CLA no. 85, arrangements must be made regarding the hours these teleworkers cannot be contacted by their employers.[195]

SUGGESTION – Disregarding occasional teleworkers can complement the exclusion from the ECA of structural teleworkers in order to prevent further complications.[196] Besides, an additional exception to be included in Article 3 of the Labour Act would be beneficial to explicitly exclude occasional teleworkers from working time regulation.

3.5. Employer Authority

SUBORDINATION – In Belgium, there are three elements characterising the employment contract: (1) work performed in return for (2) remuneration and under (3) the employer's authority.[197] The employer has the right to check and control the employee who performs his work under his supervision. However, teleworkers perform their work outside the employer's premises, raising questions regarding employer authority. During the pandemic, employers were repeatedly faced with this issue. Neither the employer nor the inspection services can enter the employee's private residence on their initiative.[198] However, the lack of direct control does not imply that the employee no

[191] S. DE GROOF, "Wetsontwerp werkbaar en wendbaar werk: een leeswijzer", *ArbeidJ* 2016, no. 2, (4) 4.
[192] K. REYNIERS, "Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse" in K. REYNIERS and A. VAN REGENMORTEL (eds.), *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 120.
[193] Art. 8, §1 CLA no. 149.
[194] Art. 8, §3 CLA no. 149.
[195] Art. 11, §3 CLA no. 149.
[196] J. DE MAERE, "De nieuwe wet werkbaar en wendbaar werk: wat verandert er op het vlak van de arbeidsduur?", *Or.* 2017, no. 6, (2) 8.
[197] Art. 2 and 3 ECA.
[198] The social inspection can only enter the residence as provided in art. 24, §1 Social penal law of 6 June 2010, *O.G.* 1 July 2010; L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 69.

longer works under the employer's supervision. Instead, indirect control is possible, for example by requiring the registration of working hours as specified in *CCOO/Deutsche Bank* case.[199] However, it is unclear how to reconcile this registration with the autonomous character of telework. Privacy and data protection should be taken into account when installing monitoring devices or software. If the employer's monitoring activities entail the processing of personal data, then the GDPR must be respected.[200] For that reason, employers consider using alternative ways to monitor their teleworkers, for example by asking them to be on-call.[201] Besides, according to case law, the employer can use a detailed summary of the employee's calls made with the company phone.[202]

HOMEWORK AND TELEWORK – Article 119.1 of the ECA emphasises that the homeworker does not work under his employer's direct control or supervision. Consequently, this supervision or direct control would exclude the qualification of a homeworker. The employer can eventually execute indirect control on the homeworker. For structural and occasional teleworkers, specific agreements can be made to arrange the control by the employer, for example in the individual employment contract, the company rules or a labour policy.[203] This agreement must entail provisions regarding the reachability of the employee.[204] For instance, the employer and employee can agree upon a daily and weekly timeframe, in which they can have an online meeting to discuss work. Nevertheless, the WAW does not provide any obligation for the employee to report to the employer on his work that day. Thus, that obligation only exists if it is explicitly stated in one of the documents mentioned above. CLA no. 85 and the WAW provide the freedom of the employee to organise his work because the employer cannot directly control them.[205] Besides, the employer of structural teleworkers must take the necessary measures to safeguard the data used and processed by the teleworker for professional purposes.[206]

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[199] CoJ 14 May 2019, no. C-55/18, ECLI:EU:2019:402, Federación de Servicios de Comisiones Oreras (CCOO) v Deutsche Bank SAE.
[200] L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 63.
[201] *Ibid.,* 65.
[202] Labour court Gent 12 May 2014, no. 2013/AG/269.
[203] F. ROBERT and D. BERCKMANS, *Telewerk. Juridische aspecten en recente ontwikkelingen,* Brussel, Larcier, 2008, 118; L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 65.
[204] Art. 6 CLA no. 85 and art. 26, §3, 2° WAW.
[205] Art. 25, §2 WAW; art. 8, §1 CLA no. 85; Explanatory memorandum regarding the draft of the law on workable and agile work, *Parl.Act.* Chamber 2016-17, no. 2247/001, (7) 21.
[206] Art. 14 CLA no. 85.

TELEHOMEWORK DURING COVID-19 – Under CLA no. 149, the employer of those engaged in telework during COVID-19 can exercise appropriate and proportional control on work-related outcomes, taking into account the private life of the teleworker and respecting the GDPR.[207] Control cannot be permanent, and the teleworker must be informed as to how this control takes place.[208]

3.6. Costs

ADDITIONAL COSTS – Telework is associated with additional expenses for both the employer and the teleworker. For example, the location where telework is performed requires an Internet connection, additional heating, water and office equipment.[209] It is up to the employer to partly reimburse the costs borne by the worker. The Department of Social Security and the tax authorities communicated the accepted amounts of money the employer shall pay to the employee to cover the additional costs inherent to telework, without subjecting them to tax or social contributions.[210]

HOMEWORK – The written agreement regarding homework should entail a provision on the reimbursement of the costs related to homework.[211] If no such agreement is made, and no collective labour agreement on this matter exists, then a forfeit of 10% of the wage of the homeworker shall be paid to meet the costs related to homework, unless the homeworker proves that the costs exceed this percentage.[212] This reimbursement is supposed to cover the costs inherent to homework, such as heating, water, electricity and gas.[213] In addition to those costs, the employer must provide the necessary equipment.[214] The reimbursement of the homeworker is only due if he does not qualify as a structural teleworker and is not subject to tax or social contributions.[215]

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[207] Art. 9, §2 CLA no. 149.
[208] Art. 9, §1 CLA no. 149.
[209] E. VAN GRUNDERBEEK, "Telewerk tijdens en na de coronacrisis", *Soc.Weg.* 2020, Vol. 16, no. 19, (6) 7.
[210] S. SCARNA and J. NOËL, "Tussenkomst door de werkgever voor kosten in verband met thuiswerk in het kader van de regeringsmaatregelen voor Covid-19", *FISC.WEEK* 2020, no. 107, (2) 2.
[211] Art. 119.4, §1 and §2, 4° ECA.
[212] Art. 119.6 ECA
[213] F. ROBERT, *Le télétravail à domicile,* Limal, Anthemis, 2020, 118.
[214] *Ibid.,* 119.
[215] Cass. 5 October 2020, AR.S.19.008.N., juridat.be.

STRUCTURAL TELEWORK – CLA no. 85 provides many rules regarding the reimbursement or payment by the employer of the costs of structural telework. The employment contract must contain a written annex with further rules regarding the reimbursements. For example, the employer is obliged to reimburse or pay the connection and communication costs related to structural telework.[216] If the employee uses his own equipment, the employer must reimburse or pay the costs of the installation of software, usage, maintenance and depreciation costs of the equipment.[217] The costs will be calculated before commencement of work on a pro-rata basis.[218] However, a general obligation to reimburse or pay other costs is not present.[219] Moreover, even if the equipment is lost or damaged because of telework, the employer has to pay these costs all the same.[220]

OCCASIONAL TELEWORK – The employer and the occasional teleworker must conclude a mutual agreement regarding the possible reimbursement by the employer of the costs related to occasional telework.[221] This provision only specifies that an agreement must be entered into and does not entail a legal obligation for the employer to genuinely reimburse the occasional teleworker.[222] The employer can nevertheless reimburse the current costs or use forfeits.[223]

TELEHOMEWORK DURING COVID-19 – The sudden conversion to telework in light of the pandemic produced several costs. The Department of Social Security published the reimbursements the employer can provide which are not subject to social contributions, e.g. a monthly allowance of € 129 to buy a desk.[224] CLA no. 149 requires the parties to agree on the employer's payment to compensate the use of the teleworkers' own equipment and on the costs of installation of relevant software, usage, operating, maintenance and

216 Art. 9, section 1 CLA no. 85.
217 Art. 9, section 2 CLA no. 85.
218 Art. 9, section 3 CLA no. 85.
219 K. REYNIERS, "Welzijn van de tele(thuis)werkers bij de uitvoering van hun werk: een juridische analyse" in K. REYNIERS and A. VAN REGENMORTEL (eds.), *COVID-19 en welzijn op het werk*, Brugge, die Keure, 2021, (93) 98.
220 Art. 11 CLA no. 85.
221 Art. 26, §3 WAW and art. 27, section 2, 5° WAW.
222 F. HENDRICKX, S. TAES and M. WOUTERS, "Corona en het arbeidsrecht: een Q&A", *ArbeidJ* 2020, no. 57.
223 L. HELLEMANS and E. KARREMAN, *Telewerk en huisarbeid*, Mechelen, Kluwer, 2018, 50.
224 https://www.rsz.fgov.be/nl/werkgevers-en-de-rsz/coronavirus-maatregelen-voor-werkgevers/vergoeding-voor-thuiswerk.

depreciation costs and additional connection costs.[225] This agreement considers the global framework of the total costs or compensation paid by the employer. The Service of Prior Decisions determined that the abovementioned forfeits and reimbursements can be granted to all employees working at least five days a month from home or from a place other than the employer's premises due to COVID-19.[226] This temporary contribution does replace other allowances which were priorly assigned to the employee.[227] Nevertheless, the employer can stipulate that he is not going to pay any reimbursement due to COVID-19.

COMPARISON – Differences exists regarding the reimbursements of the costs. The structural teleworker enjoys more guarantees regarding the reimbursement than the occasional teleworker or those who engaged in telework during COVID-19, although the amount of money granted is never specified.[228] Additionally, the costs that are not included in the law or CLAs are subject to the parties' autonomy, who are free to conclude a separate agreement on this matter.[229]

4. Conclusion

What began as a specific legal provision for homework slowly developed into three different ways of working from home in Belgian legislation, namely homework, structural telework and occasional telework. Each type of telework has its own legal framework, characteristics and conditions. This variety leads to legal uncertainty regarding the rights and obligations of both employer and employee and an unclear distinction between the applicability of each provision. For example, a clear separation cannot be made between homework and structural telework, on the one hand, and structural and occasional telework, on the other hand. The only distinguishing elements are the use of technology and the frequency of telework. The thin line between what is considered regular and non-regular telework adds further vagueness, so action is required on behalf of the legislator.

A key element of telework is the voluntary principle, which means that neither the employer nor the employee has an absolute right to telework. Besides,

[225] Art. 7 CLA no. 149.
[226] S. SCARNA and J. NOËL, "Tussenkomst door de werkgever voor kosten in verband met thuiswerk in het kader van de regeringsmaatregelen voor Covid-19", *FISC.WEEK* 2020, no. 107, (2) 2.
[227] *Ibid.,* (2) 3.
[228] F. ROBERT, *Le télétravail à domicile,* Limal, Anthemis, 2020, 103.
[229] *Ibid.*, 105.

homeworkers and teleworkers enjoy equal treatment and non-discrimination, so they cannot be treated differently from onsite workers. Nevertheless, the equal treatment principle does not seem to apply when comparing homeworkers, structural and occasional teleworkers, e.g. in terms of working time or work-related accidents. Furthermore, a royal decree regulating the well-being of teleworkers would be useful to counter the shortcomings of the current Well-Being Act and Code. Besides, the provisions regarding the reimbursement and equipment present some differences as well.

Other ambiguities can be seen within the legal frameworks implemented. The WAW introduced a new provision for occasional telework, but it is unclear in which situations the parties can apply it, i.e. the WAW did not specify the meaning of 'personal reasons' and 'force majeure'. In addition, the request for occasional telework by the employee must be made within a 'reasonable timeframe', but the employer can refuse it based on 'business needs'. Clear definitions are not provided, blurring the boundaries between structural and occasional telework.

During the pandemic, telework became more popular than ever. The implementation of telework on a massive scale revealed several issues regarding the scope of the applicable legal framework. It is not contested that telework was necessary to limit the spread of COVID-19 and to safeguard economic needs. Yet the action taken by the National Labour Council during the pandemic, resulting in a fourth type of telework, caused more confusion than clarity. Arguably, the new version of CLA no. 149 is a missed opportunity to stress the distinction between the different types of telework and to indicate the provisions applicable to mandatory telehomework during the pandemic. Regrettably, the CLA provides no answers to the questions raised by telework during this pandemic, nor did it clarify how some practical issues should be solved, making legislation more confusing. It is hard to predict the aftermath of COVID-19 and the future of telework. Nevertheless, employees will likely request to telework more often in the years to come. Therefore, legislative intervention to unclutter this patchwork of legal regimes seems appropriate.

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Spain's Law No. 10/2021 on Teleworking: Strengths and Weaknesses

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Abstract

One of the effects of COVID-19 has been the increase in the number of people who telework. Against this background, the Spanish government, trade unions and employers´ association adopted a new provision regulating this way of working. Based on these considerations, this paper provides an overview of telework in Spain. To this end, Law No. 10/2021 will be analyzed, particularly its scope of application and teleworker´s rights. This analysis will be carried out to assess the legal value of this new piece of legislation.

Keywords: *Teleworker; Regulation; Rights.*

1. Introduction

The healthcare crisis resulted from COVID-19 has changed our lives. Among other things, the pandemic has also made the recourse to remote work – especially telework – more widespread. Prior to the healthcare emergency, the share of people working remotely in Spain was almost 4.8%. Following the lockdown – which began in March 2020 – this percentage tripled, reaching 16.2% in the second quarter of 2021[1]. Thus, this crisis caused the most disruptive and rapid organizational changes ever occurred in the world of

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[1] This information was removed from the Ministerio de Asuntos Económicos y Transformación Digital. Gobierno de España, *Dossier de indicadores de teletrabajo y trabajo en movilidad en España y la UE*, 2021. It is available at the following link: https://www.ontsi.red.es/es/dossier-de-indicadores pdf/indicadores_teletrabajo_trabajo_movilidad_2021.

work[2]. The outbreak of COVID-19 produced a move away from the traditional ways of providing services, demonstrating that teleworking is an essential tool for the modernization of the employment relationship. In this way, teleworking has now become a fundamental feature of the digital economy in order to comply with the objectives laid down in the *2030 Agenda for Sustainable Development*[3].

Despite its modern character, teleworking is not a recent phenomenon. Since its first version – which was passed in 1980 – the Spanish Workers' Statute (hereinafter, WS[4]) has regulated the 'employment contract for homeworkers', through Article 13. Initially, it was conceived as a working arrangement targeting women with family responsibilities. More recently, in 2012, the serious economic situation affecting Spain made it necessary to rethink the national labour system. Consequently, and amid certain reluctance, Law No. 3/2012 of 6 July was approved (hereinafter, Law 3/2012) the aim of which was to "promote new forms of work". In this connection, telework was defined as "a form of work organisation that perfectly matched the production and economic model pursued". Therefore, the 'employment contract for homeworkers' was amended "to regulate remote work performed through the use of innovative technology" and to strike a balance between rights and duties"[5]. Since 2012, in the Spanish legal system the 'employment contract for homeworkers' has been replaced by remote and teleworking arrangements, though the rules governing them are practically the same[6].

The new version of Article 13 of the WS, resulting from major legislative changes, conceived remote work as the one in which work was carried out predominantly at the worker's house or at a location chosen by them. Thus, remote work is no longer intended as a contractual arrangement but as a form of work organization. In addition, the new provision reinforced the principle of equality, for remote workers enjoyed the same rights as on-site employees,

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[2] M. E. Casas Baamonde, *El derecho del trabajo, la digitalización del trabajo y el trabajo a distancia*, in *Derecho de las relaciones laborales*, n. 11, 2020, p. 1414.

[3] M. B. Fernández Collados, *El teletrabajo en España, antes, durante y después del confinamiento domiciliario*, in *Revista internacional y comparada de relaciones laborales y derecho del empleo*, vol. 9, n. 1, 2021, pp. 401-402.

[4] Here reference is made to the Workers' Statute approved by Royal Legislative Decree 2/2015 of 23 October.

[5] Section III of the explanatory memorandum of Law 3/2012.

[6] See, M. A. Purcalla Bonilla y C. H. Preciado Domènech, *Trabajo a distancia vs. teletrabajo: estado de la cuestión a propósito de la reforma laboral de 2012*, in *Actualidad laboral*, n. 2, 2013, pp. 1-12 (edition La ley digital). For a more detailed analysis, VV.AA. L. Mella Méndez (director), *Trabajo a distancia y teletrabajo. Estudios sobre su régimen jurídico en el derecho español y comparado*, Navarra, 2015, Aranzadi.

especially in relation to salary, training, professional development, risk prevention and representation rights.

Regrettably, legal scholars levelled criticisms against the reform, arguing that the new Article 13 of the WS presented shortcomings and failed to meet the needs of the labour market. On the one hand, Article 13 only made mention of the rights remote workers enjoyed due to their employment status, without supplying further information in relation to certain implementation aspects. On the other hand, this article did not expressly refer to telework, being the latter understood as a subtype of remote work and therefore falling within its definition. In this regard, some scholars in Spain argued that telework and remote work are two different working arrangements. This is so not so much because of the massive use of ICT in telework, but because they are seen as two different ways of organising work. They are regarded as two distinct concepts not necessarily linked to one another[7]. For this and other reasons, both scholars and the social partners have requested new and comprehensive rules for remote work (particularly telework), which should make up for the shortcomings of the 2012 reform.

Nevertheless, it was the health crisis caused by COVID-19 that brought to the fore the main issues characterizing the regulation of telework. The imposition of remote work[8] during the emergency situation evidenced the obsolescence of Article 13 of the WS[9], leading to the passing of a new provision. Royal Decree-Law 28/2020 of 22 September on remote work (hereinafter, RDL) was enacted, following considerable social dialogue between the government, trade unions and employers' associations. The RDL was ratified – with small changes in terms of content-, by Law 10/2021 of 9 July on remote work (hereinafter, LRW). More in detail, the preamble of this new regulation regards Article 13 of the WS as "insufficient to deal with the peculiarities of telework, which concerns not only the task that is preferably carried out outside the employer's premises, but also the intensive use of new information and communication technologies". In this way, the regulation of remote work now

[7] F. J. Fernández Orrico, *Trabajo a distancia: cuestiones pendientes y propuestas de mejora (RD-Ley 28/2020, de 22 de septiembre*), in *Revista General de Derecho del Trabajo y de la Seguridad Social*, n. 58, 2021, p. 223, in terms of H., Álvarez Cuesta, *Del recurso al teletrabajo como medida de emergencia al futuro del trabajo a distancia*, in *Lan Harremanak. Revista de relaciones laborales*, n. 43, 2020, p. 2.

[8] Article 5 of Royal Decree-Law 8/2020 of 17 March concerning extraordinary urgent measures to deal with the economic and social impact of COVID-19, imposes remote work in those cases in which it was technically and reasonably possible, in order to ensure business continuity.

[9] M. Rodríguez-Piñeiro Royo and F. J. Calvo Gallego, *Los derechos digitales de los trabajadores a distancia*, in *Derecho de las relaciones laborales*, n. 11, 2020, p. 1451.

is wider, as it consists of twenty-two articles, to which additional, transitory and final provisions shall be added.

According to the explanatory memorandum of this new piece of legislation, the objective is "to provide a sufficient, transversal and integrated regulation". For these purposes, lawmakers drew on the European Framework Agreement on Telework (hereinafter, EFAT) signed by the European social partners in July 2002 and revised in 2009, Convention No. 177 on home work and Recommendation No. 184 of the ILO. Although the ILO's Convention on home work was not ratified by Spain, some common features can be found when compared it to the LRW. Examples of this include: the definition of remote work; the promotion of the principle of equality and non-discrimination; the relevance of collective bargaining and the teleworker's right to health and safety[10].

In parallel, the LRW draws significantly on the EFAT, as it sets out the key areas in which it is necessary to take into account the peculiarities of telework. Like the LRW, the EFAT refers to the voluntary nature of telework and the principle of equal rights for teleworkers, mentioning the right to training, to a professional career, to the full exercise of collective rights, to the provision of equipment, to health and safety and to flexibility in the organization of work. One might think that the LRW[11] fully complies with the regulatory framework established by the EFAT, though a careful analysis of the new Spanish regulation allows us to conclude that it goes beyond the European provisions. One example of this state of affairs is that the LRW requires one to enter into an agreement to perform remote work in which its minimum contents are laid down, whereas the EFAT makes no reference to this obligation. In view of the above, this study comments on the elements of telework as regulated by the LRW, providing an analysis of its scope of application, the relevant agreement and the main rights recognized to workers engaged through this form of employment. The aim of this contribution is to provide some objective and critical insights into the new Spanish regulation of remote work, which has been the subject of a lively debate among scholars at the national level[12]. One might speculate that the causes of the inaccuracies and contradictions marking

[10] N. P. García Piñeiro, *El trabajo a distancia en el contexto internacional: OIT y Unión Europea*, in VV.AA. F. Pérez de los Cobos Orihuel and X. Thibault Aranda (eds.), *El trabajo a distancia. Con particular análisis del Real Derecho-ley 28/2020, de 22 de septiembre*, Madrid, 2021, Wolters Kluwer, p. 88.

[11] On the content of the LRW, F. J. Gómez Abelleira, *La nueva regulación del trabajo a distancia*, Valencia, 2020, Tirant lo Blanch.

[12] G. García González, *La nueva regulación del trabajo a distancia y del teletrabajo: entre lo simbólico y lo impreciso*, in *Trabajo y Derecho: nueva revista de actualidad y relaciones laborales*, n. 72, 2020, p. 2 (La ley digital).

this provision resulted from the urgency and improvisation in which lawmakers drafted it. As will be explained in the following sections, even though the LRW covers some aspects, it did not deal with pre-existing rules – e.g. the employer's costs and certain digital rights – the lack of concreteness and the constant reference to collective bargaining, which have produced unsatisfactory results.

2. Remote Work: Definition and Scope of Application

Article 2 of the LRW defines remote work as "a way of organizing work, with the latter being provided at the worker's house or at a place of their choice". Instead, telework is "remote work carried out through the exclusive or prevalent use of computers, or telecommunication means and systems". Given these definitions, the new LRW is similar to Article 13 of the WS, as telework is considered as a subcategory of remote work, therefore opposing the arguments of a number of scholars who regard these working schemes as different from one another.

The lack of a universally accepted, all-encompassing definition of telework moves the focus on the elements featuring this form of employment. A careful analysis of Article 2 of the LRW enables us to conclude that there are two aspects that are peculiar to telework. First, the relocation of workers to their house or to another place chosen by them, and, second, the intensive use of ICT. Regarding the first element, the LRW is not much different from the previous regulation. While now it is established that work "is provided at the house of the worker or at a place of their choice", the old regulation (Article 13 of the WS) provided that these services were performed "at the worker's house or in a place *freely* chosen by them" (emphasis added). The change in lawmakers' conception, expressed by deleting the word 'freely', may mean that in the new regulatory context, the choice of a different work location might also depend on collective bargaining or, ultimately, on the agreement entered into to perform remote work[13]. The second aspect that characterizes telework is the use of ICT. In this respect, the intensive recourse to technology constitutes the essential feature of telework, insofar as it distinguishes it from remote work. However, not all workers who use these technological means are teleworkers, because, according to this provision, it is necessary that this use be "exclusive or prevalent". So, Article 2 of the LRW excludes those services in which their implementation is limited or optional[14].

[13] G. García González, *La nueva regulación del trabajo a distancia y del teletrabajo: entre lo simbólico y lo impreciso, op. cit.,* pp. 3-4.

[14] L. Mella Méndez, *Sobre una manera de trabajar: el teletrabajo*, in *Aranzadi social*, n. 5, 1998, p. 645.

Both in the previous regulation and in the new LRW, telework is seen as a new form of work organization, which questions the standards characterizing the traditional employment relationship. Consequently, it is now possible to enter into an agreement to perform telework in case of open-ended, temporary, or part-time contracts, or contracts entered into for training purposes, though in this latter case at least 50% of work should be performed onsite (Article 3 of the LRW)[15]. However, not all teleworking arrangements will be regulated by LRW, because for this to happen it is necessary that the teleworker meets two requirements. In effect, for the application of the LRW, a series of individual requirements must be fulfilled.

First, according to Article 1 of the LRW, the employment relationships to which the current regulation will apply are those meeting the conditions described in Article 1.1 of the WS. In this sense, the new Spanish regulations on telework will only concern salaried workers who voluntarily provide their services away from the company office in exchange for remuneration. Thus, self-employed workers or those enjoying other employment statuses – e.g. dependent self-employment – fall outside the scope of application of this piece of legislation. Furthermore, some doubts can be cast about its implementation in the event of special working schemes – e.g. senior management – for which the provision remains silent. In these cases, it can be implied that the new regulation will apply as long as these special relationships comply with the conditions laid down in Article 1.1 of the WS.

Secondly, Article 1 of the LRW establishes that remote work shall be carried out on a regular basis. Specifically, it should take place "over a period of three months and concern at least 30% of the working day, or an equivalent percentage, depending on the duration of the employment contract"[16]. Importantly, while Article 13 of the WS demanded that remote work be simply 'preponderant' in character, the new regulation supplies a clear definition of what should be understood as 'regular', ensuring greater certainty and legal security to the regulatory model. Consequently, we can agree with those arguing that the shortcomings of the previous regulations were due to certain vagueness about some aspects[17].

In this sense, workers who comply with Article 1.1 of the WS but do not work remotely for more than thirty percent of their working hours – this is known as

[15] J. Lahera Forteza, *El acuerdo individual y los requisitos formales del trabajo a distancia regular y estructural*, in VV.AA. M. Rodríguez-Piñeiro Royo and A. Todolí Signes (eds.), *Trabajo a distancia y teletrabajo: análisis del marco normativo vigente*, Navarra, 2021, Aranzadi, p. 66.

[16] The first Additional Provision of the LRW establishes that collective agreements or agreements may adjust this percentage and/or require a shorter reference period.

[17] . Todolí Signes, *La regulación del trabajo a distancia*, in *Derecho de las relaciones laborales*, n. 11, 2020, p. 1495.

'occasional' telework – will not be subject to the provisions of the LRW, but the provisions of the WS. Really, these workers engaged in occasional telework find themselves in a 'legal limbo'[18], in which we do not known whether the WS is applied – without any specification – or this general legislation as interpreted by EFAT. Either way, the result is unsatisfactory, because occasional teleworkers do not enjoy the same rights as onsite ones. While in its explanatory memorandum the LRW defines itself as a "sufficient, transversal and balanced regulation", in practice a normative vacuum exists affecting workers engaged in occasional or transnational telework, which still needs to be properly addressed by lawmakers[19].

Finally, it should be noted that, although the entry into force of the new LRW - and more specifically of the RDL – took place during the healthcare emergency, it did not consider the telework implemented during the pandemic. Transitory Provision no. 3 establishes that the new regulation will not be applied "to remote work implemented exceptionally in application of Article 5 of Royal Decree-Law 8/2020 of 17 March, or as a consequence of the measures to tackle COVID-19".

In this regard, some scholars have argued that the procedure for the adoption of the RDL was not justified. In relation to the RDL, Article 86 of the Spanish Constitution (hereinafter, SC), establishes that the government issues royal decree-laws to face an extraordinary and urgent situation. Under the present circumstances, there is no connection between the urgency – the spread of the pandemic – and the measures adopted, since the RDL - and now, the LRW- does not apply to telework implemented to deal with COVID-19. The government did not want to adopt a provisional regulation to meet the new needs derived from the significant amount of time spent teleworking due to the pandemic. Rather, the aim was to pass a provision which would deal once for all with the shortcomings of this way of working, which have long been pointed out by scholars. Arguably, the new Spanish regulation on telework would be properly implemented by approving the LRW directly, without adopting the RDL first, as no reasons exist that justify its legal validity.

Furthermore, the LRW is not immediately applicable to teleworking arrangements prior to the pandemic, especially when this form of employment has already been regulated by collective agreements. In this sense, a distinction should be made between: 1) teleworking schemes regulated by collective agreements or agreements with a specific period of validity, in which case the

[18] A. de las Heras García, *Análisis de la nueva regulación del trabajo a distancia*, in *Revista de Trabajo y Seguridad Social. CEF*, n. 452, 2020, p. 175.

[19] G. García González, *La nueva regulación del trabajo a distancia y del teletrabajo: entre lo simbólico y lo impreciso, op. cit.,* p. 2 and 6-7.

new LRW will be applied once the agreement loses its legal validity 2) remote work governed by collective agreements or agreements without a specific duration, with respect to which the new regulations will apply after one year from its publication in the *Boletín Oficial del Estado* (Spanish Official Bulletin), unless the signatories agree on a longer term – up to three years[20].
Finally, it should be added that the LRW is not applicable to public servants, who are subject to the provisions of Royal Decree-Law 29/2020, of 29 September on Urgent Measures Concerning Teleworking in Public Administration and Human Resources in the National Healthcare System to face the health crisis caused by COVID-19[21]. Consequently, it could be concluded that the LRW is not a unitary piece of legislation. This is because its application depends on the time one starts working remotely, the rules in force, employee status and the number of days spent working away from the employer's premises.

3. The Remote Work or Telework Agreement

Telework is configured as a way to provide a service voluntarily. In this regard, Article 5 of the LRW establishes that "remote work shall be voluntary for both the worker and the employer and will require the conclusion of a remote work agreement". This agreement is the first requirement to engage in telework, as it demonstrates the parties' consent.
The effectiveness of the agreement requires a careful analysis of its form, content and effects, e.g. the worker's refusal to sign it.

3.1 Teleworkers' Will and its Relevance

Voluntariness is essential when engaging in this form of employment, as is the parties' agreement[22]. The same holds true when shifting from remote work to onsite work. Article 5.3 of the LRW provides that "this shift might take place in compliance with the terms established in collective bargaining or, absent

[20] First Transitory Provision of the LRW.
[21] For an analysis of the regulation on teleworking concerning Spanish Public Administration, see R. Jiménez Asensio, *El marco regulador del teletrabajo en la Administración Pública y en las entidades del sector público*, in *Revista vasca de gestión de personas y organizaciones públicas*, n. 4, 2021, pp. 18-39 and L. Mella Méndez, *El nuevo artículo 47 bis EBEP: La prevención de riesgos laborales en el teletrabajo del sector público*, in VV.AA. L. Mella Méndez and R. E. de Muñagorri (directors), *Globalización y Digitalización del mercado de trabajo: propuestas para un empleo sostenible y decente*, Navarra, 2021, Aranzadi, pp. 253-283.
[22] M. A. Purcalla Bonilla y C. H. Preciado Domènech, *Trabajo a distancia vs. teletrabajo: estado de la cuestión a propósito de la reforma laboral de 2012, op. cit.*, p. 1.

that, with those laid down in the remote work agreement". The same can be said for the amendments of the conditions detailed in remote work agreements, since Article 8.1 of the LRW requires that a new agreement shall be entered into between the company and the worker. So, the will of the parties becomes extremely relevant[23] in this area, being required for any matter that affects the teleworking agreement. This requirement serves as a guarantee for the employee against the employer's unilateral decisions.

Although employee consent is generally important, this requirement should not be necessary in all amendments made to the conditions established in the remote work agreement. While it is advisable and understandable to include this requirement when changing some terms – e.g. the place of work – asking for employee consent when dealing with simple amendments appears to be unnecessary. For example, when the employer intends to modify the hours of an onsite worker, they do so unilaterally, unless changes are significant. Conversely, modifying teleworkers' schedules will require consent, which sometimes is refused[24]. Accordingly, one might agree with those arguing that the LRW affects business freedom[25], since it limits human resource management, discouraging employers from resorting to this way of working.

The preamble of the provision points out that the implementation of remote work constitutes "a voluntary option for both parties". The LRW draws on previous case law[26] and legislation, taking as a starting point Article 13 of the WS, which established the need to conclude the remote work agreement in writing, without however laying down the basic terms to be included. Article 5 of the LRW provides that telework may not be imposed unilaterally by the employer and the worker's refusal to work remotely does not constitute a ground for termination of employment[27]. In addition, this article specifies that neither "the shift from remote to onsite work nor the difficulties resulting from the transition from onsite to remote work" will justify a sanction by the employer.

In parallel, the worker cannot unilaterally demand to telework, as there are a number of situations in which the principle of voluntariness is not complied

[23] In a similar way, see J. M. Goerlich Peset, *La regulación del trabajo a distancia. Una reflexión general*, in VV.AA. M. Rodríguez-Piñeiro Royo and A. Todolí Signes (eds.), *Trabajo a distancia y teletrabajo: análisis del marco normativo vigente*, *op. cit*., pp. 45-47

[24] J. Thibault Aranda, *La modificación de las condiciones de trabajo en el trabajo a distancia*, in VV.AA. M. Rodríguez-Piñeiro Royo and A. Todolí Signes (eds.), *Trabajo a distancia y teletrabajo: análisis del marco normativo vigente, op. cit.,* pp.100-102.

[25] T. Sala Franco, *El Real Decreto-ley 28/2020, de 22 de septiembre, sobre el trabajo a distancia*, in VV.AA. T. Sala Franco (eds.), *El Teletrabajo*, Valencia, 2020, Tirant lo Blanch, p. 180.

[26] See, judgment of the Spanish Supreme Court of April 11, 2015, appeal number 143/2004.

[27] R. Poquet Catalá, *El teletrabajo: análisis del nuevo marco jurídico*, Navarra, 2020, Aranzadi, p. 57.

with. However, in these cases, the worker's right to telework is not automatically granted and it must be assessed considering the company's needs. In this regard, Article 34.8 of the WS establishes that every person "has the right to request changes to the duration and distribution of working time", including the implementation of remote work, "to strike a balance between work and family life". Furthermore, the third Final Provision of the LRW introduces two new cases in which the employee has the right to telework: when the worker "is regularly enrolled in an academic programme or a professional course" and when he or she suffers from sexual harassment.

3.2 Formal Requirements and Content

According to Article 6 of the LRW, the remote work agreement must be concluded in writing and signed before starting to work. It should be clarified that the violation of these formal requirements will only give rise to an administrative sanction. A further obligation is that a copy of the agreement must be sent to the employment office and the workers' representatives, making this contractual arrangement similar to a proper employment contract[28]. The most significant novelty introduced by the LRW is not the need to conclude the agreement in writing, as this requirement was also provided for by Article 13 of the WS. The innovation lies in the mandatory terms this agreement must include[29], as detailed by Article 7 of the LRW[30]:

a) The means, equipment and tools required to carry out remote work, including consumables and furniture, and an indication of time after which they need to be replaced.
b) The costs the worker could bear for working remotely, as a way to quantify remuneration and the way work should be performed. This latter issue is detailed in the provision contained in the applicable collective agreement.
c) Working hours and rules governing the time spent on-call.
d) The share of remote work as compared to onsite work.
e) The premises to which the remote worker is assigned and where onsite work will be performed.

[28] J. Lahera Forteza, *El acuerdo individual y los requisitos formales del trabajo a distancia regular y estructural, op. cit.,* p. 67.
[29] J. Lahera Forteza, *El acuerdo individual y los requisitos formales del trabajo a distancia regular y estructural, op. cit.,* p. 72.
[30] For a detailed analysis of the content of the remote work agreement, see A. Villalba Sánchez, *El acuerdo de trabajo a distancia tras la entrada en vigor del RD-Ley 28/2020, de 22 de septiembre*, in *Revista Derecho Social y Empresa*, n. 14, 2021, pp. 1-25.

f) The location chosen by the remote worker.
g) The duration of notice periods to shift from remote work to onsite work and vice versa.
h) The employer's monitoring tools.
i) The procedures to follow in the event of technical difficulties affecting remote work.
j) The instructions issued by the company and shared with the worker's legal representative, regarding data protection in the event of remote work.
k) The instructions issued by the company and previously shared with the worker's legal representative, on information security in the event of remote work.
l) The duration of the remote work agreement.

This list is supplemented by the terms established in conventional regulations, as the first Transitory Provision of the LRW grants collective bargaining the ability to include "additional terms in the remote work agreement and other aspects which are in need of regulation". So, the content of this requirement is conditioned by collective autonomy.
Even so, and despite the precision used to define these minimum contents, a number of aspects are not dealt with properly. For example, Article 7 could have been clearer on occupational risk prevention policies, e.g. by imposing the obligation to illustrate how risk assessment and management are to be performed at the time of concluding the agreement. Another aspect, which is poorly regulated, refers to "the place of work". The lack of a relevant definition in Article 7 of the RLW of "the place of work" paves the way for agreements in which a number of places of work can be chosen. In reality, though this provision promotes greater flexibility, it might affect risk prevention strategies and the worker's insurance coverage in the event of an accident, making it difficult to determine its occupational nature. Therefore, it seems advisable that either collective bargaining or the remote work agreement addresses this issue, e.g. giving the opportunity to choose only one location where remote work can be performed.

4. Positive and Negative Aspects of the LRW. A Critical Reflection about Teleworkers' Rights

According to the provisions laid down in the LRW's explanatory memorandum, people who carry out remote work will benefit from the same rights as those granted to onsite workers performing the same tasks.

Chapter III of the LRW draws on the principle of equality and non-discrimination to recognize the rights of teleworkers. This new regulation replicates the criterion already established by Article 13.3 of the WS, although Article 4 of the LRW adds that "they (teleworkers) shall not be placed at a disadvantage in relation to working conditions, remuneration, job stability, working time, training and professional development".
Chapter III is the longest one – eleven articles divided into six sections – and concerns the regulation of different teleworkers' rights. In some cases, reference is made to all workers' general rights, which should be interpreted through the specifics of telework, e.g. the right to training and professional development, risk prevention, digital disconnection and collective rights. In some other cases, the specific rights only these workers are entitled to are detailed – e.g. the employer's obligation to meet the costs of work equipment. In this way, old and new rights coexist[31]. In any event, it can be argued that the innovative character of the LRW lies in the fact that it provides remote workers with legal status.
What follows is an overview of the novelties introduced by this new piece of legislation. Due to word-limit constraints, reference will be only made to the rights which require a more detailed analysis.

4.1 Rights concerning Equipment, its Maintenance and Costs

The new Spanish regulation refers to the economic rights of teleworkers. Article 11 of the LRW provides that teleworkers have "the right to receive work equipment and tools by the company". Article 12 of the LRW also recognizes a series of entitlements in relation to the costs derived from telework. In this respect, it is established that "the company shall cover the costs arising from working remotely, so the worker shall not meet the expenses linked to the equipment used while at work". Thus, the LRW imposes an obligation on the employer, who might be sued in case of a violation of the terms referred to above.
Once again, the ambiguous wording of the rule raises doubts in relation to the expenses that should be borne by the employer, e.g. it is not clear whether both direct costs and indirect ones are included. Direct costs are understood to derive from the purchase or maintenance of IT devices (e.g. computers, printers, microphones), furniture (e.g. chairs and tables) and stationery, whereas indirect costs include electricity, the Internet, telephone and heating bills and the rent. It seems unfair to ask the employer to meet all indirect costs,

[31] M. Rodríguez-Piñeiro Royo and F. J. Calvo Gallego, *Los derechos digitales de los trabajadores a distancia, op. cit.,* pp. 1453-1454.

as most of them are not work-related ones. For this reason, collective bargaining - to which the LRW expressly refers for this matter - or the remote work agreement should set an amount of money which covers only a part of the indirect costs.

4.2 Rights Related to the Use of Digital Media

Another novelty introduced by the new regulation concerns workers' privacy and data protection, in order to limit the employer's powers, particularly as a result of technological advances. One of the characteristics of telework is that work equipment can also serve as a monitoring tool. This way, teleworkers, and the data they produce, will be supervised constantly[32].
Although the working tools belong to the employer, monitoring activities are limited in that the employer's right of property and entrepreneurial freedom cannot be given priority over workers' fundamental right to privacy[33]. Article 17.1 of the LRW establishes that "work supervision through automatic devices shall ensure the right to privacy and data protection", specifying that employer control must be adjusted "to the principles of suitability, necessity and proportionality of means". While introducing some innovations, this clause clearly draws on Consolidated Law No. 3/2018 of 5 December on the Protection of Personal Data and Digital Rights (hereinafter, OL 3/2018). Unlike what is established by Article 87, 89 and 90 OL 3/2018, this provision discriminates between privacy and data protection. Thus, Article 17.1 of the LRW makes advances in relation to the establishment of 'digital' labour law, laying down specific rights[34] which might affect the employment relationship. Despite this progress, this provision confirms the position of those[35] maintaining that the protection provided by the LRW should be broader and not limited to privacy and data protection. In other words, the right to privacy should also include other aspects (confidentiality and protection of reputation, among others).

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[32] J. R. Mercader Uguina, *Derechos fundamentales de los trabajadores y nuevas tecnologías ¿hacia una empresa panóptica?*, in *Relaciones laborales: revista crítica de teoría y práctica*, n. 1, 2001, pp. 1-18 (La ley digital).
[33] R. Poquet Catalá, *El teletrabajo: análisis del nuevo marco jurídico, op. cit.,* p. 172.
[34] In this sense, the LRW is in line with the position of the Spanish Constitutional Court (Judgment of November 30, 2000, No. 1463/2000). According to this ruling, "the function of the fundamental right to privacy in Article 18.1 of the SC is to protect against any invasion that may be carried out in that area of personal and family life (…) The fundamental right to data protection seeks to ensure that person the control over their personal data, its use and destination, in order to prevent its illicit traffic and any damage to their dignity (…)".
[35] F. J. Fernández Orrico, *Trabajo a distancia: cuestiones pendientes y propuestas de mejora (RD-Ley 28/2020, de 22 de septiembre*), *op. cit*., p. 247.

Thanks to this requirement, the principle of proportionality of the EFAT has entered Spanish legislation for the first time, so "if a surveillance tool is used, it must be proportionate to the objective" pursued. This means that the company, prior to installing a monitoring system, must adapt it to its purpose, respecting safety regulations, informing the teleworker and their representatives, and indicating its purpose, foundation and scope, as well as all aspects related to the collection, storage and use of information[36].

The second paragraph of Article 17 of the LRW establishes that the company "may neither require the installation of software or applications on devices owned by the worker, nor its use while working". This state of affairs translates into two vetoes: on the one hand, the company cannot force the teleworker to contribute to paying technological means if used in remote work; on the other hand, the worker cannot download work-related applications or software on personal devices. The aim is to prohibit the employer's unilateral requests to force the teleworker to do this, although no mention is made of a possible agreement to detail these issues. In effect, it would be possible that collective bargaining or the remote work agreement will agree to allow worker to financially contribute to their own tools[37]. This possibility is provided for by the LRW, though it seems more realistic to define this aspect in collective bargaining than in a remote work agreement. The asymmetric nature of the employment relationship does not ensure that consent is provided in a free and informed way[38].

In order to strike a balance between employees' and employers' rights, it is necessary to establish clear rules regarding the use of IT devices. These rules could be specified in collective agreements, although the adoption of codes of conduct is also welcome. What matters is that the employer's monitoring mechanisms and the way the company's IT tools can be used by the teleworker – e.g. for both business and personal use – should be clarified properly.

4.3 Rights related to Working Time

One of the aspects distinguishing telework from onsite work is the flexibility through which tasks can be organised[39]. This way of working best epitomizes

[36] R. Poquet Catalá, *El teletrabajo: análisis del nuevo marco jurídico, op. cit.,* p. 183.

[37] See, A. Todolí Signes, *Derecho a la intimidad y a la desconexión digital en el teletrabajo*, in VV.AA. M. Rodríguez-Piñeiro Royo and A. Todolí Signes (editors), *Trabajo a distancia y teletrabajo: análisis del marco normativo vigente, op. cit.,* pp. 232-234.

[38] According to Article 6 of OL 3/2018, for the consent of the interested party to exist, their free, specific, informed and unequivocal will must be provided.

[39] J. Thibault Aranda, *La ordenación del tiempo de trabajo*, in *El teletrabajo. Análisis jurídico laboral*, Madrid, 2001, Consejo Económico y Social, pp. 67-69.

workers' 'hyper-flexibility' in current digital markets, as they are provided with autonomy when arranging their work schedule. In this connection, Article 13 of the LRW recognizes that "as long as compliance with mandatory on-call and rest time is ensured, people working remotely enjoy flexibility when organizing their schedule". This way, not only does telework challenge the notion of 'a space of work', but also that of 'working time'. Unlike the past, when scholars were worried teleworkers did not work beyond standard hours, the focus now is on tackling the effects of: time flexibility, 'hyperconnectivity' or 'hyperconnection', the fact of being 'on-call' and other issues in terms of work-life balance.

While a number of advantages exist when the teleworker is given the opportunity to arrange their own working time, some negative aspects might arise, e.g. work is also carried out outside standard hours, which blur the boundaries between work and family life[40] and affect the health of teleworker. In fact, Article 16 of the LRW requires that risk assessment and the planning of preventive measures take into account "the distribution of the working day, on call time and the right to breaks and disconnections". Thus, the new LRW contains three provisions dealing with working time organisation, which are intended to avoid the negative effects of excessive flexibility. These provisions regulate 'conditional' flexible hours, the registration of working time and the right to disconnect.

In relation to the first aspect, Article 13 of the LRW allows for flexible hours, although this flexibility will depend on what is established in the remote work agreement and in collective bargaining. In this sense, Article 7 of the LRW establishes the need for the agreement to contain "workers' working hours and rules governing on-call time". This way, some guidelines are provided to the parties which, albeit flexible, can help distinguish between working time and rest periods.

Article 13 of the LRW specifies that the implementation of flexible hours should take into account "mandatory on-call time" and "work and rest periods". Consequently, the teleworker will only be able to manage the hours in which he must not be connected, respecting, in any case, the limits of the duration of working day -maximum of 9 hours- and statutory rest periods, i.e. 12 consecutive hours, plus a day off per week. The new Spanish regulation on telework limits both the freedom of the worker to self-manage working time

[40] See, Véase, Eurofound-ILO, *Trabajar en cualquier momento y en cualquier lugar: consecuencias en el ámbito laboral*, Genova, 2019. It is available at the following link: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_712531.pdf.

and the power of the employer to make use of the worker's on-call time in order to prevent cases of "hyper-connection".
Furthermore, pursuant to Article 14 of the LRW, teleworkers are under the obligation to have their working time registered, as established by Article 39.4 of the WS[41]. In other words, the employer must "report the hours worked by the teleworker, by also taking into account flexible hours". In relation to this, one aspect that needs attention is that registration should take place electronically, particularly considering the nature of telework. However, not all IT registration tools have the same reliability, and in some cases, information can be manipulated. Consequently, choosing the proper registration system is relevant, as this decision will also affect workers' rights and obligations.
Finally, Article 18 of the LRW sets forth that "people who work remotely, particularly through telework, have the right to disconnect". This right is granted in Article of OL 3/2018, though the LRW specifies its application in the event of telework, as people working remotely are at particular risk. Unlike the generic wording of OL 3/2018, Article 18 of the LRW imposes "the employer's obligation to ensure disconnection from IT devices and work-related communication during nonworking hours". The way the provision is formulated regards disconnection as an employer's duty and not as a worker's choice – thus moving away from the approach of OL 3/2018. In this way, by putting this obligation in writing, the employer is responsible for ensuring the fulfillment of this right[42]. In all likelihood, lawmakers might have taken this stance as a result of the criticisms levelled by legal scholars against Article 88 of OL 3/2018[43].

4.4 The Right to Occupational Safety and Health

One of the most important sections of the LRW concerns the regulation of the right to health and occupational safety and health (hereinafter, OSH) of remote workers. Unlike Article 13.4 of the WS – which merely recognized this right – the new regulation details how remote workers' health and safety should be protected. Both pieces of legislation were based on the EFAT and the ILO's Convention no. 177, though in the most recent provision an attempt can be

[41] Ministerio de Trabajo, Migraciones y Seguridad Social, *Guía sobre el registro de jornada*, 2019, available at the following link: https://www.mites.gob.es/ficheros/ministerio/GuiaRegistroJornada.pdf
[42] M. Rodríguez-Piñeiro Royo and F. J. Calvo Gallego, *Los derechos digitales de los trabajadores a distancia, op. cit.,* p.1466.
[43] Among other authors, see B. Torres García, *Sobre la regulación legal de la desconexión digital en España: valoración crítica*, in *Revista internacional y comparada de relaciones laborales y derecho del empleo*, vol. 8, n. 11, 2020, pp. 239-261.

found to adapt general OSH rules to remote work. In this respect, Article 15 of the LRW sets forth that "people who work remotely have the right to adequate OSH protection, in accordance with Law No. 31/1995 of 8 November on Occupational Risk Prevention (hereinafter, LRPL). This provision replicates Article 13.4 of the WS, so it might not be useful in practical terms as it does not make specific reference to remote work. Consequently, it is Article 16 of the LRW and the terms therein which acquire relevance, in that they provide more details about the implementation of the duty of prevention.

The first section of Article 16 of the LRW states the need for both risk assessment and preventive planning to attend to "the 'risks' characteristic of this type of work, paying attention to psychosocial, ergonomic, organizational factors and accessibility. In particular, the distribution of working time, on-call hours and periods of breaks and disconnections must be taken into account". When engaging in telework, some new issues arise which do not affect onsite workers. Many of these new risks will be the result of the worker's (personal and professional) characteristics, the workplace, the equipment used, the distribution of working time and the management of the workload. Thus, the provisions of Article 16 of the LRW seem appropriate, since for the first time specific reference is made to the obligation to evaluate risk factors inherent to this way of working, which might not be detected through traditional prevention systems.

Furthermore, Article 16 of the LRW also establishes rules regarding the evaluation of the workplace. Thus, it provides that evaluation may only concern the "area where work takes place". And if an expert's check is necessary, a written report shall be issued explaining the reasons for this additional inspection, while the worker's consent shall be sought if their domicile is chosen as the main place of work. In reality, this provision promotes self-evaluation by the teleworker, by establishing in its final paragraph that "if consent is not granted, the assessment by the company may be carried out based on the determination of the risks derived from the information collected from the worker according to the instructions issued by the prevention service".

Accordingly, risk self-assessment is prioritized over that which could be carried out by experts. In other words, the right to privacy is prioritized over the right to health. However, while ensuring privacy, it remains to be seen whether this approach might also safeguard workers' physical and moral integrity. In this sense, a report by the *Unión General de Trabajadores* (*UGT*) – which participated in the adoption of a previous agreement on which the current LRW is based – confirms that doubts exist about this option. According to the report, self-assessment is not effective, and this preference "raises problems of legal

security in relation to the corporate responsibility derived from an inadequate preventive action based on this approach"[44].

One issue that the LRW disregards is to establish the formal requirements to be followed by a worker when they do not allow the expert to inspect the location chosen as a place of work. It is not known whether this refusal should be in writing and whether a reason is needed. It will be up to case law, legal opinion and in some cases, collective bargaining, to deal with these aspects. Given the existing legal void, if the request to enter the worker's house is denied, this refusal should be formalized in writing and motivated. In most cases, this refusal is justified by privacy issues, particularly when other family members live in the house elected as a place of work and the latter is not separated from other communal areas[45]. It should be noted that, once again, the misleading wording used by the LRW leads to uncertainty.

5. Conclusions and Unsolved Issues

The benefits brought about by the LRW are there for all to see, particularly because this provision has filled a legal vacuum concerning the regulation of remote work, especially telework. However, this piece of legislation presents a number of shortcomings and it is not very innovative. One example of this is the section relative to the rights of teleworkers, which, on many occasions, replicates the rules laid down in the WS[46] and OL 3/2018.

According to the signatory parties, one significant innovation contained in the LRW concerns workers' economic rights (Article 11 and 12), as well as the set of prevention measures targeting telework (Article 15 and 16). As for this last right, authoritative scholars[47] point out that there are some aspects which are poorly regulated. Indeed, this legislation fails to properly address aspects like workers' involvement in risk assessment and prevention planning, the training needed to carry out this task – particularly self-assessment – and the legal

[44] UGT Research Department, *La nueva regulación del teletrabajo: el Real Decreto Ley 28/2020, de 22 de septiembre, de trabajo a distancia. Entorno, exposición y análisis*, in *Estudios*, n. 6, 2020, p. 30. It is available in the following link: https://ugtficabcn.cat/calaix/documentacio/teletreball/La_nueva_regulacion_del_teletrabajo.pdf

[45] L. Mella Méndez, *Valoración crítica del RD-ley 28/2020, en especial sobre la protección de la salud en el trabajo a distancia,* in VV.AA. M. Rodríguez-Piñeiro Royo and A. Todolí Signes (editors), *Trabajo a distancia y teletrabajo: análisis del marco normativo vigente, op. cit.,* pp. 196-197.

[46] See Article 9 and 10 on the right to training and career advancement; Article 14 concerning the right to register working time; Article 19 regarding workers' collective rights; Articles 20 to 22 about digital rights; and Article 18 dealing with digital disconnection.

[47] L. Mella Méndez, *Valoración crítica del RD-ley 28/2020, en especial sobre la protección de la salud en el trabajo a distancia, op. cit,* p. 199.

classification of work-related accidents taking place at one's home. In reality, the generic reference of Article 15 LRW to the LRPL shows that basically the new regulation of telework draws on the legal framework safeguarding onsite workers rather than providing for an ad-hoc prevention system for teleworkers.

For all these reasons, one might agree with those[48] arguing that the LRW lacks a truly innovative character[49] and its implementation might give rise to some problems, which should be solved by collective bargaining.

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[48] J. M. Goerlich Peset, *La regulación del trabajo a distancia. Una reflexión general*, *op. cit.*, p. 48-49.
[49] J. Thibault Aranda, *Toda crisis trae una oportunidad: el trabajo a distancia*, in *Trabajo y Derecho: nueva revista de actualidad y relaciones laborales* n. 12, 2020, p. 19 (La ley digital).

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Occupational Safety and Health and Workplace Health Promotion: an Essential Area for a Recovery from Covid-19 Based on Decent Work

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Abstract

Against the rapid increase in psychosocial risks around the world brought by the COVID-19 pandemic, the workplace has become an ideal venue to address emerging psychosocial risks to protect the health and well-being of all workers. The paper aims to study how the promotion of Occupational Safety and Health measures could contribute to the recovery from COVID-19, with a particular focus on Workplace Health Promotion and Well-being at Work. The analysis will also focus on the inclusion of safe and healthy working conditions in the ILO's Framework about Fundamental Principles and Rights at Work.

Keywords: *Occupational Safety and Health, Workplace Health Promotion, Well-being at Work.*

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1. Introduction

The COVID-19 pandemic has brought to the fore the question of Occupational Health and Safety (OSH) and its central role in Decent Work. The *ILO Centenary Declaration* adopted in 2019, at the 108th session of the International Labour Conference, declared that "safe and healthy working conditions are fundamental to decent work". The Declaration also established that "all workers should enjoy adequate protection in accordance with the Decent Work Agenda, taking into account: […] safety and health at work"[1].

However, this was not the first time that the International Labour Organization (ILO) pointed out the importance of OSH for Decent Work. In fact, safe working conditions are inherent to Decent Work. According to the definition of Decent Work used by the ILO, "Decent work sums up the aspirations of people in their working lives. It involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families […]"[2]. Therefore, there can be no Decent Work without security at the workplace. The notion of Decent Work does not end at access to employment. It requires work to be provided with rights and in healthy and safe conditions[3]. In other words, Decent Work implies safe work[4]. In 2003, the ILO established that OSH had been a central issue ever since the organization's creation in 1919 and that it continued to be a fundamental requirement for achieving the objectives of the Decent Work Agenda[5]. These statements are even more significant today, as ensuring safety and health at work is indispensable in the management of the pandemic and the ability to resume work[6].

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[1] *ILO Centenary Declaration for the Future of Work*, adopted by the International Labour Conference at its 108th Session, Geneva, 21 June 2019: Available at: https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_711674.pdf

[2] http://www.oit.org/global/topics/decent-work/lang--en/index.htm

[3] J. L. Gil y Gil, *El trabajo decente como objetivo de desarrollo sostenible*, in *Lex Social. Revista jurídica de los Derechos Sociales*, vol. 10, n. 1, 2020, p. 164. Available at: https://doi.org/10.46661/lexsocial.4539

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2. Workplace Health Promotion and Well-being at Work

The concept of health promotion comes from the field of Public Health. The *Ottawa Charter for Health Promotion*, adopted by the World Health Organization (WHO) in 1986, defines health promotion as "the process of enabling people to increase control over, and to improve, their health". The Charter recognized the workplace as one of the key components for successful health promotion[7]. Hence, there is an important connection between Public Health and work. Specifically, Public Health problems can impact on workplaces, as happened during the COVID-19 pandemic, because economic activities needed to stop for Public Health reasons. At the same time, working conditions are one of the main factors that condition Public Health.

In 1997, the European Network for Workplace Health Promotion (ENWHP) developed the *Luxembourg Declaration on Workplace Health Promotion in the European Union*, in which Workplace Health Promotion is defined as "a modern corporate strategy which aims at preventing ill-health at work (including work-related diseases, accidents, injuries, occupational diseases and stress) and enhancing health-promoting potentials and well-being in the workforce". The Luxembourg Declaration stressed that OSH alone cannot address all the challenges for the working world in the 21st century, i.e., globalization, unemployment or ageing. For that reason, the complementary concept of Workplace Health Promotion is extremely important.

Following that approach, the ILO has pointed out that "safety and health at work does not merely mean preventing workers from being exposed to workplace risks and hazards and to protect them against these. It also involves being proactive in promoting healthy lifestyles and practices. Using the workplace as a platform to raise awareness of healthy lifestyles can help workers and reach out to their families and the community as a whole"[8]. The ILO has been using a broad concept of OSH since the first session, in 1950, of the Joint ILO/WHO Committee on Occupational Health. The Committee established that "Occupational health should aim at: the promotion and maintenance of the highest degree of physical, mental and social well-being of workers in all occupations; the prevention amongst workers of departures from health caused by their working

training/events-meetings/world-day-safety-health-at-work/WCMS_742463/lang--en/index.htm.

[7] ILO, *Improving health in the workplace: ILO's framework for action*, *cit.*, p. 15.

[8] ILO, *Health and life at work: A basic human right*, Geneva, 2009, p. 14. Available at: https://www.ilo.org/safework/info/publications/WCMS_108686/lang--en/index.htm

conditions; the protection of workers in their employment from risks resulting from factors adverse to health; the placing and maintenance of the worker in an occupational environment adapted to his physiological and psychological capabilities; and, to summarize: the adaptation of work to man and of each man to his job'"[9]. From that definition, we can conclude that OSH is not only about preventing hazards and professional diseases, but also about promoting physical, mental and social well-being at work.

The ILO has been dealing with Workplace Health Promotion for many years. In fact, it is one of their areas of work within the Department of Occupational Safety and Health. More specifically, in 2002 the ILO published the first edition of the *SOLVE training package: Integrating health promotion into workplace OSH policies*, as a direct response to the needs of ILO constituents to protect workers against emerging psychosocial risks and to promote their health and well-being in the workplace. In 2012, the ILO updated and enlarged that first version and published a second edition of the SOLVE training package[10].

In recent years, different phenomena, such as globalization and digitalization, have changed the way we work. The effects of those changes on OSH are very important because new risks in the workplace, for example psychosocial risks, have emerged[11]. The new version of SOLVE was designed to offer an integrated workplace response for dealing with stress, violence, tobacco use and exposure to second-hand smoke, drugs and alcohol abuse, and HIV and AIDS. SOLVE also introduced an innovative approach whereby workers' health, safety and their well-being became an integral part of organizational development and economic sustainability, by contributing to productivity and competitiveness in the globalized world economy[12].

Against the rapid increase in psychosocial risks around the world, the workplace has become an ideal venue to address emerging psychosocial risks to protect the health and well-being of all workers. In this context, in addition to being considered in risk assessment in the same way as other risks, developing preventive measures by incorporating health promotion

[9] B. O., Alli, *op. cit.*, p. 22.

[10] ILO, *SOLVE: integrating health promotion into workplace OSH policies: trainer's guide*, Geneva, 2012. Available at: https://www.ilo.org/global/topics/safety-and-health-at-work/resources-library/training/WCMS_178438/lang--en/index.htm

[11] ILO, *Emerging risks and new patterns of prevention in a changing world of work*, Geneva, 2010. Available at: https://www.ilo.org/safework/info/promo/WCMS_123653/lang--en/index.htm

[12] ILO, *SOLVE: integrating health promotion into workplace OSH policies: trainer's guide*, *cit.*, p. 6.

strategies in the workplace is key to dealing with those risks[13]. Traditional OSH approaches are not enough to fight against new challenges. In consequence, we need new approaches that focus on prevention to avoid the negative consequences of psychosocial risks and work-related stress. Workplace Health Promotion has proven to be a very effective one. SOLVE offers the tools for the design of such a policy and for taking immediate action to reduce or eliminate the emerging risks associated with these problems in the workplace[14].

Workplace Health Promotion measures contribute to enabling workers to cope more effectively with psychosocial risks and work-related, personal or family problems that may impact their well-being and work performance, such as stress, violence or the abuse of alcohol and drugs. They also help workers to manage their chronic conditions and to be more proactive in their health care in order to improve their lifestyles, the quality of their diet and sleep, and their physical fitness[15].

For the ILO, an effective Workplace Health Promotion programme complements OSH measures and should be integrated into the OSH management system of the organization[16]. The integration of Workplace Health Promotion into OSH management has been identified as a success factor for the implementation of those programmes[17]. Workplace Health Promotion aims to complement, but not to replace, workplace risk management. On the contrary, risk management is an essential foundation for a successful Workplace Health Promotion programme[18]. However, Workplace Health Promotion is not only about meeting the legal requirements for health and safety. It also means that employers actively help their staff to improve their own general health and well-being[19]. For the ILO, safety and health does not only mean preventing workers from

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[13] ILO, *SOLVE: integrating health promotion into workplace OSH policies: trainer's guide*, *cit.*, p. 11.

[14] ILO, *SOLVE: integrating health promotion into workplace OSH policies: trainer's guide*, *cit.*, p. 6.

[15] ILO, *SOLVE: integrating health promotion into workplace OSH policies: trainer's guide*, *cit.*, p. 12.

[16] ILO, *SOLVE: integrating health promotion into workplace OSH policies: trainer's guide*, *cit.*, p. 12.

[17] EU-OSHA, *Motivation for employers to carry out workplace health promotion. Literature review*, Luxembourg: Publications Office of the European Union, 2012, p. 11. Available at: https://osha.europa.eu/en/publications/literature_reviews/motivation-for-employers-to-carry-out-workplace-health-promotion/view

[18] EU-OSHA, *Motivation for employers to carry out workplace health promotion. Literature review*, *cit.*, p. 9.

[19] EU-OSHA, *Workplace Health Promotion for Employees*, FACTS 94, 2010. Available at: http://osha.europa.eu/en/publications/factsheets/94

being exposed to workplace risks and protecting them. From a broad perspective, OSH also involves being proactive in promoting healthy lifestyles and practices. Therefore, health promotion in the workplace is an integral part of OSH practice[20].

There is evidence of a relationship between poor employee well-being and an increased risk of work-related accidents and occupational diseases. By addressing the factors and psychosocial risks that affect employees' well-being, Workplace Health Promotion programmes can contribute, indirectly, to reducing the costs of work-related accidents and occupational diseases[21]. In consequence, health promotion should be added to OSH measures to prevent those kinds of problems.

In any case, it is necessary to take into account that the implementation and the participation in health promotion measures is voluntary for employers and for employees. Employees cannot be forced to change their health behaviours. However, Workplace Health Promotion programmes can encourage employees to make the decision of changing their habits[22]. Indeed, Workplace Health Promotion is effective when employers, employees and their representatives are involved[23].

For that reason, the SOLVE training course uses the social dialogue approach to promote the implementation of successful workplace and community initiatives, with the involvement of employers, workers, governments, public services and NGOs[24]. Workplace Health Promotion measures should adopt a collective point of view and focus on the improvement of working conditions, the working environment and work organization, as well as on family, community and social contexts. In consequence, Workplace Health Promotion is the combined effort of employers, workers, their communities and society to improve the health and well-being of women and men at work[25].

The ILO has pointed out that there is a growing trend to integrate health promotion into OSH programmes as an additional element to complement traditional programmes for the prevention of work-related

[20] ILO, *Health and life at work: A basic human right*, *cit.*, pp. 10 and 14.
[21] EU-OSHA, *Motivation for employers to carry out workplace health promotion. Literature review*, *cit.*, p. 20.
[22] EU-OSHA, *Motivation for employers to carry out workplace health promotion. Literature review*, *cit.*, p. 9.
[23] ILO, *Improving health in the workplace: ILO's framework for action*, *cit.*, p. 4.
[24] ILO, *SOLVE: integrating health promotion into workplace OSH policies: trainer's guide*, *cit.*, p. 8.
[25] ILO, *SOLVE: integrating health promotion into workplace OSH policies: trainer's guide*, *cit.*, p. 12.

accidents and occupational diseases[26]. However, even if during recent years many enterprises or organizations have been undertaking health promotion activities in the workplace, in the vast majority of cases, these measures were adopted in the framework of corporate social responsibility without coordination with OSH measures. Indeed, Workplace Health Promotion is considered a strategic element of corporate social responsibility[27].

In this context, the ILO considers that when integrated into OSH policies, the potential for Workplace Health Promotion to improve working life increases[28]. In consequence, to reach its full potential, we should move from the field of corporate social responsibility to the promotion of the inclusion of Workplace Health Promotion into the employer's duty to protect health and safety. By doing so, Workplace Health Promotion would no longer be voluntary, but would become an obligation both for employers and for employees.

The ILO's framework for improving health in the workplace is not something totally different from the actions that the organization has been taking in the field of OSH since its creation in 1919. On the contrary, the principles of this approach are based on the *Occupational Safety and Health Convention*, 1985 (No. 155) and its accompanying Recommendation (No. 164) as well as in the *Occupational Health Services Convention* (No. 161) and its accompanying Recommendation (No. 171)[29]. In fact, the *Occupational Health Services Convention* establishes that "the term occupational health services means services entrusted with essentially preventive functions and responsible for advising the employer, the workers and their representatives in the undertaking on (i) the requirements for establishing and maintaining a safe and healthy working environment which will facilitate optimal physical and mental health in relation to work; (ii) the adaptation of work to the capabilities of workers in the light of their state of physical and mental health". Therefore, they can also play an important advisory role in the implementation of Workplace Health Promotion programmes.

Among other reasons, we can say that the workplace is an important setting for health promotion because it is possible to use the structures

[26] ILO, *Emerging risks and new patterns of prevention in a changing world of work*, *cit.*, p. 14.

[27] ENWHP, *Making the Case for Workplace Health Promotion. Analysis of the effects of WHP*, 2004, p. 55. Available at: https://www.enwhp.org/resources/toolip/doc/2018/04/24/report_business_case_01.pdf

[28] ILO, *Improving health in the workplace: ILO's framework for action*, *cit.*

[29] ILO, *SOLVE: integrating health promotion into workplace OSH policies: trainer's guide*, *cit.*, p. 4.

that already exist in it for meeting OSH requirements, to develop health promotion programmes[30]. Furthermore, given the important connections between OSH and health promotion it is advisable to use and expand the already existing structures in the field of OSH, for example occupational health services, to incorporate Workplace Health Promotion measures within organizations. It should be easier to use these existing structures than to create entirely new ones[31].

3. Workers' Well-being and the Recovery from COVID-19

The COVID-19 pandemic has created not only a health crisis, but also a social and economic one. The main objective has been to prevent the propagation of COVID-19 in the workplace. The measures taken by different governments all over the world -mainly lockdown- have had an unprecedented impact on the labour market. The main dilemma has been to decide when workplaces should remain closed and when they can be reopened.

In May 2020, the ILO created a four-pillar policy framework, based on international labour standards for tackling the socio-economic impact of the COVID-19 crisis. Pillar 3 is about "Protecting workers in the workplace". The ILO has recognized the importance of protecting workers in the workplace, by strengthening OSH measures, adapting work arrangements (e.g. teleworking), preventing discrimination and exclusion, providing health access for all and expanding access to paid leave[32].

The *Resolution concerning a global call to action for a human-centred recovery from the COVID-19 crisis that is inclusive, sustainable and resilient*, adopted by the International Labour Conference during its 109th Session, on 17 June 2021, includes the protection of workers among the actions needed for recovery from COVID-19. Governments and employers' and workers' organizations have committed to providing all workers with adequate protection by reinforcing the respect of international standards, especially those related to the areas most affected by COVID-19, such as safety and health at work, with a particular focus on the challenges presented by the

[30] EU-OSHA, *Workplace Health Promotion*. OSH Wiki. Available at: http://oshwiki.eu/wiki/Workplace_Health_Promotion

[31] ILO, *SOLVE: integrating health promotion into workplace OSH policies: trainer's guide*, *cit*., p. 21.

[32] ILO, *A policy framework for tackling the economic and social impact of the COVID-19 crisis*. ILO Policy brief, 2020. Available at: https://www.ilo.org/global/topics/coronavirus/impacts-and-responses/WCMS_745337/lang--en/index.htm

COVID-19 pandemic[33]. As in the *ILO Centenary Declaration*, the Resolution again recognizes that safe and healthy conditions are fundamental to Decent Work. According to the Resolution, OSH measures could be strengthened through cooperation with public institutions, private enterprises, employers, workers and their representatives for the provision of tailored practical guidance, support for risk management, the introduction of appropriate control and emergency preparedness measures, measures to prevent new outbreaks or other occupational risks and compliance with health measures and other COVID-19-based rules and regulations[34].

The COVID-19 pandemic has impacted on workers' health in different ways. Many of them lost their jobs due to the crisis, but many others continue to work. In these cases, the priority has been to guarantee that work can be performed safely[35]. However, there are important differences between the working conditions of frontline workers who provide essential services, such as care workers, cleaners, or those involved in the production and sale of basic goods, and those workers whose job can be performed remotely.

On the one hand, frontline workers are particularly exposed to the risk of infection by COVID-19. In consequence, risk control measures need to be specifically adapted to the needs of these workers[36]. The implementation of adequate safety and health measures, such as preventive health protocols, was key to protecting them. Nevertheless, the risk of contagion is not the only risk to which frontline workers are exposed. Other occupational risks, particularly psychosocial ones, have been amplified by COVID-19. During the pandemic, frontline workers, particularly health workers, have been working longer hours with heavier workloads and without enough time for rest. This situation can result in chronic fatigue[37]. Moreover, the level of stress experienced by health

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[33] ILO, *Resolution concerning a global call to action for a human-centred recovery from the COVID-19 crisis that is inclusive, sustainable and resilient*. International Labour Conference – 109th Session, 2021, p. 4. Available at: https://www.ilo.org/ilc/ILCSessions/109/reports/texts-adopted/WCMS_806092/lang--en/index.htm

[34] ILO, *Resolution concerning a global call to action for a human-centred recovery from the COVID-19 crisis that is inclusive, sustainable and resilient*, *cit.*, pp. 4-5.

[35] ILO, *A policy framework for tackling the economic and social impact of the COVID-19 crisis*, *cit.*, p. 10.

[36] ILO, *In the face of a pandemic: Ensuring safety and health at work*, *cit.*, p. 15.

[37] ILO, WHO, *COVID-19: Occupational health and safety for health workers*, Interim guidance, 2 February 2021. Available at: https://www.who.int/publications/i/item/WHO-2019-nCoV-HCW_advice-2021.1

workers could also derive from strict OSH measures aimed at preventing infection[38]. The ILO and the WHO came to the conclusion that these risks should also be addressed[39].

On the other hand, the situation for those workers who can perform their job remotely is totally different. Remote working is extremely effective in the fight against COVID-19 as it allows employers to remove workers from the risk of contagion in the workplace. However, telework raises other concerns related to the well-being of working people[40]. Working conditions and arrangements have changed considerably during the last year and these changes have brought new psychosocial challenges for the health and well-being of workers[41]. Even if psychosocial and ergonomic problems may seem secondary when compared to the hazards presented by COVID-19 itself, we cannot undervalue them[42]. If psychosocial risks are not correctly managed, they can increase stress levels and lead to physical and mental health problems[43].

In this context, the ILO has elaborated the *Managing work-related psychosocial risks during the COVID-19 pandemic* guide to provide employers and managers with key elements to consider when assessing psychosocial risks and implementing preventive measures to protect health and well-being in the context of the COVID-19 pandemic. To this end, the protection of workers' mental health should be integrated into workplace OSH management systems, emergency preparedness and response plans and return-to-work plans developed in response to the COVID-19 crisis[44].

Workplace hazard identification and risk assessment should not only focus on the risk of exposure to the virus, but they also have to include all the different hazards and risks arising from the work environment, including psychosocial factors[45]. Employers have the responsibility, in consultation with workers, to take measures to manage psychosocial risks

[38] ILO, *In the face of a pandemic: Ensuring safety and health at work*, *cit.*, p. 20.
[39] ILO, WHO, *COVID-19: Occupational health and safety for health workers*, *cit.*, p. 1.
[40] ILO, *Work in the time of COVID*. Report of the Director-General. International Labour Conference. 109th Session, 2021 (ILC.109/I/B), International Labour Office, Geneva, 202, P. 14. Available at: https://www.ilo.org/ilc/ILCSessions/109/reports/reports-to-the-conference/WCMS_793265/lang--en/index.htm
[41] ILO, *Managing work-related psychosocial risks during the COVID-19 pandemic*, Geneva, 2020, p. 6. Available at: https://www.ilo.org/global/topics/safety-and-health-at-work/resources-library/publications/WCMS_748638/lang--en/index.htm
[42] ILO, *Work in the time of COVID*, *cit.*, p. 14.
[43] ILO, *In the face of a pandemic: Ensuring safety and health at work*, *cit.*, p. 6.
[44] ILO, *Managing work-related psychosocial risks during the COVID-19 pandemic*, *cit.*, p. 9.
[45] ILO, *Managing work-related psychosocial risks during the COVID-19 pandemic*, *cit.*, p. 9.

that may arise due to new working conditions[46]. Therefore, the risk assessment process in the context of COVID-19 should identify any hazard related to OSH measures or to new work processes adopted to prevent contagion. Psychosocial risk factors (for example, long working hours, reduced rest periods, increased workload and pressure, violence and harassment), ergonomics, chemical and other hazards should all be taken into account. Also, external factors affecting mental health and well-being, such as fear (of being infected, losing one's job, seeing revenues reduced and experiencing a lower quality of life) and social isolation should be considered in the risk assessment process[47]. By doing a correct hazard identification and risk assessment, it would be possible to adopt appropriate measures adapted to the workplace and to workers' needs[48].

As pointed out by the ILO in the SOLVE training package, in times of global financial and social crisis and workplace change, coping successfully with psychosocial risks in the workplace is essential for protecting the health and well-being of workers, while enhancing productivity[49]. This statement can be extrapolated to the current situation. As we have seen, the rapid spread of COVID-19 has also brought about a rapid spread of psychosocial risks, both among frontline workers and remote workers. Therefore, OSH should also focus on the prevention and mitigation of psychosocial risks and mental health problems during the COVID-19 pandemic, and not only on the prevention of contagion. The ILO has identified ten areas for managing work-related psychosocial risks during the COVID-19 crisis, which are the following: environment and equipment; workload, work-pace and work-schedule; violence and harassment; work-life balance; job security, management leadership; communication, information and training; health promotion and prevention of negative coping behaviours; social support and psychosocial support[50].

Psychosocial risks and work-related stress are associated with unhealthy behaviours, such as heavy alcohol consumption, poor eating habits, less frequent physical exercise and irregular sleep patterns. Therefore, Workplace Health Promotion is very important for avoiding the adoption

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[46] ILO, *Anticipate, prepare and respond to crises: Invest now in resilient OSH systems*, Geneva, 2021, p. 78. Available at: https://www.ilo.org/global/topics/safety-and-health-at-work/events-training/events-meetings/safeday2021/lang--en/index.htm

[47] ILO, *Managing work-related psychosocial risks during the COVID-19 pandemic*, *cit.*, p. 10.

[48] ILO, *Managing work-related psychosocial risks during the COVID-19 pandemic*, *cit.*, p. 11.

[49] ILO, *SOLVE: integrating health promotion into workplace OSH policies: trainer's guide*, *cit.*, p. V.

[50] ILO, *Managing work-related psychosocial risks during the COVID-19 pandemic*, *cit.*, p. 11.

of unhealthy behaviors to cope with the increased stress related to the COVID-19 pandemic[51]. The employer's duty to protect health and safety includes protection from psychosocial risks. As Workplace Health Promotion is key to managing psychosocial risks and work-related stress in the workplace, we stand for its inclusion as part of the employer's duty to protect health and safety. Avoiding situations that can favour the appearance of psychosocial risks, such as unhealthy habits, means fighting psychosocial risks at the source. As those risks could cause mental and physical problems, by avoiding their materialization in the workplace, the employer would be complying with their duty to protect health and safety, if we understand this duty in a broad sense. Therefore, the employer's duty to protect health and safety may also include measures for avoiding the adoption of unhealthy behaviours that can lead to psychosocial risks.

The guide elaborated by the ILO includes some actions that could be considered by employers to promote workers' health and well-being, such as revising working-time arrangements (including shifts, overtime and working hours); informing workers about how to adopt a routine for healthy sleeping, including the use of dedicated apps; encouraging workers to exercise regularly and providing information on how to exercise at home; and encouraging workers to maintain healthy habits by taking regular breaks[52]. However, even if the implementation of these kinds of actions could be very effective for coping with the spread of psychosocial risks caused by the COVID-19 pandemic, as we have already said, the implementation and the participation in those actions is voluntary for employers and for employees.

Psychosocial support is also a very important action for managing work-related psychosocial risks during the COVID-19 pandemic. In workplaces where adequate psychosocial support is provided, workers experiencing work-related stress and other mental health issues are more likely to seek it out. For that reason, the ILO's guide suggested some actions, such as the integration of psychosocial support into the workplace COVID-19 response plan[53]. Following the guide, the Resolution adopted by the International Labour Conference in June 2021 included psychosocial support as one of the measures that should be provided for workers at a higher risk of exposure to COVID-19 and for those at a greater risk of negative health impacts, such as frontline workers[54]. However, the

[51] ILO, *Managing work-related psychosocial risks during the COVID-19 pandemic*, *cit.*, p. 26.
[52] ILO, *Managing work-related psychosocial risks during the COVID-19 pandemic*, *cit.*, p. 27.
[53] ILO, *Managing work-related psychosocial risks during the COVID-19 pandemic*, *cit.*, p. 29.
[54] ILO, *Resolution concerning a global call to action for a human-centred recovery from the COVID-19 crisis that is inclusive, sustainable and resilient*, *cit.*, p. 4.

Resolution does not mention that psychosocial support is also important for remote workers. Even if it is not mentioned, psychosocial support should also become important for those workers, as the Resolution also includes the introduction, utilization and adaptation of teleworking and other new work arrangements among the actions aimed at protecting all workers[55].

The report published by the ILO on the occasion of the World Day for Safety and Health at Work 2021 includes the adoption of provisions for addressing associated OSH risks, such as psychosocial risks, among the necessary elements to build strong and resilient OSH systems, but it does not mention the importance of promoting workers' health and well-being[56]. However, the promotion of workers' well-being and the management of psychosocial risks are essential for a human-centered recovery from the COVID-19 crisis based on Decent Work. To protect workers' health from the consequences of the COVID-19 pandemic, it is necessary to promote health and well-being. Therefore, the process of recovery from the COVID-19 crisis represents an opportunity to foment the inclusion of Workplace Health Promotion in OSH policies. Even if those kinds of measures already exist in some companies, their integration into OSH policies would increase their potential to promote workers' well-being. It also represents an opportunity to promote other measures, such as psychosocial support, in all workplaces and for all workers.

Social partners have had an important role in the implementation of measures for protecting workers' health in the recovery from COVID-19. Social dialogue between employers or their organizations and workers' organizations has led to joint responses to COVID-19[57]. To ensure the efficient management of psychosocial risks, workers and their representatives should be involved in the whole process: they should actively participate in the identification of hazards and collaborate in the development and implementation of preventive and control measures[58]. Therefore, social partners also need to play an important role in the process of including Workplace Health Promotion in OSH policies.

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[55] ILO, *Resolution concerning a global call to action for a human-centred recovery from the COVID-19 crisis that is inclusive, sustainable and resilient*, *cit.*, p. 5.

[56] ILO, *Anticipate, prepare and respond to crises: Invest now in resilient OSH systems*, *cit.*

[57] ILO, *Employers and workers negotiating measures to prevent the spread of COVID-19, protect livelihoods and support recovery: A review of practice*, ILO brief, Geneva, July 2020. Available at: https://www.ilo.org/global/topics/collective-bargaining-labour-relations/publications/WCMS_749844/lang--en/index.htm

[58] ILO, *Managing work-related psychosocial risks during the COVID-19 pandemic*, *cit.*, p. 7.

4. The Consideration of OSH as a Fundamental Principle and Right at Work

At the international level, it is increasingly recognized that the protection of life and health at work is a fundamental workers' right[59]. In fact, many international instruments, such as the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948, refer, at least indirectly, to OSH in articles 23 and 25. However, OSH is not one of the four fundamental principles and rights at work recognized by the ILO Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference at its 86th Session, in Geneva, on 18 June 1998.

The report prepared by the Global Commission on the Future of Work on the occasion of the ILO's Centenary pointed out that "the international community had long recognized health as a human right", and, therefore, it was time "for safety and health at work to be recognized as a fundamental principle and right at work"[60]. Indeed, the Draft Declaration for the consideration of the International Labour Conference expressly stated that "Occupational safety and health is a fundamental principle and right at work in addition to those specified in the ILO Declaration on Fundamental Principles and Rights at Work (1998)"[61]. However, it was not possible to reach the necessary consensus at the Plenary debate of the International Labour Conference at its 108th Session, in 2019. In consequence, as we have already said, the ILO Centenary Declaration just pointed out that "safe and healthy working conditions are fundamental to decent work", without any reference to the ILO's Framework about Fundamental Principles and Rights at Work.

In any case, in addition to the Declaration itself, at its 108th Session in 2019, the International Labour Conference also adopted a Resolution on the ILO Centenary Declaration for the Future of Work. In this Resolution, the Conference requested "the Governing Body to consider, as soon as possible, proposals for including safe and healthy working

[59] B. O. Alli, *op. cit.*, p. 19.

[60] ILO, *Work for a brighter future – Global Commission on the Future of Work*, International Labour Office, Geneva, 2019, p. 39. Available at: https://www.ilo.org/global/topics/future-of-work/publications/WCMS_662410/lang--en/index.htm

[61] ILO, *ILO Centenary outcome document*. Report IV. International Labour Conference, 108th Session, 2019, International Labour Office, Geneva, p. 7. Available at: https://www.ilo.org/ilc/ILCSessions/108/reports/reports-to-the-conference/WCMS_700622/lang--en/index.htm

conditions in the ILO's framework of fundamental principles and rights at work"[62]. At its 337th Session of October-November 2019, the Governing Body decided to approve the procedural road map as a planning tool, which can be reviewed and modified by the Governing Body based on progress made, for the consideration of proposals for including safe and healthy working conditions in the ILO's framework of fundamental principles and rights at work. However, the evolution of the COVID-19 pandemic impacted on the implementation of that procedural road map. In consequence, at its 341st Session, in March 2021, the Governing Body approved a revised procedural road map. The final step will be the consideration, at the 110th Session (2022) of the International Labour Conference, of a possible outcome document concerning the inclusion of safe and healthy working conditions in the ILO's framework of fundamental principles and rights at work[63]. The devastating effects of COVID-19 on human lives, employment and the economy alerted the world to the urgency of placing occupational safety and health at the center of global and national responses to tackle the pandemic, prepare for recovery and build resilience against forthcoming global emergencies[64]. In consequence, more than ever, it is vital to include OSH among the fundamental principles and rights at work. Therefore, the necessary consensus for including OSH in the ILO's Framework about Fundamental Principles and Rights at Work is expected to be finally reached at the 110th Session of the International Labour Conference. This would represent a change of paradigm and would be a significant moment in the process of recovery from COVID-19 based on Decent Work, as it would contribute to highlighting the extreme importance of OSH. The inclusion of OSH in the ILO Declaration on Fundamental Principles and Rights at Work would also be an important step towards the integration of Workplace Health Promotion into OSH systems.

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[62] ILO, *Resolution on the ILO Centenary Declaration for the Future of Work*. International Labour Conference, 108th Session, 2019, International Labour Office, Geneva. Available at: https://www.ilo.org/ilc/ILCSessions/108/reports/texts-adopted/WCMS_711659/lang--en/index.htm

[63] ILO, *Follow-up to the resolution on the ILO Centenary Declaration for the Future of Work. Proposals for including safe and healthy working conditions in the ILO's framework of fundamental principles and rights at work*. Institutional Section. Governing Body, 341st Session, Geneva, March 2021, p. 17. Available at: https://www.ilo.org/gb/GBSessions/GB341/ins/WCMS_769712/lang--en/index.htm

[64] ILO, *Follow-up to the resolution on the ILO Centenary Declaration for the Future of Work. Proposals for including safe and healthy working conditions in the ILO's framework of fundamental principles and rights at work*, *cit.*, p. 16.

Occupational Health and Safety in Nigeria: Managing Employees' Well-Being in the Post-COVID-19 World of Work

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Abstract

The objective of the study is to examine the management of occupational health and safety of employees in the post-COVID-19 world of work in the Nigerian context. This is imperative in view of the poor state of health facilities in Nigeria as elsewhere in developing countries. The study is anchored on the socio-psychological theory and the Kurt Lewin's force-field model of change. The historical research design was adopted with the extensive use of secondary data. The authors recommended that both employers and governments should put in place public-health education programmes and campaigns to increase awareness of the COVID-19 pandemic in the workplace. Employers and governments should invest massively in occupational health and safety and should insist on workers' total compliance with safety protocols with a view to curbing the rate of transmission of the pandemic in the workplace and in the Nigerian society at large.

Keywords: *COVID-19 Pandemic, Occupational Hazards, Health, Safety, Nigeria.*

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Introduction

An outbreak of a strange disease which caused thousands of deaths was discovered in the city of Wuhan in Hubei Province of China in December, 2019. According to the World Health Organisation (WHO, 2019), the deaths were caused by SARS-CoV-2, also commonly referred to as the Coronavirus and was christened the COVID-19 pandemic (Burdorf, Porru, & Rugulies, 2020). The phenomenal spread of the virus to other parts of the world, largely to the Western World in late February and early March 2020, has been cataclysmic as it continues to wreak havoc on the entire world. Livelihoods have been brought to a total halt as many business organisations, educational institutions, churches, mosques, markets, national and global economies were locked down to curtail its transmission, as there is no known cure or vaccine for treatment as at the time of writing. On the 27th of February, 2020, a 44-year-old Italian citizen was diagnosed of COVID-19 in Lagos state. The case was the first to be reported in Nigeria since the first confirmed case was reported in China in January 2020 (NCDC, 2020). Further incursion of the virus into Nigeria was by other returnees abroad. This led to the gradual spread of the pandemic across the country (ASUU-UI., 2020).

With the spread of COVID-19 pandemic across Nigeria and the global north, frantic efforts have been made by various governments, non-governmental organisations, public-spirited individuals and the World Health Organisation (WHO) to curtail the spread of the virus as well as various initiatives to provide a vaccine for treatment and prevention of the spread of the virus. The ravaging impact of the virus is well felt by different sectors of the economy, but the health sector is worst hit, with adverse implications for occupational health and safety (OHS) of workers in Nigeria as elsewhere in the world. The state of OHS in Nigeria pre-COVID-19 leaves much to be desired. The challenges posed by the pandemic and the implications for individuals, organisations and society have exacerbated the already problematic state of OHS in Nigeria.

The legal provisions regulating health, safety and security in Nigeria are expressly stated in the 1999 Constitution of the Federal Republic of Nigeria. Section 17(3) of the Constitution stipulates that the health, safety and welfare of all persons in employment would be safeguarded and not endangered or abused and that there would be adequate medical and health facilities for all persons. The National Policy on Occupational Safety and Health was developed in 2006, with the goal to facilitate the improvement of occupational safety and health performance in all sectors of the Nigerian economy (ILO, 2016). Occupational Health and Safety regulations have been put in place globally through the initiatives of the International Labour Organisation (ILO)

Conventions and the World Health Organisation (WHO). The Occupational Safety and Health Convention 1981 (No. 155) and Occupational Health Services Convention 1985 (No. 161) adopted by the General Conference of International Labour Organisation have had a major influence on the development of occupational health regulations among member countries including Nigeria (Chidi & Ayinla, 2019). However, the COVID-19 pandemic has actually exposed the vulnerability of the health sector in Nigeria which has been bedevilled by insufficient funding pre-COVID-19 as shown in Table 1.

Table 1: Budgetary Allocations to the Health Sector and Percentage of Total Annual Budget 2012 – 2020

Year	Budgetary Allocations to the Health Sector in Billions (₦)	% of Total Annual Budget
2012	280.77	5.95
2013	282.50	5.66
2014	264.46	5.63
2015	259.75	5.78
2016	250.75	4.13
2017	308.46	5.17
2018	411.6	4.40
2019	424.03	4.75
2020	427.30	4.14

Source: Ekwoaba & Chidi (2020).

Table 1 depicts the budgetary allocations to the health sector in Nigeria and the percentage of total annual budget from 2012 to 2020. From Table 1, it is instructive to note that the budgets for the healthcare sector by successive governments leave much to be desired as budgetary allocations to the sector have been grossly inadequate to meet the health needs of the citizenry.

The COVID-19 pandemic poses a challenge to occupational health and safety globally (Burdorf, Porru, & Rugulies, 2020). Workers in many occupations are facing high risks of becoming infected with the dreaded virus (Burdorf, Porru, & Rugulies, 2020). All businesses, regardless of size, are grappling with serious challenges as a result of the coronavirus pandemic, as no sector is spared including the health sector, construction, manufacturing, maritime, electricity and power, financial institutions, education, oil & gas, transportation, agriculture, ICT, aviation, tourism and hospitality industries to name a few, with a real threat of significant declines in revenue, insolvencies and job losses in specific sectors (ILO, 2020). Those in the informal economy such as the Micro, Small and Medium Enterprises (MSMEs) are not left out from the adverse effect of the pandemic.

The Director-General of WHO, Tedros Adhanom Ghebreyesus declared the COVID-19 disease as a global pandemic on the 11th of March, 2020 and a Public Health Emergency of International Concern on the 30th of January 2020 (Ajisegiri, Odusanya, & Joshi, 2020; Koh, & Goh, 2020). The World Health Organisation (2002) argues that occupational diseases and injuries, work-related and workplace preventable diseases and injuries are responsible for much of the current levels of reduced work capacity, increased temporary and permanent work disability, shortened life expectancy, and premature retirement or death. COVID-19 is a communicable but preventable disease. It is an occupational hazard that threatens the well-being of workers globally. Millions of people have contracted the virus as 33.4 million have been infected with the virus with 23.2 million recoveries and 1 million deaths globally as at the 29th of September, 2020. In Nigeria, there are 58,596 confirmed cases, 49,895 recoveries and 1,114 deaths (NCDC, 2020). These figures are disturbing and require urgent and concerted efforts by relevant authorities to provide a cure for this dreaded virus to safeguard human lives.

Many victims have survived COVID-19 based on early detection of the virus as well as adherence to safety protocols as enunciated by the World Health Organisation and the Nigerian Centre for Disease Control (NCDC), including the issue of testing and contact tracing to identify those infected. According to Koh and Goh (2020), the virus poses both a public health and occupational health threat or challenge in the world of work globally. A healthy individual/worker is free of illness, injury, mental and emotional problems; which may encumber or negatively affect normal human functioning/performance. The well-known dictum that a healthy workforce is a productive workforce is essential for organisational survival and sustainability (Chidi & Okpala, 2020). Workers in the health sector are at greater risk of exposure to the virus because of their personal contact and proximity with COVID-19 victims/patients. This exposes them to the risk of being infected as well as being a potent source of transmission to colleagues, patients, friends, and family members.

Before now, COVID-19 was not classified as an occupational disease in the relevant labour laws in Nigeria, as elsewhere, which would warrant workers' compensation as enshrined in the Employees' Compensation Act, 2010. However, according to Watterson (2020), countries like Denmark already recognise COVID-19 as an occupational disease. The objective of the study is to examine the management of occupational health and safety of employees in the post-COVID-19 world of work in the Nigerian context. This is imperative in view of the poor state of health facilities in Nigeria as elsewhere in developing countries. The mental, physical and emotional tensions or anxieties which accompanied the COVID-19 pandemic were devastating across

countries and led to massive deaths especially in the advanced or developed countries where health facilities are somewhat sophisticated and considered adequate. The developing countries are worse-off considering the meagre budgetary allocations to the health sector prior to and sequel to the COVID-19 pandemic. Surprisingly, the rates of infection and death have been on a downward trajectory in developing countries comparable to the developed countries.

2. Literature Review

This section examines some key concepts, theoretical underpinnings of the study and empirical review of the literature.

2.1 Conceptual Clarifications

The following concepts are explained in this section: occupation, health, safety, occupational health and safety, workplace hazards and risks, as well as personal protective equipment (PPE).

i. The Concept of Occupation

The terms occupation, career and profession can be used interchangeably. An occupation is the job by which people or individuals earn their livelihoods or a living. Fuller and Unwin (2013) stated that a suitable way to approach the meaning of occupation is to consider the term 'job' which is sometimes used interchangeably with occupation. Fuller and Unwin (2013) posit that occupation could also be seen as a vocation which may be manifested at different levels as the individual matures. In a nutshell, tasks give rise to duties, duties give rise to positions, positions give rise to jobs, and jobs give rise to occupations. Many occupations abound and each has its associated health and safety hazards and risks. Some occupations attract more prestige and enormous pecuniary gains than others depending on the value which individuals and society attach to such jobs/occupation. The nature of hazards associated with certain occupations also determines the remuneration paid to workers as well as the nature of healthcare provisions for workers.

ii. The Concept of Health

Health refers to the general state of physical, mental and emotional well-being. A healthy person/employee is free of illness, injury or mental and emotional problems (Mathis & Jackson, 2004). Health refers to holistic wellness of

employees and encompasses safety and security at work. The attention of managers has always been focused on safety and accidents prevention. This trend has however changed as it has been discovered that workers' performance is affected by a good number of diseases and health-related challenges that are not linked to their jobs. Efforts are therefore made by organisations to remove health hazards from the workplace and to incorporate programmes that will improve employees' health. As noted by Dalton (1998), there are top ten workplace diseases and they include lung diseases, backache, cancer, spine and head injuries, heart diseases and strokes, reproductive disorders, nervous system damages, noise induced hearing loss, dermatitis/skin diseases, and stress, depression and anxiety. Also, Krause, Frank, Dasinger, Sullivan and Sinclair (2001) argue that the most common work-related health problems are musculoskeletal disorders, respiratory and skin diseases, stress, depression, anxiety and pulmonary disorders. The United States Department of Labour according to Byar and Rue (2006) classified occupational illnesses into four major categories as follows:

(i) Occupational skin diseases and disorder
(ii) Respiratory conditions due to toxic agents
(iii) Poisoning (systemic effects of toxic materials)
(iv) All other occupational illnesses

Occupational health programmes deal with the prevention of ill-health that arises from working conditions.

iii. The Concept of Safety

The aim of effective safety programmes in organisations is to prevent work-related accidents and injuries (Mathis & Jackson, 2004). Safety refers to protecting both the psychological and physical well-being of people at work. Safety programmes deal with the prevention of accidents and the minimisation of the loss and damage to people and property. In the design of safety programmes therefore, efforts are made to keep workers mindful of safety and accident preventions. Safety professionals are of the view that preventing accidents is better than responding to them. The sectors with high accidents rates are agriculture, construction, manufacturing and transportation (Pouliakas & Theodossiou, 2010).

vi. The Concept of Occupational Health and Safety

The World Health Organisation (WHO) and the International Labour Organisation (ILO) in the 1950s generated a description of occupational health and safety, and described the essential contents of Occupational Health

Services (OHS) to include the promotion and preservation of the topmost degree of bodily (physical), mental (psychological) and social well-being of workers in all occupations or professions. Occupational health and safety aim at: (i) the maintenance and promotion of workers' health and working capacity; (ii) the improvement of working environment and work to become conducive to safety and health; and (iii) development of work organisations and working cultures in a direction which supports health and safety at work and, in doing so, also promotes a positive social climate and smooth operation, and may enhance the productivity of the enterprises (WHO, 2002). An occupational illness is defined by Byar and Rue (2006) as any abnormal condition or disorder caused by exposure to environmental factors associated with employment.

v. COVID-19 as Workplace Hazard and Associated Risks

A hazard is any condition or incident which has the potential to cause injuries, harm to people, damage to equipment or structures, loss of material, or reduction of ability to perform a prescribed function (Ebeloku, Akinbode, & Sokefun, 2018). A hazard is anything that can cause harm such as working on roofs, lifting heavy objects, electricity, exposed electricity cables, chemicals, and slippery floors, vibration, noise as well as chemical hazards such as poisons and toxics. COVID-19 is now a workplace hazard. "Risk is the chance, large or small of harm being actually done by the hazard" (Armstrong, 2012, p.441). Untimely loss of lives or death is a risk associated with the COVID-19 pandemic/ hazard. Ebeloku, Akinbode, and Sokefun (2018) argue that occupational health and safety hazards negatively impact on the health of workers and their job performance. Risk assessment is the identification of hazards and the analysis of the risks attached to them. Blake (1963) classified hazards into four typologies as follows:

a) ***Environmental hazards:*** These include vibration and shocks, noise, vibration and shocks, poor ventilation, air and water pollution, slippery floors, unguarded equipment, fire outbreak, elevator entrapment, poor illumination, radiation, heat to name a few. Some of these hazards can cause genetic disorders, cancer, loss of hearing, redness of eyes, and sterility.

b) ***Psychological hazards:*** These include smoking, workplace violence, bomb and terrorism, drug/substance abuse, alcoholism, industrial/job stress. These could lead to emotional disturbances as well as conflict.

c) ***Chemical hazards:*** These are acid, carbon dioxide, exposure to asbestos as well as limes and alkaline. These can cause injury to workers when they are

absorbed through the skin or inhaled. Diseases such as heat diseases, respiratory disease, skin diseases, allergy, and cancer are consequences of chemical hazards. These could shorten employees' life expectancy.

d) ***Biological hazards:*** These hazards are manifested by diseases caused by bacteria, fungi, insects, tetanus and viruses. All these affect employees' physical, mental and emotional well-being. COVID-19 is a form of biological and chemical hazards.

vi. COVID-19 Safety Protocols and Personal Protective Equipment (PPE)

Many safety protocols have been put in place by relevant authorities such as the WHO, the Presidential Task Force on COVID-19 and the NCDC in Nigeria since the emergence of the COVID-19 pandemic to curtail its transmission, with a view to safeguarding human lives. These include: total and partial lockdowns, travel restrictions, the use of face masks and shields, covering coughs and sneezes with elbows, frequent hands washing with soap and water, the use of alcohol-based hand sanitizers, avoiding touching of face, nose, and eyes, social/physical distancing of at least two metres, avoiding crowded places, avoiding handshakes and hugging, self-isolation of infected persons, frequently cleaning of surfaces and touched objects to help prevent coronavirus transmission, the use of personal protective equipment to name a few.

Personal protective equipment (PPE), are various safety devices or safeguards worn to prevent the transmission of harmful substances or diseases from person- to- person contact and to prevent persons from being infected by diseases or toxic substances in the environment. The use of the PPE has been the old normal in the health, construction and manufacturing sectors in Nigeria before the emergence of the COVID-19 pandemic. The use of PPE in the above-named sectors arose in part from the nature of these occupations and the hazardous work environment workers are exposed to. According Koh and Goh (2020), healthcare workers are among those with a high-risk of exposure and susceptibility to the COVID-19 pandemic.

However, in the post-COVID-19 world of work, the above- listed safety protocols are expected to be the new normal. Some PPE which are instrumental to safeguarding employees during the COVID-19 pandemic and in post-COVID-19 world of work are described briefly: Breathing protective wear should be utilised to avoid inhaling dusts and poisonous substances as well as COVID-19. Body protective wears should be used to prevent contamination with harmful substances or diseases including COVID-19.

Safety foot wears (foot protective wear should be used to protect the foot from injuries or corrosive substances including avoiding exposure to COVID-19. Eyes protective wear should be worn to protect the eyes from harmful substances as well as radiation and exposure to COVID-19. Safety hand glove (hand protective wear) should be worn to protect the palms and hands from injuries and infectious diseases including COVID-19. Hard hat (head protective wear) should be used to protect the head from accidents/injuries as well as exposure to COVID-19; while ear protective wear should be worn to protect the ears from abnormal sound and noise in workplaces/factories as well as exposure to COVID-19.

2.2 Theoretical Underpinnings of the Study

The study is anchored on the socio-psychological theory and the Kurt Lewin's force-field model of change.

i) The Socio-Psychological Perspective/Theory

The socio-psychological perspective of the COVID-19 pandemic was advanced by Koh, Lee, Lo, Wong, and Yap (2020). This theory or perspective explains the negative emotions such as the fear and anxiety as well as stress and distress emanating from the uncertainties following the emergence of the virus. There was global tension from different parts of the world; various governments both in the global south and north, non-governmental organisations (NGOs), public-spirited individuals as well as the international agencies such as the World Health Organisation (WHO) and International Labour Organisation (ILO) among others were disturbed because of the health, social and economic implications of the pandemic. The fear of the unknown and the rising cases of the virus led to massive deaths globally and evoked a myriad of psychological tensions such as physical safety and health concerns, financial uncertainties, negative and conflicting news, cases of depression and mental health challenges, job losses and economic recession to name a few which negatively impacted on workers' well-being and job performance. Psychologically, employees as human beings feel the need to be protected from harmful experiences to satisfy their safety and security needs as espoused by Maslow (1943).

ii) Lewin's Force-field Model of Change

Lewin (1951) developed the force-field model of change. Lewin's model entails three stages of implementing change which are unfreezing, changing and

refreezing (Dhingra & Punia, 2016). Unfreezing involves disseminating the reasons behind any change initiative in order to forestall resistance by those affected by the change. That is, creating an awareness of change. The changing phase involves a shift from the old normal and behaviour to the new normal and behaviour. The refreezing phase entails ensuring that the change has been imbibed and put into practice (Dhingra & Punia, 2016). Refreezing involves stabilising change by assisting those affected by the change to integrate the new response into day-to-day activities. This model aptly explains the unplanned change brought about by the COVID-19 pandemic. Thus, the Presidential Task Force on COVID-19, the NCDC and the WHO through massive dissemination of information on the virus and the safety protocols applied Lewin's force-field model of change. With the COVID-19 pandemic, occupational health and safety would undergo significant changes in the world of work globally. The only constant in the world is change. Change can be planned or unplanned. It could be natural or instigated by human beings. The emergence of the COVID-19 pandemic is considered an unplanned or an unexpected event which has brought about a paradigm shift from the old normal to the new normal in ways and manners, in which individuals, organisations and societies interact, work and live. As a watershed in human history, COVID-19 pandemic has brought in its wake a new modus operandi and modus vivendi globally. This implies dramatic changes in the ways we live, work and manage employees' health in the post-COVID-19 world.

2.3 Empirical Review of the Literature

Personal protective equipment is very essential in the prevention of COVID-19 virus infection and other diseases. The study by Atnafie, Anteneh, Yimenu and Kifle (2021) in Ethiopia reported that health workers had always protected themselves by using gloves, medical masks, protective glasses, goggles or face shields and disposable gowns. The use of PPE such as facemasks were shown to be protective and that wearing one at all times reduced the risk of infections among healthcare workers (Gholamia, Fawada, Shadana, Rowaieea, Ghanema, Khamisb, & Ho, 2021). However, it was observed in some cases that health workers had poor adherence to the use of PPE and aseptic practices while interacting with patients and these exposed them to infections (Atnafie, Anteneh, Yimenu & Kifle, 2021).

Denning, Goh, Tan, Kanneganti, Almonte, and Scott (2021) found that there was significant burnout, anxiety and depression among healthcare workers during the COVID-19 pandemic. Similar findings were reported in Kenya by Ali, Shah and Talib (2021) that nurses that were directly involved in the care of COVID-19 patients reported higher rates of mental health issues and that

burnout increased the challenge of high shortage of nurses. It is therefore expected that workers should have target support services to reduce the burden on such workers. Gorgenyi-Hegyes, Nathan and Fekete-Farkas (2021) investigated the relationship between health-related work benefits and employee well-being, satisfaction and loyalty to the workplace, two-layers of factors described as internal locus of control and external locus of control variables that impact employee well-being, satisfaction and loyalty were reported. It was revealed that internal locus of control variables such as mental and emotional health led to well-being at the workplace but did not directly impact employee satisfaction and loyalty while the external locus of control factors such as healthcare support led to well-being, satisfaction and loyalty.

3. Materials and Methods

The authors adopted the historical research design and reviewed published articles on COVID-19 and daily epidemiological reports from the website of the Nigeria Centre for Disease Control (NCDC) from the 29th of February, 2020 to the 27th of September, 2020 (Epidemiology Week 9- 40) to describe the pandemic. The data from the NCDC formed the secondary data for the study. An in-depth examination of coronavirus cases in Nigeria on a state-by-state basis as reported by the NCDC was carried out indicating active cases, recoveries and fatalities. COVID-19 is yet to be classified as an occupational disease in Nigeria. Thus, there are no records or data of COVID-19 as an occupational disease in Nigeria's Profile on Occupational Safety and Health as at the time of writing. Nigeria's Profile on Occupational Safety and Health only contains data on occupational accidents, injuries, diseases and fatalities not associated with COVID-19. However, occupational accidents and diseases reporting in Nigeria is part of the statutory responsibilities of the Federal Ministry of Labour and Employment with collaborative input from the Nigerian Social Insurance Trust Fund (NSITF). Descriptive statistics was used in the analyses of data.

4. Results and Discussions

Table 2: States in Nigeria with Reported Laboratory-Confirmed COVID-19 Cases, Recoveries, Deaths and Days since last Reported Case as at 27th September, 2020

STATES	CONFIRMED CASES		DISCHARGED CASES		DEATHS		TOTAL ACTIVE CASES	DAYS SINCE LAST CASE
	TOTAL	NEW	TOTAL	NEW	TOTAL	NEW		
Lagos	19,239	24	15,246	0	204	0	3,789	0
FCT	5,674	30	4,962	4	78	0	634	0
Plateau	3,388	9	2,543	31	33	0	812	0
Oyo	3,254	0	2,336	0	39	0	879	1
Edo	2,624	1	2,495	9	107	0	22	0
Kaduna	2,397	4	2,293	0	38	1	66	0
Rivers	2,347	23	2,212	6	59	0	76	0
Ogun	1,836	13	1,727	3	28	0	81	0
Delta	1,802	0	1,652	0	49	0	101	1
Kano	1,737	0	1,661	0	54	0	22	2
Ondo	1,631	6	1,545	0	36	1	50	0
Enugu	1,289	0	1,166	0	21	0	102	2
Ebonyi	1,040	0	1,007	0	30	0	3	1
Kwara	1,032	4	955	0	25	0	52	0
Abia	891	0	847	0	8	0	36	1
Gombe	864	0	742	0	25	0	97	2
Katsina	857	9	833	10	24	0	0	0
Osun	827	0	788	4	17	0	22	1
Borno	741	0	703	0	36	0	2	27
Bauchi	698	1	668	0	14	0	16	0
Imo	568	2	271	0	12	0	285	0
Benue	481	0	413	0	10	0	58	2
Nasarawa	449	0	325	0	13	0	111	5
Bayelsa	398	0	371	0	21	0	6	1
Jigawa	325	0	308	0	11	0	6	2
Ekiti	321	0	297	2	6	0	18	1
Akwa-Ibom	288	0	272	0	8	0	8	10

Niger	259	0	232	0	12	0	15	5
Anambra	237	0	213	0	19	0	5	3
Adamawa	234	0	198	0	16	0	20	7
Sokoto	162	0	144	0	17	0	1	2
Taraba	95	0	73	0	6	0	16	16
Kebbi	93	0	84	0	8	0	1	30
Cross River	87	0	74	0	9	0	4	3
Zamfara	78	0	73	0	5	0	0	38
Yobe	76	0	62	3	8	0	6	1
Kogi	5	0	3	0	2	0	0	86
Total	**58,324**	**126**	**49,794**	**72**	**1,108**	**2**	**7,422**	

Source: Nigeria Centre for Disease Control (2020)
NB: States, including FCT, are arranged in descending order by number of total confirmed cases and then alphabetical order.

From Table 2, as at the 27th of September, (2020), there was 58,450 total confirmed cases with 49, 866 recoveries, 1,110 deaths and 7, 422 total actives cases in Nigeria. However, as at the 29th of September, 2020, these figures increased with 58,596 confirmed cases, 49,895 recoveries and 1,114 deaths (NCDC, 2020). With the flattening of the COVID-19 curve, the number of confirmed cases is plummeting. Based on state-by-state analyses, it was observed that Lagos state and the FCT were the worst hit during the period under review with respect to confirmed cases as can be deciphered in Table 2. With respect to the demographic characteristics of COVID-19 confirmed cases, of the total confirmed cases, 37,102 representing 64% are male, while 21,222 representing 36% are female. The most affected age group is 31-40 years (NCDC, 20020). The following states had the lowest confirmed cases: Kogi (5), Yobe (76), Zamfara (78), Cross-River (87), Kebbi (93) and Taraba (95). Some commentators on the COVID-19 pandemic have attributed these low figures of confirmed cases to lack of or inadequate testing capacity in these states. To this end, respective state governments in collaboration with the federal government are expected to provide adequate testing facilities to ascertain the rate of infections of the virus so as to effectively manage the spread.

In the same vein, employers/ government at all levels should develop a robust occupational health culture with a high commitment to employees' well-being, through regular hazards and risk assessments of the COVID-19 pandemic. Also, regular inspections of workplaces by the NCDC and the Ministry of

Health are imperative to enforce compliance with safety protocols. Employers and governments should put in place public-health education programmes and campaigns to increase awareness of the COVID-19 pandemic in the workplace and in the larger society. Workers' wellness programmes such as employee counselling services, personal hygiene, control and sanctions on the use of illicit substances should be given a pride of place by employers for significant success to be achieved to mitigate the scourge of the pandemic. Workplace ergonomics should be redesigned to encourage social distancing so as to limit person-to-person contact and transmission. As part of the preventive measures to protect employees against the pandemic, it is necessary for regular medical screening services and health surveillance for the early detection and treatment of victims of the virus.

5. Conclusion and Recommendations

Health is wealth is a popular maxim. The significance of managing employees' well-being at work cannot be ignored by well-meaning organisations and employers if the set goals of organisations are to be achieved. The importance of managing employees' well-being was brought to the fore by the United Nations Sustainable Development Goals (SDGs). Specifically, goal number 3 of the SDGs focused on ensuring healthy lives and the promotion of well-being for all at all ages (Chidi, 2019). Employees' well-being is part and parcel of welfare programmes put in place by employers to boost employees' and organisational performance. The effective management of occupational health and safety of employees in the post-COVID-19 world of work could make tremendous transformation in healthcare systems in Nigeria. It is a truism that the emergence of the COVID-19 pandemic has transformed the world of work and has altered significantly many aspects of our individual, organisational and societal life. This is also true of how employees' health and safety are managed in the post-COVID-19 world of work not only in Nigeria but globally. Many believe that there are some good lessons to be learnt from the pandemic as its emergence exposed a lot of inadequacies in human society and the need for relevant governmental agencies to be alive to their responsibilities especially in the area of healthcare, education, governance and the like. The pandemic has caused serious dislocations globally in all spheres of life. There is no doubt that the COVID-19 pandemic will have short-term and long-lasting impact on healthcare systems, organisations, individuals and societies. From the foregoing, it is hereby recommended that personal hygiene should be stepped up more than ever before as well as regular cleaning of offices/premises. The use of PPE should be made mandatory for employees depending on the nature of health and safety hazards they are exposed to. PPE should be provided by

the employer at no cost to workers. Employers should insist on workers' total compliance with the COVID-19 safety protocols by the WHO and the NCDC. Employers and governments should invest massively in occupational health and safety in Nigeria. The government should increase budgetary allocations to the healthcare sector in Nigeria. The adoption of Information and Communication Technology (ICT) such as teleworking or telecommuting which entails remote working or working from home should be intensified in the post-COVID-19 world of work in Nigeria, as well as virtual meetings using zoom or other video-conferencing devices to reduce the transmission of the COVID-19 pandemic in the workplace and the Nigerian society at large.

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Two Notions to Delimit the Nature of Work on Digital Platforms: Autonomy and Alienness

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Abstract

Nowadays, we are experiencing an increasing and ever-growing resort to the use of technologies at work, and even new forms of employment are appearing through the use of digital platforms. These have been labelled with different terms such as "collaborative platforms", "sharing economy", "on demand economy", "gig economy", etc. Such reality has raised the justified question as to whether these forms of work provision are covered by Labour Law, or whether, on the contrary, they are excluded. Consequently, the purpose of this article is to analyse the personal scope of Labour Law, providing a critical view of subordination as a defining element of employment relationships and revaluing autonomy and alienness[1]: two notions that can delimit the employment nature of work on digital platforms.

Keywords: Platform Economy; Gig Economy; Employment Relationship; Autonomy; Alienness; Subordination; Self-employed workers.

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[1] Translator's note: The term "ajenidad" in Spanish refers to an essential condition of the employment contract, which implies that workers do not assume the risks or the benefits of providing their activity, they are not the owners of the means of production, do not provide their labour force directly for the market and do not use their own brand, but that of others, integrating themselves into the organisational structure of another person (their employer). Since there is no equivalent in the English language for such a notion, in the foregoing translation it shall be referred to as 'alienness' or 'alienation'.

Introduction

The implementation of "new forms of work" through the development of digital platforms has been linked to an economic explanation of the market that is intrinsically collaborative (among people), known as sharing economy, platform economy, on demand economy or gig economy[2]. Nevertheless, in some cases there is little at the core of the phenomenon of the business models to justify an altruistic notion such as sharing or helping. On the contrary, the on demand economy is clearly driven by economic incentives.[3]

On the other hand, the activity itself, i.e., the exchange of these goods or services, does not represent any novelty either. On the contrary, what is new is the rise of these technological tools of digital applications and platforms which allow this exchange activity to grow and be enhanced.[4]

But there is one novel character widely present in the gig economy, since the design of these business models rests on a methodical speech, as well as a formal implementation that is based on two central ideas: the first is related to the legal nature of the activity of these business structures; and the second, which naturally relies on the previous one, is linked to the legal relationship between the underlying service provider and the digital platform itself.

Certainly, the work carried out in the gig economy has been organizationally structured, in most cases, in such a way as to be formally apart from the regulatory scope of Labor Law. This new reality has very important implications considering that the consolidation of this paradigm of business organisation is having and will continue to have an increasingly real and negative impact on the working conditions of service providers, generating greater precariousness in comparison to the typical protection scheme of a

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[2] This term has been proposed by DE STEFANO as a "slogan" which lately has captured the attention of the media. (V. De Stefano, "The rise of the 'just in time workforce': On- demand work, crowdwork and labour protection in the 'gig economy'", *Inclusive Labour Markets, Labour Relations and Working Conditions Branch*, Conditions of Work and Employment Series, No 71, ILO, Geneva, p. 1 (2016), https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_443267.pdf).

[3] M. Freedland and J. Prassl, "Employees, workers and the 'sharing economy' Changing practices and changing concepts in The United Kingdom", *Spanish Labour Law and Employment Relations Journal*, V. 6, No 1-2, Labor Law, Economics Changes and New Society Research Group - Carlos III University of Madrid, p. 17 (2017), https://e-revistas.uc3m.es/index.php/SLLERJ/article/view/3922.

[4] A. Aloisi, "Commoditized workers: case study research on Labour Law issues arising from a set of 'on-demand/gig economy' platforms", *Comparative Labor Law and Policy Journal*, Vol. 37, No 3, p. 655 (2016), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2792331_code2428967.pdf?abstractid=2637485&mirid=1.

dependent employment relationship. Note that, for example, the work developed on digital platforms generates a series of factual problems for the provider of the underlying services, such as a formal expansion of the boundaries of self-employment; laxed working hours; an impact on health and safety; difficulties of collective action; and inconveniences for social protection. Accordingly, the phenomenon of digital platforms, far from being a novelty, is presented instead as one more expression of the trends towards the de-standardisation of Labour Law, precariousness and outsourcing, which is deepened by the novel administration through platforms governed by algorithms[5]. In this sense, VALLAS and SCHOR point out that platforms represent a manifestation of a much broader trend that has allowed companies to outsource risks that they had previously been forced to take. Initially, the evident effect on temporary employment and outsourcing is that working time becomes a commodity and the worker is disconnected from previous systems of social protection. What platforms then provide is a convenient and readily available infrastructure with which to limit the company's obligations to the workforce it relies on. From this point of view, platforms provide business organisations with another way of achieving accumulation through dispossession, i.e., the use of legal and financial mechanisms with which to root out the economic rights that workers previously enjoyed.[6]

In this sense, DUBAL has stated that "what is disruptive about the platform economy is the rate at which technology and venture capital together have spurred the growth of precarious unregulated independent contractor work".[7] In a similar way, CHERRY has described that "the new crowdwork seems a throwback to the de-skilled industrial processes associated with Taylor, but without the loyalty and job security".[8]

Therefore, there is a debate on the importance of taking action such as the regulation of these phenomena in order to prevent such precariousness from spreading to the rest of the economy. The regulatory approach has been

[5] A. Goldin, "Los trabajadores de plataforma y su regulación en la Argentina", *Documentos de Proyectos* (LC/TS.2020/44), Comisión Económica para América Latina y el Caribe (CEPAL), Santiago, p. 15 (2020), https://www.cepal.org/es/publicaciones/45614-trabajadores-plataforma-su-regulacion-la-argentina.

[6] S. Vallas and J. Schor, "What Do Platforms Do? Understanding the Gig Economy", *Annual Review of Sociology*, 46:1, p. 8 (2020), https://www.annualreviews.org/doi/pdf/10.1146/annurev-soc-121919-054857.

[7] V. Dubal, "Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy", *Wisconsin Law Review*, No 239, p. 752 (2017), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2597&context=faculty_scholarship.

[8] M. Cherry, "Beyond misclassification: the digital transformation of work", *Comparative Labor Law & Policy Journal*, No 37, pp. 2-3 (2016).

influenced by the disruptive narrative with the past, since a generalized idea has been transmitted about the inadequacy of institutions and labor regulation, on the basis of considering that new phenomena require new regulations.[9]
However, it is also justified to ask (and I believe that this question should be asked chronologically before resorting to legislative intervention) if the classic categories and tools of Labour Law (such as dependency, which defines the legal configuration of an employment relationship) are sufficient to determine whether these new forms of work fall into the scope of Labour Law.
Various courts in all the continents have tried to answer this question and this has generated, rightly or wrongly, conflicting and inconsistent positions: on the one hand, it is understood that these forms of work provision are those of an independent or self-employed worker (and therefore, both the organisational business model and the inapplicability of Labour Law protection to these providers are validated), and on the other hand, it is construed that the work provided on digital platforms falls into the typical category of a dependent worker, thus extending Labour Law protection to these providers.
All this analysis would lead to the following question: are these new forms of work provision covered by Labour Law?
In short, it comes down to the old problem of establishing the scope of application of Labour Law and determining who are (or even who should be) the individuals protected by this discipline.[10]

2. Legal Classification Problems Generated by Work Carried Out on Digital Platforms

When the work developed in the gig economy is analyzed, there is a strong temptation to "close the case" by calling for a generalised re-classification aimed at protecting workers engaged in particularly flexible forms of employment. However, this would be an easy way to solve the controversy quickly and definitively, although the idea may be flawed, as it generalises that all work carried out on platforms should be considered as false self-employment (bogus self-employed workers).[11]

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[9] M. Rodríguez Fernández, "Anatomía del trabajo en la Platform Economy", AADTySS, p. 5, https://www.aadtyss.org.ar/docs/ANATOMIA_DEL_TRABAJO_EN_LA_PLATFORM_ECONOMY_MLRF.pdf.

[10] G. Davidov, M. Freedland and N. Kountouris, "The Subjects of Labor Law: 'Employees' and Other Workers", at M. Finkin and G. Mundlak (Eds.), *Research handbook in comparative labor law*, Eduard Elgar, p. 16 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561752.

[11] V. De Stefano and A. Aloisi, *European legal framework for "digital labour platforms"*, European Commission - Publications Office of the European Union, Luxemburg, p. 47 (2018),

Indeed, not all digital platforms operate in the same way[12], nor are the services provided within the framework of this type of company in any way homogeneous. However, they have a common denominator as they use the internet and applications to connect the user with the provider of a good or service[13]. On the one hand, digital platforms that truly belong to the sharing economy will, in principle, be excluded from the scope of Labour Law since they tend to fit in with voluntary actions or friendly and benevolent work[14], while on the other hand, the remaining ones which are developed in a professional manner, also have their own particular characteristics that will require their appropriate study and legal framework, some of them having a special connection with Labour Law.

Notwithstanding this diversity of models, many of the companies that own digital platforms consider themselves to be providers of information society services, whose activity is limited exclusively to intermediation between the user or customer requesting a specific service on that platform and the provider of that service. Therefore, the companies formally present themselves as intermediaries between supply and demand, without any control or development of the product on offer, applying their energies to the creation of a mere technological support[15]. For this reason, they tend to label themselves as platforms developed within the scope of the sharing economy.

In line with this approach, if a company focuses its activity only on the development of a technological product, such as an application or digital platform, and does not actually provide any additional service, naturally, it will not be necessary for it to have dependent workers for the purpose of providing a different service which does not constitute or form part of its core of business. Therefore, the providers of the underlying service offered within

https://publications.jrc.ec.europa.eu/repository/bitstream/JRC112243/jrc112243_legal_framework_digital_labour_platforms_final.pdf.

[12] J. Prassl and M. Risak, "Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork", *Comparative Labour Law and Policy Journal*, No 8/2016, p. 1 (2016), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2733003_code2511333.pdf?abstractid=2733003&mirid=1.

[13] R. Serrano, "Nuevas formas de organización empresarial: economía colaborativa -o mejor, economía digital a demanda-, trabajo 3.0 y laboralidad", at M. Rodríguez-Piñero and M. Hernández (Dirs.), *Economía colaborativa y trabajo en plataforma: realidades y desafíos*, Editorial Bomarzo, Albacete, p. 25 (2017).

[14] F. Calvo, "Uberpop como servicio de la sociedad de la información o como empresa de transporte: su importancia para y desde el derecho del trabajo", at M. Rodríguez-Piñero and M. Hernández (Dirs.), *Economía colaborativa y trabajo en plataforma: realidades y desafíos*, Editorial Bomarzo, Albacete, p. 372 (2017).

[15] M. Alameda, *Empleo autónomo en la hibridación del mercado de trabajo*, LA LEY 15181/2018 (2018), www.laleydigital.laley.es.

these platforms are considered by companies as self-employed or genuine entrepreneurs and businessmen.

However, when analysing this reality based on Labour Law, a problem arises from the moment these discursive and formal premises begin to distance themselves from the material facts. In this sense, the first aspect to consider is whether the technological support is accompanied by the offer of an underlying service, allowing to understand that it is incorporated or it constitutes the usual or main line of business of the digital platform.

In addition to the above, the second element to analyse corresponds to the development of the work provided by those who are formally self-employed, bearing in mind that the picture becomes more complex when the digital platform orders, manages and controls the worker and, in addition, receives a fee for each service provided.[16] In such cases, on the one hand, the organisational model of these platforms could shift from a self-classification as sharing economy companies to that of platform economy or on demand economy (which has led to the designation of these situations as improper models of sharing economy or sharing economy in a broad sense[17]). Furthermore, on the other hand, the classification of the legal relationship established with the service provider could eventually be re-routed towards one of dependent work.

The complexity pointed out is increased by the fact that what arises from the forms is not a determining element when it comes to defining the application of the legal regime of Labour Law. On the contrary, what is essential to the extension of labour protection regulations comes to the analysis of what actually happens in real life. Because of this, Labour Law has traditionally based its foundations on the concepts of dependence or subordination and alienness so as to include within its scope of application all the legal relationships that gather these essential elements.

For this reason, the "new forms of work" analysed from the point of view of Labour Law pose a problem of legal classification. Its resolution will lead to the inclusion of a given factual situation within the scope of application and protection of the Labour Law system, or on the contrary, to its exclusion.

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[16] Alameda *supra* 12.

[17] L. Miranda, "Economía colaborativa y competencia desleal. ¿Deslealtad por violación de normas a través de la prestación de servicios facilitados por plataformas digitales?", *Revista de Estudios Europeos*, No 70, Instituto de Estudio Europeos de la Universidad de Valladolid, Valladolid, pp. 207-208 (2017).

3. Conceptual Premises and Legal Framework to Determine the Nature of the Relationship between Service Providers and Digital Platforms

As a starting point, it should be noted that there are certain concepts and premises that have been legally considered as central dogmatic elements in the processes of determining the existence (or not) of employment relationships. These are constructions legitimised by some regulatory statements in Comparative Law, as well as by doctrinal constructions and/or case law interpretations that have an important inclination towards their universal application. In particular, many of these statements are contained in the ILO International Labour Recommendation No. 198 (hereinafter ILO R198)[18], which sets out the inspiring and guiding principles for the policies to be applied by member States after failing to agree on the adoption of an International Convention on this matter.

From an historical perspective of the drafting process of ILO R198, its approval has been particularly significant and has clarified the objectives, principles and instruments of the ILO and of Labour Law. Likewise, regarding its importance and legal effectiveness, this international instrument indicates' what both the legislator and the judge should and should not do[19].

In short, ILO R198 constitutes the appropriate legal framework to be considered, as it contains a series of particularly important dogmatic statements on the determination of an employment relationship.

First, it establishes the application of a specific method as it enhances the "typological method" or the "similarity judgement"[20] by detailing the specific indicators that should be considered in the determination of an employment relationship. In this sense, there has been an intentional deviation from the "criterion of subsumption"[21], insofar as this would have required the express

[18] C. Carballo has highlighted the universal nature of ILO R198 ("Patrono y Empresa. Revisita a propósito del trabajo mediante plataformas digitales", *Tripalium. Justicia Social y Trabajo Decente*, Vol. I, No 1 (2019), www.tripaliumsite.wordpress.com).

[19] O. Ermida, "La Recomendación de la OIT sobre la relación de trabajo (2006)", *rev. Derecho Laboral*, No 223, FCU, Montevideo, p. 683 (2006).

[20] Translator's note: Procedure used to diagnose the existence of an employment relationship, which consists of looking for indications which may reveal such relationship, by analysing multiple elements, and weighing how many elements point towards an employment relationship and how many point towards a self-employed figure.
See B. Waas, "The legal definition of the employment contract in section 611a of the Civil Code in Germany: An important step or does everything remain the same?", *Italian Labour Law e-Journal* 12, No 1, pp. 26–27 (2019), https://doi.org/10.6092/issn.1561-8048/9695.

[21] Translator's note: The criterion of subsumption is used to diagnose the existence of an employment relationship by indicating which elements are essential for an employment relationship to exist, and therefore, if only one of them is missing, it is concluded that there is

recognition of a specific definition of employment relationship, as well as the identification of its essential elements. The practical difficulties resulting from the diverse normative realities of each Member State, as well as the different political views of the social actors and governments, have undoubtedly been decisive barriers when opting for a different method, to allow for the universal application of the statements endorsed in the ILO R198.

Secondly, and hand in hand with the method adopted, certain conditions that operate as indicators for the determination of the existence of an employment relationship are enunciated; specifically, remuneration, subordination, economic dependence, alienness, personal service, durability, and exclusivity.

Thirdly, and no less important than the other two statements, the international instrument expressly confirms a position which breaks away from the element of subordination by disregarding it as the only essential element to typify an employment contract.

In this sense, Chapter II of the ILO R198 establishes the facts related to the performance of work as the fundamental principle to base the determination of an employment relationship, and it lays down the techniques to make this determination, including presumptions'. As for subordination or dependence, a "displacement" is detected, since it introduces the idea that this criterion ceases to be hegemonic and seems to be exhausted, to the extent that it is merely mentioned by way of example[22].

4. Critical Review of the Central Role of Subordination in the Determination of the Existence of an Employment Relationship

Since the origins of Labour Law it has been difficult to establish the boundaries between subordinate work and self-employment, as the emergence of new employment realities provokes the resurgence of old debates and generates centrifugal and centripetal tensions that expel or integrate certain types of ways of working from or into the scope of application of Labour Law[23]. For this reason, it has been pointed out that the history of Labour Law

no employment relationship. It compares regulations with reality, and every element expressly required by the legislator must be verified.

[22] H. Barretto, "La determinación de la relación de trabajo en la Recomendación 198 y el fin del discurso único de la subordinación jurídica", *rev. Derecho Laboral*, No 225, FCU, Montevideo, pp. 91-98 (2007).

[23] J. Cruz Villalón, "El concepto de trabajador subordinado frente a las nuevas formas de empleo", *Revista de derecho social*, Nº 83, pp. 13-14 (2018).

is identified with the history of subordination, and also with the history of objecting to subordination as a distinctive criterion of dependent work[24].

Despite this constant opposition and tension, it is possible to point out that currently there is a strong tendency which suggests the inadequacy of the criterion of dependence as an element that defines the essence of an employment contract, and therefore the scope of the application of Labour Law.

The fact that dependence was set out in the ILO R198 as a merely exemplary instrument and not a determining and imperative one, ratifies it is being questioned, as well as its deep insufficiency for the determination of the existence of an employment relationship.

Consequently, it would be reasonable to raise a naturally critical and stirring question. The question comes down to figuring out if it is imperative and essential to analyse the element of subordination in order to classify the legal relationship or whether, on the contrary, it would be plausible to postulate its displacement as the sole defining criterion of the existence of an employment relationship.

In historical terms the total suppression of this element would constitute an inadequate solution from the point of view of the subject of study that is proper to Labour Law, since ontologically this is based on the work freely provided by man, when employed by a third party, in exchange for valuable consideration and in a subordinate manner[25]. Some authors even postulate the idea that subordination and dependence constitute the two vulnerabilities present in the protection purposes of Labour Law regulations[26]. However, and in line with the aforementioned critical approach, it would be possible to introduce some considerations and nuances in relation to the postulate of dependence and its classical identification as a central element of an employment contract.

Indeed, it can be reasonably understood that the element of dependence has historically been effective, given that in the process of recognition of a legal relationship this device was simple, evident and almost intuitive, since in most cases it did not require a complex logical operation. On the other hand, when the case did not have a simplistic and obvious answer, the procedure showed its weakness, as it was necessary to resort to the technique of the bundle of

[24] D. Rivas, *La subordinación. Criterio distintivo del contrato de trabajo*, FCU, Montevideo, p. 34 (1996).

[25] A. Plá Rodríguez, *Curso de derecho laboral*, T. I, V. I, Acali Editorial, Montevideo, p. 92 (1976).

[26] G. Davidov, "The Status of Uber Drivers: A Purposive Approach", *Spanish Labour Law and Employment Relations Journal*, V. 6, No 1-2, Labor Law, Economics Changes and New Society Research Group - Carlos III University of Madrid, pp. 10-11 (2017), https://e-revistas.uc3m.es/index.php/SLLERJ/article/view/3921/2477.

clues[27], hitherto limited to marginal or exceptional cases. Nowadays, the problem has worsened with the increased use of this technique, which, would be good if used exceptionally, or in other words, it is all the more effective the less it is used. In this way, it is possible to diagnose that due to the profound transformations under way, this process of recognition of dependence (simple, evident and almost intuitive) has lost its original primacy; and therefore the need to explore the boundaries of dependence becomes more and more usual and the technique of the bundle of clues reveals (according to its growing use) its congenital weakness[28].

The grounds for questioning subordination as a central delimiting criterion of the boundary between the protection afforded by Labour Law and the exclusion from its scope of application stems from the very characteristics of this institution. The reason is that it has a purely legal scope, also defined as a possibility or power of the employer, which is expressed and verified by the presence of four specific powers: the powers of organisation, management, control, and discipline.

In short, if subordination is conceived in this way, this element will respond to a question of a strong socio-economic nature, such as the question of who needs social protection, with the technical-formal answer that everything depends on how and under what conditions work is performed[29].

And precisely in order to respond to this question, a method resembling that of the bundle of clues, of empirical and scarcely reliable content, has been flexibly followed, insofar as it is not based on the search for legal descriptions of contracts, abstractly speaking, but on the presence, and the dose, of certain essential elements. This has led to the construction in case law of an indeterminate legal concept, such as that of dependence, which appears as a consequence of the performance of an activity within the organisation and management sphere of the employer[30].

By virtue of such content and extension, the inevitable consequence is reflected in the fact that subordination can be exercised or reserved and not exercised at the sole discretion of the employer.

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[27] Translator's note: technique which unlike the criterion of subsumption, instead of verifying the presence of all elements in the situation analysed, infers the existence of a subordinate relationship from the combination of several indicators.

[28] Goldin *supra* 5, pp. 17-18.

[29] J. Ugarte, "La subordinación jurídica y los desafíos del nuevo mundo del trabajo", *Revista Gaceta Laboral*, Vol. 11, No 1, Universidad de Zulia, Venezuela, p. 29 (2005), http://www.redalyc.org/articulo.oa?id=33611102.

[30] M. Palomeque and M. Álvarez De La Rosa, *Derecho del Trabajo*, 24th edition, Editorial Universitaria Ramón Areces, Madrid, pp. 476- 477 (2016).

This legal power has often been confused with a material force, to the extent of denying the existence of a state of subordination when there is no cohabitation between employee and employer, when there is no possibility to actually give orders or pronounce them verbally, because for some authors the subordination created by this contract would still be something like a restored form of servitude[31].

For this reason, one of the questions arising from this observation is that it would be unreasonable that the verification of one of the possible central elements of the contract depended on the verification of a legal and not a factual matter, whose manifestation even depends on the will of one of the parties in the relationship.

For subordination to exist, it does not need to be materialized, but instead it is verified when one of the contracting parties is empowered to direct the activity of the other. Likewise, from this power to direct stems the related powers of control and supervision of the activity; from which it follows that subordination implies the simple possibility of directing even if it is not used. In addition, in actual fact, the power to direct can be exercised by the employer or by those who represent him, and furthermore, it manifests itself in naturally varied ways, and with varying degrees of intensity[32].

This suggests the idea that it is reasonable to deduce that this element should be considered as a potential effect of the employment contract. In this sense it can be identified abstractly with a state of latency as in most cases it may be exercised by whoever is attributed the status of employer, or it may be hibernating and awaiting its subsequent manifestation.

This has a transcendental consequence when determining the presence of an employment relationship, since from both points of view, whether substantial, or adjectival or evidential, the element of subordination could be assigned a somewhat relegated importance, at least in terms of the central role traditionally attributed to it.

Indeed, if the powers of organisation, management, control, and discipline that are inherent to the employer are not externalised, it is easy to see that there would be a case of probatio diabolica at the expense of the worker, insofar as the verification of this legal element would on many occasions be materially impossible. However, if considered as an effect of the employment contract, this component would cease to have the transcendence traditionally attributed to it, especially when proving the existence of the employment relationship. In any case, its importance is vindicated if it manifests in facts and is unveiled in

[31] F. De Ferrari, *Derecho del Trabajo*, Vol. I, Depalma, 2nd edition, Buenos Aires, p. 317 (1968).

[32] A. Plá Rodríguez, *Curso de derecho laboral*, T. II, V. I, Ediciones Idea, Montevideo, p. 25 (1991).

reality, since in that case it would be possible to carry out an analysis to verify its factual expression, to rule out any doubts as to the classification of the legal relationship under analysis.

In line with this consideration, what is truly particular (the essence) about the platform economy is the voluntary "passivity" of the companies to exercise the power to impose penalties and/or the power to terminate a contract. And, in this sense, on occasions it is a merely contained permissiveness that does not entail a complete waiver of them[33].

For this reason, a false debate on subordination or dependence has been generated when it comes to classifying the relationship between service providers and the companies that own digital platforms. In this sense, an apparent freedom of the service provider has been suggested, as well as a deliberate dissipation of the characteristic features of the employer. On this basis, corporate slackness generates false problems such as the "right to refuse work", or "no fixed work schedules". For this reason, it can be proposed a different reading, considering instead that the fact that employers do not exercise some of their powers does not mean that they do not have them and, therefore, does not blur their legal nature[34].

To complement this analysis, it is appropriate to make a reading from the point of view of alienness, as one of the central elements that identify an employment contract. Subordination, as it has been pointed out, constitutes a consequence or an effect of the contract; or in other words, a latent state that governs it. Precisely, the employer is vested with a power, which content is identified with the possibility of organising the work, directing the tasks of other individuals, controlling, and penalising them. On the other hand, this entitlement arises from the initial transfer of the fruits of the workers' labour (i.e., a manifestation of alienness) and, particularly, of part of their freedom.

For this reason, organising the work, giving peremptory and specific instructions, carrying out a meticulous control of the work done, and eventually penalising the worker, are contingent and not necessary aspects. It follows that their manifestation and materialization depend on the free will of the employer, so if they exist and are expressed their limits shall be set by Labour Law. On the other hand, if they are not articulated, Labour Law will allow the employer to unilaterally decide to restore part of the worker's freedom. But the state of subordination will remain latent, and its

[33] I. Beltran, "Economía de las plataformas (*platform economy*) y contrato de trabajo". *Ponencia XXIX Jornades Catalanes de Dret Social (marzo'18)* (2018), https://www.academia.edu/.

[34] I. Beltran, "Riders de Glovo: ¿trabajadores o TRADEs? (¿hasta qué punto estamos "apegados" a nuestras ideas?)", *Una mirada crítica a las relaciones laborales*. Blog entry for February 18 (2019), https://ignasibeltran.com/2019/02/18/riders-de-glovo-trabajadores-o-trades-hasta-que-punto-estamos-apegados-a-nuestras-ideas/.

materialization and manifestation will depend exclusively on the employer. Criticism to the central role of subordination in determining the existence of an employment relationship responds to the need to reorder its importance as a mere consequence of alienness[35]. Subordination of the worker is an inevitable consequence of the situation of those employed by a third party on a long-term basis. This is because the very organisation of this work binds them to comply with the instructions of the employer, and on the other hand, because those who live off work provided to another depend economically on the person who provides them with this profit opportunity[36].

As practice shows, the starting point followed for the analysis of the classification of the relationship between the parties, when in doubt, has turned out to be identical, in those solutions that were inclined to identify the existence of employment by a third party as well as in those that recognised a hypothesis of self-employment. In this sense, in accordance with the traditional criterion and for the purpose of giving one answer or the other, the study of each case has been limited to the proof of the essential elements of the employment contract, by reviewing them in terms of whether they were verified. If they were not verified, the existence of an employment relationship was ruled out, as this tipped the balance in favour of its non-existence[37].

It should be noted that, predominantly, this criterion has found (and finds) as its main obstacle the impossibility of fully and effectively proving the element

[35] J. Maldonado, "Superación del concepto clásico de contrato de trabajo", *El futuro del trabajo que queremos. Conferencia Nacional Tripartita*, Ministerio de Empleo y Seguridad Social, Madrid, p. 381 (2017).

[36] A. Sempere, "Sobre el concepto de Derecho del Trabajo", *Revista Española de Derecho del Trabajo*, No 26, Civitas, Madrid, p. 184 (1986).

[37] Such approach is used in many judgments dictated at the comparative level. See, among others: 33a Vara do Trabalho de Belo Horizonte, Process No 0011359-34.2016.5.03.0112, 02.13.2017; 8a Vara do Trabalho de São Paulo, Tribunal Regional do Trabalho, 2nd Região, Public Civil Action ACPCiv 1001058-88.2018.5.02.0008, Orders No 1001058-88.2018.5.02.0008, 06.12.2019; Tribunal Supremo, Social Chamber, Plenary, Judgment of unification of doctrine, 09.25.2020, Appeal No. 4746/2019; Juzgado de lo Social No. 11 of Barcelona, Sentence No. 213/2018, 05.29.2018, Appeal No. 652/2016; Juzgado de lo Social No. 6 of Valencia, Judgment No. 244/2018, 06.01.2018, Appeal No. 633/2017; Juzgado de lo Social No. 5 of Valencia, Sentence No. 197/2019, 10.06.2019, Appeal No. 371/2018; Juzgado de lo Social No 1 of Madrid, Sentence No 128/2019, 03.04.2019; Judgments No 130/2019 and 134/2019, 04.04.2019; Juzgado de lo Social No 19 of Madrid, Sentence No 188/2019, 22.07.2019; Juzgado de lo Social No. 33 of Madrid, Judgment No. 53/2019, 02.11.2019, Appeal No. 1214/2018; Juzgado de lo Social No. 1 of Gijón, Judgment No. 61/2019, 02/20/2019, Appeal No. 724/2018; Tribunal Superior de Justicia of Asturias, Social Chamber, Judgment No. 1818/2019, 07.25.2019, Appeal No. 1143/2019; Corte Suprema di Cassazione, Sezione Lavoro, Judgment No 1663/20, 24.01.2020.

of subordination, in its factual expression of the exercise of the power to organise, to direct, control and discipline.

In essence, when applying the aforementioned reasoning to the work carried out on digital platforms it could be argued with sufficient grounds that this type of analysis, blurs the element that constitutes the reference point for the resolution of the legal relationship between a provider of the underlying service and a digital platform.

Indeed, by unravelling that a worker is genuinely autonomous, as formally declared by the companies that own digital platforms, it would be possible to overcome the barriers mentioned, and avoid solutions contrary to the material reality (derived from procedural evidentiary deficiencies), as well as conclusions that truly leave workers unprotected.

In this way, and by way of example, the traditional analysis centred on the element of subordination has been strongly highlighted and attacked by the legislation of the State of California in the United States[38]. This legislation has established a normative criterion for determining the existence of an employment relationship, which obliges the contracting entity to prove, among other requirements, that the worker is autonomously and habitually engaged in a trade, occupation, or business of the same nature as the work carried out for the contracting entity. This means that the law requires the company to prove that this virtually "independent" worker is indeed a genuinely self-employed worker, a genuine entrepreneur, or in other words, something conceptually more important, that the element of alienness does not verify.

From the examination carried out, it can be said that the ideas of ALONSO GARCÍA are correct. On the one hand he pointed out that the element of subordination is not going to disappear; although on the other hand, "this concept cannot play a role of such absolute relevance that it determines the inclusion or exclusion of certain types of work in the framework of our discipline"[39].

5. Proposed Criteria to Determine the Existence of an Employment Relationship

For the purpose of determining the nature of the relationship established between a service provider and the companies owning digital platforms, the procedure and criteria suggested in this paper postulate a systematisation which

[38] A ballot measure exempting companies that own digital platforms from the application of Labour laws (known as '*Yes on Prop 22*', under the motto of '*Save App-Based Jobs & Services*', formally identified as the '*Protect App-Based Drivers and Services Act*') has recently been passed.

[39] M. Alonso García, *Introducción al estudio del Derecho del Trabajo*, Bosch, p. 89 (1958).

comprises three specific stages of analysis, calling on a method of indicators and its typological technique that shall be applied in each specific case.
In this way, the following concepts or hypotheses must be verified: firstly, the nature of the activity carried out by the digital platform must be preliminarily unravelled; secondly, as a fundamental issue, it will be necessary to carry out a study centred on verifying the authenticity of the autonomy of the service provider and the notion of alienness (this being the neuralgic or key point); and finally, it will be necessary to resort to an analysis (adjuvant and accessory to the main examination) of the remaining notions: the voluntary personal provision of work, working for a valuable consideration and the verification of the possible manifestations of dependence or subordination.

5.1. Preliminary Issue: Classification of the Nature of the Activity Carried Out by the Companies Owning Digital Platforms

A scenario where it is verified that a company limits its activity exclusively to the intermediation between supply and demand of a good or service, would determine the non-existence of an employment relationship between the service provider and the digital platform. Such a conclusion would stem from the fact that it is a technology company dedicated to providing information society services, with no impact whatsoever on the underlying service or on the service provider. In other words, there would be no impositions, instructions, guidelines, or other manifestations in relation to the work itself. In contrast, the company will cease to be an intermediary when it offers more than simply putting the user in contact with a service provider.
It is therefore necessary to consider different specific items in order to confirm if it is a horizontal platform that creates a virtual space where the buyer and the provider of a good or service interact freely and negotiate their own conditions. Otherwise, it would be a vertical platform that is deeply integrated into the market and directly offers the underlying good or service.
The first element to analyse relates to unravelling who organises the service, determines the price of the exchanged product, as well as its conditions and forms of provision. This will allow to elucidate the possible existence of control and influence of the digital platform over the underlying service offered and over the service provider, as well as the verification of an interest in the organisation of that service.
Thus, the fact that the platform issues recommendations or suggestions on how to carry out a service, or imposes certain demands or requirements for the purposes of providing it, are indicators of the organisational interest of its undertaking, moving it away from a mere intermediary platform that provides

information society services, and bringing it closer to the classification of a company that effectively offers the underlying service instead.

The second aspect to study is the key component or primary asset when offering that service. This aspect must be analysed in the light of a basic premise: in order to be considered a defining feature, such asset must constitute the essence of the organisational business structure set up to provide that particular service, enabling it to be identified as the essence of the brand.

The third important matter concerns the implementation of a system which assesses or monitors the quality of the underlying service. The introduction of a mechanism to assess the service providers (either in-house or external, requested from the users), to control the quality of the service (with the consequent increase in work assignment to those with higher ratings, or the suspension of those providers who do not meet a predetermined rating), will be sufficiently important signs to reflect the interest of the platform in organising and controlling the underlying service. Indeed, such an approach would be incompatible with its consideration as a mere intermediary between the supply and demand of a service.

The most important case in this matter corresponds to the one that was submitted to a decision of the CJEU, whose intervention has been limited to a preliminary ruling, question raised by the Commercial Court No. 3 of Barcelona, with respect to a procedure between the Elite Professional Association Taxi and Uber Systems Spain, SL.

Precisely, on that occasion the Court had to qualify the legal nature of the service provided by Uber, analyzing whether it is an intermediation service, which connects a non-professional driver who uses his own vehicle with a person who wishes to make an urban displacement; or if, on the contrary, it creates at the same time an offer of urban transport services. The ruling has opted for the second interpretation and concluded that "this intermediation service must be considered as an integral part of a global service whose main element is a transport service"[40].

The aforementioned conclusion rests on considering that a service such as the one at issue, is not limited to an intermediation service that consists simply in connecting a non-professional driver who uses his own vehicle with a person who wants to make an urban displacement. Indeed, in this case, passenger transport is carried out by non-professional drivers who use their own vehicle, while the provider of this intermediation service creates at the same time an offer of urban transport services, which makes accessible specifically through computerized tools (through the application), and whose general operation it

[40] CJEU, Judgment of December 20, 2017, C-434/15.

organizes in favor of people who wish to use this offer to carry out a specific urban displacement.
Likewise, the Court has explained that Uber's intermediation service is based on a selection of non-professional drivers who use their own vehicle, to whom this company provides an application, without which, on the one hand, these drivers would not be in conditions to provide transport services and, on the other hand, people who wish to make an urban displacement could not use the services of the aforementioned drivers. For this reason, the CJEU expressly maintains that "Uber exercises a decisive influence on the conditions of the services provided by these drivers", establishing the maximum price of the ride, receiving payment from the customer and then paying a part to the non-professional driver of the vehicle, and exercising certain control over the quality of the vehicles, as well as the suitability and behavior of the drivers, which in their case may lead to their exclusion.
Consequently, the definition of the nature of the activity of the company owning the digital platform as the provider of the underlying service (by virtue of its organisation and control) will determine the need to continue with the analysis of the other criteria in order to answer the question about the nature of the relationship between the company and the service provider.

5.2. Main Criterion: Verification of the Authenticity of the Autonomy of the Service Provider's Entrepreneur Status and Revaluation of the Element of Alienness

5.2.1. The Central Role of Analysing the Authenticity of the Autonomy of the Service Provider's Entrepreneur Status

Instead of the usual path followed during the procedure to determine the existence (or not) of an employment relationship in the work provided via digital platforms, the alternative corresponds to the verification of the authenticity of the autonomy of the service provider's entrepreneur status, for the purpose of revealing the real and factual existence or non-existence of the figure of the self-employed worker.
The advantage of this mechanism lies in placing the focus on questioning the figure that formally emerges from the documents or outward appearance, and that may be eventually disputed by the provider, in order to compare its structural basis and essential elements with what actually happens. Thus, avoiding the difficulties posed by the classic criterion for determining the employment relationship, which is limited to the central analysis of the concurrence of the concept of subordination (since it is usually considered as an essential element of the employment contract).

A study focused on the traditional determination of the personal scope of application of Labour Law could exclude many cases from the protection afforded by this legal system, based on the absence of typical adequacy of a work provision with respect to the conceptual elements that determine a subordinate relationship.

On the contrary, the suggested technique focuses on determining the level of authenticity of the autonomy of the entrepreneur status that the service provider virtually holds. This constitutes the essential element that must be actually verified for the development of a work activity carried out by an independent work provider; and whose verification constitutes not only a *sine qua non* requirement for that classification to be applicable, but also an element that excludes the concept of dependent work or employment by a third party.

Indeed, the main criterion for delimiting self-employment and employment by a third-party lies in the actual verification of the existence of the independence of those providers, who must substantively provide the service on their own account, in order for the concept of self-employed worker to be applicable. Therefore, the individual who carries out a human activity on a personal basis, without technical, economic, organisational, structural, productive and brand independence, cannot be considered a self-employed worker.

The reason is that, three characteristics are essential requirements of self-employment: firstly, the existence of a genuine autonomous business organisation of their own; secondly, the assumption of the risk of the economic activity; and finally, regularity[41].

In this sense, on the one hand, an activity carried out on one's own account is incompatible with the concurrence of alienness and its various manifestations, and on the other hand, the existence of genuine autonomy in the performance of the activity, as well as the absence of the element of alienness, constitutes an obstacle to the configuration of dependent work.

In any case, this does not mean that subordinate workers cannot have a certain margin of autonomy in the performance of their work. On the contrary, work that is organised, determined, used, and exploited by the employer is not incompatible with the existence of a degree of worker autonomy when dully performing the work provision, without this turning it into autonomous work. Subordinate forms of work can thus include a considerable margin of freedom, autonomy and self-determination of the worker[42].

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[41] A. Ginès and S. Gálvez, "Sharing economy vs. uber economy y las fronteras del Derecho del Trabajo: la (des)protección de los trabajadores en el nuevo entorno digital", *InDret*, No 1, Barcelona, p. 14 (2016), http://www.indret.com/pdf/1212_es.pdf.

[42] M. Rodriguez-Piñero, "Contrato de trabajo y autonomía del trabajador", *Trabajo subordinado y trabajo autónomo en la delimitación de las fronteras del Derecho del Trabajo. Estudios en homenaje al Profesor José Cabrera Bazán*, Editorial Tecnos, Madrid, pp. 21-22 (1999).

It is likely that the arduous task of scrutinising subordination causes such a burden that it prevents due attention from being paid to its flip side, i.e.; autonomy or independence: in the binary logic that (as a general rule) characterises labour legislation, whoever does not provide personal services with subordination or dependence does so in conditions of autonomy or independence[43].

Accordingly, while self-employed workers provide services independently and autonomously, assuming the profits and costs of the economic activity, employees provide services within the scope of the management, organisation and control of another individual without assuming the risk of the business activity[44].

Self-employment requires the existence of a genuine and independent organisation, where individuals provide their own means of production, freely choose when to work, how much to work and how to work, and take over the results of their activity, assuming the business risks. Such elements are diametrically opposed to the concept of alienness, which is essential in the activity regulated by Labour Law.

Some interpretive views have devoted special emphasis to verifying the real autonomy of the service provider in order to validate the formal qualification assigned by companies as autonomous and independent workers. Based on this, certain facts considered relevant to rule out the presumed autonomy have been outlined, such as, for example, that providers cannot fully organize their activity (both its practical aspects of execution, such as setting the price and owning a portfolio of clients). Consequently, a central point of study refers to the determination of the existence of an effective freedom in favor of the providers, regarding the choice of working days and hours, as well as the place to execute the service, or the route chosen (in the case of the ride hailing services or the delivery of goods), as well as the power of acceptance or rejection of the different orders. There is a broad coincidence in relativizing the aforementioned freedom, insofar as it is conditioned in many cases by the valuation system introduced in the platforms, which is built by said companies on the basis of the application of an algorithm that allows the customers evaluate the service and to generate a statistic or rating scale, which acts as a determining element for the assignment of new tasks, as well as for the suspension of the provider in case of breaching the canons of conduct established by the platforms. All this determines that in many cases the

[43] Carballo *supra* 16, p. 115.

[44] Ginès and Gálvez *supra* 38, p. 13.

freedom to reject tasks is merely virtual and that it is not possible to choose the days and hours to work with total freedom[45].

In short, for the purpose of determining the nature of the relationship between the service providers and the companies owning digital platforms, the main criterion lies in the analysis of the true autonomy of the entrepreneur status of the service provider, and in particular, in the presence of alienness in its various projections (alienness of the results and/or benefits and of the risks; alienness of the ownership of the means of production; alienness of the brand and of the market; and the worker's incorporation to the organisational structure of the company)[46].

[45] See, among others: Fair Work Commission of Australia, "Joshua Klooger v Foodora Australia Pty Ltd", U2018 / 2625, 16.11.2018; 33a Vara do Trabalho de Belo Horizonte, Process No 0011359-34.2016.5.03.0112, 02.13.2017; 42nd Vara do Trabalho de Belo Horizonte, Process No 0010801- 18.2017.5.03.0180, 06.12.2017; Tribunal Supremo, Social Chamber, Plenary, Judgment of unification of doctrine, 09.25.2020, Appeal No. 4746/2019; Juzgado de lo Social No. 11 of Barcelona, Sentence No. 213/2018, 05.29.2018, Appeal No. 652/2016; Juzgado de lo Social No. 5 of Valencia, Sentence No. 197/2019, 10.06.2019, Appeal No. 371/2018; Juzgado de lo Social No 1 of Madrid, Sentence No 128/2019, 03.04.2019; Judgments No 130/2019 and 134/2019, 04.04.2019; Juzgado de lo Social No 19 of Madrid, Sentence No 188/2019, 22.07.2019; Juzgado de lo Social No. 33 of Madrid, Judgment No. 53/2019, 02.11.2019, Appeal No. 1214/2018; Juzgado de lo Social No. 1 of Gijón, Judgment No. 61/2019, 02/20/2019, Appeal No. 724/2018; Tribunal Superior de Justicia of Asturias, Social Chamber, Judgment No. 1818/2019, 07.25.2019, Appeal No. 1143/2019; Tribunal Superior de Justicia of Madrid, Social Chamber, Plenary, Sentence No 1155/2019, 27.11.2019, No of Appeal 588/2019; Tribunal Superior de Justicia of Madrid, Social Chamber, Section 2, Judgment No. 1223/2019, 12.18.2019, Appeal No. 714/2019; Cour de Cassation, Chambre Sociale, Judgment No 374, 04.03.2020; Cour d'Appel de Paris, Chambre 2, RG n ° 18/08357, 10.01.2019; Labor Commissioner of the State of California, "Barbara Ann Berwick v. Uber Technologies, Inc., a Delaware corporation, and Rasier - CA LLC, a Delaware limited liability company ", Case No. 11-46739, 06/16/2015; Tribunal de Apelaciones del Trabajo de 1er Turno, Sentence No 111/2020, 03.06.2020.

[46] There is a large amount of judgments that have addressed the note of alienation in the framework of the work carried out in the platform economy. See, among others: Tribunal Supremo, Social Chamber, Plenary, Judgment of unification of doctrine, 09.25.2020, Appeal No. 4746/2019; Juzgado de lo Social No. 5 of Valencia, Sentence No. 197/2019, 10.06.2019, Appeal No. 371/2018; Juzgado de lo Social No. 6 of Valencia, Judgment No. 244/2018, 06.01.2018, Appeal No. 633/2017; Tribunal Superior de Justicia of Asturias, Social Chamber, Judgment No. 1818/2019, 07.25.2019, Appeal No. 1143/2019; Juzgado de lo Social No 1 of Madrid, Sentence No 128/2019, 03.04.2019; Judgments No 130/2019 and 134/2019, 04.04.2019; Juzgado de lo Social No 19 of Madrid, Sentence No 188/2019, 22.07.2019; Juzgado de lo Social No. 33 of Madrid, Judgment No. 53/2019, 02.11.2019, Appeal No. 1214/2018; Tribunal Superior de Justicia of Madrid, Chamber of the Social in Plenary, Sentence No 1155/2019, 27.11.2019, No of Appeal 588/2019; Tribunal Superior de Justicia of Madrid, Social Chamber, Section 2, Judgment No. 1223/2019, 12.18.2019, Appeal No. 714/2019; Tribunal Superior de Justicia of Madrid, Social Chamber, Section 1, Sentence No.

5.2.2. The Generic Concept of Alienness: Alienness of The Results and/or Benefits and Alienness of the Risks

The notion of alienness has been developed based on the description of a situation in which the fruits of labour are destined for a person other than the person performing the service. By virtue of this, what is important is the "original assignment" of these fruits, since from the moment they are produced, they belong to another person[47]. This allows us to determine two sides of this element, as it is understood that workers are alien to the results of what is produced and its profit, and in contrast, they are also alien to the contingencies involved in business exploitation. It is for this reason that two basic effects of alienness are usually highlighted, identifying each of them with "alienness of the results" and "alienness of the risks".

In this sense, the meaning of alienness is broad and complex, and it cannot be reduced to the fact of "working for someone else" or "the work being destined for someone else". In fact, alienness should not be explained from a "positional" description of the parties in the framework of the relationship between them, or by verifying whether the work provided benefits to another person, but rather it could be understood attending to the results of the work, what is produced or its fruit.

In the same sense, it is not the same to work "for another" (this is what almost everyone does, sometimes with a merely economic otherness; other times - most of the time - with otherness in a strict, legal sense) as to work "on behalf of another" (this is only done by those who provide their labour activity within the framework of an employment contract)[48]. Therefore, it is necessary to differentiate between otherness (understood as working "for" another) and alienness (working "on behalf" of another), attributing to the latter a specific and distinct meaning where the decisive factor is the context, the concrete form and the conditions in which the work is provided to another person[49].

Thus, self-employment implies an initial acquisition of the fruits of labour, whereas working on behalf of another requires the transfer of the fruits of labour to another person from the beginning. Naturally, the necessary counterpart of both concepts is, in the case of self-employment, assuming the risks in the execution of the activity, and in the case of working on behalf of

40/2020, 01.17.2020, Appeal No. 1323/2019; Tribunal de Apelaciones del Trabajo de 1er Turno, Sentence No 111/2020, 03.06.2020.

[47] Plá Rodríguez *supra* 23, p. 93.

[48] M. Alarcón, "La ajenidad en el mercado: Un criterio definitorio del contrato de trabajo", *Revista Española de Derecho del Trabajo*, No 28, Civitas, Madrid, p. 501 (1986).

[49] S. González, "Trabajo asalariado y trabajo autónomo en las actividades profesionales a través de las plataformas informáticas", *Temas Laborales,* No 138, p. 93 (2017).

another, transferring those risks to the person who acquires the fruits of labour, initially transferred by the one who works.

The main exponent of this notion was ALONSO OLEA, who emphasizes that the fruits of labour are initially and directly attributed to a person other than the individual who performs the work[50]. In this way, self-employed work is opposed to working on behalf of another by virtue of the fact that, in the former, the person who works retains the initial ownership of the fruits of their labour[51].

MONTOYA has introduced a nuance to this conception, insofar as he has emphasised that what is transferred to the employer are not the results themselves, but rather the capital gains or economic profit arising from the worker's activity[52]. By virtue of this variant and nuance, ALONSO OLEA and CASAS BAAMONDE stated that the expression "results" should be conceived in such a broad sense that it covers all the results of the productive work of man, intellectual or manual, valuable in itself or associated with that of others, be it a good or a service; alienness refers to the capital profit of the work[53].

Other authors preferred to refer to alienness of the risks as a typical feature of the employment contract, referring to the fact that the employer must bear unfavourable economic results without the worker being affected, since otherwise, the fact of participating in the economic and production adversities would imply bringing it closer to the figure of a corporate contract[54]. Along the same lines, DAVIDOV has referred to alienness as the incapacity to absorb risks[55].

Notwithstanding these different approaches provided by legal doctrine, what is clear is that in the employment contract, workers do not take ownership of either the results of their work nor its capital profit. Instead, from the very moment they enter into the employment relationship, they freely hand them over to their employer; and in return for this initial cession, they also disengage themselves from the economic results of the company, not assuming any

[50] M. Alonso Olea, *Introducción al Derecho del Trabajo*, Civitas, Madrid, pp. 50-52 (1994).

[51] M. Alonso Olea and M. Casas Baamonde, *Derecho del Trabajo*, 10th edition, Universidad de Madrid – Facultad de Derecho, Madrid, p. 30 (1988).

[52] A. Montoya, *Derecho del Trabajo*, 38th edition, Editorial Tecnos, Madrid, p. 40 (2017).

[53] Alonso Olea and Casas Baamonde *supra* 46, p. 30.

[54] G. Bayón Chacón and E. Pérez Botija, *Manual de Derecho del Trabajo*, 11th edition, Marcial Pons, Madrid, p. 18 (1978).

[55] This author highlights two weaknesses of labour relationships, identified precisely in reference to two essential concepts as subordination and alienness (he has named this last term as '*dependency')* (Davidov *supra* 24, p. 14).

unfavourable circumstances of the same. The risks of business development are borne exclusively by the employer.
Thus, for example, the fact that workers do not determine the price of their services on their own free will is a true reflection of the alienness of the results and of the lack of autonomy. Indeed, the individual who takes ownership of the results of their work, personally organises it, determines the rates for their service, possibly negotiates with the client the price of the product or service, establishes the payment method, assumes the direct collection of the same, etc. In this sense, the results of the work would be attributed exclusively to that individual, as well as the capital profits, and eventually the assumption of the business risks of that undertaking.

5.2.3. Alienness of the Ownership of the Means of Production

The generic concept of alienness is also closely linked to several of its species, such as that referring to "alienness of the ownership of the means of production". This element determines that the equipment and the working tools are property of the employer and not of the worker[56]; or in other words, it refers to the ownership of the productive elements, understood as the management of the productive infrastructure used by workers in the provision of their services[57].
This analysis shows that self-employed workers own the means necessary to carry out their activity, not requiring external infrastructure either to produce the goods or carry out the services entrusted to them, nor for their subsequent insertion in the market[58].
Consequently, in the gig economy, where the platform itself provides the underlying service, the main productive elements, without question, together with the brand, are the platform or technological application, which allows to organise and manage all the other production aspects that become accessory. For this reason, even if the service provider contributes some specific material means, such as a car in the case of ride-hailing services, or a two-wheeler in the case of a food or other goods delivery service, this is not relevant for the purpose of identifying alienness of the ownership of the means of production, precisely because they are not significant elements, nor representative of the

[56] J. Gorelli, "Plataformas digitales, prestación de servicios y relación de trabajo", *El derecho del trabajo en la actualidad: problemática y prospectiva. Estudios en homenaje a la Facultad de Derecho PUCP en su centenario*, Pontificia Universidad Católica del Perú, Lima, p. 90 (2019).
[57] Ugarte *supra* 27, p. 48.
[58] A. Valdés, "El trabajo autónomo en España: evolución, concepto y regulación", *Revista del Ministerio de Trabajo y Asuntos Sociales*, No 26, Ministerio del Trabajo e Inmigración, Spain, p. 24 (2000).

existence of a genuine business structure of their own. Moreover, the service will be endowed with certain characteristics, which will make it identifiable not with a specific provider, but with the type of service provided by the platform, offered to consumers as a brand[59].

5.2.4. Alienness of the Brand and of the Market

Other projections of the analysed genre are "alienness of the brand" and "alienness of the market". Conceptually, it is possible to identify that the worker does not act directly with the customers, but does so through the intervention of the employer, who controls the relationship with the market of potential customers[60].

The factual and/or legal impossibility for service providers to enter the market by offering their own brand, and in such case, having to do so on behalf of others by means of a brand that is not their own, prevents them from being classified as self-employed workers. In that sense, the fact that a customer acknowledges that the services offered are inherent to the brand of the company which owns it, and not to the specific provider of that service, is a revealing element of the existence of this kind of alienness.

Direct producers are legally alien to the consumers of "their' products" (which are not their own), and therefore, this is verified whenever a stranger legally comes between the direct worker and the consumer, collecting the price for that good or service, having paid the worker a salary and seeking to make a profit. In addition, alienness of the market exists as something constitutive in the social relationship, as well as from the legal point of view and *ab initio*. In short, alienness of the market, together with the alienness of the ownership of the means of production, are prior to and comprehensive of the alienness of the risks, of the capital profits or of the results, the latter being mere consequences of the former[61].

Precisely in relation to this aspect lies the main difference between companies that own digital platforms and operate as mere intermediaries between supply and demand for goods or services, and those that actively intervene in the market and offer the underlying service.

[59] Calvo *supra* 11, pp. 353-354 and 366-367.
[60] Gorelli *supra* 51, p. 90.
[61] Alarcón *supra* 43, pp. 499-505.

5.2.5. The Integration of the Worker in the Organisation of the Enterprise

According to ILO R198, "the integration of the worker in the organisation of the enterprise" constitutes a specific indicator for the determination of the existence of an employment relationship, when the work performed leads to include such integration. For this reason, the aforementioned international instrument requires the analysis to focus on facts, and on the concrete details relating to the performance of such work[62].

This notion evokes those situations in which there is no business organisation of the service providers themselves[63], and no assumption of the risks and benefits of the activity[64].

In short, in this respect there lies a particular difference between self-employed and employed workers. Self-employed workers carry out individual work on their own account, in other words, they carry out their own business in undertakings organised and structured by themselves; whereas employed

[62] Many rulings at a comparative level have indicated that the determination of the nature of the link must be resolved on the basis of the evaluation of the material reality of the facts (applying the principle of primacy of reality largely recognized in Latin America) especially on the modality of execution of the activity, above any documentary formality that tries to define in advance said link. See, among others: 33a Vara do Trabalho de Belo Horizonte, Process No 0011359-34.2016.5.03.0112, 02.13.2017; Tribunal Supremo, Social Chamber, Plenary, Judgment of unification of doctrine, 09.25.2020, Appeal No. 4746/2019; Tribunal Superior de Justicia of Madrid, Chamber of the Social in Plenary, Sentence No 1155/2019, 27.11.2019, No of Appeal 588/2019; Rechtbank Amsterdam, Case No. 7044576 CV EXPL 18-14763, 01.15.2019; Employment Appeal Court of the United Kingdom, Appeal No UKEAT / 0056/17 / DA, "Uber BV & ors -v- Aslam & ors", 10.11.2017; United Kingdom Court of Appeal, Civil Division, Case No A2 / 2017/3467, "Uber BV & ors -v- Aslam & ors", 19.12.2018; Juzgado Letrado del Trabajo de la Capital de 6to Turno, Sentence No 77/2019, 11.11.2019; Tribunal de Apelaciones del Trabajo de 1er Turno, Sentence No 111/2020, 03.06.2020.

[63] Montoya *supra* 47, pp. 69-70.

[64] See, among others: Fair Work Commission of Australia, "Joshua Klooger v Foodora Australia Pty Ltd", U2018 / 2625, 16.11.2018; Tribunal Supremo, Social Chamber, Plenary, Judgment of unification of doctrine, 09.25.2020, Appeal No. 4746/2019; Tribunal Superior de Justicia of Madrid, Social Chamber, Section 1, Sentence No. 40/2020, 01.17.2020, Appeal No. 1323/2019; Cour de Cassation, Chambre Sociale, Judgment No 374, 04.03.2020; Cour d'Appel de Paris, Chambre 2, RG n ° 18/08357, 10.01.2019; Rechtbank Amsterdam, Case No. 7044576 CV EXPL 18-14763, 01.15.2019; Employment Appeal Court of the United Kingdom, Appeal No UKEAT / 0056/17 / DA, "Uber BV & ors -v- Aslam & ors", 10.11.2017; United Kingdom Court of Appeal, Civil Division, Case No A2 / 2017/3467, "Uber BV & ors -v- Aslam & ors", 19.12.2018; State of New York Unemployment Insurance Appeal Board, No 596722, 07/12/2018; Juzgado Letrado del Trabajo de la Capital de 6to Turno, Sentence No 77/2019, 11.11.2019; Tribunal de Apelaciones del Trabajo de 1er Turno, Sentence No 111/2020, 03.06.2020.

workers do not carry out any undertakings, do not have their own business but are inserted in the economic activity of another[65].

Certainly, this indicator has an open and complex character and assumes the recognition that workers are alien to the organisation of the productive process in whose sphere they provide services, thus revealing a certain deficit of autonomy, which is also equivalent to identifying a certain degree of subordination, which could be described as structural[66].

Thus, this element is usually dogmatically identified as an indicator of dependence. Truthfully, in essence, it is preferable to describe it as a manifestation of alienness, insofar as without its own structure and autonomy, it is not possible to identify a type of self-employment, but rather work on behalf of another (a third party other than the provider). In fact, if an individual is inserted in the organisation of another, alienness is externalised.

On the other hand, although marginality in the provision of a service or the lack of continuity has been raised as an indicator of non-employment[67], it would also be possible to offer a different reading from the point of view of the worker's' autonomy and their insertion in an alien organisational structure. In fact, this lack of continuity could actually be considered as a manifestation of the absence of an organisational structure of their own, and therefore of a structural dependence on another company, or in other words, of a lack of autonomy and insertion in an alien organisational structure.

It must therefore be concluded that the verification of the integration of the worker in the organization of the enterprise will be conditioned by the classification of the nature of the activity carried out by the enterprise owning the digital platform. After all, if the latter were considered to be engaged in offering and performing the underlying service, then the admission that the concrete and individual provider of that service is integrated in the organisation would gain force.

Notwithstanding the above, the specific definition of this type of alienness will depend on an overall analysis of the other aforementioned elements. Indeed, the fact that the service provider fulfils the same corporate purposes as the principal company, as well as the fact that integral parts of its production cycle are carried out without its own business organisation, without the results and profits of the business, transferring the risks to the principal company, with the latter providing the brand and the technological application that operates as the main and fundamental asset for the service and intervenes in the market, are all

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[65] R. De Lacerda Carelli, "O trabalho em plataformas e o vínculo de emprego: desfazendo mitos e mostrando a nudez do rei", *Futuro do trabalho. Os efeitos da revolução digital na sociedade*, Escola Superior do Ministério Público da União, Brasília, p. 75 (2020).

[66] Carballo *supra* 16, p. 114.

[67] Serrano *supra* 10, p. 26.

defining elements for the purpose of assuming that the service provider lacks true autonomy and therefore carries out an activity on behalf of others.

5.3. Adjuvant Criterion: Verification of the Free Will Provision of Personal Services, in Exchange for Valuable Consideration and Manifestations of Subordination

In addition to the necessary verification of the element of alienness, it would also be necessary to consider the other typical elements of the employment contract, namely a free will provision of a personal service in exchange for valuable consideration.

In addition to said assessment, and in the event of any interpretative doubts arising in relation to the weighting of the aforementioned elements, it would be useful to verify any possible manifestations of subordination that may be seen in each specific case.

The presence of indicators revealing alienness of the results and risks, as well as alienness of ownership of the means of production, alienness of the brand and the market and the insertion of the worker in the organisation of the enterprise, not only would verify one of the essential elements of an employment contract (alienness), but it would also reflect the assumptions that constitute the employer's powers of organisation, management, control and discipline, i.e. the legal components of subordination, whose manifestation is contingent in the facts.

Thus, if the externalisation of the powers of organisation, management, control, and discipline (any of them in an isolated and independent manner) was confirmed, it would be possible to complete the process proposed for its legal classification, in the sense of the existence of an employment relationship.

Likewise, such powers could be inferred to be verified to a greater or lesser extent depending on the evidential scope arrived at, in relation to the nature of the activity carried out by the company owning the digital platform. Indeed, if it were confirmed that the company actually provides the underlying service, it would be possible to extract elements that assume that the link between the service provider and the platform is an employment relationship, given that we would be dealing with a company that provides and manages the underlying service, exercises decisive and influential control over it and assumes the organisation of the way it is provided (power of control, organisation and management over the work and the workers).

By way of example, in relation to the work provided in the delivery of goods and merchandise, the importance of the control (geolocation) of the service providers, the greater or lesser remuneration based on the periods in which said individuals are connected to the platform application, the possibility of

being deactivated if they do not connect periodically or fail to fulfil some of their obligations, and very especially the ownership of the app through which the workers must connect in order to be able to provide the services, will be the determining elements for assessing whether or not there is a salaried employment relationship.[68]

5.3.1. Power of Organisation

The delivery service of goods and merchandise provided through digital platforms, is an example to point out that the technology provided by this companies constitutes the core of the business, in such a way that the determination of the working hours, as well as the areas where the activity is provided, is irrelevant[69].

However, the absence of a working timetable, both in relation to when to provide the service and in terms of its extension or duration (i.e., when, and how much to work) are not sufficient elements, much less decisive, to understand that the digital platform does not organise the work.

As noted above, two factors can work against this formal freedom to choose when and how much to work, especially in the case of vertical platforms.

The first is that the organisation of the service is generally structured by virtue of a convergent and multitudinous concert of providers, which allows the platform to have the service always covered, regardless of whether a particular provider is unable to attend or decides not to be available at particular periods.

The second, dependent on the above, is the result of the remuneration system usually adopted in this kind of situations. Indeed, as the remuneration is linked to the effective provision of the service, and also as it is better remunerated in those cases in which the service is provided in the time slots of greater demand, there is an intense conditioning both to be active and available in a greater number of hours, and to do so in those in which the digital platform needs a larger volume of workers at its disposal, according to the market and consumption requirements.

In short, the technological means can operate as a mechanism for work assignment and for the distribution of customers to be served by service providers according to the needs or requirements of the demand. If we add the fact that this assignment is conditional on the ownership of the database of customers and service providers, which is the exclusive property of the

[68] E. Rojo, "Unas notas sobre el objeto del Derecho del Trabajo", *El nuevo y cambiante mundo del trabajo. Una mirada abierta y crítica a las nuevas realidades laborales*. Blog entry for April 16 (2019), http://www.eduardorojotorrecilla.es/2019/04/unas-notas-sobre-el-objeto-del-derecho.html.

[69] Carballo *supra* 16, p. 113.

platform, a clear indicator of power of organisation becomes evident. Furthermore, in the case studies it has been found that the assignment of tasks and customers is in many cases conditioned, for example, by geographic issues (which are determined by a geolocation system), or according to the result of assessments (which are required from customers in relation to their degree of satisfaction with the work provided by the service provider), or even by the rate of orders' acceptance (recorded and analysed by the algorithm in the platform). As it can be appreciated, all these information elements are owned by the digital platforms, which serve as a basis for organisational and operational decision-making.

Likewise, in many cases, the price to be charged to the customer will be determined through the algorithm. In connection with the above, in addition to setting the cost or fee, digital platforms also usually manage its collection, through the implementation of on-line payment systems, by means of electronic mechanisms. This means that the digital platforms are the ones that agree with the financial companies on the payment methods (banks, credit cards, etc.) and not the service providers themselves. In addition, customers' credit card data are in the sole and exclusive possession of the companies that own the platforms.

These are some of the essential elements of a business organisation for the management of a certain service.

In other cases, a clear sign of the power of organisation can be seen when a selection process is adopted for the individuals who will provide the service, assessing them according to certain pre-established criteria. This is a revealing indication of the power of organisation of the digital platform, since if it were operating as a mere intermediary between supply and demand for a service, its intervention in one of the market factors would not be compatible with the nature of the activity (mediating between producer and consumer).

Another suggestive indication of an activity of organisation of the productive process and of the provision of labour is the implementation of help or support systems for the service providers (known as helpdesk). While formally, the general discourse among platforms often states that they are not enterprises that provide an underlying service, but that simply intermediate between its supply and demand, the implementation of these help and support desks for service providers contradicts this statement in facts. Indeed, these arrangements to provide technical support and assistance represent an inherent element of the organisation of an underlying service.

5.3.2. Power of Management

Some court decisions have valued the service provider's compulsion to comply with certain recommendations and instructions given through the digital platform, since failure to do so could lead to poor customer ratings and, ultimately, to penalties imposed by the algorithm (ranging from a reduction in the number of tasks assigned to deactivation and removal from the application)[70]. Therefore, the analysis of this element must be complemented with the other powers of the employer, in particular, with the powers of control and discipline of the service provider.

At the same time, in some cases there is a clear presence of the power of management in relation to the place where the work is provided. Specifically, in those off-line platforms for the delivery of merchandise or goods, or even ride-hailing services, the computer application usually determines unilaterally the place where the service is to be performed (the final destination), as well as the route for the delivery (where the service provider must circulate), which is controlled by a geolocation system. The same is true for some on-line platforms, as the work must be executed on a single, specific computer system.

On the other hand, there has also been a formal idealisation of an alleged freedom to choose the working hours in favour of those who perform the service, and, correlatively, a right to refuse tasks when the worker deems it convenient.

However, it is possible to verify a practical compulsion to devote a large number of hours to work and in the time slots required by the platform, as well as the material impossibility of resorting to the refusal of task assignments. It

[70] See, among others: Fair Work Commission of Australia, "Joshua Klooger v Foodora Australia Pty Ltd", U2018 / 2625, 16.11.2018; 33a Vara do Trabalho de Belo Horizonte, Process No 0011359-34.2016.5.03.0112, 02.13.2017; Tribunal Supremo, Social Chamber, Plenary, Judgment of unification of doctrine, 09.25.2020, Appeal No. 4746/2019; Juzgado de lo Social No. 33 of Madrid, Judgment No. 53/2019, 02.11.2019, Appeal No. 1214/2018; Juzgado de lo Social No. 1 of Gijón, Judgment No. 61/2019, 02/20/2019, Appeal No. 724/2018; Tribunal Superior de Justicia of Madrid, Chamber of the Social in Plenary, Sentence No 1155/2019, 27.11.2019, No of Appeal 588/2019; Tribunal Superior de Justicia of Madrid, Social Chamber, Section 2, Judgment No. 1223/2019, 12.18.2019, Appeal No. 714/2019; Tribunal Superior de Justicia of Madrid, Social Chamber, Section 1, Sentence No. 40/2020, 01.17.2020, Appeal No. 1323/2019; Cour d'Appel de Paris, Chambre 2, RG n ° 18/08357, 10.01.2019; Cour de Cassation, Chambre Sociale, Judgment No 374, 04.03.2020; Cour de Cassation, Chambre Sociale, Judgment No. 1737, 11.28.2019; Rechtbank Amsterdam, Case No. 7044576 CV EXPL 18-14763, 01.15.2019; Employment Court of the United Kingdom, Case No. 2202512/2016, "Ms M Dewhurst -v- CitysprintUK ltd", 05.01.2017; Juzgado Letrado del Trabajo de la Capital de 6to Turno, Sentence No 77/2019, 11.11.2019; Tribunal de Apelaciones del Trabajo de 1er Turno, Sentence No 111/2020, 03.06.2020.

should also be added that the latter possibility is not an unbalancing element in favour of the alleged autonomy of the service provider.
Indeed, the power to refuse is not an exclusive or novel characteristic of the platform economy. On the contrary, what is truly innovative in comparison with traditional work, is not that the worker may not comply with the successive business requirements (in this case, the proposal of each new task), but the decision of the platform to tolerate (to a greater or lesser degree) this type of behaviour. Furthermore, paragraph 10 of EU Directive 2019/1152 recognises that in the case of employment by a third-party, if the work pattern is unpredictable, workers may refuse a work assignment (under certain conditions). Hence, if in a relationship of employment by a third-party it is recognised that the "right to refuse" and self-organisation is not a notion contrary to subordinate work, how is it possible to allege self-employment on the platforms providing the underlying service?[71]
In short, in these flexible models of work organisation, in which the worker's total temporal freedom to perform tasks is claimed, the employer asserts a greater dominance over the worker, who is not subject to any specific working time frame. The business logic can be summed up as providing freedom to choose working hours, in exchange for a power to manage the worker that is intensified over a wide temporal space.

5.3.3. Power to Control

Modern expressions of control can be seen in several examples[72]. Such is the case of the geolocation systems installed in mobile devices, which indicate the

[71] I. Beltran, "Directiva 2019/1152 y «derecho al rechazo»: los riders/glovers son trabajadores por cuenta ajena", *Una mirada crítica a las relaciones laborales*. Blog entry for November 11 (2019), https://ignasibeltran.com/2019/11/11/directiva-2019-1152-y-derecho-al-rechazo-los-riders-glovers-son-trabajadores-por-cuenta-ajena/.

[72] See, among others: Fair Work Commission of Australia, "Joshua Klooger v Foodora Australia Pty Ltd", U2018 / 2625, 16.11.2018; 33a Vara do Trabalho de Belo Horizonte, Process No 0011359-34.2016.5.03.0112, 02.13.2017; Tribunal Supremo, Social Chamber, Plenary, Judgment of unification of doctrine, 09.25.2020, Appeal No. 4746/2019; Juzgado de lo Social No. 6 of Valencia, Judgment No. 244/2018, 06.01.2018, Appeal No. 633/2017; Juzgado de lo Social No. 1 of Gijón, Judgment No. 61/2019, 02/20/2019, Appeal No. 724/2018; Tribunal Superior de Justicia of Asturias, Social Chamber, Judgment No. 1818/2019, 07.25.2019, Appeal No. 1143/2019; Tribunal Superior de Justicia of Madrid, Chamber of the Social in Plenary, Sentence No 1155/2019, 27.11.2019, No of Appeal 588/2019; Tribunal Superior de Justicia of Madrid, Social Chamber, Section 2, Judgment No. 1223/2019, 12.18.2019, Appeal No. 714/2019; Cour de Cassation, Chambre Sociale, Judgment No 374, 04.03.2020; Cour d'Appel de Paris, Chambre 2, RG n ° 18/08357, 10.01.2019; Cour de Cassation, Chambre Sociale, Judgment No. 1737, 11.28.2019; United States District Court Northern District of California, Case No. C-13-3826 EMC, "Douglas O'Connor, et. al., v.

real-time location of the service providers, as well as all their movements, routes, pauses, waiting or resting times, speed, etc. It should be noted that such an instrument constitutes a potentially invasive means of control of a service provider's privacy, particularly in the transport activities, whether of goods or merchandise, or of people. Precisely, this monitoring mechanism allows the platform to acquire transcendental information for the purpose of optimising the organisation and management of the company, by virtue of classifying the service provider as one who fulfils the task quickly or slowly, who follows the most suitable route or deviates from it, etc.

If we add to this instrument the control carried out by the service users (through the rating of the service), we expose the existence of an extremely complete monitoring mechanism of the work activity, by incorporating to this accumulation of information the expectations and standards demanded by the customer, which serve as a basis for better decision making in the company and for adopting the relevant organisational, managerial and disciplinary measures (decisions that are often automated through the algorithm implemented for this purpose).

The power to control is also reflected in other cases when there are negative consequences for the workers derived from their deviation from the instructions of the platform. Such realities have surfaced in several legal disputes with reports of the algorithm suspending the assignment of tasks to those who are available to work because they had previously rejected some work assignments, or because they are not available at peak hours, among other similar examples. In practice, there have also been situations with even more serious consequences, like the disconnection of a service provider from the service platform, by removing that person from the application as a sanction imposed by the platform itself.

In short, DEGRYSE argues that "algorithms have taken over the functions of a traditional company: they coordinate production, match supply and demand, organise, control and appraise the workforce"[73].

Uber Technologies, Inc., et al. ", 03/11/2015; United States District Court Northern District of California, Case No. C-13-cv-04065-VC, "Patrick Cotter, et al., V. Lyft, Inc. ", 03/11/2015; State of New York Unemployment Insurance Appeal Board, No 596722, 07/12/2018; Juzgado Letrado del Trabajo de la Capital de 6to Turno, Sentence No 77/2019, 11.11.2019; Tribunal de Apelaciones del Trabajo de 1er Turno, Sentence No 111/2020, 03.06.2020.

[73] I. Daugareilh, C. Degryse and P. Pochet (Eds.), *The platform economy and social law: Key issues in comparative perspective*, Working paper 2019.10, European Trade Union Institute, ETUI, Brussels, pp. 25-26 (2019).

5.3.4. Power to Discipline

The analysis of manifestations of the punitive power[74] must be carried out in conjunction with those of the other powers, insofar as the submission to the exhaustive control referred to above (with the constant demand for greater connectivity and availability, both to have more work assignments and to obtain better and more remuneration) operates correlatively with the pressures arising from the possibility of being deactivated or poorly rated by customers who may harm the workers (depriving them of their source of income).
The possibility of reducing the work assignments given to service providers, by virtue of their rating and prior assessment, constitutes an element that allows to identify the development of a punitive manifestation, typical of the notion of subordination, and far removed from the possible autonomy and freedom to exercise an undertaking on one's own account. The same conclusion can be extrapolated to the fact of unilateral deactivation of the provider's account or its suspension for not complying with certain instructions or rules of conduct required by the digital platform.

6. Concluding Remarks

1) There are important objections to the self-characterisation made by some companies owning digital platforms as intermediary companies providing information society services, limiting their activity to the simple development of technology, and linking supply and demand for a good or service.
In particular, the rebuttal to that classification stems from the factual verification of several factors, which, taken together or individually, lead to the conclusion that in fact the activity carried out is limited to the supply and provision of the underlying service performed by the providers. Thus, the fact that these companies exercise decisive influence over the organisation and management of the service and of the service providers themselves is more than sufficient evidence to overturn the self-classification made by the companies.

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[74] See, among others: 33a Vara do Trabalho de Belo Horizonte, Process No 0011359-34.2016.5.03.0112, 02.13.2017; Tribunal Supremo, Social Chamber, Plenary, Judgment of doctrine unification, 09.25.2020, Appeal No. 4746/2019; Juzgado de lo Social No. 1 of Gijón, Judgment No. 61/2019, 02/20/2019, Appeal No. 724/2018; Tribunal Superior de Justicia of Madrid, Chamber of the Social in Plenary, Sentence No 1155/2019, 27.11.2019, No of Appeal 588/2019; Tribunal Superior de Justicia of Madrid, Social Chamber, Section 2, Judgment No. 1223/2019, 12.18.2019, Appeal No. 714/2019; Cour de Cassation, Chambre Sociale, Judgment No 374, 04.03.2020; Cour de Cassation, Chambre Sociale, Judgment No 1737, 11/28/2019; Juzgado Letrado del Trabajo de la Capital de 6to Turno, Sentence No 77/2019, 11.11.2019.

2) The propositional content of this work has materialized in the projection of criteria for the determination of the nature of the relationship established between service providers and digital platforms, by considering a critical review of the central role of the element of subordination and a revaluation of the element of alienness.
This leads to the conclusion that when determining the existence of an employment relationship, the element of subordination has been relegated in importance, at least in terms of the central role traditionally conferred to it.
3) In this paper it is understood that verifying the authenticity of the autonomy of the entrepreneur status of the service provider and the revaluation of the element of alienness are the main criteria to determine the existence of an employment relationship.
In short, the main criterion lies in the analysis of the authenticity of the autonomy of the entrepreneur status of the service provider, and in particular, of the presence of alienness in its various projections: alienness of the results and/or profits and of the risks; alienness of the ownership of the means of production; alienness of the brand and of the market; and insertion of the worker in the organisation of the company.
4) In the event of genuine doubts arising when verifying the main criterion suggested, the analysis of possible manifestations of subordination would become important. Hence, the verification of the exercise of any of the powers of organisation, management, control, or discipline would form part of the complementary examination, considering that the presence of any of them in isolation would represent a manifest incompatibility with the alleged autonomy of the worker.
To detect some of the contingent manifestations of subordination, several particular aspects of work in these realities become relevant.
Firstly, the analysis will be enriched after having addressed the first classification problem referred to the determination of the activity carried out by digital platforms.
Secondly, there are many indications of the employer's exercise of the power of organisation. The algorithm setting the price of the services, as well as the management of its collection, the possession of the relevant information data for business decision-making, such as work assignment and the distribution of customers, the implementation of a selection process for service providers, the creation of support systems for service providers, among other examples, are indications of this power.
Furthermore, there are several practical expressions that converge to mitigate the alleged provider's freedom of choice of when and how much to work, which would presumably constitute an element incompatible with the exercise of the employer's own power of organisation. In fact, the company's power of

organisation is not exhausted since it is irrelevant whether a particular provider cannot or chooses not to be available at certain periods, since there is a convergent and multitudinous concert of providers, which allows the platform to have the service always covered. Moreover, the remuneration system usually adopted in this type of situation considerably limits the alleged formal freedom. As remuneration is linked to the actual provision of the service, as well as being better remunerated when the service is provided in the time slots with the highest demand, there is an intense conditioning both to be active and available during a greater number of hours, and to do so during those hours when the digital platform needs a larger volume of workers at its disposal, due to market and consumer requirements.

In another aspect, in casuistry there are also expressions of the exercise of the power of management. By way of example, behavioural suggestions or recommendations become intense directives, as compliance with them is linked to the rating processes set up by the platform, the result of which can lead to the suspension or deactivation of a service provider, or to a reduction in the work assignments.

On the other hand, there are many indications of the platforms' exercise of the powers of surveillance. Generally, the greatest influence of this power is concentrated in the implementation of the control system which requests customers to rate the work. Likewise, other means of control are exercised using novel technological instruments, such as geolocation systems generally implemented on off-line platforms.

Finally, the element that is most evident in the facts, relates to the exercise of punitive powers. Even if, statistically, its manifestation is occasional, suspending a provider's account or disabling access to it is a typical expression of the discipline inherent in a dependent employment relationship.

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What (if anything) May Justify a New Policy Regulation for Gig-delivery Workers? The Case of *Rappi* in Argentina

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Abstract

There is an ongoing discussion regarding the disruptive effects of the 'gig' or 'platform' economy on labour law. The debate focuses on whether gig-work is a new typology of work that might overcome traditional employment categories. However, there is little acknowledgement of that discussion in developing countries. This article aims to contribute to fulfilling that gap by analysing the case of *Rappi* in Argentina. *Rappi* is a Colombian delivery platform created in 2015 in 27 cities and six countries in Latin America. We evidence that current legal frameworks are insufficient to explain the gig-work that *Rappi* riders perform. It is argued that there is a room to propose a new regulation in order to effectively capture the essence of this new type of work. The article develops four main features that such regulation should include. This new law might serve an optimal basis to encourage the protection of the gig-workers positions whilst encouraging the growth of these type of platforms.

Keywords: Labour law; gig economy; platform-economy.

Introduction

In July 2018, food-delivery riders in Buenos Aires spontaneously organised a protest against on-demand (gig) platforms such as Uber Eats, *Glovo* and *Rappi*.

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The trigger was a sudden reduction of the fixed commission per delivery. Shortly after, on October 1, 2018, the constitutional assembly of the trade union "*Asociación de Personal de Plataformas ("APP")"* was held with an attendance rate of 170 delivery-riders from these platforms. All the procedures established in the law regarding the constitution of a trade union were followed. Yet, until today, the Labour Authority has not yet recognized them formally.

The literature on the effects of the 'gig' or 'platform' economy on labour regulations have been centred in case-studies of some developed countries. However, little attention has been paid to those very effects in legal frameworks of developing economies, which suffer from different labour challenges such as high unemployment and informality rates. This article aims to start fulfilling that gap by studying the case of a gig-platform named *Rappi. Rappi,* is a Colombian multinational created in 2015 that operates in 27 cities and 9 countries in Latin America with similar labour law traditions.[1]

In all these countries there is an ongoing discussion regarding the nature of the legal relationship between the platform and its riders also called '*Rappitenderos*'. It seems that several aspects of the work deployed by the riders are controlled unilaterally by the platforms' algorithm, starting from the commission's fixation per delivery. Therefore, it would denote a subordination which would amount to as typical employment relationship. In fact, a similar reasoning was followed by the Spanish Supreme Tribunal that considered how delivery riders were, in fact, typical employees of the company that administered the platform. The argument was centred on the labour coordination and organisation of a standardised service by the platform.[2]

On the other hand, *Rappi* claims that its riders are, in fact, self-employed entrepreneurs. That is to say, they serve as 'agents' for a final user, which acts as a principal. In that narrative, platforms are merely intermediaries of the relationship between the principal (user) and the agent (delivery worker). According to Argentina's legal framework, as it is for the majority of the legislations in which *Rappi* operates, being either self-employed or an employee

[1] Miranda, B. *Rappi, el "Amazon de Colombia" que se convirtió en el emprendimiento más exitoso del país (y que genera protestas en algunas ciudades de América Latina)*, BBC World, Oct. 26, 2018 at: https://www.bbc.com/mundo/noticias-america-latina-45975280

[2] *Sentencia Número 805/2020* (Tribunal Supremo de España, Sala de lo Social, Pleno, 2020). Recurso de casación para la unificación de doctrina. MP: Excmo. Sr. D. Juan Molins García-Atance. (Sept. 23, 2020). Moreover, after that ruling, the Country issued a new regulation for workers associated to these types of platforms and recognized the relationship between riders and the platform was covered within the typical employment relationship in *Real Decreto-Ley 9/2021*. España, 11 May, 2021.

triggers a different set of rights, and duties. Moreover, the costs associated with one or another type of relationship are also different.

Typically, self-employed workers are owners of their organisation, tools and materials to perform a job. They have the necessary independence to choose whether to accept or reject a task, thus bearing its associated risks. On the other hand, employees are dependent on another person or organisation who provides precise instructions, tools, and materials to perform a job. As opposed to the independence of the self-employed, the subordination of employees implies being part of a company's disciplinary sphere. It means that employees would have to follow and comply with specific rules and procedures. Moreover, be subject to a certain degree of control in their job performance.[3] Nevertheless, it seems that, at least for the case of Argentina, neither of those categories might be able to fully capture the underlying legal relationship between the user, a platform and its riders.

The question that arises is whether (if at all) it is justified to create a new category in that legislation to regulate these relationships. In the affirmative, what would be its main characteristics. A normative claim is made which implies that this regulation should comply with a sufficiency criterion with respect to two elements: (i) the protection of minimum labour rights. (ii) the flexibility needed to encourage these types of businesses. To address this question, the methodology to be followed is a mix between comparative and critical legal analysis and qualitative analysis of riders' conditions. One of the main sources used for this article is a recent study conducted by the International Labour Organization (ILO) in Argentina.[4]

There are four sections in this article, including this introduction. In the first chapter, after a literature review and a critical legal analysis, it will be evidenced that the current legal framework in Argentina is insufficient to explain the relationship between *Rappi* and its riders, hence opening a path for a new category and regulation. The second section presents and details each of the minimum features such new regulation might have considering comparative experiences and policy developments. Finally, the article will draft some conclusions.

[3] See also Todolí-Signes, A. *The 'gig economy': employee, self-employed or the need for a special employment regulation?* European Review of Labour and Research. At 23(2). Pp. 193-205. (2017).

[4] Madariaga, J., Buenadicha, C., Molina, E. y Ernst, C. *Economía de plataformas y empleo ¿Cómo es trabajar para una app en Argentina?*, CIPPEC-BID-OIT. Buenos Aires (2019)

1. *Rappi:* The Two Sides of its Success

Labour markets and industrial relations in developing countries have not been exempted from the impact of new technological improvements. Two simultaneous yet different phenomena may be identified: automatisation and digitalisation. The first one relates to how technological innovations and developments would impact employment rates and inequality. The second one entails a disruptive and expansionary revolution over established economic relations. In sum, whilst automatisation impacts employment substitution, digitalisation affects the quality and forms of employment.[5]

The challenges posed by these new modes of production to labour law are similar in all latitudes, thus becoming a phenomenon that may be better addressed globally.[6] Nevertheless, its impact differs depending on the geographical location of its operation. As for today, only a few articles have covered the impact of these models in developing countries' legal systems. As a result, there is a gap regarding whether there might be a case arguing for a new regulation that overcomes the classical divide in the legislation between employment relationships and independent or self-employed contractors. This article aims to contribute to the fulfilment of such a gap.

The so-called 'platform economy' includes several business models and transversely affect different economic sectors –with their characteristics and markets– and thus, an all-embracing definition may not be fully reached.[7] That is why, frequently, these concepts are used indistinctively and alternately in the literature.[8] Furthermore, almost all scholars researching this topic come up

[5] Molina, O. & Pastor, A. *Digitalización, Relaciones Laborales y Derecho del Trabajo*. In Fausto Miguélez (coord.) *La revolución digital en España. Impacto y Retos sobre el Mercado de Trabajo y el Bienestar*. Bellaterra: Universitat Autònoma de Barcelona. Available at: https://ddd.uab.cat/record/190328 (2018).

[6] In fact, Globalisation and technological innovation, together with an agenda of deregulation and flexibilisation, radically transform the production and accumulation models in western societies. This transformation is also partly supported by a narrative encouraging 'entrepreneurship' that moves away from the social and trade union movements, triggering an escape from the labour law regulations and labour perspectives. Rodríguez-Piñero Royo, M. *La agenda reguladora de la economía colaborativa. Aspectos laborales y de seguridad social*. Temas laborales. Oct. 9th, 2017, at 138. 125-161.

[7] See Petropolous, G. *An economic review of the collaborative economy*. Policy Contribution. Issue 5. Bruegel (2017) P-1. Also, refer to Schneider, H. *Creative Destruction and the Sharing Economy. Uber as disruptive innovation. New Thinking of Political Economy*. Edward Elgar Pub. Ltd. Cheltenham, UK. (2018). P-24.

[8] See Stewart, A. & Stanford, J. *Regulating work in the gig economy: what are the options?* The Economic and Labour Relations Review. At 28(3) P. 420-437, (2017). Also, see Sargeant, M. *The Gig Economy and the Future of Work*. E-Journal of International and Comparative Labour Studies. 6(2). Pp.1-11, (2017)

with a different categorisation of the same phenomenon. For instance, 'crowd-work' and 'work-on-demand via app', or 'generic and specific on-demand via app platforms'[9]. However, regardless of the specificities of each categorisation, there is a common denominator. These business models perform a matching or connecting role for direct or indirect exchange[10].

What is relevant for this article is the type of service provided by *Rappi*. It is a delivery service that includes food delivery or the innovative category of 'whatever you would like'.[11] This service is done physically through their delivery men. They access the platform, accept a command from a user and provide the service. *Rappi* has fulfilled up to 200.000 orders a day, making it one of the most important digital platforms in Latin-America and thus, attractive to investment funds[12]. In fact, in September 2018, *Rappi* became the second Latin American 'unicorn', defined as a company with a market valuation of one billion dollars or more.[13]

The literature has identified five causes: to explain the expansion of these type of platforms: i) the rising rentability of capital; ii) an increasing purchasing power; iii) the improvement of market functioning (including growing atomisation of the markets due to the reduction of entry barriers and a decrease of information asymmetries); iv) digital innovation and, finally, v) the diversification of the skills of individuals in a competitive labour market[14]. I would add a sixth cause: the grey zones of the labour relationship between platforms, users and workers that allow these business models to use less costly legal figures regarding their payroll fixed costs like self-employment relationships.

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[9] De Stefano, V. *The rise of the 'just-in-time workforce': On-demand work, crowd work and labour protection in the 'gig-economy'*, in Comparative Labor law and Policy Journal, 37 (3): 471- 503 (2016). See also Todolí-Signes, *supra* n. 2.

[10] Stanford, J. *The Resurgence of gig work: Historical and theoretical perspectives*. The Economic and Labour Relations Review, at 28(3), P.382-401 (2017).

[11] It consists in asking to a person would provide a service of your preference like buying a book or a pack of cigarettes or delivering a package to another address.

[12] Recently, *Rappi* received an investment of 200 million US dollars. See Miranda, *supra* n. 3. In fact, the number of digital platforms that are rising as a consequence of this 'digital revolution' expresses all its potentially disruptive effects. According to a study of *PriceWaterhouseCoopers* these types of business are projected to represent almost 335 billion dollars of revenue in 2025 –in contrast to the 15 million dollars it represented in 2014–, corresponding to a growth rate of more than 35% per year. For further reference, see Montel, O. *L'economie des platformes: enjeux pour la croissance, le travail, l'emploi et les politiques publiques*. Document d'études. Direction de l'animation de la recherche, des études et des statistiques (DARES). No. 213, (2017).

[13] Fan, J.S. *Regulating Unicorns: Disclosure and the New Private Economy*. Boston College Law Review. April 5th, 2016, at 583, 583-642.

[14] Montel, *supra* n.14, 21-24

1.1. The Dispute in the Literature: Between Regulation And Enforcement

In the literature, it is possible to find five solutions to the legal challenge posed by the operation of platforms like *Rappi*: i) confirming and enforcing the existing laws through litigation; ii) clarifying or expanding the definitions of employment to consider the set of new activities as equivalent to employment[15]; iii) creating (or enforcing) the third category in between typical employment and self-employment relationships; iv) establish a set of rights for workers as a broader concept that goes beyond the employee status and lastly, v) redefine the notion of 'employee'. [16]

These five options are not incompatible with each other. For instance, it would be possible to imagine creating a third category that establishes a set of rights for workers considering a broader concept than the employee relationship. Thus, in synthesis, there are two options: i) fitting the platform-delivery worker relationship to the already established categories in the legislation. Alternatively, ii) create another category of a different nature that would include some fundamental rights from one relationship whilst maintaining the freedom associated with the other.

The question to be addressed is whether the disruption of *Rappi* and other similar platforms in Argentina challenges current legal categories in the country. In the affirmative, then explore whether it would be desirable to create a new category in the legislation or enforce the current ones. Finally, if accepting the thesis of new regulation, what are its overall features. This last question will be discussed in the next section. Firstly, let us frame the first question in recent discussions held in the literature.

In the literature, it is possible to categorise those who depict the need of a third category and those who defend such a position: we might label them as *orthodox* and *heterodox*. The first group includes the authors who argue that the platform-service economy such as *Rappi* does not constitute a different mode of production. Therefore, it could be perfectly explained through classical categories of employees and self-employed as exists in most legislations. The second one holds the opposite. It considers that these disruptive businesses entail a new mode of production. Hence, there is a need for a new regulation

[15] Within this category it is interesting to analyse the more radical proposal of redefinition of a worker where the concept of 'worker' should include the perspective of an economic subordination more than a legal one: "This way of thinking upholds the concept that an employment relationship should be applied to any worker who has an objectively weak bargaining position regardless of how he/she executes the work, albeit under dependency or with autonomy". See Todolí-Signes, *supra* n. 11, P.198.

[16] Stewart & Stanford, *supra* n.10, 429-431

overcoming the classical binary discussion of employee-independent contractor.

Among the arguments provided by the orthodox position, authors like De Stefano[17] explain how the business model of the platforms such as *Rappi* resembles classical casual work. Thus, the application of existing legal regulations towards labour should be enforced to protect these workers. Cherry & Aloisi arrive at a similar conclusion. After engaging in comparative legal analyses of the three most quoted 'third categories' existing in Canada, Spain and Italy, they found out that these are not enforceable to gig-relations[18]. Their main critique focuses on various reasons such as: i) the vagueness of the definition of the addressed relationship; ii) the unintended risks and consequences that it could have regarding a typical employment; relation; iii) the potential increase of arbitrage by those who are dissatisfied with the classification and, finally, iv) the fact that a comprehensive regulation might discourage the usage of these platforms by those people who use them as a mean to earn extra money besides their established job.

Similarly, some arguments between the orthodox position consider that gig-work is a self-employment relationship between workers and user, whilst the platform serves as a mere intermediary between the latter two[19]. Moreover, these intermediation types have been a practice since the 19th century when the 'long-standing management-labour extraction strategy' was enforced. Nonetheless, what is new, is the use of digital techniques involving a new system to plan, supervise, pay and allocate resources. However, these new means to execute work does not have the entity to change the nature of the work. In sum, these platforms use on-demand contingent workers to perform particular productive work associated with a deemed supply service.[20]

The heterodox posture defends that even if the strength of the authors' arguments mentioned above is not to be disputed, current definitions of labour were determined and well placed before the entrance of these disruptive models. Thus, their aim was not regulating a new employment relationship but protecting certain other kinds of work framed within the classical industrial

[17] De Stefano, *supra* n.11, P.13.

[18] Cherry, M.A. & Aloisi, A. *"Dependent Contractors" In the Gig Economy: A Comparative Approach,* American University Law Review, at, vol. 66 : Iss. 3. (2017)

[19]. Cavallini, G.G. *The (Unbearable?) Lightness of Self-Epmloyed Work Intermediation: The cases of Uber, Foodora and Amazon. Mechanical Turk In The Light of the Italian Labor Law*. Working Paper. Università degli Studii de Milano. (2017). However, the relationship between the final user and the worker is even more blurry than the one between the platform and the worker. As Stewart & Stanford, *supra n.*10, argue, "the relationship between the gig worker and the ultimate user of their services is more ambiguous. It depends on the business model adopted by the intermediary, and how it is characterized by regulators".

[20] Stanford *supra* n.12 386-396

mode of production. Hence, those categories are not associated with the new challenges raised by digital on-demand platforms, like the new modes of control and a new definition of dependency created by the digitalisation of labour relations.[21] Furthermore, a new regulation would necessarily harm the already established typical labour relations presumed to be the default relationship of all working schemes in most legislations.

The heterodox position recognises that the platform economy has created legal uncertainty regarding workers' classification and such is the main challenge to be addressed by a new regulation. A new category would thus ascertain predictability among the parties regarding the relationship under which they are involved[22]. Furthermore, this becomes relevant as some companies would have less risk in providing a set of benefits to its workers without the fear of them being categorised as *faux indépendants* and actual employees.[23]

Furthermore, there are two other arguments in advocating for the heterodox position: the first is that the authors arguing in favour of extending the employee relationship to these workers would drastically increase the cost structure of those business models. Hence it would potentially lead to a decrease in consumer welfare and the platforms' collapse.[24] The second one is that it is an excellent opportunity to engage in a regulation based on tripartism. It is argued that an efficient regulation depending on the job performed could be achieved more adequately through collective agreements. The best example is how Denmark decided to approach this issue.[25]

Recent judicial and policy decisions in some developed countries have mostly seemingly agreed with the orthodox position[26]. However, the following sections of this article will argue that there might still be a case to argue in favour of adopting a new regulation after considering the specificities of Argentina's regulation.

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[21] Sierra Benítez, E.M. *El tránsito de la dependencia industrial a la dependencia digital: ¿qué Derecho del Trabajo dependiente debemos construir para el siglo XXI?.* Rev. Intnal y Comp. Rel. Lab. Dcho Empl., at vol 3, n 4, (Oct. 2015).

[22] Nadler, M. L. *Independent Employees: A New Category of Workers for the Gig Economy*. North Carolina Journal of Law & Technology, at 19(3) pp. 443-496 (2018).

[23] Madariaga et al, *supra* 4, 30.

[24] Buenadicha, C.; Cañigueral Bagó, A. & De León, I.L. *Retos y posibilidades de la economía colaborativa en América Latina y el Caribe.* Sector de Instituciones para el Desarrollo. División de Competitividad, Tecnología e Innovación. Doc. No. IDB-DP-518. Banco Interamericano de Desarrollo. (June 2017).

[25] Todolí-Signes, *supra* n.11

[26] See *Sentencia Número 805/2020 supra,* n 3.

1.2 Rappitenderos: Neither Agents nor Employees

Rappi is the employer of 1.500 workers under an employment relationship and 25.000 *Rappitenderos* (riders) who are considered, according to the terms and conditions in Argentina, as "independent delivery men".[27] That is to say, self-employed *via* an agency relationship. This section aims to address whether it is possible to describe the underlying relationship between *Rappi* and its riders through an 'agency relationship' as claimed by the platform or as an employment relationship as claimed by the riders?

Categorising this relationship impacts not only the set of rights and obligations to both the platforms and riders. Moreover, according to recent case law, it seems that collective rights also depend on that. For instance, in some legislations, being entitled to the right of association and collective bargaining depends on the definition of a precise legal relationship.[28] As Cherry & Aloisi indicate, "classification as an employee is a "gateway" to determine who deserves the protections of labour and employment laws"[29]. In the Argentinian legal framework, there is nothing to suggest that it would be the case. However, the latest judgement on *Rappi* and its workers in Argentina seems to suggest the contrary.[30]

Argentinian legislation includes two common legal categories present in most legislations: employee (worker) and independent contractor (agent or self-employed). Each one of them triggers a different set of rights, duties and protections. Although it is commonplace to situate the emergence of these categories in the industrial revolution after the workers' struggle to gain their rights, the literature suggests that these figures could be actually traced back to the Roman civil law tradition[31]. Legal categories *locatio-conductio rerum* and *locatio-conductio operarum* were the concepts through which both subordinated and autonomous work was regulated in the Roman Empire legislation. The difference between them is that the worker would fall into the orbit of personal subordination *vis-à-vis* his employer in the first one, whilst in the second one, there would be absolute autonomy to perform the work.[32] In other words, the discussion on the binary divide in modern labour legislation based

[27] See *Rappi Términos y Condiciones*. Available at: https://legal.*Rappi*.com/argentina/terminos-y-condiciones-*Rappi*-2/. [Accessed 14th May 2021].

[28] Vega Pérez-Chirinos, C. *Lo que el caso Deliveroo puso sobre la mesa: autónomos y acción colectiva.* Revista Crisis y Renovación del Sindicalismo, at 36, 123-132. (2017).

[29] See Cherry & Aloisi *supra* n. 19 p.638.

[30] This discussion will be developed in section 2.

[31] At that time, the legal regime that covered the relations of production was based on property relations that were, in any case, vertical and strictly hierarchical. See Sierra Benítez *supra n* 22, 5.

[32] See Sierra Benítez, *supra* 22.

on subordination was opened since that time. Despite the different revolutions that have changed the social relations of production, they remain essentially unaltered.

In both common law or civil law traditions, the most critical feature that distinguishes an employee from an independent worker is the level of control of the counterparty over the worker or its job performance.[33] Thus, the notions of subordination, dependency and alienation are the key when speaking about typical employment relationships, whilst autonomy, freedom and independence, are the main features of an independent relationship[34]. Henceforth, the set of rules governing one or the other relationship change.

Rappi considers its platform as an intermediator that facilitates the relationship between the 'independent delivery man' and the 'users' (both a natural or physical person) through its 'technological and mobile platform'. The legal narrative[35] used by this company is that the service they provide is claimed to be executed through an 'agency contract'[36]. In those relationships, the user is the principal, and the delivery man is the agent, thus escaping labour-law regulations and falling into the civil or commercial set of rules[37].

However, specific features of such a relationship would reveal that their role between them and their delivery-men goes beyond mere intermediation or agency. Thus, suggesting that there may be some subordination features with mechanisms of discipline and control.

1.2.1. *Rappitenderos* as Agents

Civil and commercial contractual relations are the 'fundamental act of the private autonomy'. Being susceptible to economic valuations, they constitute

[33] See Cherry & Aloisi *supra* n. 19

[34] See Sierra-Benítez *supra* n. 22. Indeed, dependency and subordination do not only refer to the submission and compliance of a worker to the employer in terms of following instructions, but also the insertion of the worker to the disciplinary circle of the enterprise. For instance, there would be subordination when the worker complies with the disciplinary codes of conduct and determined tasks that are controlled by the employer. That notion has demonstrated a huge resilience capability to the new economic and technological realities.

[35] See Molina & Pastor *supra n. 5*. They argue how "it seems like Adam Smith's invisible hand would have embodied itself into these digital platforms and what is more important and overall, lucrative for these kinds of enterprises is that if they are not considered a service provider, the enforcement of labour, social security or consumer laws cannot be properly done. That situation would put them in a sort of legal limbo that would report them undoubtedly competitive advantages in terms of social costs savings".

[36] See *Rappi supra* n.27.

[37] An employment relationship according to the Argentinian law would be costlier than a self-employed one for the platform.

the essential legal instrument for capital circulation.[38] As mentioned, *Rappi* argues that their role consists of intermediating in the agency contract between their delivery men and the final user. However, it seems that its role goes beyond neutral intermediation.

The agency contract relationship is regulated in the Civil and Commercial Code of the Nation (CCCN) Law 26,994 of 2015 within articles 1319 to 1334. Such a contract is defined as when a person gives another one the power to represent them to execute a legal act. Among other characteristics, the agency contract could be either written or verbal, and it could be expressly or tacitly accepted by both parties involved. According to article 1904 of the Civil Code, the agency contract implies that if there is acceptance of the mandate by the agent (in *Rappi*, it would be the acceptance of a command requested by a user), then it is the agent who is obliged to fulfil its duty by himself. Hence it would be the agent who could be held liable for potential breaches in the execution of the mandate. However, that is not what happens with a command in *Rappi* when a command is unfulfilled. The platform counts with a channel to attend to final users in case of any problem with the commands. Therefore, it is the platform which directly held responsible by the consumer for the service failure, not the rider.[39] This peculiarity would break down one of the essential elements of an agency contract. Moreover, it would contradict the pure 'intermediation' function claimed to be performed by *Rappi.*

Another essential feature of the agency contract is the possibility to subcontract with a different agent to fulfil the object of the contract. However, according to *Rappi*'s T&Cs, the rider cannot subcontract the command once it is assigned to him or her. In fact, 100% of the workers from *Rappi* indicated that they had never subcontracted their work.[40] Furthermore, the agency contract is, in general terms, a generic contract, not a special one (i.e. *intuitu personae*)[41]. Hence, the prohibition set by *Rappi's* T&C is an exogenous element to such kind of relationship. The consequence of imposing that clause to all potential contracts between riders and users implies an unnatural restriction to private autonomy that governs agency agreements, hence constituting itself as an element of control of the service provided by *Rappi* riders.

Another example of how the assumptions of a civil or commercial agency contract are not fully useful to accurately describe the underlying relationship

[38] Hinestrosa, F. *De los principios generales del derecho a los principios generales del contrato*. Revista de derecho privado, at 5, Pp.3-22. (Jan/June, 2000).
[39] See Madariaga et al, *supra* n.4.
[40] See *Idem,* 111.
[41] It could potentially be an '*intiutu personae*' contract, but it has to be clear in the contract.

for the case of *Rappi* is the platform's ability to block riders[42] who do not comply with certain requirements. In an agency relationship, the task is performed independently and autonomously with the tools owned by the agent. However, *Rappi* demands its riders to acquire and wear company advertisement (among which there are hats, t-shirts, and carry-bags) under the risk of being penalised by not receiving any further commands. Moreover, the platform seems to have a control mechanism called the 'acceptance rate', according to which riders are supposed to accept all and every single command offered to them, even if not convenient for their location.[43] Seemingly, riders are controlled, uniformized and identified with the brand of the company. The use of control mechanisms evidence that *Rappi* is seeking a standardised service even if they are not providing any training for their delivery riders. Hence, there is little autonomy for riders to perform their job. With these elements, it seems the argument of *Rappi* as being just an intermediary between a user and a rider could be rejected.

1.2.2. *Rappi* Workers as Employees

This section will explore whether the typical employment relationship might fully explain the underlying relationship between user, platforms and riders like *Rappitenderos* argue, or there might be a case for a *sui generis* category. The position of the trade union *APP* is to recognise that between the platform and its riders, there is a hidden typical employment relationship.

The history of labour law starts in Argentina in 1853 when the National Constitution recognised the freedom to work. As in the rest of Latin America, Labour Regulations were developed after the first decades of the XXth Century, especially after the constitution of the ILO[44]. There was a recognition of a maximum workday, social security regulations, collective bargaining rules and basic protections for workers such as occupational health[45]. However, it was not until May 15, 1974 when the Labour Contract Regime [*Régimen de Contrato de Trabajo*] (Ley No. 20.744) was created. Such legislation remains today the leading framework regulating these types of relations[46]. The individual employment contract is the antithesis of the civil contracting model,

[42] The contract modality between the platform and the riders referring to the acquisition of the elements of work and advertising of the platform is supposedly a 'loan agreement' which requires the return of the material once the legal relationship finishes. See *Rappi supra* n.27.

[43] See Miranda *supra* n. 3

[44] See Villasmil Prieto, H. *Pasado y presente del derecho laboral latinoamericano y las viscicitudes de la relación de trabajo (segunda parte)* Revista Latinoamericana de Derecho Social. 2016, P. 2

[45] See Madariaga *supra* n 4, p.131.

[46] Arg. Lab. Cont. Reg. (Law 20.744) (1976).

as it recognises the inherent asymmetry between employers and employees. Hence, the weak party of the relation would need to receive statutory protection to equilibrate the relationship.[47]

Article 21 of the Labour Contract Regime indicates the two concurrent conditions to hold an employment relationship: i) a person obliges him or herself towards another to perform a service or execute a task in exchange for a salary. ii) It does so under the dependency or subordination of the other person[48]. Article 23 of the Law of the Labour Contract also recognises a 'presumption' of an employment relation whenever there is a relationship with some aspects of an employment relationship, yet it is not expressly recognised.[49] This would mean that the burden of proof for an autonomous relation is higher, as the law assumes that the default option for those cases is the employment relationship.

Subordination is a notion that has not been adequately developed in positive legislation, but in the case law. High Courts in Argentina have adopted multiple criteria to establish when would a self-employment relationship hide typical employment. The two most important ones are dependency and identification. Dependency could be either economic or legal. Economic dependency considers the regularity and predictability of the remuneration. Legal dependency analyses if the job is performed under precise instructions and subjected to the disciplinary power of an employer-like figure. On the other hand, identification relates to the possibility of detecting elements that could associate a worker having a link with a determined company.[50] All things

[47] Such vision is evidenced by Article 17Bis in Arg. Lab. Cont. Reg. (Law 20.744) (1976) where it is stipulated that "inequalities created by this law in favour of one of the parties shall only be understood as a way of compensating for other inequalities in the relationship" (own translation).

[48] Public employees are covered by another set of rules. The Labor Contract Law only regulates the employment relationship between private individuals and entities. Article 21 Arg. Lab. Cont. Reg. (Law 20.744) (1976) indicates "[a] contract of employment, whatever its form or name, exists whenever a natural person undertakes to perform acts, execute works or render services in favour of another and under the dependence of the latter, for a specified or unspecified period of time, against payment of remuneration. Its clauses, as regards the form and conditions of the performance, are subject to the provisions of public policy, the statutes, collective agreements or awards having the force of such, and customs and usages." (own translation)

[49] Arg. Lab. Cont. Reg. (Law 20.744) (1976), Art 23. "The fact of the provision of services gives rise to a presumption of the existence of a contract of employment, unless the circumstances, relations or causes that motivate it demonstrate the contrary. This presumption shall also apply even if non-employment figures are used to characterise the contract, and insofar as the circumstances do not allow the person providing the service to be classified as an employer." (own translation"

[50] See Madariaga *supra* 4, P.133.

considered, this is the main point to consider when analysing the platform-rider relationship.[51]

There might be good reasons to declare that *Rappi* riders might fall within the category of the typical employment relation. Indeed, there are some hints of legal dependency because of the elements of control described in the last sub-section. Furthermore, there might be good reasons to argue that these riders also have an economic dependency. As far as 95.5% and the number of hours dedicated to that job is, on average is 58.13 hours a week. This working time exceeds 10 hours: the maximum working time per week allowed in a typical labour relationship without extra charges.[52] Moreover, there are normative reasons such as the benefits these workers could derive from being in an employment relationship: paid vacations, licences and a guaranteed resting day.

However, current employment categories used in the Labour Contract regime are not functional for the type of work performed by *Rappitenderos* nor for the type of business model attained by *Rappi*. Indeed, it might be inconvenient to argue for a declaration of an employment relationship. Moreover, there is one feature of typical employment relationships that would lead to rejecting the idea of categorising these workers as traditional employees: its inflexibility. This inflexibility manifests itself in the legal restrictions employees and employers have in a typical employment relation regarding a minimum and maximum working time.

The law regulating the employment contract establishes a uniform length of the working day for all the nation[53]. It is established at 8 hours per day and a maximum working time of 48 hours per week[54]. This feature would break the backbone of gig-work: the freedom these workers have in setting up their working schedules however they want. [55] In fact, some riders would rather prefer to do extra work on certain days to compensate for others in which they would preview to work less time.[56] In that way, there are some days or even

[51] See De Wilde D'Estmael, J. & Marique, E. *La fonctoion d'intermédiaire des plateformes: une nouvelle clé pour réglementer les relations de travail qu'elles in-/produisent?*. In Lamine, A and Wattecamps, C. (coord.) *Quel droit social por les travaillerus de plateformes? Premiers diagnostics et actualités législatives*. UCLouvain. Pp.241-295. (Feb. 2020).

[52] See Madariaga et al. *supra* 4, P.83.

[53] Arg. Lab. Cont. Reg. (Law 20.744) (1976), Art 196. "The length of the working day is uniform throughout the Nation and shall be governed by Law 11.544, to the exclusion of any provincial provisions to the contrary, except as modified or clarified in this Title." (own translation)

[54] Arg. Work. Day. Law (Law 11.544) (1929), Art 1. "The duration of work may not exceed eight hours a day or forty-eight hours a week for any person employed in public or private undertakings, even if they are not for gainful employment. (…)" (own translation)

[55] See Molina & Pastor *supra n. 5*

[56] See Madariaga *supra* 4.

weeks in which a gig worker would exceed the maximum working time set up by law[57]. It would be highly artificial to apply the argument according to which the delivery worker, because of his schedule choices, certain days of the week is covered by the standard employment relationship and some other days by the partial employment relationship. [58] Furthermore, it is of the essence of this type of business to offer such freedom to workers. Around 80% of *Rappi* workers consider flexibility understood as freedom to schedule their own time as the best feature of this type of business[59]. The reason argued by those workers is that they do not consider that job as an opportunity to develop a career in the long-term but as a way to overcome the shock of unemployment and generate income whilst there is an opening in the formal labour market.[60] Hence, the restrictions offered by this type of relationship in forcing these workers and platforms to comply with this particular restriction do not seem suitable to explain the gig-work performed by *Rappi* riders.

An objection might be raised at this point: current developments in labour law have incorporated new types of employment with new categories, such as the recent law of teleworking adopted in Argentina as part of the Labour Contract Regime.[61] This regulation establishes that the minimum requirements to

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[57] I acknowledge a potential objection of such freedom as entailing and encouraging self-exploitation behaviour. However, attending that discussion exceeds the scope of the current paper. Moreover, it exceeds the scope of a potential legal regulation in terms of the type of work deployed by gig or any other type of workers. for further reference on the paradox of freedom in a performance society and its potential derived risks of self-exploitation, please refer to Han, B-C *Die Müdigkeitsgesellschaft (La Sociedad del Cansancio)*. Traducción: Arantzazu Saratxaga Arregi y Alberto Ciria. Editorial Herder. Barcelona, 2017.

[58] See Arg. Lab. Cont. Reg. (Law 20.744) (1976), Art 92 TER "1. A part-time employment contract is a contract under which the worker undertakes to provide services for a certain number of hours per day or per week, less than two thirds (2/3) of the normal working day of the activity. In this case, the remuneration may not be less than the proportional remuneration corresponding to a full-time worker, established by law or collective agreement, in the same category or position. If the agreed working time exceeds this proportion, the employer shall pay the remuneration corresponding to a full-time worker. 2. Part-time workers may not work overtime or overtime, except in the case of Article 89 of this Act. The violation of the working day limit established for part-time contracts shall generate the obligation of the employer to pay the salary corresponding to the full working day for the month in which the violation occurred, without prejudice to other consequences that may arise from this non-compliance. (…) 5. Collective bargaining agreements shall determine the maximum percentage of part-time workers in each establishment who shall work under this contractual modality. They may also establish the priority of such workers to fill full-time vacancies occurring in the undertaking." (Own translation)

[59] See Madariaga et al *supra,* n 5

[60] See Madariaga et al *supra,* n 5

[61] Arg. Lab. Cont. Reg. (Law 20.744) (1976), Art 102Bis incorporated by Law 27.555 of the 14th August 2020. "There shall be a telework contract when the performance of acts, execution

perform such work should be established by a special law and the specificities of regulation by activity should be negotiated in a collective bargaining process. The Argentinian Government presented in 2017 a project to reform Law 20.744. This project introduces a new category of employment: the 'economically engaged autonomous professionals,' *[Profesionales autónomos, económicamente vinculados*]. The figure aims to formalise the working conditions of individuals who receive remuneration for delivering a service also having an economic dependency. The project argues that an individual is economically dependent when a person receives at least 80% of their yearly income by working under this 'new figure'. However, the individual must not have worked over 22 hours per week under this type of contract. Otherwise, there would be a typical employment relationship[62].

The problem with this proposal is that such legislation remains part of the Labour Contract Regime, which means that the inflexibilities derived from an employment relationship remain the same for this new way of working. Moreover, such regulation as proposed is virtually inapplicable. Essentially no riders would benefit from this regulation as their average working hours per week is beyond that time limit[63]. Moreover, there is an additional risk associated with such a proposal. It is hard to embrace all types of gig-work in a single regulation because within the rigidity of the Labour Contract Regime. As

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of works or provision of services, in the terms of Articles 21 and 22 of this law, is carried out totally or partially at the domicile of the person working, or in places other than the establishment or establishments of the employer, by means of the use of information and communication technologies. The minimum legal requirements for the telework contract shall be established by a special law. The specific regulations for each activity shall be established by collective bargaining considering the principles of public order established in this law." (own translation) This regulation does not apply to *Rappi* riders as their delivery job is done physically.

[62] See Madariaga et al *supra* n 3, p. 22.

[63] According to Madariaga et al *supra* n 3, P. 85, the number of hours dedicated to that job in average for the delivery-men in *Rappi* is 58,13 hours a week, which exceeds in 10 hours the maximum working time per week allowed in a typical labour relationship without extra charges. Moreover, this project does not define what would be the regulation to be applied to those workers who comply with the requirements set by the reform but have an even higher degree of dependency translated, for example, in a higher number working hours per week. Would they be considered as being entitled to a typical employment relationship? And in the affirmative, then the understanding of dependency in the labour legislation in Argentina would switch from the perspective of legal dependency to an economic one. The economic dependency, as described are sensible to income sources and the time spent working for an employer. Once the legislation is changed, other forms of autonomous work would be endangered if analysed through this new category. Hence, the consequences of this proposal, although well-intentioned, would most likely increase the legal uncertainty for these workers. It will further create more confusion regarding the enforcement of certain laws and, ultimately, making the new regulation unenforceable or too risky to follow

described, not even the literature has agreed on a single classification of such phenomenon. Hence, a policy regulation might create new grey zones within the gig-workers, leaving them more susceptible to precarity.
Thus, we can agree that *Rappitenderos* are neither agents nor typical employees. None of those legal figures might fully explain the underlying relation between the platform and its riders. This would have consequences in the collective labour law analysis of this platform which will be discussed in the next section. Moreover, it opens the door to regulate a new figure to capture the essence of this *sui generis* relationship.

2. A *sui Generis* New Category? Minimum Requirements for Adequate Regulation

The case of *Rappi* in Argentina opens up a possibility of a new policy regulation overcoming the limits of both the civil-law and labour law current frameworks. This new figure must attend to the disruptive flexibility which is reflected in the freedom of riders to set up their schedule along in exchange for a less costly contract. Based on the literature, comparative proposals and the overall discussion on the Argentinian legal framework, the new regulation should at least include the following four elements: i) explicit recognition of platform workers as collective bargaining actors; ii) reinforcement of the presumption of employment relationships; iii) agreement on a set of fundamental principles governing the relationship such as a shared payment of social security contributions, enjoyment of regular licenses, paid vacations and resting hours; and, finally, iv) respect the rider's freedom to set up working hours and schedules.

2.1. Platform Workers as Collective Bargaining Actors

There are three reasons to consider platform workers as collective bargaining actors in the case of *Rappi* in Argentina. The first one is of a legal character: (i) recent judicial decisions have been ambiguous on recognising the right of association and collective bargaining to these workers; (ii) national and comparative developments of new regulations in different jurisdictions lead to the same conclusion and, finally, (iii) because of the differences between gig-work performed with different platforms, a comprehensive regulation on the subject might have undesirable consequences such as the creation of new grey zones in the legislation, fostering the uncertainty of these workers. With

respect to the first reason, as it was argued in another article[64], recent judicial developments in Argentina subordinated fundamental collective labour rights to the clarification of the type of relationship held between platforms and their riders.[65] The *Cámara Nacional de Apelaciones del Trabajo* ('CNAT') ruled that it was impossible to judge *a priori* whether blocking *Rappitenderos* as a consequence of creating a trade union might breach their collective fundamental rights. The reasons focus on the 'impossibility to determine the relationship between the platform and its deliverymen[66]. In fact, the Chamber indicates[67]:

> [I]t is clear that it is impossible for this Chamber to qualify the relationship between the parties, because that would imply anticipating the criterion to be applied only when the file can return to the Court for a final judgment establishing the full extent of the parties' rights. Given this impossibility of qualifying the link, there is no other solution - it is reiterated, at this stage of the proceedings - than to provisionally annul the measure issued at first instance.[68]

Seemingly, this interpretation suggests that the fundamental right to association and its subsequent protections are consubstantial only to employment relationships[69]. The objection to this particular judgement is that there is not a single requirement in the legislation in Argentina, labour or competition law, conditioning the assessment of an anti-trade union behaviour or simply the right of association to the resolution of an employment relationship. The three riders were seeking *Rappi* to stop a potential anti-trade union behaviour triggered by the prohibition to access the platform after constituting a Trade Union. It was the essence of their procedure. However, the ruling leads to an

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[64] See Kevin Hartmann-Cortés. How did a food-delivery platform's judgement transform freedom of association into a second-class right? Dispatch 37, Argentina. Comp. Labor Law & Pol'Y Journal. August, 2021. 1-9.

[65] *Rojas Luis Roger Miguel y otros v Rappi Arg. SAS*. S.N°1141; Exp.N°. 46618/2018. Juzgado Nacional de Primera Instancia del Trabajo N° 37, (March 19, 2019).

[66] *Rojas Luis Roger Miguel y otros v Rappi Arg. SAS*. CN°: 46618/2018. Cámara Nacional De Apelaciones Del Trabajo - Sala IX, (July 19th, 2019). P.1-3.

[67] "[E]s claro que esta Sala se encuentra imposibilitada de calificar el vínculo entre las partes, porque ello implicaría anticipar el criterio con el que solamente corresponde resolver cuando el expediente pueda volver al Tribunal para dictar una sentencia definitiva que establezca en toda su extensión los derechos de las partes. Dada esa imposibilidad de calificar el vínculo, no cabe otra solución –se reitera, en este momento del trámite del expediente- que dejar provisoriamente sin efecto la medida dictada en primera instancia" *Rojas Luis Roger Miguel y otros v Rappi Arg. SAS*. CN°: 46618/2018. Cámara Nacional De Apelaciones Del Trabajo - Sala IX, (July 19th, 2019). P.1.

[68] *Ibidem.* Own translation.

[69] See Kevin Hartmann-Cortés *op cit* P.7-8.

unusual interpretation of the right of association. Such interpretation of collective fundamental rights such as the right of association creates an unjustified differentiation between individuals who have different type of employment status.

Furthermore, and what is more salient, the CNAT should have applied Article 2 of Convention 87 from the ILO, ratified by Argentina and thus part of its ordinary legislation[70]. This article protects the right of association for *all workers* independently of whether they are entitled to an employment relationship or not. According to multiple reports and interpretations from the Committee on the Right of Association of the ILO, the word 'workers' in the mentioned article has to be interpreted not to be restricted to those who have a standard employment relation, but extensively. This means that the underlying relationship between the platform and the rider is irrelevant to grant protection of collective rights such as the ones derived from the right to association and collective bargaining. The Committee of Freedom of Association also highlights that trade union freedoms and guarantees should at all times be enjoyed without being subordinated to any *ex ante* legal relationship.[71]

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[70] Convention 087 Freedom of Association and Protection of the Right to Organize Convention, Article 2. "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their choosing without previous authorization."

[71] To the extent to which the ILO agrees with such vision, see the following report-cases of the ILO: Case No. 2556, *349th Report of the Committee on Freedom of Association* (2008) "The Committee recalls in this regard that the status under which workers are engaged with the employer should not have any effect on their right to join workers' organizations and participate in their activities. The Committee likewise recalls that all workers, without distinction whatsoever, whether they are employed permanently, for a fixed term or as contract employees, should have the right to establish and join organizations of their choosing". Para 754; P.174-175. Furthermore, 376th Report of the Committee on Freedom of Association "the Committee again recalls that all workers must be able to enjoy the right to freedom of association regardless of the type of contract by which the employment relationship has been formalized." Para 560; P.145 (2015). Finally378th Report of the Committee on Freedom of Association "the legal status of the workers' employment relationship should not have any effect on their right to join workers' organizations and participate in their activities" Para 158; P.44, (2016) Dorssemont & Lamine, arrive to a similar interpretation of Convention 87. By quoting the report 2888 of the Committee of Freedom of Association on Poland it is established that the definition of the word 'workers' needs to be extended to cover categories of precarious workers like agricultural workers and independent workers. Moreover, the authors illustrate the consequences of such interpretation and rightfully conclude: "the committee has thus decided to not dissociate the recognition of trade union freedoms from collective bargaining rights. In principle, that approach implies that the recognition of the right to create or affiliate to a trade union acknowledges the recognition of the essential means in seeking the defence of the interest of its members. Within them, there is the right of collective bargaining of the trade union in question.". See Dorssemont, F. and Lamine, A. *Quels droits*

Considering this recent judgement, the new regulation policy must be careful in establishing explicitly that platform workers are collective bargaining actors. That would be the way in which *tripartism* that inspires the labour legislation in Argentina could be ensured. Moreover, as referring to the second argument announced at the beginning of this sub-section, there is a need to explicitly recognise such right explicitly in the general legislation to avoid situations like the ones triggered by the legislation implemented in the Netherlands.

That country enhanced a regulation called the 'min-max contracts'. It stipulates a "threshold and ceiling values for working hours so that part-time work can be organised in response to fluctuating volumes"[72]. Gig-workers, however, are still essentially considered by the platforms as 'autonomous workers or 'independent contractors'. Therefore, the possibility of collective bargaining is annulled.[73] Furthermore, the experience of other countries is similar. American Senator Warren from Virginia in the United States proposed the Bill H.R. 5367 from march 21, 2018 to "[A]mend Rule 23 of the Federal Rules of Civil Procedure to protect the "gig economy" and small businesses that operate in large part through contractor services from the threat of costly class action litigation, and for other purposes". Such regulation aims to protect the potential misclassification of workers in these platforms as 'independent contractors'. However, it does not mention any collective bargaining rights or a minimum floor of social security standards enjoyed by gig-workers.[74]

Finally, considering the third argument, the work made by riders could be different from the work performed by another type of gig-workers. Thus, an over comprehensive regulation may miss the differences between their situation and the type of job performed. For that reason, encouraging autonomous bargaining might be a way to allow the parties to find a suitable

collectifs pour le travailleur de plateformes? Champ d'application des droits fondamentaux et obstacles à leur exercise, In Lamine, A and Wattecamps, C. (coord.) (2020) *Quel droit social por les travaillerus de plateformes? Premiers diagnostics et actualités législatives*. UCLouvain. Pp. 299-350.

[72] Valenduc, G.; Vendramin, P. *Work in the digital economy: sorting the old from the new*. Working papers - European Trade-Union Institute (ETUI). P.35 (March 2016).

[73] See De Stefano *supra* n 11, P.486 and Rodríguez-Piñero Royo *supra* n 6, P 143-144.

[74] For common law countries, it would be better to set a judicial test that could set a minimum legal standard for such workers. As summarised by Pinsof: "[t]he common law control test was the first legal standard to emerge to determine which workers fell into which category. It consists of ten factors: control, supervision, integration, skill level, continuing relationship, tools and location, method of payment, intent, employment by more than one company, and type of business. No single factor is dispositive. Courts evaluate each of the ten factors with an eye towards determining which party generally has control over the work process: if the employer controls, the worker is deemed an employee, and if the worker controls, he is deemed an independent contractor". See Pinsof, J. *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 Mich. Telecomm. & Tech. L. Rev. (2016), p.347

regulation of their work through collective agreements. Moreover, the trade-union density[75] and history in Argentina and its collective bargaining legal framework would allow for such procedure to be followed. This option is the one followed by Denmark and it has resulted in positive consequences[76].

2.2. Reinforcing the Presumption of Employment Relationships

Even if this presumption already exists in the legislation[77], it seems necessary to reinforce it in the new regulation due to the potential risk of using this new category as a scapegoat to undermine typical employment relationships. For example, after their flexible regulation on gig-work that facilitates the possibility to dispose of the workforce, countries such as England or the Netherlands are experiencing a significant increase in work arrangements such as zero-hour and on-call contracts, which are undermining typical employment relationships.[78]

In England, the regulation does not include a retribution for the platform-worker while looking for a gig and making the contract. That means the new workforce is paid per project, task, or unit of output, not per hour. Thus, the figure adopted in that country does not recognise remunerated resting time (i.e. vacations or lunch hours) for those workers. Thus, finally, there is a reinforcement to the competence of "hire and fire" or, more precisely, "to mobilise and demobilise a significant portion of the workforce on an on-demand and 'pay-as-you-go' basis"[79].

Considering that, in Spain they adopted a regulation which reinforced the presumption of an employment relationship. *Real Decreto-Ley 9/2021* was adopted May 12 2021. It consisted of a tripartite negotiation on the categorisation of these type of workers. It decided two things: the first is that any digital work is assumed to be performed under an employment relationship. The presumption already existed in the law. However, it was reinforced explicitly in this new legislation. The second decision fo that law implied that workers would be informed about the parameters, rules and

[75] According to the ILO, the tradeunion density in Argentina is one of the highest in Latin-America with an average of 30% in the last decade. See ILO, ILOSTAT (2019), available at: https://www.ilo.org/ilostat/faces/wcnav_defaultSelection?_afrLoop=3534642212010866&_afrWindowMode=0&_afrWindowId=null#!%40%40%3F_afrWindowId%3Dnull%26_afrLoop%3D3534642212010866%26_afrWindowMode%3D0%26_adf.ctrl-state%3De8d32kudp_4

[76] "Strong unions are associated with reduced wage dispersion, enhanced welfare state generosity, and increased electoral participation among low-income groups" Andrias, K. *The New Labor Law*. Yale Law Journal, at 126, no. 1. P.77-78 (2016).

[77] See Arg. Lab. Cont. Reg. (Law 20.744) (1976), Art 23, *supra* n 48.

[78] See De Stefano *supra* n 11, p.481.

[79] See De Stefano *supra* n 11, p.481.

instructions used by the algorithm to decide on how it shares the information and allocates the work between its riders. This feature is important to avoid potential arbitrariness by the platform via automatised control mechanisms such as performance or acceptance rates.
Hence, to prevent potential interpretations of the new regulation that might lead to a race-to-the-bottom to already established labour rights, it would be necessary to reinforce the presumption of the employment relation already established in the legislation. In that way, the norm's scope would be targeted to its legitimate destination: current platform workers facing the legislation's grey zone.[80]

2.3 Agreement on Fundamental Social Rights

In developing economies that suffer from high informality rates, platform work constitutes the main source of income for the people performing these tasks. In the case of Argentina, the level of economic dependency from *Rappi* workers to its platform is high. This job constitutes the primary source of income for around 90% of the workers and their families.[81] Therefore, certain fundamental benefits derived from the new relationship must be the ground. If the new regulation seeks to overcome the divide between the typical employment and the self-employed or autonomous relationships, it would be possible to guarantee a set of fundamental rights for platform workers: for instance, a shared payment of social security contributions.
Social Security is also one of the main topics regarding the regulation of these platforms. Usually, the social security system is nurtured through contributions that usually depend on the type of relationship a worker has with his or her employer. The way to contribute to the social security system in Argentina depends on the modality of contract a person would hold. According to the Law 24.241, the contribution under a typical labour relationship would be

[80] There is an idea of an intermediate category that could be useful for the Argentinian case. In Colombia, bill PL-082/2018-C creates the figure of *trabajador digital* ('digital worker') as an intermediary relationship in-between the dependent labour relationship and the independent civil relationship. It procures the creation of a basic social security safety net for these workers that are unprotected by the legislation. This law bill ensures a joint social security contribution (pensions, health and occupational safety) as well as the recognition of basic collective labour rights to improve the digital-worker's bargaining position to autonomously negotiate better conditions of work considering the specificities of these business model. This proposal would be a better fit for Argentina as it contemplates the flexibility of the nature of this type of job, a basic standard social protection and the recognition of collective rights which would enhance a direct negotiation between digital workers and platforms regarding the specificities of the work offered by each platform.
[81] See Madariaga et al *supra* n 5

made jointly by both the employee and the employer according to specific proportions. For autonomous workers, the category in which *Rappi* riders are currently included, Law 25.865 created a regime oriented to facilitate the contribution of independent workers through a more flexible scheme called the 'social unified tax'. Nevertheless, the contribution to social security relies exclusively on the autonomous worker.

It seems that allocating the responsibility to contribute to the social security system to the rider might not be a good idea. It might encourage evasion of the payments which leads to deprotection of their social security rights. For that reason, new regulation might try to imitate the employment relationship by sharing with the riders the contributions to social security. Nonetheless, it could be done in a different proportion than the employment rule due to the flexibility and rotation rates in delivery-jobs like *Rappi* in Argentina. This could be decided in the collective agreements reached after the collective bargaining of each platform with the trade union. In that way, the platform would gain because the weight of the contribution under a typical employment relationship is, in any case, costlier due to the proportion the employer must assume. In addition, the platform worker would also benefit as the autonomous workers must assume the totality of the contribution to the social security system. Some other fundamental rights might be needed to be regulated, like the enjoyment of standard paid leaves like maternity, paternity, illness or bereavement. Furthermore, paid resting hours and vacation time according to the business production model. However, as it is a new regulation, the rights might be announced as a general rule in the new regulation leaving the details on their application open to collective bargaining. A similar approach was adopted by the new teleworking legislation, which is still to be regulated through collective agreements once the pandemic had reached an end.[82]

2.4 Respecting the Rider's Freedom to Set Up Working Hours and Schedules

The following minimum feature of this regulation aims to ensure not only the expectations of *Rappi* and other platform workers regarding the job to be performed but also to encourage the expansion of these types of platforms. Indeed, flexibility and liberty to schedule the riders' work are among these types of platforms' main disruptive elements. In that sense, as insisted in previous sections of this article, protecting a minimum standard of flexibility regarding the schedule and working time by law might be an essential feature

[82] See Arg. Lab. Cont. Reg. (Law 20.744) (1976), Art 102Bis, *supra* n 61.

to differentiate these types of working arrangements from the classical employment relationship. It seems the most critical feature of both the riders and the platform as the disruptive mechanism to be held in a future regulation through collective agreements.

Conclusions

Current legal frameworks fail to fully explain or capture the type of relationship hidden between users, *Rappi* and its delivery-men in Argentina. The inflexibility of the typical employment relationships cannot resist the disruption of on-demand work schedules. In fact, it might be inconvenient to be applied to that relationship. Moreover, autonomous self-employment relationships seem to be insufficient to include control features such as the organisation and coordination of delivery jobs through acceptance rates. Therefore, there is a good case to justify an innovation in policy regulation regarding new types of work.

Policies adopted in developed countries seemed not to be applicable in the Argentinian context either because they are too risky to follow, or they might not entirely capture the subtilities of *Rappi* work. Yet, it does not reduce the urgency to adopt a new regulation. According to the recent judicial developments in Argentina, there is a need to decide on the nature of work performed by those riders as an *ex-ante* condition to determine whether they enjoy some collective rights. Nonetheless, the current proposal of regulation drafted by the Government has several risks. It lacks precision and could lead to impossible enforcement if approved.

Consequently, there is an opportunity for a new regulation that might constitute itself a model for other developing countries. Considering the Argentinian legislation and its development, it seems that *at least* four essential features should be included in this regulation: i) explicit recognition of platform workers as collective bargaining actors; ii) reinforcement of the presumption of employment relationships; iii) agreement on a set of fundamental principles governing the relationship such as a shared payment of social security contributions, enjoyment of regular licenses, paid vacations and resting hours; and, finally, iv) respect the rider's freedom to set up working hours and schedule. This new law would serve as a basis to be further developed in collective agreements between the platforms and trade unions from the sector.

Non-Standard Forms of Employment: Trends and Prospects of Ukraine's Legal Regulation

Yana Simutina and Sergii Venediktov [*]

Abstract

This paper examines the modern trends and problematic aspects accompanying the reform of labour legislation and the regulation of non-standard forms of employment in Ukraine. The complexity of reviewing labour law in Ukraine prompted the legislator to make targeted amendments to the current Labour Code, which was adopted in 1971, concerning non-standard forms of employment, i.e. remote work and homeworking. This paper focuses on current trends in Ukrainian law-making policy oriented towards deregulating employment relations and labour legislation, as well as the draft laws reviewing them. On the one hand, the reform put forward will expand the scope of fixed-term employment contracts, legalizing on-call work and gig workers. On the other hand, the Ukrainian legislator seeks to include in the Labour Code the indicators of employment relations which can help to identify and distinguish them from self-employment or civil-law relations. It is concluded that the legislator's law-making strategy of 'plugging a hole' in labour legislation does not deal with its obsolescence.

Keywords: *Fixed-term Employment Contract; Homework; On-call work; Platform-based work; Bogus self-employment.*

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1. Introduction

The last decades have witnessed an increase in non-standard forms of employment worldwide.[1] Among others, this phenomenon was the result of technological advances, globalization, and economic fluctuations. Undoubtedly, the COVID-19 pandemic that broke out last year affected the recourse to this way of working, for example through platform work. Engaging in task-based work, platform workers might face self-isolation without being entitled to paid sick leave and sickness benefits. Significantly, 7 platform workers out of 10 did not receive compensation and did not take paid sick leave when tested positive for COVID-19, posing risks to themselves and the others.[2]

Unfortunately, Ukraine is no exception. The introduction of quarantine in 2020 led to an increase in the number of orders and platform workers. Yet only Uber Eats pledged to bear the costs of masks and antiseptics[3].

National legislation fails to regulate all forms of non-standard employment, mostly because Ukraine's Labour Code (LC) entered into force almost 50 years ago. More than 140 amendments have been introduced since then, though this piece of legislation still retains its original structure, disregarding many developments in the world of work. The LC does not regulate multi-party employment relationships and on-call work and is silent on the different employment relationships and their main characteristics.

In Ukraine, the idea of adopting a new Labour Code has been around since national independence, and attempts to do so were reported in 2003, 2009, 2011, 2015, 2019 and 2020. In 2019, the Cabinet of Ministers of Ukraine (CMU) submitted a draft labour law, which moved away from the traditional codification of labour legislation, putting forward the free regulation of the employment relationship, an approach that is unusual in Ukraine.

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[1] Non-standard forms of employment, ILO, available at: https://www.ilo.org/global/topics/non-standard-employment/lang--en/index.htm. (Accessed 01 June 2021).

[2] COVID-19 has highlighted the risks for platform workers, available at: https://ilo.org/infostories/en-GB/Campaigns/WESO/World-Employment-Social-Outlook-2021#regulatory-puzzle. (Accessed 10 June 2021).

[3] Kak karantin izmenil rabotu dostavcshikov edy. Otvechaet kurier. [How quarantine changed the work of food suppliers. The courier answers], *Commons* (14 April 2020), available at: https://commons.com.ua/ru/kak-karantin-izmenil-rabotu-dostavshikov-edy/?fbclid=IwAR1SWqrkF31AmKIM4FF1U_0f4mKmTiwpw2P89gVnXKa70W43IuuWTLptQf8. (Accessed 10 June 2021).

This draft was criticized by trade unions and seen as a limitation of workers' rights. The Federation of Trade Unions of Ukraine, supported by the statements of the International Trade Union Confederation, opposed the adoption of this bill. In January 2020, the Federation of Trade Unions filed a lawsuit with the District Administrative Court of Kiev on the lawfulness of this piece of legislation. Concurrently, the Committee of the Verkhovna Rada of Ukraine on issues of European Integration stated that the document 'weakens labour protection, narrows the scope of labour rights and social guarantees of employees in comparison with current national legislation, contradicting Ukraine's obligations contained in the Association Agreement and failing to comply with EU law.' It was the position of union activists that levelled criticism at the draft. However, experts argue that changes to labour law are inevitable. And they should meet the requirements of the time, rather than certain morally outdated views concerning the 'employer-employee' relationship[4].

The unsuccessful attempts to adopt new legislation – caused by disagreement between the government, trade unions and employers – led lawmakers to make targeted amendments to the current version of the LC. A number of draft laws were therefore tabled in. Some of them are under evaluation by the national parliament, while others have already entered into force. The distinctive trait of these provisions is that they mostly regulate some non-standard forms of employment. Against this backdrop, the purpose of this paper is to analyse the innovations, risks and prospects of this new legislation in relation to non-standard forms of employment, to investigate the correlation of these new rules with international labour standards, and to compare them with similar regulations in a number of European countries.

2. Discussion

2.1. The Deregulation of Employment Relationships

At the end of 2020, the Ministry for Development of Economy, Trade and Agriculture of Ukraine (MDETA) introduced a draft Law on the Deregulation of Employment Relationships (LDER). According to the explanatory note of the draft, this act is intended to liberalize employment

[4] Inna Krupnik. *The rules on the labour market. What are the chances for updates? Promote Ukraine* (3 April 2020), available at: https://www.promoteukraine.org/the-rules-on-the-labour-market-what-are-the-chances-for-updates. (Accessed 10 June 2021).

relationships, streamlining procedures limiting employers' action without considering today's world of work. The aim is to ensure flexibility when concluding a fixed-term employment contract (FTC).[5]

In most countries, specific provisions regulate fixed-term employment contracts, though in some of them (e.g. North Europe), it is collective agreements concluded at national, sectorial, and company level that govern this working scheme. A relatively common sanction for breaching relevant legal requirements is to convert the fixed-term contract to an open-ended one. Examining national labour laws, it can be noticed that different approaches are adopted to prevent the abuse of FTCs: prohibition of FTCs for permanent work; limitations to the number of successive FTCs and to the cumulative duration of FTCs.[6]

Presently, the LC provides a stringent framework for the conclusions of FTCs. Under Article 23 (2) of the LC, FTCs are concluded when the employment relationship cannot be established for an indefinite period, taking into account the nature of work, the conditions of its implementation, the interests of the employee and other cases provided by law. The provisions of this article illustrate lawmakers' attempt to harmonise the Code with existing international standards. However, this attempt has been far from successful. Here reference is made to ILO Recommendation No. 166, which supplements the Termination of Employment Convention, 1982 (No. 158), which was ratified by Ukraine in 1994.

Despite the fact that Recommendation No. 166 is devoted to termination of the employment relationships, some of its provisions also affect FTCs. In accordance with Article 3 of the Recommendation, adequate safeguards should be provided against the recourse to contracts of employment for a specified period of time. This article limits the use of contracts for a specified period to cases in which, owing either to the nature of work or to the circumstances under which it is performed or to the interests of the worker, the employment relationship cannot be of

[5] Proekt zakonu Ukrayiny "Pro vnesenn'a zmin do deyakyh zakonodavchih aktiv Ukrainy cshodo deregul'acii trudivych vidnosyn" [Draft Law on Deregulation of Employment Relationships], 14 December 2020, available at: https://www.me.gov.ua/Documents/Detail?lang=uk-UA&id=fc4a8cf7-85ae-4c7f-b509-c224b924b3df&title=ProektZakonuUkrainiproVnesenniaZminDoDeiakikhZakonodavchikhAktivUkrainiSchodoDereguliatsiiTrudovikhVidnosin. (Accessed 10 June 2021).

[6] Mariya Aleksynska, Angelika Muller. *Nothing more permanent than temporary? Understanding fixed-term contracts*. Inwork Policy Brief No. 6 (27 March 2015), available at: https://www.ilo.org/travail/info/fs/WCMS_357403/lang--fr/index.htm. (Accessed 10 June 2021).

indeterminate duration. Thus, the provision on the 'interests of the worker' was literally transferred from Recommendation No. 166 to Article 23 (2) of the LC. Nevertheless, if we examine Article 3 of Recommendation No. 166 and Article 23 of the LC closely, we can see that their semantic meaning is completely different. The provisions of the Recommendation consider the interests of the employee not as a reason for concluding FTCs – as it actually draws on the content of Article 23 (2) of the LC – but as a tool against the abuse of these working arrangements. In practice, the employee's interest in concluding an FTC often coincides with the interest of the employer. In other words, an employee, preoccupied with being unable to find another job, may be compelled to conclude a FTC, indicating 'personal interests' when looking for employment. Another negative aspect of the legal regulation of FTCs in the LC is the absence of time limits for the validity of contract, which distinguishes Ukraine from other European countries. For example, in Estonia a fixed-term contract can have a maximum duration of 5 years (Article 9 of the Law on Employment Contract[7]); in the United Kingdom, it might last up to 4 years (Article 8 of The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002[8]); 3 years in Spain (Article 15 of the Workers' Statute[9]), and 33 months in Poland (Article 25-1 of the Labour Code[10]). A FTC currently in force can thus be extended endlessly, exposing workers to uncertainty and instability. In accordance with Article 39-1 of the LC, employment contracts that have been renegotiated one or more times are considered concluded for an indefinite period. However, in case of an extension of the term of the employment contract by means of an additional agreement, this Article of the Code does not apply. This mechanism is confirmed by current case law (e.g. Resolution of the Supreme Court No. 607/18964/18, of

[7]Employment Contracts Act, 17 December 2008, available at: https://www.riigiteataja.ee/en/eli/520062016003/consolide. (Accessed 10 June 2021).

[8] *The Fixed-term Employees (Prevention of Less Favourable Treatment)*, Regulations 2002. UK Statutory Instruments 2002 No. 2034, Part 2, Regulation 8, available at: https://www.legislation.gov.uk/uksi/2002/2034/regulation/8/made. (Accessed 10 June 2021).

[9]Estatuto de los Trabajadores [Law of the Workers' Statute], available at: https://www.boe.es/buscar/act.php?id=BOE-A-2015-11430 (Accessed 10 June 2021).

[10]Kodeks pracy [Labour Code], 26 June 1974, available at: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19740240141/U/D19740141Lj.pdf (Accessed 10 June 2021). (Accessed 10 June 2021).

22.01.2020)[11]. Returning to the LDER, it was opposed by trade unions, as they regarded it as a replay of 2019 draft labour law[12]. One of the reasons for this is that the LDER does not include restrictions on the conclusion of FTCs, giving the parties the opportunity to freely conclude this type of employment contract. This provision, in addition to having a negative impact, also contradicts the already mentioned Article 3 of Recommendation No. 166, which insists on limiting the application of fixed-term employment contracts.

In addition, the LDER enables one to lay down additional grounds for termination. This provision penalizes employees in comparison with the current LC, which establishes clear grounds for terminating employment. This circumstance points to the contradictory nature of the provisions of LDER when compared to Article 58 of Constitution of Ukraine, which provides that laws and other regulatory legal acts shall have no retroactive effect, unless they mitigate or nullify someone's responsibility. The LDER also contains some positive elements related to the regulation of temporary employment relationships. For instance, the bill establishes a maximum duration of FTCs, i.e. 5 years. It should be noted that this is duration is longer than that in other European countries. But, in any case, this provision of the LDER limits the abuse of FTCs in Ukraine.

2.2. Legal Regulation of Homeworking and Remote Work

The need to remain in quarantine to counter the spread of COVID-19 in the spring of 2020 necessitated a change in labour legislation, mostly regarding homeworking. The LC had not regulated this issue until March 2020. Employers could only introduce procedures for working from home in accordance with the Soviet-time Regulations respecting the Working Conditions of Homeworkers, dated 29 September 1981[13]. In order to solve this problem, the Parliament of Ukraine adopted Law No. 540-IX of 30 March 2020, which amended labour legislation, primarily the LC. These amendments were aimed at detailing the use of home-based

[11] Postanova Verchovnogo Sudu [Resolution of the Supreme Court] No. 607/18964/18, 22 January 2020, available at: https://reyestr.court.gov.ua/Review/87115229. (Accessed 10 June 2021).

[12] Deregul'aciya trudovych vidnosyn [Deregulation of Employment Relationships], *FPSU* (17 November 2020), available at: https://fpsu.org.ua/materialy/19354-deregulyatsiya-trudovikh-vidnosin. (Accessed 10 June 2021).

[13] Polozhenn'a pro umovy praci nadomnykiv [Regulations on working conditions of homeworkers], No 275/17-99 on 29 September 1981, available at: https://zakon.rada.gov.ua/laws/show/v0275400-81#Text. (Accessed 10 June 2021).

work as well as remote work. In turn, due to the fact that amendments to the Code were made hastily, they could not be regarded as positive ones. Specifically, the new version of Article 60 of the LC, which was amended through Law No. 540-IX, combined two different working schemes – 'remote work' and 'homework' – without establishing any difference between them. According to the amended version of Article 60 of the LC, remote (home) work is a form of work organization performed by an employee at his place of residence or in another place of his choice, with the help of information and communication technologies, but outside the employer's premises.[14] 'Homework' provides for the implementation of work directly at one's home or another, clearly-defined place, while 'remote work' does not require one to specify the place where work will be carried out.

In spring 2021, the Ukrainian parliament adopted a Law on Amendments to Certain Legislative Acts of Ukraine concerning the Improvement of Legal Regulation of Remote work, Homework and Work with the Flexible Working Hours[15]. The purpose of this legislation is to amend the LC in order to establish clear and understandable rules when resorting to remote work, homework and work with the application of flexible working hours, while ensuring compliance with labour rights. This Law has amended the LC in relation to: a) the employment contract to perform homework, which must be provided in writing; b) ad hoc regulation for homework (Article 60-1; c) the establishment of full financial liability for the damage caused by the lack or the destruction of equipment and facilities provided to an employee to perform work under the contract governing homeworking.

In general, the changes made to the LC were welcomed. Article 60-1 of LC defines homework as a form of work organization in which work is

[14] Zakon Ukrayiny "Pro vnesennya zmin do deyakych zakonodavchych aktiv Ukrayiny, spryamovanykh na zabezpechennya dodatkovykh sotsial'nykh ta ekonomichnykh harantiy u zv"yazku z poshyrennyam koronavirusnoyi khvoroby (COVID-19)" [Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (COVID-19)], 30 March 2020, № 540-IX, available at: https://zakon.rada.gov.ua/laws/show/540-20#Text. (Accessed 10 June 2021).

[15] Zakon Ukrayiny "Pro vnesennya zmin do deyakykh zakonodavchykh aktiv Ukrayiny shchodo udoskonalennya pravovoho rehulyuvannya dystantsiynoyi, nadomnoyi roboty ta roboty iz zastosuvannyam hnuchkoho rezhymu robochoho chasu" [Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning the Improvement of Legal Regulation of Remote work, Homework and Work with the Flexible Working Hours], 04 February, 2021, № 1213-IX, available at: https://zakon.rada.gov.ua/laws/show/1213-20#Text. (Accessed 10 June 2021).

performed by an employee at his place of residence or in other premises designated by him, featuring a fixed workplace, technical means for the manufacturing of products, the provision of services, the performance of works or functions specified in the documents, but outside the employer's premises. Under this article, performing homework does not entail changes as far as labour rights are concerned. As for remote work, an employee can work outside the employer's premises using information and telecommunication technologies[16]; i.e. they do not have a fixed workplace. Consequently, no employer's consent is required to change the workplace. Furthermore, remote work can be combined with work in the office (blended working), if specified in the employment contract. Unless the employment contract provides otherwise, a homeworker shall comply with working hours and labour regulations. Contrariwise, a remote worker can organize and distribute his working time, so the employer's rules do not apply unless the employment contract stipulates otherwise. Save for home workers, employees working remotely shall be provided with the right to disconnect, without this being considered a violation of the employment contract. Leisure time shall be defined in the employment contract on remote work (or in a document compiled by the employer). Arguably, it is impossible to summarise in two articles all the features of non-standard forms of employment when implemented in practice. Bulgaria is a good example in this sense, as a whole section of the Labour Code (VIIIa) is devoted to the regulation of homework.[17] Furthermore, the changes to the LC – which assign employees working from home full liability – are not clearly organized. For example, there are two articles concerning this aspect: Article 135 states that an additional agreement regarding full financial liability shall be concluded with the employee, while Article 134 is silent about this aspect.

2.3. On-call Work: Future Prospects

The Bill on Amendments to the Labour Code Regarding the Regulation of Certain Non-Standard Forms of Employment (LNSFE) is another piece of legislation put forward by MDETA at the end of 2020. It introduces a new employment contract with no fixed working hours. Under its terms, the employee's obligation to work arises only if the

[16] This type of work is known under the more common term "teleworking" or ICT-based work.

[17] Kodeks na truda [Labour Code], 1 April 1986, available at: https://www.noi.bg/images/bg/legislation/Codes/KT.pdf. (Accessed 10 June 2021).

employer provides it, without guarantees of stable employment. In accordance with the explanatory note of LNSFE, the use of an employment contract without fixed working hours provides employee mobility, greater freedom in relation to the right to work, and a convenient legislative mechanism for the legalization of labour for freelancers, who prefer short-term projects from different clients. The drafters of LNSFE emphasize that this provision will deal with non-standard forms of employment for persons performing work on a temporary basis, taking into account the specifics of this way of working and increasing the protection of workers.[18] To date, no legal regulation of on-call work has been implemented in Ukraine. In addition to defining an employment contract without fixed working hours, the LNSFE establishes that: a) the number of on-call work arrangements with one employer may not exceed 10 % of the total number of employment contracts concluded by the employer; b) an employee has the right to refuse to perform work if he was made aware of this opportunity in violation of the terms determined by the employment contract; c) the minimum number of monthly working hours under the on-call contract is eight; d) an employer cannot prohibit or interfere with on-call workers when performing work under other employment contracts.

Working without fixed working hours has become mainstream overseas. The 19th century was characterized by some employment schemes that did not give workers any stability (e.g. working at docks). In the 21st century, the use of this form of non-standard employment has become widespread and continues to grow. The number of people working on zero-hours contracts in the United Kingdom in 2000 was 225 thousand, but in 2021 that figure rose to 1.05 million.[19] In recent years, there has been attempts to introduce restrictions or even ban zero-hours contracts.

[18] Proekt zakonu «Pro vnesennya zmin do Kodeksu zakoniv pro pratsyu Ukrayiny shchodo vrehulyuvannya deyakykh nestandartnykh form zaynyatosti» [Draft Law on Amendments to the Labour Code of Ukraine Regarding the Regulation of Certain Non-Standard Forms of Employment], available at: https://www.me.gov.ua/Documents/Detail?lang=uk-UA&id=73819a0c-b52b-4bcd-b94d-c427d7cac4bb&title=ProektZakonuUkrainiproVnesenniaZminDoKodeksuZakonivProPratsiuUkrainiSchodoVreguliuvanniaDeiakikhNestandartnikhFormZainiatosti. (Accessed 10 June 2021).

[19] Number of people on a zero-hours contract in the United Kingdom (UK) from 2000 to 2020, available at: https://www.statista.com/statistics/414896/employees-with-zero-hours-contracts-number/. (Accessed 10 June 2021).

In New Zealand, a law made zero-hours contracts unlawful in 2016[20]. In Ireland, the Employment (Miscellaneous Provisions) Act 2018 – which entered into force on 4 March 2019 – prohibited the use of zero-hours contracts, introducing banded working hours on a statutory basis[21].

Unlike other European countries, it is not possible to enter into a valid zero-hours contract in Germany. German law follows the principle that the economic and employment risk of the employer should not rest with the employee. The parties must either designate the specific working time in the employment contract or conclude a 'work-on-demand' relationship in the context of fixed-term employment pursuant to Sec. 12 of the German Act on Part-Time Work and Fixed-Term Employment (TzBfG). A 'work-on-demand' relationship is only valid when complying with strict requirements to protect the employee, which in certain cases may be amended by a collective agreement. The work-on-demand agreement must include a specified duration of weekly as well as daily working time. The law permits the employer flexibility with regard to the allocation of each work assignment. Where weekly working time is not provided for, the agreement will provide for ten hours. Where the contract is silent in relation to daily working time, the employer must provide the employee with a minimum of three successive hours of work[22].

Thus, the legislative changes referred to above may be useful in overcoming undeclared employment or employment under civil law contracts. When entering into a contract of employment with no fixed working hours, the worker would receive minimum protection and social protection. However, there is a potential risk that these contracts may extend to traditional employment. As on-call work creates instability and the illusion of formal employment, the specific areas in which such contracts might be used should be clearly defined in order to avoid employers' violations.

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[20] Isaak Davison. Zero-hours contracts officially history, *NZHerald,* (10 March 2016), available at: https://www.nzherald.co.nz/nz/zero-hour-contracts-officially-history/VYIUDJTSE4KM5GCPHYJHZLL4VU/. (Accessed 10 June 2021).

[21] The Employment (Miscellaneous Provisions) Act 2018, *Williamfry* (4 March 2019), available at: https://www.williamfry.com/newsandinsights/news-article/2019/03/04/the-employment-(miscellaneous-provisions)-act-2018. (Accessed 10 June 2021).

[22] Jannis Breitschwerdt. *What rights and protections are there for workers on zero hours contracts in Germany*? Global Workplace Insider (23 September 2016), available at: https://www.globalworkplaceinsider.com/2016/09/what-rights-and-protections-are-there-for-workers-on-zero-hours-contracts-in-germany/. (Accessed 10 June 2021).

2.4. Gig-workers and Online Platforms

In November 2020, a Draft Law about Stimulating the Development of the Digital Economy in Ukraine (LSDDE) was submitted to the in Parliament and on 15 April 2021 its first version was adopted. The explanatory note of this piece of legislation specified that: 'Due to favourable tax conditions, the most common form of cooperation in the technology industry today are civil law contracts concluded with individual entrepreneurs. In addition to a favourable tax regime, this work arrangement gives the parties freedom and flexibility, which is not usual within employment relationships governed by labour law. At the same time, the employer is not under the obligation to ensure rest periods, the reimbursement of travel expenses, and paid leave for temporary work incapacity, among others. Furthermore, this model does not contribute to attracting investment and does not create preconditions for business stability. 'Gig-contracts preserves the benefits of flexibility of civil law relationships, eliminate the risk of retraining of relations into employment relationships and provides social guarantees to gig workers'.[23]

In the LSDDE, reference is made to the 'Action City' – an environment (eco-system) that will stimulate the development of the digital economy and advanced technologies featuring high- added value and the knowledge economy. Under Article 4 (5) of this draft law, to carry out economic activities, a resident of the 'Action City' (i.e. a legal entity recorded in a specific register) has the right to hire employees through employment contracts, gig-specialists through gig-contracts, as well as contractors, including natural persons or entrepreneurs, on the basis of other civil law and commercial contracts. In accordance with Article 1 of LSDDE, gig-contracts are civil law contracts under which an individual (a gig-specialist) undertakes to perform work and (or provide services on behalf of a resident of the 'Action City' (a customer). Concurrently, a resident of the 'Action City' undertakes to pay for the work performed and or the services provided, ensuring the gig-specialist performs work or supplies services in appropriate conditions and according to statutory protection. Relations based on a gig-contract have features specific to labour law: the open-ended duration of the gig-contract, the possibility of engaging in probation periods, and the limitation of the gig-specialist's liability (20%

[23] Proekt zakonu pro stymulyuvannya rozvytku tsyfrovoyi ekonomiky v Ukrayini [Draft Law on Stimulating the Development of the Digital Economy in Ukraine], available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70298. (Accessed 10 June 2021).

of his monthly remuneration). Also, Article 18 (1) of the draft law stipulates that gig-contracts or internal documents concluded by a resident of the 'Action City' may specify the following aspects, taking into account the provisions of LSDDE: working hours; rest time; working conditions and the place where work will be carried out; the rules established by the Action City resident (e.g. labour protection) and liability in case of violation; the procedure for processing personal data; provision of additional compensation; additional aspects (e.g. provision of services).

While the LSDDE aims to serve a noble purpose – i.e. to govern existing relations in the IT-sector – the drafters failed to include the arrangements it regulates in the context of labour law.

The introduction of a new gig-contract has a positive economic effect, though its implications regarding labour rights are yet to be seen. This is also due to the fact that the draft law does not give these workers the same rights provided to employees who have entered into an employment contract. However, the LSDDE is aimed to promote the use of information technology in Ukraine and does not define the general principles and guarantees for doing business in the 'digital economy'. Furthermore, it applies to a number of companies which want to be part of the 'Action City'. In addition to the IT sector, there is a significant number of people working on different online platforms which might benefit from this piece of legislation. As the growth of online work continues, it is important to understand its consequences for workers and for Ukrainian society. According to various sources, in 2013-2017, Ukraine ranked first in Europe and fourth in the world in relation to the financial flows and the number of tasks performed on digital labour platforms.[24]

The crucial element is whether people working via online platforms are to be regarded as 'workers' or as 'independent contractors/self-employed' under EU and national law. As they are often formally contracted by the platforms as independent workers and have working arrangements that do not correspond clearly to a traditional employment relationship, online platform workers have been difficult to classify in many EU and national law jurisdictions[25]. In order to ensure platform workers proper working conditions and social protection, and with a view of striking a balance

[24] Work on Digital Labour Platforms in Ukraine: Issues and Policy Perspectives. ILO. Geneva, 2018. URL: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_635370.pdf. (Accessed 10 June 2021).

[25] Sacha Garben. *'Old' rules and protections for the 'new' world of work*. Social Europe, (20 April 2021), available at: https://www.socialeurope.eu/old-rules-and-protections-for-the-new-world-of-work. (Accessed 10 June 2021).

between rights and interests of both parties, specific criteria should be laid down.

2.5. Legal Definition of an 'Employment Relationship': Main Features

The issue of who should be considered an employee, and the rights and obligations resulting from this status have become extremely problematic in Ukraine in recent decades. This is due to rapid digitalization, deep changes in workflow organization, as well as the lack of up-to-date regulation. The determination of the employment relation is even more important since in Ukraine the number of people engaged in the informal economy in 2020 was 3.2 million.[26] There is increasing difficulty in determining whether or not an employment relationship exists since the current LC does not provide an adequate frame for the application of labour law. No definition is provided of the notion of an 'employee', an 'employer' or an 'employment relationship'. The LC only gives a definition of the employment contract, based on which the categories referred to before are interpreted.

The Ukrainian labour market is characterized by a segmentation between salaried and self-employment. There are no particular safeguards against the use of civil contracts to retain labour or services. Moreover, hiring a self-employed person instead of an employee may be more convenient from an employer's point of view. The cost for hiring a self-employed person is unrelated to the minimum wage or other wage-setting methods (e.g. collective agreements). In addition, no social security contribution shall be paid. The most common examples of civil contracts used to retain the services of self-employed people concern task-specific contracts or contracts of services. These agreements can be entered into by people without a registered business as well as by self-employed individuals. It is for judicial authorities to establish if an employment relationship is in place. Taking into account the absence of the legal presumption of an employment relationship, judicial practice on these disputes is rather heterogeneous and contradictory. The issue of adopting specific regulation and criteria related to an employment relationship was raised at the beginning of 2021, as demonstrated by two draft laws.

[26] Informally employed aged 15-70 in 2020, by sex, place of residence and employment status, available at: http://www.ukrstat.gov.ua/operativ/operativ2017/rp/eans/eans_u/arch_nzn_smpsz_u.htm. (Accessed 10 June 2021).

On 8 February 2021, the CMU approved the draft Law on Amendments to the Labour Code to Define the Concept and Features of an Employment Relationship (LCER). According to the government statement, the adoption of the law will help reduce undeclared labour in Ukraine, legalize wages and strengthen the protection of workers[27]. The LCER was submitted to the parliament in February 2021, but has not yet been considered.[28] The LCER defines employment relationships as relationships between an employee and an employer, which regulates work performed on behalf of or under the direction and supervision of the employer in exchange for remuneration. The employment relationship is characterized by the following features: 1) work performed as a result of a specific qualification, profession, position on behalf of and under the control of the person for whom work is carried out; 2) regulation of the labour process, which is permanent and, as a rule, does not establish one's person a specific result of work over a certain period of time; 3) performance of work at a workplace determined by or agreed with the person for whom work is carried out, in compliance with internal labour regulations; 4) organization of working conditions, in particular, provision of means of production (equipment, tools, materials, raw materials); 5) regular payment of remuneration; 6) establishment of working hours and rest periods; 7) reimbursement of travel and other financial costs associated with work performed. In accordance with this draft law, work can be recognized as being performed within the framework of an employment relationship, regardless of the name and type of contractual relationship between the parties, if three of more features among those outlined above exists. The above provisions of LCER are perceived positively. This draft law also defines the concepts of 'an employee' and 'an employer'. As already mentioned, the LC does not make reference to these concepts and does not clearly specify who the employer is.

The other act implemented – draft Law on Amendments to the Labour Code to Regulate Certain Issues in the Employment Relationship (LRER)

[27] Uryad skhvalyv zakonoproekt shchodo posylennya zakhystu pratsivnykiv [The government has approved a draft Law to strengthen the protection of workers], *Government portal*, (08 February 2021), available at: https://www.kmu.gov.ua/news/uryad-shvaliv-zakonoproekt-shchodo-posilennya-zahistu-pracivnikiv. (Accessed 10 June 2021).

[28] Proekt Zakonu pro vnesennya zmin do Kodeksu zakoniv pro pratsyu Ukrayiny shchodo vyznachennya ponyattya trudovykh vidnosyn ta oznak yikh nayavnosti [Draft Law on Amendments to the Labour Code to Define the Concept and Signs of Employment Relationships], Verkhovna Rada of Ukraine: official web-portal, available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=71071. (Accessed 10 June 2021).

– was submitted by the head of the Parliamentary Committee on Social Policy and Protection of Veterans' Rights, to the parliament on 9 February 2021. The current LC was defined in the context of the industrial economy and the existence of large enterprises, which were the flagships of the economy. Presently, as the number of employees in the production industry has decreased threefold since 2000, there is a need to adapt labour legislation to the needs of new relationships and new sectors.[29] Under the LRER, work may be recognized as performed within the employment relationship, regardless of the name and type of contract between the parties, if there are at least four (or six, when the employer is a physical person) criteria as discussed above. In addition to these provisions of LRER, which are generally perceived positively, the draft law also contains some rules that negatively affect the regulation of employment relationships. For example, lawmakers provide for the possibility of establishing restrictions to the work of other employers. This provision is contrary to current national legislation. Under Article 43 (1) of the national Constitution, everyone shall have the right to work and to earn a living from the work he or she agrees to perform. In this sense, Article 9 of LC stipulates that those terms of employment contracts that worsen the conditions of employees in comparison with national labour legislation are null and void. Moreover, the LRER contains a number of provisions that are perceived as not compliant with the law. For example, at some point, the LRER specifies that 'labour law does not apply if: work is performed by an employer – a physical person operating independently or an individual conducting work under an employment contract'. In this case, it is impossible to interpret the meaning given to this paragraph by lawmakers.

3. Conclusions

To date, only one of the above-mentioned draft laws has been considered by the parliament. The impression, however, is that some concepts have been modelled so as to penalize employees, making believe this has been done to clarify the legal regulation of the employment relationship. While this seems to have been done intentionally, workers' interests might be

[29] Proekt Zakonu pro vnesennya zmin do Kodeksu zakoniv pro pratsyu Ukrayiny shchodo rehulyuvannya deyakykh pytan′ trudovykh vidnosyn [Draft Law on Amendments to the Labour Code to Regulate Certain Issues of Employment Relationships], Verkhovna Rada of Ukraine: official web-portal, available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=71251. (Accessed 10 June 2021).

affected for the sake of economic growth. In this regard, the authors share the view that 'the reforms must be paid by those who can afford it – aided, inter alia, by the modernization of the LC and the move towards European standards. Making the poorest foot the bill would be an irredeemable error, which would plunge Ukraine into public unrest and affect its European aspirations. It is the government's responsibility to prevent this situation and to put in place adequate protection and support for those who possess the least and risk the most and whose support is vital for Ukraine's development'.[30] In some cases, the inconsistency of these provisions with existing national legislation and international standards is evident. Moreover, the strategy of 'plugging a hole' in labour legislation does not solve the problem of its obsolescence, but it only puts off its reform. This innovation process calls for the involvement of a wide range of stakeholders, i.e. the social partners, academics and relevant international organizations.

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Caste Discrimination in Employment and Enhancing Protections available under the Equality Act

Zia Aktar [*]

Abstract

The UK government has the evidence of minorities of South Asian origin who suffer from victimisation in employment based on caste. The intra racial prejudices within the Asian community have been exposed in recent years by the 'outcastes' or the 'untouchables'(Dalits), who have suffered employment discrimination because their rights have been abused. The evidence that caste hatred in based on socio economic variables in employment can be found in the cases that have come before the courts and there have been findings that there has been victimisation against those who belong to the lowest castes. There is a need to evaluate the provisions of the Equality Act 2010 and the power available under section 69 of the Enterprise Regulatory and Reform Act 2013 to raise caste as a basis for discrimination in the courts. The obstacles in the enforcement of the Equality Act are in the positive duty which is difficult to implement for the employer in recruiting staff and causes difficulties of interpretation. This paper argues that the scope of legislation should be extended to take into consideration a wider ambit of racial discrimination under which caste is included to provide a remedy in employment law.

Keywords: *Caste prejudice; Racial Discrimination; Equality Act; Positive Duty.*

1. Introduction

The appearance of caste-based discrimination in the communities of the Indian subcontinent has surfaced in the UK's labour market where people

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of lower caste have been employed in an occupation. There is an insidious form of discriminatory behaviour that victimises the employees through denying labour rights and by expressing hatred on the premises. Its likely manifestation is in employment contracts where the employer is born into a higher caste of the Hindu religion and the employee from the lowest caste. It is necessary to evaluate if the Equality Act 2010 has the framework to redress this problem, and if not, the amendments that may be possible by legislation.

The Hindu religion is stratified by a caste system the highest rung of which is occupied by the Brahmins and at lowest tier are the Dalits or the "untouchables" who are deemed to be outside the hierarchy of the faith. [1] They are not accorded the same rights extended to other castes in the religious pyramid.[2] In the UK the discrimination against the lower castes has been exposed by litigation in the courts and this has brought the issue in the spotlight and the cases in the labour discrimination have invoked the Equality Act. [3]

The Equality Act, Section 9, defines caste as a "*hereditary, endogamous (marrying within group) community associated with a traditional occupation and ranked accordingly on a perceived scale of ritual purity. It is generally (but not exclusively) associated with South Asia, particularly India, and its diaspora. It can encompass the four classes (varnas) of Hindu tradition (the Brahmin, Kshatriya,*

[1] The substantive and underlying principle of the caste system is Varna Dharma or in essence the division of labour. Marc Galanter argues that " the abolition of slavery at the middle of 19th century extended discriminatory rights to many untouchables " including the untouchables who had access to the courts at least "formally". The legal system was not organised to deal with "graded inequality" the overall British approach towards caste was a "policy of interference". This was effected by the courts by the granting "injunctions to restrain member of particular castes from entering temples even ones that were publicly supported and dedicated to the entire Hindu community". There were damages awarded for "purificatory ceremonies necessitated by the pollution caused by the presence of the lower castes; such pollution was actionable as a trespass on the person of the higher caste worshippers" . Marc Galanter, Untouchability and the Law, Economic and Political Weekly, Vol 4, No 12, 1969, pp 131-133.

[2] Dr B.R. Ambedkar, one of the framers of the Indian Constitution who was from the Dalit background defined caste as [a] "an enclosed class and endogamy is the only characteristic of caste' (2002) 'Castes in India: Their Mechanism, Genesis and Development', in V. Rodigrues (ed.), The Essential Writings of B.R. Ambedkar, New Delhi: Oxford University Press. (1916) 241-62.

[3] The Equality Act 2010 section 9(5) states that 'A Minister of the Crown:
(a) must by order amend this section so as to provide for caste to be an aspect of race;
(b) may by order amend this Act so as to provide for an exception to a provision of this Act to apply, or not to apply, to caste or to apply, or not to apply, to caste in specified circumstances.

Vaishya and Shudra communities); the thousands of regional Hindu, Sikh, Christian, Muslim or other religious groups known as jatis; and groups amongst South Asian Muslims called biradaris. Some jatis regarded as below the varna hierarchy (once termed "untouchable") are known as Dalit". [4]

The Equality Act sets down nine protected characteristics and only race or religious belief contend as possible legal basis for caste discrimination. [5] This Act does have a provision for a minister who "must by order amend this section so as to provide for caste to be an aspect of race" under the legislation.[6] The protection against discrimination based on caste in English law has to satisfy a very narrow criteria and the Enterprise and Regulatory Reform Act 2013 section 69 has defined this legislative protection in employment law against caste discrimination by allowing the litigant to raise caste within an existing head or characteristic.

The International Convention against Racial Discrimination (CERD) 1966, Article 1 has formulated the legal obligations of states and defines "*the term 'racial discrimination' that shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life*".[7]

The argument of this paper is that caste discrimination should be codified and be deemed on the same level as racial discrimination that can lead to claims in unfair dismissal. It defines the obstacles in the Equality Act that arise in establishing a positive duty on employers to enact in practice and

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[4] The Equality Act 2010: caste discrimination briefing Paper Number 06862, 31 December 2014 www.parliament.uk/briefing-papers/SN06862.pdf

[5] The Enterprise and Regulatory Reform Act 2013 converts the existing power in Clause 9(5)(a) of the Equality Act into "a duty to include caste as an aspect of race for the purposes of the Equality Act". Section 97 also provided that a Minister may carry out a review of the effect of the section 9(5) EA 2010 (and orders made under it) and whether it remains appropriate. If a review is carried out, it must be published. The review must not be carried out before the end of a period of five years, beginning with the day the ERRA was passed if a Minister considers it appropriate in the light of the outcome of the review, he may by order repeal or otherwise amend the provision on caste. Any such order must be made by statutory instrument and would be subject to the affirmative resolution procedure. HL Deb 24 April 2013 c1476.

[6] Section 9 of the Equality Act 2010 sets out the definition of Race to include: (a) colour; (b) nationality; (c) ethnic or national origins. www.legislation.gov.uk/ukpga/2010/15/section/9

[7] *International Convention on the Elimination of All Forms of Racial Discrimination. Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19. ohchr.org/en/professionalinterest/pages/cerd.aspx*

its application in industrial relations if caste discrimination was codified into law. There is reference to the current legal framework and how the victimisation by caste in employment could fill the void if it were made a protected characteristic in law. The overarching aim of the thesis is that the caste should be viewed as intersectional discrimination in employment law and that it should be included as falling within racial discrimination. This will serve to litigate on grounds of discrimination even when it is committed within the intra racial discrimination by the South Asian employers against persons of similar origins.

1. The International Definition of Race Discrimination

The discrimination in employment based on caste has to draw from the same principles under the race legislation which is now covered by the Equality Act, so that the liability can be fixed under the heads of antidiscrimination law. There have been cases that have invoked the public sector duty that conforms to equality and these have been dealt with under the jurisdiction of the Employment Appeal Tribunals (EAT). The EAT have considered the dismissal of the employees allegedly based on caste discrimination where the respondent employer has been accused of breaching the protected characteristic of racial discrimination.

In *Naveed v Aslam*[8] the claimant was a South Asian chef who was of an Arian descent, who worked in a restaurant and upon dismissal from his employment he raised the issue that it was because of his caste that his employment was terminated. His claim was that he had been discriminated under the section 9 (1) the Equality Act based on the unlawful discrimination that consisted of deduction from his wages during the course of his employment. This was accompanied by the suggestion that the proprietors of the business were also members of the same caste but had elevated themselves in the caste hierarchy and victimised him in the course of employment.

The EAT ruled that the respondents were not liable for the 'caste' based discrimination because, " *firstly, no order had been made extending the section 9 of the Act to provide for caste to be a concept of race and, secondly, it was quite impossible for the claimant's caste to fall under the existing definition of ethnic origins because of the Claimants clear acceptance that movement with the Arian caste is possible and that it was the Claimant's status within the same caste as the Arian brothers which he claims led to his treatment* ". [9]

[8] (2012) EAT 1603968/2011.

[9] Para 27

This implied that the claimant was being treated differently because of his social class not his caste. The judge did not consider that the Claimant and the Respondents may have been of different sub- castes or jatis, and, therefore, of different status within the broader group or caste to which they were both affiliated. However, without the Equality Act and the discretionary 'caste power' which is present in s. 9(5)(a), and its amendment by ERRA 2013 s 97 to become a duty, caste might not have been pleaded as a ground of discrimination in this case. The principle is that the Equality Act has facilitated the litigation that has reached the jurisdiction of the Employment Appeal Tribunals when the issue has been raised of the employer treating the employee less favourably because of their caste. [10]

The judgments have impacted on the issue of caste discrimination that includes racial discrimination by reference to the Equality Act Section 9. In *Chandok and another v Tirkey,* [11] the claimant Ms Tirkey was employed as a domestic servant after being hired in India before the family's transfer to the UK. Her employers were aware that she was an Adivasi Christian, who historically have been outside the Hindu caste system but treated as being of the lowest caste similar in status to the Dalits. After her employment commenced she was forced to live separately in servants quarters and compelled to work in breach of the Working Time Regulations, with only a single day of annual leave in her entire employment of four and a half years.

She claimed compensation to the amount of £175,000 in unpaid wages for the infringement of Section 9 (1) (c) of the EA 2010. Justice Langstaff ruled that the definition of race is not exclusive, but it "includes" ethnic origin and it could have been argued that the "caste" insofar as it was an aspect of "ethnic" origin was already included. The lack of a single definition of caste 'does not mean that a situation to which that label can,

[10] In Begraj v Heer Manak Solicitors (2014) ICR 1020 16/12/14 the claimant Vijay, a practice manager, was Dalit who was dismissed in March 2010 and his wife Amardeep, a solicitor, was Jat a higher caste who resigned in January 2011. The couple claimed wrongful dismissal on grounds of caste discrimination and race and religious discrimination. Amardeep also claimed sex discrimination. They claimed that the firm's partners, who were of the same higher Jat caste as Amardeep, objected to their relationship and discouraged them from the inter caste marriage and their claim was that they were treated less favourably compared to both junior or equivalently qualified Jat staff who were not married or did not have a lower-caste partner. This case did not reach a conclusion because the tribunal recused itself on grounds of ostensible bias. Thus, what was deemed a "complex and novel matter" was not heard by the court.

[11] (2014) EAT/0190/14/KN

in one of its manifestations, be attached cannot and does not fall within the scope of "ethnic origins"". [12]

His honour reflected on the international dimension of prejudice based on ethnic origins to rule that it was illegal under the protected characteristic of racial discrimination and stated: "*Seven Treaties, Conventions and UN reports; nineteen authorities; and eleven other publications in an initial bundle of authorities, together with a further eleven authorities, two publications and three Hansard extracts in a supplementary bundle of authorities*".[13]

However, Justice Langstaff ruled that his judgment was fact-specific and not all caste-based claims would come within the definition of 'ethnic origins'.[14] His honour found that "ethnic origins" was a wide and flexible phrase covering questions of descent his judgment was based on "this particular case, in its particular circumstances", and his role was not to "establish more general propositions".[15] Ms Tirkey succeeded in her claims for unfair dismissal, racial harassment and indirect religious discrimination and was awarded a substantial sum at a subsequent remedy hearing. The decision did not indicate, still less establish, that there is an existing legal remedy of caste-based discrimination but it has brought into the ambit of Section 9 (1) (c) in certain circumstances for caste to be part of ethnic or national origins.

The judge cited the previous case law in coming to his decision and in particular two cases on indirect racial discrimination that gave "a wide and flexible scope to the meaning of 'ethnic origins'." [16] In *Mandla v Dowell Lee* [17] there was an appeal to the House of Lords by a pupil belonging to the Sikh community who had asserted his right to wear a turban to school as part of his racial identity. The decision of their Lordships was based on the interpretation of the Race Relations Act 1976 section 1(1) (b) (i) and (ii) the issue was if the headmaster of a school in refusing to admit the boy unless he removed his turban in order to minimise religious distinctions was guilty of unlawful discrimination. The defence was that under section 3 the boy was a member of a 'racial group . . . who can comply' with the rule did not need to show the rule to be 'justifiable irrespective of [the boy's] ethnic . . . origins'.

Lord Fraser held that "*a distinct community had to have a long shared history, of which the group was conscious as distinguishing it from other groups, and the memory of*

[12] Para 45
[13] Para 55.
[14] Para 55
[15] Para 53-55
[16] Para 42
[17] [1983] 2AC 548

which it kept alive, and second it had to have a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition, the following characteristics could also be relevant, namely (a) either a common geographical origin or descent from a small number of common ancestors, (b) a common language, which did not necessarily have to be peculiar to the group, (c) a common literature peculiar to the group, (d) a common religion different from that of neighbouring groups or from the general community surrounding it, and (e) the characteristic of being a minority or being an oppressed or a dominant group within a larger community". [18]

The Sikhs were deemed to be a racial group defined by reference to 'ethnic origins' even though they were not racially distinguishable from other people living in the Punjab. It was not material to the case that the racial and religious minority came under definition of race because it was the overriding characteristic of the ethnic group. This was reviewed again in a later case which also concerned victimisation of a distinct category that included race and religion.

In "*Jewish Free School Case*" - *R(E) v Governing Body of JFS and Another* [19] a Jewish school boy had been excluded from a school exclusively for the Jewish school children because their ancestral line was not all Jewish on the side of their maternal parentage. The case reached the House of Lords where it was ruled that there had been discrimination "on racial grounds" (defined by section 3 of the Act that included the "ethnic origins"). Lord Phillips held that "the critical question is whether the requirements of Jewish identity as defined by the 1976 Act met the characteristics that define those who have them by reference to " colour, race, nationality, or ethnic or national origins?".[20]

Lord Hope held that the crucial question was not whether the person was a member of a separate ethnic group from those advantaged by the school's admissions policy, but whether he had been treated differently on grounds of ethnicity. His Lordship recognised the right of the Office of the Chief Rabbi (OCR) to define Jewish identity in the way it does as a matter of Jewish religious law but "to say [its] ground was a racial one is to confuse the effect of the treatment with the ground itself" .[21]

Judge Lonstaff considered these cases in his ruling leading to the "same principle" of ethnic origins and racial identity as the circumstances in Tirkey. [22] This ruling brings UK law more proximate to the ICERD 's

[18] p 1066
[19] [2010] 2 AC 728, SC
[20] Para 27
[21] Para 201
[22] Para 52

definition of racial discrimination [23] and affirms that it can define a national group such as the lower caste hierarchy.[24] This form of victimisation can be brought into the framework of public law by extending the forms of liability that are part of victimisation with aggravated characteristics. The desired step would be to augment the present legislation by addressing the caste discrimination as part of racial prejudice expressly within the provisions of the Equality Act.

2. Equality Act and the Employers' Obligations

The effectiveness of the current legislation to protect against caste discrimination in employment has to be set against provisions of the Equality Act that places a duty on the employer to recruit employees with regard to any protected characteristics. Section 149(1) of the EA 2010 and it requires public bodies, when exercising their functions, to "*have due regard to the need to: (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it*".[25]
This Public Sector Equality Duty (PSED)is augmented by powers of the Secretary of State in England, and the Welsh Ministers in Wales, who can impose different specific duties on relevant authorities (those specified in Parts 1 and 2 of Schedule 19 to the Equality Act 2010) by way of separate regulations.[26] The Public authorities must prepare and publish (in a manner that is reasonably accessible to the public) one or more specific and measurable objectives they think they should achieve in pursuance of one or more aims of the general equality duty.[27] The general duty applies

[23] ICERD, Supra 8
[24] The term 'national origin' was defined in Ealing Borough Council v Race Relations Board (1972) 1 All ER 105 as "national only in the sense of race not nationality or citizenship". Lord Simon at 352.
[25] Public Sector Equality Duty, Equality and Human Rights Commission. https://www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty
[26] s.153(1) and (2) Equality Act 2010.
[27] Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 SI 2017/253; before 31 March 2017, Equality Act 2010 (Specific Duties) Regulations 2011 SI 2011/2260.

to all public authorities listed in Schedule 19 to the Equality Act 2010, [28] and to other organisations when they are carrying out public functions. There are limited exceptions relating to certain functions, such as immigration (in relation to race, religion, age and the advancement of equality) and judicial functions.[29] The PSED applies to age, disability, race (this includes colour, nationality, and ethnic or national origins), religion or belief, sexual orientation, pregnancy and maternity, gender and gender reassignment.[30]

The Government has carried out a Consultation and input from a study by the Economic and Social Research Council (ESRC)/ University of Wolverhampton has evaluated the possibility of extending the public sector duty to prevent caste discrimination. They have focussed on the provisions in the Equality Act that present hurdles when applied to caste discrimination. [31] The joint research project in 2013-15 considered caste and they identified two provisions in particular which might be relevant in excluding protection to caste discrimination. These are Schedule 3 to the Equality Act 2010 as amended by the Equality Act 2010 (Age Exceptions) Order 2010 and the Schedule 5 of the Equality Act 2010 which relates to the public sector equality duty and positive action as problematic if applied to caste. [32]

The findings state that a Ministerial Order under Section 9 (1) of EPRA which implements the caste duty can include exceptions for caste, or make particular provisions of the Equality Act apply in relation to caste in some but not in other circumstances. [33] The advantage of the public sector equality duty specifically extended to caste, rather than ethnic origins as at present would be to that public bodies would need specifically to consider the need to eliminate caste discrimination. [34]

However, one particular risk of caste legislation would be further entrenching caste-identity would arise if personal, caste-related, information was requested from applicants. While the Government is emphatic that there is no reason why employees or service recipients

[28] As amended by Equality Act 2010 (Public Authorities and Consequential and Supplementary Amendments) Order 2011 SI 2011/1060, and by Equality Act 2010 (Specification of Relevant Welsh Order 2011 SI 2011/1063 (W.154).

[29] Sch. 18 to Equality Act 2010.

[30] Sec 149(7)

[31] Caste in Great Britain and Equality Act : A Public Consultation: Government Equalities Office, March 2017, https://www.gov.uk/government/consultations/caste-in-great-britain-and-equality-law-a-public-consulation

[32] Para 3.21

[33] Page 15

[34] Ibid

should be required or encouraged to disclose their caste it found in the Review of the Duty many examples of public authorities seeking and using diversity data in ways which seemed excessive and in some cases inappropriate. The exclusion of caste from the scope of the PSE D would discourage authorities from seeking information to enable them to take caste into account in making decisions and would guard against public authorities requesting this information for that purpose. [35]

The findings noted that "in relation to caste there appears to be widespread agreement that the collection of data on caste would be counter-productive".[36] The PSED could be disapplied to caste if the courts decide in accordance with EA's Explanatory Notes definition and it would exclude it as aspect of ethnic origins. Therefore, caste discrimination not related to descent could be covered by the law in enforcing the PSED. The report also deals with specific provisions about taking "positive action" for instance where someone such as an employer "reasonably thinks" that people with a particular characteristic ie, disability have a disadvantage because they are disproportionately under-represented in a job or a training opportunity or other activity.[37]

In such circumstances, the employer may be able to take positive action to address the under-representation, by assisting people who share that characteristic. The race protection is one of the characteristics covered by positive action, and, the inclusion of caste as an aspect of race would mean that caste would also be covered. However, this might be relevant where an employer with a substantial workforce of South Asian ethnic origin knew or suspected that employees of a particular caste background were being relegated for management development opportunities. [38]The ability to take positive action might create similar drawbacks to those stated in the PSED because for an employer to "reasonably think" that there was a problem of the kind mentioned, they would probably need evidence about what caste his or her employees were. This will not if routinely enquired be either helpful or proportionate.[39]

The Government response to the Consultation Paper from those within industrial relations and perceived discrimination in employment opportunity.[40] Their argument reflects on the nature of social status, and

[35] Page 16
[36]Ibid p 16-17
[37] Ibid p 17
[38] Ibid
[39] Ibid
[40] Caste in Great Britain and equality law: A Public Consultation analysis report for the Government Equalities Office, July 2018, Nigel Lloyd, NHL Partnership Ltd

the possibility of social mobility, within the caste system. The issue they raise is that the systematic disadvantage suffered by certain castes may not be related to ethnicity but to perceived social status. The result showed "*most frequently cited applicable responses to that applying the PSED to caste would: result in a negative impact for public sector service-providers, for example, an increase in costs or administrative burden (924 respondents); or lead to a decrease in caste discrimination (804 respondents). In addition, 888 respondents stated that they had answered Question 8 as they had, because there was no clear definition of 'caste'*".[41]

The Employment Lawyers Association have provided their feedback to the Government Consultation by making the following observation :

'Social function as a distinct feature of caste would not easily fall within the definition of ethnic origin whether this is based on occupation or wider economic position – if a respondent were to argue that discrimination is based on someone's occupation or socio-economic standing (more akin to class than caste) this may evade the scope of 'ethnic' origins…' [42]

This is based on the assumption that there is a risk in considering whether or not to take positive action or whether the public sector equality duty applies, an employer may consider that the best way to establish the necessary data would be to establish an applicant's caste, but the Government does not support people being asked such potentially intrusive and socially divisive questions.[43]

The law at present is that the legislation does not set out the steps a public authority should take to meet the requirements of the general equality duty, but states that complying with the duty might mean treating some people more favourably than others, where doing so is allowed by the Equality Act The principles from case law developed under the previous equality duties will continue to apply, and guidance has been issued.[44] In R (on the application of (1) Rajput (2) Shamji) v Waltham Forest LBC: R (on the application of Tiller) v East Sussex CC the Court of Appeal approved the guidance set out in R (on the application of Brown) v Secretary of State for Work and Pensions [2008][45] that in complying with the PSED there are six principles, known as the "Brown Principles" as follows: "*decision-makers must be made aware of their duty to have due regard to the identified needs; the duty must be fulfilled both before and during consideration of a*

https://www.gov.uk/government/consultations/caste-in-great-britain-and-equality-law - a-public-consulation

[41] p 29

[42] Caste in Great Britain and equality law, supra 41 Para 2.12

[43] Caste in Great Britain and equality law

[44] [2011] EWCA Civ 1577

[45] [2008] EWHC 3158 (Admin)

particular policy, and involves a "conscious approach and state of mind";[46] *it is not a question of ticking boxes, the duty must be approached in substance, with rigour and with an open mind, and a failure to refer expressly to the duty whilst exercising a public function will not be determinative of whether due regard has been had; the duty is non-delegable; the duty is continuing; it is good practice for an authority to keep a record showing that it has considered the identified needs'.*[47]

The courts are obliged to consider the Brown Principles alongside the statements of Lord Justice Dyson in the *Baker & Ors, R (on the application of) v Secretary of State for Communities & Local Government & Ors* [48] in defining the requirements " *What is due regard? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged ... group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing*". [49]

The approach of the UK government has been defined by the Public Consultation where it reached the conclusion that "the best way to provide the necessary protection against unlawful discrimination because of caste is by relying on emerging case-law as developed by courts and tribunals". [50] This it feels is a more "proportionate approach given the extremely low numbers of cases involved" and because of the "controversial nature of introducing 'caste', as a self-standing element, into British domestic law".[51]

3. Racial Discrimination and Equal Protection

The current state of English law in dealing with caste discrimination is premised on racial discrimination and the lack of legal umbrella does not reflect the consensus in Parliament where it has support in the House of

[46] para 91.
[47] paras 89-96
[48] [2008] EWCA Civ 141
[49] para 31
[50] This was implied in a debate in the House of Lord when Baroness Williams of Trafford, the Parliamentary Under-Secretary of State for Communities and Local Government stated that the UK Government was 'currently unaware of any cases of race discrimination with an alleged caste element coming before the courts since the Langstaff ruling (re: Chandhok & Anor v Tirkey) was delivered". (Caste based discrimination,11 July 2016 Vol 774, https://hansard.parliament.uk/Lords/2016-07-11/debates/3EEC4BE4-C98F-4155-82E2-E8485A752C94/Caste-BasedDiscrimination.
[51] Conclusions, Public Consultations

Lords.[52] The government has minimised the impact of caste hatred or the urgent need for enacting legislation by stating that there is insufficient litigation on the matter. However, the inability of the PSED under the Equality Act to provide the basis for caste to be challenged by those who consider being victimised needs further consideration under the international standards and treaties.

The International Convention for the Elimination of Racial Discrimination (ICERD) has defined caste prejudice or hatred based on birthright or "descent" within the broad definition of 'racial discrimination.[53] While there is no specific discrimination based on caste the ICERD Committee has recommended the inclusion of a prohibition against caste discrimination and analogous systems of inherited status in domestic legislation.[54] This requires an understanding of the theory of caste hatred as a public order offence against the Dalit population in the UK. In its General Recommendation XXIX the ICERD Committee states that discrimination "against members of communities based on forms of social stratification such as caste and analogous systems which nullify or impair their equal enjoyment of human rights" is void. This extends the definition of race victimisation in the communities to be recognised, "including inability to alter inherited status, socially enforced restrictions on outside marriage, and dehumanising discourses". [55]

There has been increasing tendency in the UN frameworks to issue various documents that declare discrimination based on descent illegal. The UN General Assembly has identified caste discrimination as continuing to affect diaspora communities 'whose original cultures and

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[52] Caste based discrimination. Hansard, Vol 774: debated on Monday 11 July 2016. https://hansard.parliament.uk/lords/2016-07-11/debates/3EEC4BE4-C98F-4155-82E2-E8485A752C94/Caste-BasedDiscrimination

[53] Article 1 " In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". www.ohchr.org/EN/Professionalinterest/Pages/CERD.aspx

[54] Concluding observations (CERD/C/63/CO/11 para. 25) and its General Recommendation 29 (2002) on descent.

[55] *At the Sixty-first session (2002) General recommendation XXIX on article 1, paragraph 1, of the Convention (Descent), The Committee on the Elimination of Racial Discrimination stated "Recalling the terms of the Universal Declaration of Human Rights according to which all human beings are born free and equal in dignity and rights and are entitled to the rights and freedoms therein without distinction of any kind, including race, colour, sex, language, religion, social origin, birth or other status ". http:www.ohcr.org/EN/HR Bodies/CERD/Pages/CERDindex.aspx*

traditions include aspects of inherited social exclusion'.[56] This relates to intermarriage between castes, commensality (i.e. the act or practice of eating/drinking together), access to places of worship, employment conditions, discrimination in access to political participation, and the role of the media. [57]

The UN Special Rapporteur on Contemporary forms of Racism and the UN Sub Commission on the Promotion and Protection of Human Rights have taken note of the existence of discrimination on the basis of caste and termed it as a issue of fundamental rights in the countries where there are members of South Asian communities.[58] In his annual report to the Human Rights Council in June 2011 the UN Special Rapporteur on Contemporary forms of Racism recommended the UK government enact specific legislation to outlaw direct and indirect discrimination against affected groups in accordance with the general measures contained in ICERD General Recommendation XXIX. [59]

There has been incorporation in other Commonwealth countries of the ICERD framework for outlawing caste discrimination. In Australia the Racial Discrimination Act (RDA) 1975 it has been adopted into domestic legislation. Article 9(1)states : *It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.*[60]

Section 10 of the RDA provides the rights to equality granted under ICERD Article 5 "*which extends by subsection (i) to the Commonwealth or of a State or Territory, for persons of a particular race, colour or national or ethnic origin who do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or is "more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-*

[56] UN Doc.E/CN4/Sub2/2004/31para35

[57] E/CN.4/Sub.2/2004/31

[58] The Commission on Human Rights, taking note of resolution 2004/17 of 12 August 2004 of the SubCommission on the Promotion and Protection of Human Rights, decided to take this step, on the basis of the three working papers submitted to the Sub-Commission on this topic (E/CN.4/Sub.2/2001/16, E/CN.4/Sub.2/2003/24 and E/CN.4/Sub.2/2004/31), the comments made during the sessions of the SubCommission and national human rights institutions, relevant organs and agencies of the United Nations system and NGOs on the basis of information circulated by the Special Rapporteurs.

[59] A/HRC/8/25/Add.1

[60] RDA 1975 (as amended) 2013. https://www.legislation.gov.au/details/C2014COOO14

mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin".[61]

The Canadian Constitution Act 1982 extends its protection to caste discrimination and includes it in Part 1 of the so- called *Canadian Charter of Rights and Freedoms* which "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[62] These are included in section 15 which contains a non exhaustive list under "Equality Rights" that in subsection (i) corresponds to 'Equality before and under law and equal protection and benefit of law'. [63]

The section defines "*Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability*". Section 15 (2) includes a provision in subsection (1) for 'Affirmative action programs' which "*does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability*".

The province of Ontario, which comprises the National Capital Region the legislature has introduced a Human Rights Code in 2015, Section 11, that expressly states that federal statutes and its own legislation forbids discrimination from "religion or creed based prejudice". It sets out a duty to " accommodate creed beliefs and practices " and "prohibits discrimination that results from requirements, qualifications or factors that may appear neutral but have an adverse effect on people identified". This is interpreted as "constructive" or "adverse effect" discrimination which is protected under the HR *Code* unless the requirement,

[61] The State of Queensland Anti-Discrimination Act 1991 defines race as including "colour and descent or ancestry [italics added], and ethnicity or ethnic origin, and nationality or national origin". https://www.humanrights.gov.au/federal-discrimination-law-chapter-3-race-discrimination-ac.

[62] Justice and Law, Government of Canada. http://laws-lois.justice.gc.ca/eng/Const/page-15.html

[63] In contrast to the UK, section 15 of the Constitution Act 1982 also known as the Canadian Charter of Rights and Freedoms contains a non-exhaustive list of grounds; see G. Moon, 'From equal treatment to appropriate treatment: what lessons can Canadian equality law on dignity and on reasonable accommodation teach the United Kingdom?' 6 European Human Rights Law Review (2006) 695-721, 697.

qualification or factor is reasonable and *bona fide* in the circumstances, and cannot be accommodated short of undue hardship".[64]

There is a legal duty on employers, service providers, unions and housing providers to accommodate people's beliefs and practices not to cause undue hardship. This implies those adversely affected by a standard, rule or requirement of the organisation that is sincerely (honestly) held are protected in law. The "creed" protections are contingent on a person's belief to be "sincerely held" and it does not need for them to show that "their belief is an essential or obligatory element of their creed, or that it is recognised by others of the same creed (including religious officials)".[65]

However, unlike Australia and Canada, the UK adopts a 'grounds-based' approach to discrimination law, meaning that legislation affords protection from discrimination on specified grounds only. In English law the unlawful discrimination is regulated under the Equality Act that sets out Section 9 protected characteristics under its Schedule. This leads to the demands for the existing categories to be interpreted, so as to include forms of discrimination which are not expressly covered such as caste based discrimination in employment law.

4. Codifying Caste into law

The non-discrimination law in the UK, presently, suffers from the difficulties where litigants often raise several forms of linear discrimination.[66] The finding of an appropriate comparator has posed a major difficulty in cases before the courts in evaluating the direct or indirect discrimination. [67] This can be brought into the framework of the

[64] OHRC, 17/9/15 http://www.ohre.on.ca/en/policy-preventing-discrimination-based-creed

[65] In *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 the principle was established that it need only establish that an asserted creed belief is "in good faith, neither fictitious nor capricious, and that it is not an artifice" and "organisations may also sometimes need to evaluate objective evidence to decide whether a belief is in fact connected to a creed, or that a requirement, rule or practice actually negatively affects a person based on their creed". at para. 52.

[66] The United States offers a multi ground discrimination claims in practice are often separated into different components by the courts. Rosenburg, L, The limits of Employment Discrimination Law in the US and European Community. Copenhagen, DJOB Publishing, (1999) p 377, See also Moon, G ' Multiple Discrimination- Problems compounded or solutions found ?' London, Justice,(2007) page 6

[67] Unlike the European Court of Human Rights (ECtHR) the EU operates on the basis of a 'closed list of discrimination grounds' provided for in the treaties. For instance, TFEU, art 19 enables the EU to 'take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

law by extending the remit of intersectional discrimination by extending the adjudication net into several forms of liability that can be a set of accumulated characteristics.

Bell argues that each protected characteristic needs to be defined separately. This is because the concept of 'ethnic group' suggests a uniformity of experience with all members assumed to share similar characteristics, and yet, " an individual 's ethnic origins will be combined with other personal characteristics such as gender, age, physical/mental abilities and sexual orientation". [68] An example is that a black person can face both racial and gender discrimination which would come under the umbrella term of "multiple discrimination". This can be compartmentalised into several strands to " the extent that different forms of discrimination operate concurrently then they may be described as additive discrimination". These can reflect in the barriers to promotion that cover two different characteristics such as gender and race but that there is a "more complex" concept of intersectional discrimination. [69]

This presupposes that there is a combination of different forms of inequality that results as "a distinct experience which can be attributed to a number of factors as inter sectionality which may rise to specific stereotypes such as the assumption that women wearing a headscarf lack self confidence or that young Muslim men face a security risk" .[70] This form of intersectional discrimination presents a growing body of evidence which indicates heightened levels of disadvantages for those vulnerable to multiple forms of victimisation. [71] The contention is based on legislating on intersectionality by adopting a policy based approach that extends the racist discrimination to caste in the legal framework.

Bell contends that "there are some grounds which are very difficult to disentangle from 'race' and ethnicity and differences in treatment due to

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Consolidated version of the Treaty on the Functioning of the European Union 2012, OJC 326/56

[68] Martin Bell, Racism and Equality in the EU, Oxford University Press, (2008) Page 23

[69] S Hannett explains that "multiple discrimination*" can occur in at least two ways. This is where the grounds of discrimination are additive(or double) in nature, and/or where the discrimination is based on an indivisible combination of two or more social characteristics. This denotes situations where an individual suffers cumulatively from (different) discriminatory practices to which the two or more different groups he or she belongs to are susceptible, with statistics being key in determining such discrimination*". Equality at the Intersection: the legislative and judicial failure to tackle multiple discrimination (2003, 23 Oxford Journal of Legal Studies, p,83.

[70] European Commission, Tackling Multiple denomination -practices, policies and laws. Luxembourg : OOPEC, 2007, Page 17

[71] This argument is supported by S Friedman in ' Double trouble: Cumulative discrimination and EU law (2005) 2 European Anti Discrimination Law Review, 13.

nationality, religion and language are often interlinked with discrimination on grounds of ethnic origins". [72] In applying ground based discrimination in "many instances direct discrimination on these grounds will constitute indirect discrimination on grounds of ethnic origins". The proximity between issues "such as nationality, religion, language and ethnicity there is a strong argument in favour of a comprehensive response in law and policy". The "EU Directives applying to these forms of discrimination provide a first step in enabling multiple discrimination to be addressed". [73]
The intersectional discrimination is not possible to prevent by means of a closed list but the development of legal principles may bring the current head of racial discrimination to include caste in its umbrella. This approach gives rise to the issue, firstly, which grounds are regulated and how they are to be defined and extended. Although there is no generic reason why legal protection from discrimination is organised on the basis of categories, it is logical that such a model will give rise to demands for the list to be expanded by legislation, or for existing categories to be interpreted broadly as forms of discrimination not accepted by current laws.
Solanke has observed that categorisation "is 'not preordained' but 'may have been inevitable given the nature of political campaigns for discrimination law". This means that "in some cases the addition of categories has been in response to the obligation to implement EU anti-discrimination law" as in the EA. The concept of caste "as a statutory protected characteristic in its own right or as a statutory subset of an existing characteristic, the legal protection against caste discrimination depends on establishing in the courts that caste is subsumed within an existing characteristic such as race or religion or belief ".[74]
The retention of a closed list means that direct discrimination could not be challenged in the courts by means of a racial category including caste. It could be prevented by a justification defence based on a Public Sector duty or the Positive Action because of the lack of protection in the current legislation. Moon has argued that lack of intersectional protection legislation " would have seriously damaging consequences in the continental European countries from East and West which are reluctant to acknowledge the existence of non discrimination law in the market

[72] Bell, Ibid p 18
[73] Ibid
[74] I. Solanke, 'Putting Race and Gender Together: A New Approach to Intersectionality', 72(5) Modern Law Review (2009) 723-749, 723

place in its entirety". [75] Therefore, the legislative innovation that is required which states that unlawful discrimination includes discrimination based on an intersection of grounds that brings caste within race discrimination.[76]

The grounds for intersectional discrimination would lead to the legal interpretation from a wider selection than that currently available in non - discrimination. In dealing with this perspective such an initiative would entail an acknowledgement that directives not providing multiple or intersectional discrimination do not apply in such cases. This would have negative effects on the development of any adequate response to intersectional discrimination by invoking a "teleological interpretation".[77] The desired step would be to legislate by addressing disadvantages that would acknowledge the accumulative heads of discrimination including caste in employment relations. It will then become recognized as a category of non discrimination law within race that would also have the potential to develop the concept further in the interpretation of racial discrimination in employment. The prism of intersectional discrimination will enforce the positive duty to override occupational necessity by finding a comparator that has restricted the application of discrimination law in the courts of the UK.

5. Caste Discrimination and Cultural Defence

In assessing the framework of employment and labour law which can serve to prevent the discrimination based on caste its likely impact on industrial relations has to be evaluated. This reform will extend to the provision of goods, facilities and services, education and vocational

[75] G Moon, Multiple Discrimination – Problems Compounded **or** Solved ... (2006) http://www.justice.org.uk/images/pdfs/multiplediscrimination.pdf at p 163

[76] European Parliament Resolution 2013/2676 RSP (10 October 2013) on caste based discrimination refers to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and General Recommendation XXIX of the Committee on the Elimination of Racial Discrimination in its preamble. Para 8 states " recognise caste as a distinct form of discrimination rooted in the social and/or religious context, which must be tackled together with other grounds of discrimination, i.e. ethnicity, race, descent, religion, gender and sexuality, in EU efforts to fight all forms of discrimination". http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT%20TA%20P7-TA-2013-0420%200%20DOC%20XML%20V0//EN

[77] European Union Non Discrimination law and Intersection ality : Investigating the Triangle of Racial, Gender and Disability Discrimination. Ashgate 2011 edited by Dr Dagmar Schiek and Professor Anna Lawson. Intersectionality in EU law. A Critical Re appraisal. Ashgate (2011) p 259-275 at Page 266

training, or the management or disposal of property. There are retentionists in the Hindu community in the UK who want to preserve caste differentials because they view it as an internal matter of the community. They have presented a 'cultural' defence to preempt any legislation against caste hatred. The Hindu Forum of Britain, National Hindu Students and Vishwa Hindu Parishad have established a 'cultural defence' of caste norms as part of anthropological framework for protection against any enactment of law in the UK. [78]

Their spokesman, Prakash Shah, is against any intervention that would declare caste as an offence and he describes potential legislation as a 'threat to Indian businesses and to the well-being and existence of the Indian communities' which would cause distress and create "a climate of intimidation".[79] Shah argues that caste hierarchy only occurs in the non-regulated fields that are arranged informally and is a cultural characteristic that impacts on behaviour or conduct. The caste stratification, in his view, is a consequence of the "motivation; opinions, beliefs, preferences and choices that are not unlawful unless they give rise to prohibited conduct or impacts". [80]

Shah's perspective is that the operation of caste based legislation will lead to an increase in legal proceedings against Indian employers because they will be exposed to "*the challenges that include the litigation each type of organization might be faced with and what areas of their work may be affected. For example, in the case of community organizations, the holding of community events, such as Navratri or even weddings, could be questioned on grounds of caste preferences. The employment of personnel to perform rituals for weddings could also be exposed to charges of discrimination*". [81]

Shah's argument is that in legal terms the "burden and standard of proof" will be on the employers including the possible impact on charity status and fund-raising.[82] Despite advocating against the enactment of caste into law Shah considers the decision in the Chindok case to have raised the "potential contradictions given that the Equality Act's provision on caste

[78] Amrit Wilson, Why is the UK government wheeling back on legislation against caste discrimination? Open Democracy, 24 May 2017 .https://www.opendemocracy.net/en/opendemocracyuk/why-is-uk-government-wheeling-back-on-legislation-against-caste-discrimination/

[79] Prakash Shah, Against Caste in British law. A Critical Perspective in the Caste Discrimination Provision in the Equality Act 2010, Palgrave McMillan, (2015)

[80] page 65.

[81] page 67

[82] page 71

has not yet been implemented".[83] The ruling presents difficulties in interpretation if it is extended into legislation because, he postulates, that "it is now unclear what the reach of the existing law is and a question remains whether the Equality Act's provision on caste should be brought into force". [84]

However, Dhanda, Warnapura, Keane, et al counter argue that " *in Britain, caste is positively a form of association and social capital among communities of South Asian origin, but negatively a form of social separation, distinction and ranking. In predominant usage in Britain, caste is used interchangeably for varna, jati, and biradari. The most typical usage, though, is of caste as jati* ". [85] They argue that the "*second meaning of caste is rendered by the South Asian term jati. Jatis are not fixed units and may be divided into 'sub-castes' which are the socially significant identities and status groups. Unlike varna, the concept of jati is not connected to any one religious grouping, but is found in all the major South Asian religious communities. Finally, caste encompasses biradari (brotherhood), also referred to by the term zaat, used interchangeably with biradari or in combination with it (zaat-biradari). Zaat is in turn related to 'nasal' (lineage), meaning race*".[86]

Waughray, an advocate for outlawing caste victimisation proposes legislation to declare it as an offence in the UK law based on the Chindok case that she argues contributed significantly and acted as the catalyst for the surfacing of "the hidden phenomenon" of caste discrimination. It would be necessary to not " repeal EA s. 9(5)(a) on the basis of that judgment despite pressure" but to also to augment the provision " *by secondary legislation, as decided by Parliament in April 2013, to include caste as an aspect of race (however this is done), that offers legal certainty and proclaims publicly that discrimination on grounds of caste is both unacceptable and unlawful*". [87]

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[83] page 80

[84] page 99

[85] Meena Dhanda, Annapurna Waughray, David Keane, David Mosse, Roger Green, and , Stephen Whittle, Caste in Britain: Socio-legal Review, Equality and Human Rights Commission Research Report 91 (2014)

[86] Ibid.

[87] Annapurna Waughray, Ensuring protection against caste discrimination in Britain Should the Equality Act 2010 be extended?, International Journal of Discrimination and the Law July 11, 2016) Vol 16, Issue 2-3, 2016, p 177-196) In Capturing Caste in Law: Caste Discrimination and the Equality Act 2010 Waughray states that "successive governments have argued that caste could already be covered by race as currently defined in the EA by virtue of the descent aspect of ethnic origins; but as has been argued elsewhere, 'in order to construe caste as part of race in domestic law following the JFS route, a three-fold interpretive leap had to be made; caste must be viewed as part of descent, itself part of ethnic origins, which in turn is a sub-set of race". Human Rights Law Review Vol. 14(2) (2014) 359-379

The implication is that the discretionary 'caste power' for the Minister which was included in the Equality Act s. 9(5)(a), and its amendment by ERRA 2013 s 97 became a duty that has enabled caste to be pleaded as a ground of discrimination. [88] This is an inference that it should be made into a public order offence and that it has all the elements present such as intention and commission to be brought into the framework of criminal law and civil law.

The Dalit based community organisation, Caste watch UK, has compiled evidence of discrimination such as "cases of elderly patients being refused care because 'upper caste' medical professionals will not touch them, or workers being side lined, or refused promotion, and school children being bullied for reasons of caste". It has proposed a law against caste discrimination that could be used to penalise these incidents as hate crimes. The primary reason for this is that the protection arises in the private relationships but in the consequences are observed in the public domain such as in "breakdowns in relationships and marriages, for example, where transgressing caste boundaries lead to emotional and sometimes physical abuse".[89]

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[88] Hepple, B, Equality : The new Legal Framework, (Oxford, Hart, 2011) p 12-26; Hepple notes the EA10 has three distinctive features. First, it is comprehensive, creating a unitary conception of equality and a single enforcement body, the Equality and Human Rights Commission. Second, it 'harmonises, clarifies and extends the concepts of discrimination (direct and in direct), harassment and victimisation and applies them across nine protected characteristics', specifically, age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. Third, it transforms anti-discrimination protection into equality law although does not go as far as establishing a constitutional right to equality". For more on this concept of a structured approach to the use of dignity as the basis for equality law see J. Jowell, 'Is Equality a Constitutional Principle?' (1994) 47 Current Legal Problems; J. Stanton-Ife, 'Should Equality Be a Constitutional Principle?' (2000) 11 KCLJ 133 opposing Jowell's argument; J. Jones, '"Common Constitutional Traditions": Can the Meaning of Human Dignity under German Law Guide the European Court of Justice?' [2004] PL 167; E. Grant, 'Dignity and Equality' (2007) 7 Human Rights Law Review 299 46 This is a highly contested concept – see for example D. Beyleveld, R. Brownsword, 'Human Dignity, Human Rights, and Human Genetics' (1998) 61 MLR 661; D. Feldman, 'Human Dignity as a Legal Value' [1999] PL 682 and [2000] PL 61; C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655 47; G. Moon, R. Allen, 'Dignity Discourse in Discrimination Law: A Better Route to Equality?' [2006] EHRLR 610.

[89] Ibid, See also Capturing Caste in Law: The Legal Regulation of Caste and Caste-Based Discrimination Thesis submitted in accordance with the requirements of the University of Liverpool for the degree of Doctor in Philosophy by Annapurna Deborah Waughray

The government should not be bound by considerations of its Public Consultation where it reached the conclusion that it will not be proportionate to enact a law that gives renewed emphasis to human dignity by protecting caste in addition to the five categories that include, at present, racial and religious discrimination, disability, homophobia, and old age. This should by analogy be extended to caste based hatred because if racism is prohibited then so should the manifestation of speech or acts related to caste. The protection of victims of caste discrimination is to ensure that the term caste appears on the face of the legislation as a self-standing, separate element of race in Section 9(5) of the Equality Act in addition to the aspects which are already included ie (a) colour (b) nationality and (c) ethnic or national origins.
Moreover, the courts have already established in *Mandla v Dowell Lee* and the Jewish Free Schools Case that a group can be defined as a racial category in indirect discrimination if its ethnicity has a special characteristic and this subsumes both religious and racial categories. The victimisation based on caste is likely to arise where the differentiation is in work relationships and in employment relations where the Dalit community will be discriminated against. This is because they have traditionally occupied occupations in the lower rungs of the hierarchy that gave them the title of 'untouchables'. [90]

6. Conclusion

There is a need for caste discrimination to be terminated in employment contracts as it is a form of intra racial prejudice in South Asian communities that victimises the lower castes in industry when they are employed in the occupations. The current definition in the Equality Act does not extend to the form of exclusionary and discriminatory behaviour which is prevalent in employment and is manifested in jobs by the wages paid, conditions of employment and human rights violations. It is under Section 69 of the EPRA that the Minister can invoke the Equality Act and bring the infringement under racial discrimination but this is a discretionary exercise subject to the evaluation of each case.

April 2013https://livrepository.liverpool.ac.uk/12553/1/WaughrayAnn_Apr2013_12553.pdf

[90] Cleaning Human Waste, Manual "Scavenging", Caste and Discrimination in India. Human Rights Watch Report. 28/814, https://www.hrw.org/report/2014/08/25/cleaning-human-waste/manual-scavenging-caste-and-discrimination-india

The law needs to be enacted that recognises intersectional discrimination which will increase the scope of the courts in the realm of equality legislation by declaring caste discrimination illegal. In other common law based countries where there are large minority communities of Indian origins the law has been enacted to cover discrimination and victimisation based on caste. This is unlike the grounds based discrimination that is currently enforced in the UK and which has limits in addressing discrimination.

The existing basis for litigation in cases of discrimination in employment law has to override the burden of the PSED on the employer. This can be redressed if cumulative discrimination is recognised that will include a broad category of discriminatory behaviour which will increase the possibility of litigation based on caste. There should be a remedy available in law and the cultural defence argument should be rejected and work contracts that victimise the Dalit community should be voided.

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