Section C

Scope and Coverage

19. Fundamental labour rights, platform work and human rights protection of non-standard workers

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1 INTRODUCTION

The spread of non-standard forms of employment in industrialised and developing countries over the last three decades has prompted an extensive debate on how to reshape labour regulation.[1] This debate, however, has arguably concentrated on how to adjust regulation of individual aspects of employment law to address the spread of non-standard work, such as the working conditions and equal treatment of some non-standard workers or the very possibility of making recourse to non-standard work arrangements. Less attention has been given, instead, to the questions that non-standard work poses to the regulation of fundamental labour rights, including the right to freely associate in trade unions and to bargain collectively.

This chapter aims at reorienting the debate towards these neglected dimensions of labour regulation, by shedding light on the risks that accompany non-standard work with regard to fundamental labour rights. It concentrates, in particular, on the risks that affect work in the so-called 'gig' or 'platform' economy, since the relative novelty of these forms of work may obscure the difficulties these workers face in enjoying fundamental labour rights. Naturally, nonetheless, these problems go much beyond platform work and extend to a far vaster area of work that does not fall in the realm of the standard, open-ended, full-time employment relationship (SER). This is particularly true for collective labour rights, whose legal restrictions often disproportionately affect non-standard workers and prevent them from enjoying these rights fully.[2] This chapter argues that some of these restrictions are at odds with the increasing international recognition of labour rights, and particularly of some collective rights, as human rights. It focuses in particular on the limits that current anti-trust standards pose to the right to organise and to collective bargaining of some non-standard workers and advances a proposal for the review of these restrictions.

[1] See references in Zoe Adams and Simon Deakin, 'Institutional Solutions to Inequality and Precariousness in Labour Markets' (2014) 52 *BJIR* 779; ILO, *Non-standard Employment around the World: Understanding Challenges, Shaping Prospects* (ILO 2016); Janine Berg, Mariya Aleksynska, Valerio De Stefano and Martine Humblet, 'Non-standard Employment around the World: Regulatory Answers to Face Its Challenges' (2018) 100 *Bulletin of Comparative Industrial Relations.*

[2] Valerio de Stefano, 'Non-Standard Work and Limits on Freedom of Association: A Human-rights Based Approach' (2017) 46(2) *ILJ* 185.

2 REGULATION AND THE (IR)RESISTIBLE GROWTH OF NON-STANDARD WORK

According to the International Labour Office, non-standard employment includes 'temporary employment, part-time work, temporary agency work and other multi-party employment relationships, disguised employment relationships and dependent self-employment'.[3] It is arguably an open description, since the list of the possible work arrangements indicated as 'non-standard' is a non-exhaustive one.

Reference to 'non-standard work' is theoretically preferable to other terms that are often used to refer to similar phenomena. 'Precarious work', for instance, arguably extends much beyond the borders of non-standard work. Workers may experience precariousness also when they are in an SER.[4] This may happen, for instance, when regulation against unfair dismissal is so scarce that they are not effectively protected against arbitrary acts of the employer or when an extended length of service is necessary to qualify for labour protections such as maternity leave, redundancy pay or action against unfair dismissal. In addition, not every non-standard worker is precarious, as there could be non-standard work contracts that nonetheless afford sufficient stability of employment and income, such as some form of fixed-term or part-time contracts.

The expression 'atypical work', instead, presents non-negligible legal flaws. In some civil law traditions, the terms 'contratto atipico', 'contrato atípico' or 'atypischer Vertrag' technically refer to contracts that are not specifically regulated – this is not true for a vast number of non-standard contracts. On the contrary, fixed-term work, temporary agency work, dependent self-employment and part-time work are explicitly regulated in a vast number of legal systems, at the international, regional and national level.

Reference to 'non-standard employment' could also be criticised as implying the adoption of an obsolete SER-centric vision of labour markets, which fails to recognise the growing relevance of other work arrangements alternative to the inevitably receding SER. This picture, however, is hardly accurate. According to the ILO, 'despite the growth of non-standard work in many regions of the world the (SER) remains the dominant form of employment in industrialised countries, accounting for 70 per cent of jobs in Europe and the United States. In emerging economies, such as Brazil and Argentina, most jobs created in the 2000s were formal jobs with indefinite contracts'.[5] On the one hand, thus, the SER is far from being vanishing in numerical terms and the mainstream accounts of an alleged replacement of the employment relationship with various forms of self-employment[6] can be called into question also by thoroughly

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[3] ILO, *Non-standard Employment around the World: Understanding Challenges, Shaping Prospects* (ILO 2016).

[4] Nicola Kountouris, 'The Legal Determinants of Precariousness in Personal Work Relations: A European Perspective' (2013) 34 *CLLP'Y* 21.

[5] ILO, '*Non-standard Forms of Employment' Report for Discussion at the Meeting of Experts on Non-standard Forms of Employment* (Geneva, 16–19 February 2015) (ILO 2015).

[6] McKinsey, *Independent Work: Choice, Necessity, and the Gig Economy* (McKynsey 2016).

investigating how much the rise of self-employment corresponds to truly 'new' and 'liberating' business models rather than to a rebrand of casualised forms of work and of misclassification practices.[7] On the other hand, the SER still constitutes the backbone of labour regulation in most jurisdictions of the world,[8] while the growth of non-standard employment should also be seen as a voluntary or involuntary outcome of regulation.[9] Needless to say, the spread of non-standard employment is not only attributable to regulation; the impact of global trade, the decline of the manufacturing sector and the enormous expansion of the service sector in industrialised countries as well as technological innovation all hugely contributed to this spread;[10] nonetheless, regulatory practices also played a significant role that should not be underestimated.[11]

A prominent example is the development of the doctrine of mutuality of obligation and its impact on the spread of casual employment, particularly in the form of zero-hour arrangements, in the United Kingdom.[12] Regulation can also remove restrictions to the lawful recourse to non-standard work, by, for example, allowing the conclusion of fixed-term contracts for non-temporary reasons,[13] and can promote non-standard work as a cheap alternative to the SER. This is arguably the case of some existing social security and unemployment benefit regulation in some European countries such as 'mini-jobs' in Germany and 'zero-hour' contracts in the United Kingdom.[14] In Italy, instead, the spread of 'parasubordinate' work was also arguably an unintended effect of civil procedural rules and social security regulation.[15]

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[7] Valerio de Stefano, 'The Rise of the "Just-In-Time Workforce": On-demand Work, Crowdwork and Labour Protection in the "Gig-economy"' ILO Conditions of Work and Employment Series Working Paper, No. 71 (ILO 2016).

[8] ILO, *Non-standard Employment around the World: Understanding Challenges, Shaping Prospects* (ILO 2016); Guy Davidov, Mark Freedland and Nicola Countouris, 'The Subjects of Labor Law: 'Employees' and Other Workers' in Matthew Finkin and Guy Mundlak (eds), *Research Handbook in Comparative Labor Law* (Edward Elgar 2015).

[9] Guglielmo Meardi, 'The Claimed Growing Irrelevance of Employment Relations' (2014) 56 *Journal of Industrial Relations* 594–605; Zoe Adams and Simon Deakin, 'Institutional Solutions to Inequality and Precariousness in Labour Markets' (2014) 52 *BJIR* 779.

[10] ILO, *Non-standard Employment around the World: Understanding Challenges, Shaping Prospects* (ILO 2016).

[11] Janine Berg, 'Contractual Status, Worker Well-being and Economic Development' (2017) *Ind. J. Labour Econ.* https://doi.org/10.1007/s41027-017-0092-1; David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press 2014).

[12] Valerio de Stefano, 'Casual Work Beyond Casual Work in the EU: The Underground Casualization of the European Workforce – And What to Do About It' (2016) 7(3) *European Labour Law Journal* 421.

[13] Mariya Aleksynska and Janine Berg, 'Firms' Demand for Temporary Labour in Developing Countries: Necessity or Strategy?' (2016) 77 ILO Conditions of Work and Employment Series Working Paper (ILO).

[14] Zoe Adams and Simon Deakin, *Re-regulating Zero Hours Contracts* (The Institute of Employment Rights 2014).

[15] See Valerio de Stefano, 'Smuggling-in Flexibility: Temporary Work Contracts and the "Implicit Threat" Mechanisms. Reflections on a New European Path' (2009) 4 Labour Administration and Inspection Programme LAB/ADMIN Working Document (ILO), arguing

In some cases, also, administrative and enforcement practices can play an endogenous role in the erosion of the SER. For instance, in 2015 the US Department of Labour had issued an administrative interpretation showing how many workers currently misclassified as independent contractors in the United States would be covered by the Fair Labour Standards Act, in light of the wording of the law and established case law.[16] Following the change of Administration, the Department of Labour decided to withdraw the interpretation, indicating a change in the determination of enforcing current labour standards. Rather than a structural shift in business models and an acknowledgement of increased entrepreneurship and genuine self-employment, therefore, the withdrawal of the brief signals merely to businesses that misclassification practices will more likely be tolerated than under the previous Administration. Future increases in the number of US self-employed workers must also be weighted against this purely administrative policy.

Erosion of collective bargaining driven by deregulation and re-regulation in the field of industrial relations have also contributed to the spread of casual labour in developed economies.[17]

Finally, exclusions of non-standard workers from fundamental labour rights as well as limitations in the exercise of collective rights that disproportionately affect non-standard workers can be another prominent example of regulation providing undue incentives to recur to non-standard work.[18] Calling for the revision of these restrictions, with a view to ensure that all non-standard work is made decent, does neither suggest that all non-standard work arrangements should be brought under the SER nor implies that the SER itself is an outmoded and irrelevant phenomenon, unsuited for advanced labour markets.

A further objection can be that there is no need to adopt a generic 'umbrella' term to group the distinct forms of work contract deviating from the SER and that it is instead opportune to analyse and refer to any such form one by one. Despite being aware of the

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that the first time Italian law meaningfully regulated parasubordinate relationships or 'collaborazioni', 'only procedural rules were extended to them'. However, 'the mere fact that the legislator mentioned them as self-employment relationships on a continuous and coordinated basis, distinct from traditional relationships of that kind, was interpreted by firms as the legislator's consent to firm-integrated working activities not covered by the legal and collective protections of the employment relationship. In 1973, the first elements and practices of Post-Fordism were already starting to gain ground. This resulted in the ever-increasing use of 'collaborazioni' as a cheaper alternative to permanent employment relationships … When, in 1995, modest social security contributions and employment tax were extended to 'collaborazioni', this, far from constituting a disincentive, fostered the idea that they were a low-cost substitute for employment, in consequence of which they became more popular than ever'.

[16] United States Department of Labour (US DoL), *The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors. Administrator's Interpretation No. 2015-1*, issued by Administrator David Weil, 15 July 2015 (US Department of Labour, Wage and Hour Division).

[17] ILO, *Non-standard Employment around the World: Understanding Challenges, Shaping Prospects* (ILO 2016).

[18] Valerio de Stefano, 'Non-Standard Work and Limits on Freedom of Association: A Human-rights Based Approach' (2017) 46(2) *ILJ* 185.

potential shortcomings of adopting any generic term to group different legal phenomena, it can, however, be useful to have a general framework to refer to, when dealing with non-standard work. This is the case, for instance, when addressing situations in which two or more 'non-standard' dimensions sum up: a worker may very well be hired on a fixed-term contract by a temporary work agency and work part-time at the same time. The distinction between casual work arrangements and self-employment is also sometimes blurred.[19] Forms of non-standard work are often associated and should not be regarded only on a discrete basis. Also, referring to a more general class can prove worthwhile, when it is necessary to examine some common problems that affect non-standard workers. One of such issues is undoubtedly the general difficulty to adequately access fundamental labour rights.[20]

Examining in detail all these difficulties goes beyond the scope of this article. The next section will attempt to shed light on the particular hardship faced by a growing part of the non-standard workforce: platform workers. Despite 'platform work' being a vastly heterogeneous phenomenon, we argued in the past that the so-called 'platform' or 'gig' economy, should not be considered in isolation, as a sort of separate dimension of labour markets. Instead, it should be understood as a part of a broader phenomenon, namely the spread of work arrangements alternative to the SER. We also pointed out the many dimensions platform work shares with all the non-standard forms of work identified by the ILO and recalled above.[21] The following section highlights the risks platform workers face about the ILO Fundamental Principles and Rights at Work. In doing so, it also draws parallels between the situation of platform workers and the challenges that other forms of non-standard work present to the universal enjoyment of those fundamental principles and rights.

3 PLATFORM WORK AND FUNDAMENTAL RIGHTS

'Platform', or 'gig', work is usually understood to include chiefly two forms of work: 'crowd work' and 'work on-demand via apps'.[22]

Crowd work is work that is executed through online platforms that put in contact an indefinite number of organisations, businesses and individuals through the Internet, potentially allowing connecting clients and workers on a global basis. The nature of the

[19] Valerio de Stefano, 'Labour is Not a Technology – Reasserting the Declaration of Philadelphia in Times of Platform-work and Gig-economy' (2017) 2 *IUSLabor* 1.

[20] ILO, *Non-standard Employment around the World: Understanding Challenges, Shaping Prospects* (ILO 2016).

[21] Valerio de Stefano, 'The Rise of the "Just-In-Time Workforce": On-demand Work, Crowdwork and Labour Protection in the "Gig-economy"' ILO Conditions of Work and Employment Series Working Paper, No. 71 (ILO 2016); Antonio Aloisi, 'Facing the Challenges of Platform-Mediate Labour. The Employment Relationship in Times of Non-standard Work and Digital Transformation' (PhD Thesis, Bocconi University, 2018).

[22] Valerio de Stefano, 'The Rise of the "Just-In-Time Workforce": On-demand Work, Crowdwork and Labour Protection in the "Gig-economy"' ILO Conditions of Work and Employment Series Working Paper, No. 71 (ILO 2016); Jeremias Prassl, *Humans as a Service* (OUP 2018).

tasks performed on crowd work platforms may vary considerably.[23] In 'work on-demand via apps', working activities such as transport, cleaning and running errands, but also forms of clerical work, are offered and assigned through IT platforms or apps like Uber, Deliveroo or Taskrabbit. The businesses running these apps typically intervene in setting minimum quality standards of service and in the selection and management of the workforce.[24]

As already mentioned, platform workers may face unsurmountable difficulties in exercising internationally recognised fundamental labour rights. The ILO identifies four categories of Fundamental Principles and Rights at Work: freedom of association and the effective recognition of the right to collective bargaining, elimination of all forms of forced or compulsory labour, effective abolition of child labour, elimination of discrimination in respect of employment and occupation. These principles and rights are regarded to be universal and to apply to all workers and are enshrined in the eight fundamental Conventions of the Organisation. The 1998 ILO Declaration on Fundamental Principles and Rights at Work calls all the Member States of the ILO to respect, promote and realize these principles and rights, whether or not they have ratified the relevant Conventions. Platform workers, nonetheless, may often find impossible to enjoy these rights.

As to freedom of association, for instance, the practical possibility of associating is reduced in particular for crowd workers, also given their dispersion on the Internet, even if some initiatives aimed at organising workers online also emerged.[25] Actions through these platforms, however, tend to suffer from some of the typical problems of online activism.[26] Given the considerable competition existing on crowd work, platforms workers may also be unwilling to cooperate. Moreover, in forms of work where reputation and ratings play a significant role in securing continuation of employment with a particular platform or access to better-paid jobs,[27] workers may feel particularly reluctant to exercise any collective right as it could adversely impact on their

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[23] Janine Berg, 'Income Security in the On-demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers' (2016) 37(3) *CLLP'YJ* 543; Six Silberman and Lili Irani, 'Operating an Employer Reputation System: Lessons from Turkopticon, 2008-2015' (2016) 37(3) *CLLP'YJ* 505.

[24] Jeremias Prassl and Martin Risak, 'Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' (2016) 37(3) *CLLP'YJ* 619.

[25] Six Silberman and Lili Irani, 'Operating an Employer Reputation System: Lessons from Turkopticon, 2008-2015' (2016) 37(3) *CLLP'YJ* 505; Hannah Johnston and Chris Land-Kazlauskas, 'On Demand and Organized: Developing Collective Agency, Representation and Bargaining in the Gig Economy' (2018) ILO Conditions of Work and Employment Series Working Paper (ILO).

[26] Jessica Beyer, *Expect Us: Online Communities and Political Mobilization* (OUP 2014); Niloufar Salehi, Lilly Irani, Michael S. Bernstein, Ali Alkathib, Eva Ogbe, Kristy Milland, Clickhappier et al. 2015, 'We Are Dynamo: Overcoming Stalling and Friction in Collective Action for Crowd Workers' (33rd Annual ACM Conference on Human Factors in Computing Systems, Seoul, April 2015).

[27] Valerio de Stefano, 'The Rise of the "Just-In-Time Workforce": On-demand Work, Crowdwork and Labour Protection in the "Gig-economy"' ILO Conditions of Work and Employment Series Working Paper, No. 71 (ILO 2016).

reputation.[28] This is not only true for crowd work but also for work on-demand via apps and for the actors that attempt to organise these workers. Also, the possibility of being easily terminated via a simple deactivation or exclusion from a platform or app may magnify the fear of retaliation that – as argued below – can be associated to some forms of non-standard work. The constant IT connection to platforms and apps also increases the businesses' possibilities to monitor and discourage forms of activism.[29]

Moreover, the fact that some forms of online work can be executed from anywhere in the world also implies serious risks related to forced and child labour. In some developing and emerging countries, factories exist where people are employed in 'gold-farming', a particular kind of online work whereby 'workers are paid to harvest virtual treasures for online gamers in the developed world' who 'want to advance quickly within their online role-playing games of choice' and avoid the repetitive tasks required 'to build a high-level' character.[30] Some gold farmers may work up to 12 hours per day;[31] in some cases, detainees in labour camps in China have been reported to be employed in gold-farming.[32]

These practices should prompt reflections about a crucial issue: online work is not necessarily dispersed in people's homes and in cafés, as we normally give for granted. It can very well take place in sweatshops. The risk of people in forced labour being employed in some forms of crowd work is a serious and non-negligible one. Moreover, as practices like these would open an unexpected dimension of compulsory work, the real danger is that they would be undetected through existing measures against forced labour.[33] For instance, codes of conduct and monitoring mechanisms regarding supply chains do not focus on this potential expression of forced labour yet, something that should be urgently addressed.

The very same problems affect child labour. Also in this case, the possibilities of circumventing traditional instruments against the unlawful employment of children are enhanced by the spread of crowd work. Indeed, the risk of child labour is even more pervasive as it may concern a higher number of countries relative to forced labour. Children with access to the Internet may be lured to execute working activities online that are remunerated with money or also credits to be spent for online games or on

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[28] Emanuele Dagnino, *Uber law: prospettive giuslavoristiche sulla sharing/on-demand economy* (Adapt Labour Studies. e-Book series 2015) http://www.bollettinoadapt.it/uber-law-prospettive-giuslavoristiche-sulla-sharingon-demand-economy/ accessed 20 December 2017.

[29] Colum Murphy, 'Uber Orders Drivers in China to Steer Clear of Taxi Protests' *The Wall Street Journal* (New York City, 13 June 2015) http://www.wsj.com/articles/uber-orders-drivers-in-china-to-steer-clear-of-taxi-protests-1434181092 accessed 20 December 2017.

[30] Miriam Cherry, 'The Global Dimension of Virtual Work' (2010) 54 *Saint Louis University Law Journal* 471, 471.

[31] David Barboza, 'Ogre to Slay? Outsource It to Chinese' *The New York Times* (New York City, 9 December 2005) http://www.nytimes.com/2005/12/09/technology/ogre-to-slay-outsource-it-to-chinese.html accessed 20 December 2017.

[32] Danny Vincent, 'China Used Prisoners in Lucrative Internet Gaming Work' *The Guardian* (London, 25 May 2011) http://www.theguardian.com/world/2011/may/25/china-prisoners-internet-gaming-scam accessed 20 December 2017.

[33] Miriam Cherry, 'A Taxonomy of Virtual Work' (2011) 45(4) *Georgia Law Review* 951.

platforms.[34] In doing so, they may also be exposed to contents that are inappropriate for them. Monitoring mechanisms against the improper access of children to work online may be very difficult to implement, and existing instruments against child labour may very well fall short of these new possible forms of children exploitation.

The gig-economy also prompts grave concerns about discrimination. Online work can indeed have positive effects on this issue. For instance, avoiding 'real' personal contact and anonymity on the net can contribute to reducing risks of discrimination. Besides, the possibility to work online from anywhere provides access to work opportunities also to persons that are home-bound due to health issues or disabilities. Online work, however, is not a cure-all solution against discrimination.[35] Crowd work platforms, for instance, allow providers to restrict the geographical areas from where workers can undertake tasks online.[36] This possibility may allow cutting out entire countries, regions or communities from access to work, without any guarantee that the limit is only imposed on objective grounds such as language. Discriminating practices can therefore surely occur also in virtual work. Similar considerations hold true also for offline platform work. While some arguments exist that this kind of work may contribute to combat discrimination, both explicit and implicit bias of customers may play a significant role in deciding whether to accept a worker for a particular job and, above all, when reviewing its performance.[37] Since customers' reviews may be essential in preserving the possibility to accede to the app and to future jobs, a biased review could entail a major detrimental effect for workers' employment opportunities.[38] Once, again, given that these working practices are still relatively novel, these risks may evade existing mechanisms and policies and call for urgent action in ensuring that platform workers are protected against discrimination.

In addition to these risks, as mentioned above, platform workers may face some problems with reference to Fundamental Principles and Rights at Work that affect non-standard workers in general. Particular difficulties and gaps have been reported in this respect, about all forms of non-standard work.[39] Some of these hardships are, however, particularly significant for workers in the gig-economy, namely those associated with casual work, self-employment and misclassification of employment status.

On various occasions, the ILO supervisory bodies expressed their concern on the fact that when casual workers and self-employed persons are typically excluded from the general application of employment and labour laws, they might find themselves also

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[34] Miriam Cherry, 'A Taxonomy of Virtual Work' (2011) 45(4) *Georgia Law Review* 951.

[35] For a discussion of both opportunities and risks in this regard, see Miriam Cherry, 'A Taxonomy of Virtual Work' (2011) 45(4) *Georgia Law Review* 951.

[36] Sarah Kingsley, Mary Gray and Siddarth Suri, 'Monopsony and the Crowd: Labor for Lemons?' (3rd Conference on Policy and Internet, Oxford, September 2014).

[37] Brishen Rogers, 'The Social Costs of Uber' (2016) 82 *University of Chicago Law Review Dialogue* 85; Will Knight, 'Is the Gig-economy Rigged' (*MIT Technology Review*, 17 November 2016) https://www.technologyreview.com/s/602832/is-the-gig-economy-rigged/ accessed 20 December 2017.

[38] Foundation for European Progressive Studies (FEPS), *Work in the European Gig-economy* (2017).

[39] See ILO, *Non-standard Employment around the World: Understanding Challenges, Shaping Prospects* (ILO 2016).

excluded from regulation protecting fundamental principles and rights at work.[40] The International Labour Office has recently reported on the vast number of observations and direct requests issued by the ILO Committee of Experts on the Applications of Conventions and Recommendations (CEACR) dealing with national legislation that failed to protect categories of workers such as those in casual arrangements but also self-employed workers against child labour practices and non-discrimination policies.[41]

These exclusions, in fact, are more widespread than what one may imagine and they are by no means confined to developing countries. In the United States, for instance, Chapter VII of the Civil Rights Act, which constitutes the backbone of the national anti-discrimination policy regarding employment and occupation, does not apply to self-employed persons. Even under European union (EU) law the application of the full range of anti-discriminatory measures with regard to employment and occupation to self-employed persons is not a reality[42] and the implementation of EU Law by national authorities and courts has also fallen short of providing a universal protection of self-employed persons against discrimination in employment and occupation.[43]

The platform economy, and the vast debate it has ignited among labour scholars and policymakers, therefore, offers the opportunity to re-discuss some of the structural shortcomings that affect a binary construction of labour regulation whereby self-employed persons are, often by default, excluded from the scope of protection even when it comes to fundamental rights.[44] These exclusions also persist if these rights are proclaimed to be universal, sometimes by the very same wording of the relevant instruments. Leaving momentarily aside the possibility of generally challenging this binary distinction or its boundaries,[45] something that goes beyond the purpose of this paper, the exclusion of casual and self-employed workers from basic human-right policies such as non-discrimination and the abolition of child labour must be urgently called into question. The spread of new forms of casual work, dependent self-employment and disguised employment relationships that is often concealed under the buzzwords 'platform' or 'gig' economy[46] must prompt a reconsideration of the scope of

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[40] Janine Berg, Mariya Aleksynska, Valerio De Stefano and Martine Humblet, 'Non-standard Employment around the World: Regulatory Answers to Face Its Challenges' (2018) 100 *Bulletin of Comparative Industrial Relations.*

[41] ILO, *Non-standard Employment around the World: Understanding Challenges, Shaping Prospects* (ILO 2016).

[42] Catherine Barnard, 'Discrimination Law, Self-employment and the Liberal Professions' (2011) 12 *European Anti-Discrimination Law Review* 21.

[43] *Jivraj v Hashwani* [2011] UKSC 40. See Mark Freedland and Nicola Kountouris, 'Employment Equality and Personal Work Relations – A Critique of *Jivraj v Hashwani*' (2012) 41(1) *ILJ* 56.

[44] Janice Bellace, 'The Changing Face of Capital: The Withering of the Employment Relationship in the Information Age' (2018) 100 *Bulletin of Comparative Industrial Relations.*

[45] Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011); Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016).

[46] Valerio de Stefano, 'Labour is Not a Technology – Reasserting the Declaration of Philadelphia in Times of Platform-work and Gig-economy' (2017) 2 *IUSLabor* 1; Mark Freedland and Jeremias Prassl, 'Employees, Workers, and the 'Sharing Economy': Changing Practices and Changing Concepts in the United Kingdom' (2017) Oxford Legal Studies Research

application of fundamental rights, coherently with the spirit of the ILO 1998 Declaration on Fundamental Principles and Rights at Work. It is urgent to ensure that workers in need of vital aspects of protection, independently from their employment status, are not left behind when it comes to the application of fundamental labour rights.[47] The emergence of the 'gig' economy has, as a matter of fact, prompted a vast debate on the scope of application of labour regulation.[48] Nonetheless, this debate, and the mushrooming litigation on misclassification practices in this section of the labour market, however, has mostly been concerned with rights such as the minimum wage, holiday pay and other economic benefits. A comprehensive reflection on how these forms of work challenge the protection of fundamental rights has, instead, lagged behind.

Hopefully, the 'Future of Work' discussions to be held at the 2019 International Labour Conference will contribute to shedding light on these vital aspects of labour protection and on the many regulatory shortcomings that affect non-standard work much beyond the blurred boundaries of platform work. In this regard, specific attention needs to be given to collective rights such as freedom of association, the effective right to collective bargaining and the right to industrial action. The next sections will deal with these aspects, firstly by concentrating on the recognition of fundamental labour rights, including collective rights, as human rights and then focusing on some major obstacles that prevent some non-standard workers, both in the 'platform' economy and beyond, from adequately enjoying collective rights, and, in particular, the right to bargain collectively.

4 HUMAN RIGHTS, LABOUR RIGHTS AND NON-STANDARD WORK

The recognition of collective rights as human rights forms part of a more general debate on the construction of labour rights as human rights[49] that was recently spurred by numerous judgments of international and national supreme courts.[50] The recognition

Paper No. 19/2017 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2932757 accessed 20 December 2017.

[47] Janice Bellace, 'The Changing Face of Capital: The Withering of the Employment Relationship in the Information Age' (2018) 100 *Bulletin of Comparative Industrial Relations.*

[48] Antonio Aloisi, 'Facing the Challenges of Platform-Mediate Labour. The Employment Relationship in Times of Non-standard Work and Digital Transformation' (PhD Thesis, Bocconi University, 2018).

[49] Harry Arthurs, 'Who's Afraid of Globalization? Reflections on the Future of Labour Law' in John D.R. Craig and S. Michael Lynk (eds), *Globalization and the Future of Labour Law* (CUP 2006); Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart 2010); Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 *European Labour Law Journal* 151; Bob Hepple, Rochelle le Roux and Silvana Sciarra (eds), *Laws against Strikes. The South African Experience in an international and Comparative Perspective* (Franco Angeli 2015).

[50] European Court of Human Rights ECtHR, *Demir and Baykara v Turkey* 2008 ECHR 1345; ECtHR, *Enerji Yapi-Yol Sen v Turkey* 2009 ECHR; ECtHR, *RMT v United Kingdom* 2014 ECHR 366; Constitutional Court of South Africa, *Bader Pop Pty Ltd v NUNMSA* [2002]

of collective rights as human rights is strongly interrelated with the issue of securing adequate access of non-standard workers to collective rights.

Categorising these rights as human rights, in fact, must prompt a reflection on the legal restrictions posed to these rights. It goes without saying that the collective rights can be lawfully subject to restrictions even if they are recognised as human rights. All the international treaties that recognise freedom of association, the right to collective bargaining or the right to strike, indeed, allow for exclusion from, or limitations to, the exercise of those rights. A prominent example is the exclusion of the armed forces or the police from the application of these rights or the possibility of limiting the right to industrial action in essential services. Nonetheless, considering collective rights as human rights – as it is possible to infer not only from the text of the international instruments but also from the opinions of the bodies called to supervise their application[51] – calls for these restrictions to be limited only to those strictly necessary in securing the exercise of other human rights. Allowing broader restrictions would, in fact, risk diluting the entire human rights discourse.

Reviewing current restrictions, as already mentioned, is also essential to ensure that the possibility of meaningfully exercising collective labour rights is granted to all workers, as existing limits to these rights may exclude growing parts of the workforce, and many non-standard workers in particular, from this possibility.

The categorisation of labour rights as human rights can be particularly beneficial for workers in non-standard arrangements. An important, and yet often neglected, reason to approach labour rights from the human rights standpoint is the existence of managerial prerogatives and their impact on workers.[52] The employment relationship is by definition based on the social and legal power of one contractual party *vis-à-vis* the other. Contract law and employment regulation, customs and practices grant employers with extensive rights on workers. Employers have the power to give detailed directions and instructions on how the work is to be performed; they can also closely monitor how these instructions are complied with and are also entitled to discipline recalcitrant workers. Managerial prerogatives are therefore not only a result of economic phenomenon such as inequality of bargaining power. They are also enshrined in regulation that vests employers with an authority over their workers that goes beyond social norms and is also recognised from the legal standpoint.[53] These prerogatives and this authority may affect the workers' dignity as human beings and, therefore, their limitation and

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Industrial Law Journal South Africa 104 LAC; Supreme Court of Canada, *Dunmore v Ontario AG*, [2001] 3 SCR 1016, 2001 SCC 94; Supreme Court of Canada, *Health Service and Support – Facilities Subsector Bargaining Assn. v British Columbia*, [2007] SCC 27; Supreme Court of Canada, *Ontario AG v. Fraser*, [2011] SCC 20.

[51] George Politakis (ed.), *Protecting Labour Rights as Human Rights: Present and Future of International Supervision* (ILO 2007); Janice Bellace, 'The Changing Face of Capital: The Withering of the Employment Relationship in the Information Age' (2018) 100 *Bulletin of Comparative Industrial Relations.*

[52] Valerio de Stefano, 'Non-Standard Work and Limits on Freedom of Association: A Human-rights Based Approach' (2017) 46(2) *ILJ* 185.

[53] Emmanuel Dockes, 'De la supériorité du contrat de travail sur le pouvoir de l'employeur' in *Analyse juridique et valeurs en Droit social, Etudes offertes à Jean Pélissier* (Dalloz 2004); Alain Supiot, *Critique du droit du travail* (PUF 1994).

rationalisation – which is one of the core rationales of labour law – is also relevant from the human rights' perspective.[54] As also argued in the past, non-standard workers are often exposed to some mechanisms that may magnify employers' managerial prerogatives.[55]

In particular, workers in temporary contracts – regardless of their employment status – are often exposed to what De Stefano labelled the 'implicit threat' mechanism, namely the fear and reluctance to exercise their contractual and labour rights afraid that their temporary contract may not be renewed or prolonged, should they do so.[56] This is also particularly true for workers in casual work arrangements that are on the rise in industrialised countries, such as zero-hour contracts and on-call jobs, in which the employer is not bound to offer working hours in the future.[57] In situations like these, the possibility of the workers renouncing to exercise basic rights and to react to malpractices from the other party is a serious one and materially strengthens the managerial powers of this latter party.

The 'implicit threat' mechanism can also be particularly strong in platform work, where the platform can automatically discontinue the relationship with workers, by denying them access to the platform or by preventing them from acceding to certain or to all jobs from the platform. In many cases, these decisions may be taken on the basis of the ratings that workers receive from the platform's customers, with the result that platform workers often report living in fear of a bad rating or of being excluded or penalised by the platform, at the platform's whim.[58]

In a situation like this, but also in circumstances in which the worker is employed in traditional temporary, short-term and casual work arrangements, the necessity to preserve the workers' ability to exert their fundamental labour rights and, therefore, their very same human dignity at the workplace is particularly pressing. Reinforcing instruments to limit and restrict potentially abusive business practices is, thus, all the more essential.

In this respect, collective labour rights may play a crucial role. Freedom of association, and the right to collective bargaining and collective action, acting as 'enabling rights' can make labour rights effective for non-standard workers without the

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[54] Olivier de Schutter, 'Human Rights in Employment Relationships: Contracts as Power' in Filip Dorssemont, Klaus Lörcher and Isabelle Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (Hart 2013); Susan Bisom-Rapp, 'What We Know about Equal Opportunity Law after Fifty Years of Trying' (2018) 100 *Bulletin of Comparative Industrial Relations.*

[55] Valerio de Stefano, 'Non-Standard Work and Limits on Freedom of Association: A Human-rights Based Approach' (2017) 46(2) *ILJ* 185.

[56] Valerio de Stefano, 'Smuggling-in Flexibility: Temporary Work Contracts and the "Implicit Threat" Mechanisms. Reflections on a New European Path' (2009) 4 Labour Administration and Inspection Programme LAB/ADMIN Working Document (ILO); Valerio de Stefano, 'Non-Standard Work and Limits on Freedom of Association: A Human-rights Based Approach' (2017) 46(2) *ILJ* 185.

[57] Valerio de Stefano, 'Casual Work Beyond Casual Work in the EU: The Underground Casualization of the European Workforce – And What to Do About It' (2016) 7(3) *European Labour Law Journal* 421.

[58] Foundation for European Progressive Studies (FEPS), *Work in the European Gig-economy* (2017).

need to recur to burdensome and intimidating individual protection and enforcement mechanisms such as grievance procedures or judicial claims. They can also be pivotal in making business practices such as 'management by algorithms', and managerial decisions based on customers' rating, but also the allocation of work shifts to casual workers, more transparent and fair.[59] International union organisations are, in fact, starting to advance specific demands in this direction.[60] The involvement in, and control of, management of non-standard work by collective actors can indeed be most beneficial for the relevant workers.

Nonetheless, for workers in non-standard employment, collective labour rights, and the very same freedom of association, may be particularly affected by the 'implicit threat' of losing one's job. The ILO supervisory bodies highlighted how recourse to non-standard forms of work might have a detrimental impact on union rights and collective bargaining. For instance, the CEACR reported that:[61]

> one of the main concerns indicated by trade union organizations is the negative impact of precarious forms of employment on trade union rights and labour protection, notably short-term temporary contracts repeatedly renewed; subcontracting, even by certain governments in their own public service to fulfil statutory permanent tasks; and the non-renewal of contracts for anti-union reasons. Some of these modalities often deprive workers' access to freedom of association and collective bargaining rights, particularly when they hide a real and permanent employment relationship. Some forms of precariousness can dissuade workers from trade union membership.

It is, therefore, particularly urgent to reinforce the collective protection of non-standard workers, to strengthen their position in a situation in which they may bear the brunt of particularly invasive business practices and may not feel comfortable with individually exerting their rights, lest they lose their job.

Since the increasing casualisation of labour markets and the spread of platform work and practices that are materially blurring the distinction between the managerial prerogatives exerted on employees and the contractual powers exerted on some self-employed workers,[62] it also indispensable to ensure that the traditional distinction

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[59] Antonio Aloisi, Valerio de Stefano and Six Silberman, 'A Manifesto to Reform the Gig Economy' *Pagina99* (Milan, 29 May 2017) http://www.pagina99.it/2017/05/29/a-manifesto-to-reform-the-gig-economy/ accessed 20 December 2017.

[60] UNI Global Union, 'Global Union Sets New Rules for the Next Frontier of Work—Ethical AI and Employee Data Protection' (*UNI Global Union*, 11 December 2017) http://uniglobalunion.org/news/global-union-sets-new-rules-next-frontier-work-ethical-ai-and-employee-data-protection accessed 20 December 2017.

[61] ILO, *Giving Globalization a Human Face General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (ILO 2012), 386.

[62] Valerio de Stefano, 'Labour is Not a Technology – Reasserting the Declaration of Philadelphia in Times of Platform-work and Gig-economy' (2017) 2 *IUSLabor* 1; Mark Freedland and Jeremias Prassl, 'Employees, Workers, and the 'Sharing Economy': Changing Practices and Changing Concepts in the United Kingdom' (2017) Oxford Legal Studies Research Paper No. 19/2017 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2932757 accessed 20 December 2017.

between employment and self-employment does not act as a boundary for the enjoyment of collective rights.

Automatically excluding self-employed workers from these rights would not be compatible with the recognition of collective rights as human rights and their consequent universal character. Nor can the rationale of restraining the powers exerted on workers be limited to people in formal employment relationships. This is not only because the widespread practices of full disguisement of these relationships would risk depriving workers of the possibility of collectively acting to challenge misclassifications without having to resort to potentially lengthy and costly litigation. It is also because the spread of forms of genuine self-employment which is nonetheless dependent on a single or limited number of clients,[63] and therefore also theoretically in need of a collective answer to the powers exerted by those clients, is also a pressing reality of modern labour markets.

Both traditional and non-traditional unions have begun to act in view of this reality, by starting to organise non-standard workers regardless of their employment status, and in particular platform workers, sometimes also building upon grassroots initiatives undertaken from these workers, also with a view to bargain collectively on the relevant working conditions.[64] In doing so, however, they risk meeting material hurdles posed by anti-trust restrictions that are failing to catch up with the new realities of industrialised labour markets. The next section is going to investigate specifically this issue.

5 ANTI-TRUST REGULATION AND COLLECTIVE BARGAINING OF SELF-EMPLOYED WORKERS: SHOULD THE TRADITIONAL APPROACH BE UP-ENDED?

In recent years, the question of anti-trust limits to collective bargaining has continuously accompanied the collective initiatives aimed at bettering the conditions of non-standard workers, and in particular self-employed and platform workers.[65]

In the EU, a key judgment was issued by the Court of Justice of the EU (CJEU) in late 2014.[66] The Dutch union FNV had negotiated a collective agreement in favour of

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[63] ILO, 2016.

[64] Hannah Johnston and Chris Land-Kazlauskas, 'On Demand and Organized: Developing Collective Agency, Representation and Bargaining in the Gig Economy' (2018) ILO Conditions of Work and Employment Series Working Paper (ILO).

[65] Camilo Rubiano, 'Precarious Workers and Access to Collective Bargaining: What Are the Legal Obstacles?' (2013) 5(1) *International Journal of Labour Research* 133; Shae McCrystal, 'Organising Independent Contractors: The Impact of Competition Law' in Judy Fudge, Shae McCrystal and K. Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart 2012); Valerio de Stefano, 'Labour is Not a Technology – Reasserting the Declaration of Philadelphia in Times of Platform-work and Gig-economy' (2017) 2 *IUSLabor* 1.

[66] Case 413/13 *FNV Kunsten Informatie en Media* 2014 ECLI:EU:C:2014:2411. See also Tonia Novitz, 'The Paradigm of Sustainability in a European Social Context: Collective Participation in Protection of Future Interests?' (2015) 31 *International Journal of Comparative Labour Law and Industrial Relations* 243; Valerio de Stefano, 'Non-Standard Work and Limits

both employed and self-employed substitute orchestra players, also regarding their compensation. The Dutch anti-trust authority had issued an opinion under which a collective bargaining agreement negotiated in favour of self-employed workers would not be excluded from anti-trust law. The collective agreement of the orchestra player was then terminated, and the relevant employers' association refused to negotiate a new agreement. FNV started judicial proceedings to claim the legitimacy of such collective agreements, which led to a referral to the CJEU.

The Court of Justice held that collective bargaining agreements in favour of self-employed persons could not be conceded immunity from competition law such as the one granted to collective bargaining in favour of employees under its 1999 Albany judgment.[67] It also ruled, nonetheless, that both employees and the 'false-employed' are allowed to bargain collectively over their compensation under EU law.

Reference to 'false self-employed' workers in this context, however, needs clarification. The CJEU refers to 'false self-employed' as those 'service providers in a situation comparable to that of employees'. The judgment also states that 'the term 'employee' for the purpose of EU law must itself be defined according to objective criteria that characterise the employment relationship' and recalls that under the CJEU's jurisprudence, 'the essential feature of that relationship is that for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration'.[68]

This paragraph of the judgment, with its reference to the 'direction' criterion, may be misread as limiting the right to bargain collectively only to workers in an employment relationship defined under a strict test of control and subordination. If the notion of 'false self-employment' were to be construed accordingly, the exemption would apply only to blatant cases of employment misclassification, leaving outside the protection of collective labour rights multitudes of workers defined as self-employed workers under national legislations, including in countries like Germany, Italy and Spain where the law has long allowed some categories of self-employed persons to bargain collectively.

To avoid this detrimental scenario, it is firstly important to remind that the test of 'direction', in the CJEU's jurisprudence, may also refer to tenuous elements of control and subordination.[69] It is also essential to concentrate on other paragraphs of *FNK*

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on Freedom of Association: A Human-rights Based Approach' (2017) 46(2) *ILJ* 185; Nicola Kountouris, 'The Concept of "Worker" in European Labour Law: Fragmentation, Autonomy and Scope' (2017) 47(2) *ILJ* 192–225 https://doi.org/10.1093/indlaw/dwx014 accessed 12 March 2019.

[67] C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* 1999 ECLI:EU:C:1999:430.

[68] For an analysis of this jurisprudence, see Nicola Kountouris, 'The Concept of "Worker" in European Labour Law: Fragmentation, Autonomy and Scope' (2017) 47(2) *ILJ* 192–225 https://doi.org/10.1093/indlaw/dwx014 accessed 12 March 2019.

[69] Court of Justice of the European Union, *Dita Danosa v LKB Līzings SIA*, 11 November 2010, C-232/09.

Kunsten[70] and, in particular, on the one in which the CJEU considers that, under its jurisprudence on anti-trust cases, a subject cannot be considered as an undertaking

> if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking.[71]

This notion is based on independence on the market rather than on the employment tests of control and subordination and is indeed suited to encompass workers that are dependent on their principals even if they do not meet those tests in full under national laws. The need to look beyond these strict criteria is confirmed by a subsequent paragraph in which the Court states:

> the status of 'worker' within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that person acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work, does not share in the employer's commercial risks, and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking.[72]

Arguably, these two paragraphs refer not only to the situation of workers formally classified as 'employees' according to the law of the respective Member States, but also to many workers that national laws may consider as self-employed. This is particularly relevant for many platform workers. In this regard, in fact, the decision of the CJEU in its *Uber* case is crucial.[73] The Court found that Uber acts as a transportation service provider rather than a mere technological intermediary between customers and independent service providers. To reach this conclusion, the Court observed:

> Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion.[74]

In a situation like this, it is clear that Uber drivers – as many platform workers do – only operate 'as an auxiliary within the principal's undertaking'[75] and therefore, in *FNV Kunsten*' terms, do not 'determine independently (their) own conduct on the

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[70] Nicola Kountouris, 'The Concept of "Worker" in European Labour Law: Fragmentation, Autonomy and Scope' (2017) 47(2) *ILJ* 192–225 https://doi.org/10.1093/indlaw/dwx014 accessed 12 March 2019.

[71] *FNV Kunsten Informatie en Media* (n 66) para. 33.

[72] *Ibid*., para. 36.

[73] C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain* 2017 ECLI:EU:C:2017:981.

[74] *FNV Kunsten Informatie en Media* (n 66) para. 39.

[75] *Ibid*., para. 39.

market, but (are) entirely dependent on (their) principal'.[76] They can, therefore, be regarded as being 'an integral part of (the) employer's undertaking, so forming an economic unit with that undertaking'.[77] As such, they fall into the definition of 'worker' sanctioned by *FNV Kunsten* and should, among other things, be allowed to bargain collectively under EU competition law.

The term 'false self-employed' used by the CJEU, therefore, must be read broadly, and as extending beyond the national definitions of 'employee'. The exemption from anti-trust law does not only cover cases of employment misclassification. Arguably, instead, it encompasses many workers that are dependent on their principals, even if they do not fully meet the tests of employment status under the relevant national legislations. It is the same CJEU that recalls that 'the classification of a "self-employed person" under national law does not prevent that person being classified as an employee within the meaning of EU law if his independence is merely notional'.[78] Nor can it be neglected that the Court defines 'false self-employed' workers as persons in a situation 'comparable' – and therefore not 'identical' – to employees.

In this respect, it is significant that when introducing an amendment to the national anti-trust regulation with the purpose of allowing collective bargaining beyond the scope of 'employment' *sensu strictu*, Ireland, also considering the reasoning in *FNV Kunsten*, did not only refer to 'false self-employed' persons, i.e. persons merely misclassified as employees. It also referred to 'fully dependent self-employed workers', namely individuals who 'perform services for another person' and 'whose income in respect of the performance of such services … is derived from not more than 2 persons'.[79] To benefit from this exemption, the union must prove that a collective bargaining agreement in favour of these workers 'will have no or minimal economic effect on the market' in which the workers operate and that the requirements of competition law and EU law are not contravened.[80]

Despite this opening to collective bargaining of self-employed persons, however, the Irish Act is hardly satisfactory. The reference to an income derived from not more than two persons is problematic when it comes to the 'platform economy', where workers often work for more than two platforms, clients or employers at the same time, since the earnings derived from each single platform are often insufficient to make ends meet,[81] and it is sometimes difficult to establish who is actually paying the compensation between the platform and the customers.[82] It also introduces a potentially insurmountable burden of proof on the side that wants to negotiate and conclude a collective bargaining agreement.

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[76] *Ibid*., para. 33.
[77] *Ibid*., para. 36.
[78] *Ibid*., para. 35.
[79] Competition Amendment Act 2017.
[80] Michel Doherty, 'Trade Unions and the Gig-economy'' (2018) 100 *Bulletin of Comparative Industrial Relations.*
[81] Foundation for European Progressive Studies (FEPS), *Work in the European Gig-economy* (2017).
[82] Jeremias Prassl and Martin Risak, 'Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' (2016) 37(3) *CLLP'YJ* 619.

As such, this provision seems to be at odds with international standards on collective rights and, in particular, with ILO standards. Commenting on the Irish restrictions to collective bargaining in 2015, the CEACR had recalled that 'the right to collective bargaining should also cover organisations representing the self-employed' and had invited the Government and the social partners to identify 'the particularities of self-employed workers that have a bearing on collective bargaining, so as to develop specific collective bargaining mechanisms relevant to them'.[83] The Committee had later welcomed the introduction of a bill in Parliament in this field;[84] nonetheless, the final legislation adopted in the country still poses very high obstacles to collective bargaining and risks to impair the very essence of this right, therefore, falling short of compliance with ILO standards on freedom of association and collective bargaining. The ILO supervisory bodies have consistently observed that these standards apply to all workers with the sole possible exception of those explicitly excluded by the text of Convention No. 87 and No. 98.[85] Self-employed workers are not among those excluded and, therefore, the Conventions are deemed as fully applicable to them.[86]

When the Irish case was discussed in 2016 before the tripartite Committee on Application on Standards, some of the employers' members raised doubts on the application of Convention No. 98 to self-employed persons, since Article 4 of the Convention, in laying down the right to collective bargaining, only refers to 'conditions of *employment*'.[87] Arguably, however, the term 'employment' in this context must be interpreted as synonymous of 'occupation'. Article 1 of the Convention, for instance, prohibits to 'make the employment of a worker subject to the condition that he shall not join a union …'. A restrictive interpretation of 'employment' in this context would therefore directly impinge not only on the right to collective bargaining but also on the right to organise, opening the door to unacceptable discrimination of union members. Moreover, it would have disastrous consequences on the possibility of the most vulnerable workers, for instance, informal workers who may find it impossible to claim the existence of a formal employment relationship, to fully accede to collective rights. The Committee on Application of Standards, in fact, concluded in agreement with the invitation of the CEACR to identify the self-employed persons relevant for collective bargaining.[88]

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[83] CEACR – *Ireland*, observation, C.98, published 2016.

[84] CEACR – *Ireland*, observation, C.98, published 2017.

[85] ILO, *Giving Globalization a Human Face General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (ILO 2012); ILO, *Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th revised edition, ILO 2006).

[86] Breen Creighton and Shae McCrystal, 'Who Is a Worker in International Law?' (2016) 37(3) *CLLP'YJ* 691.

[87] Emphasis added. See ILO, *Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations: Report of the Committee on the Application of Standards*, International Labour Conference 105th Session, Provisional Record Geneva, May–June 2016 16(Rev) Pt 2 (ILO 2016).

[88] ILO, *Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations: Report of the Committee on the Application of Standards*,

A restrictive interpretation, besides going against the long-standing position of the ILO supervisory bodies, would also be incompatible with foundational ILO principles and, in particular with the principle that 'labour is not a commodity', enshrined in the Declaration of Philadelphia. The origins of this principle are well known and so is its direct relation with the Clayton Antitrust Act of 1914 that firstly provided that: 'the labor of a human being is not a commodity or article of commerce' with the explicit purpose of excluding trade unions and collective bargaining from anti-trust law.[89] If labour is not a commodity, unions and collective agreements are not cartels or acts of restraint of trade, is the direct implication of this provision. Reference to the 'labour of a human being' is vital in this context. As it was recently noted, nothing in the Clayton Act restricts the scope of this principle to the sole labour of 'employees'. A distinction in collective rights based on employment status was not introduced in the legislation of the United States until the 1940s, with the revision of the National Labour Relations Act (NRLA) passed by Congress with the purpose of countering a judicial precedent of the US Supreme Court that had liberally interpreted the scope of application of the NRLA. This, however, it is convincingly claimed, should bear no consequence on the application of the statutory exemption provided in the Clayton Act, which can still be applied beyond the scope of the federal definition of 'employees' found in the NRLA and based on the control test. The consequence, it is argued, is that drivers of platform-based businesses can be allowed to bargain collectively and that a city ordinance passed to provide them with this right is not in conflict with federal anti-trust legislation.[90]

Arguably, the same expansive interpretation should be given to the Declaration of Philadelphia, and ILO standards on collective rights read in coherence with the Declaration. 'Labour' cannot concern only the work of 'employees'. Instead, also in light of the categorisation of collective rights as human rights, 'labour' should be granted an 'universal' meaning and deemed to cover all human work activities where the personal character of the work is not dwarfed by the existence of a material business organisation that an individual independently manages to provide a service. It goes without saying that platform workers and dependent self-employed persons do not fall outside this notion of labour, read in coherence with the universal character of the human rights to freedom of association and collective bargaining.

Going back to the CJEU rulings, despite the opening to allow collective bargaining beyond a strict definition of 'employee', the Court's approach still falls short of a real valorisation of freedom of association and collective bargaining as human rights. It is clear that the CJEU is still anchored to its 1999 *Albany* decision. This judgment treated the recognition of collective bargaining of employees as an exception to the general anti-trust principles, an approach arguably followed also by *FNV Kunsten*. *Albany*,

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International Labour Conference 105th Session, Provisional Record Geneva, May–June 2016 16(Rev) Pt 2 (ILO 2016).

[89] Clayton Antitrust Act 1914 15 US Code § 17.

[90] Samuel Estreicher, 'Brief of Amicus Curiae Professor Samuel Estreicher in Support of Defendant-Appellees in the Case *Chamber of Commerce of the United States et al. v City of Seattle et al.* on appeal from the United States District Court for the Western District of Washington' (2017) No. 17-35640.

however, was decided when collective bargaining was not yet recognised as a fundamental right under Article 28 of the EU Charter of Fundamental Rights, and a decade before the same Charter acquired the same legal values of the Treaties in 2009. Importantly, given the relevance that the Treaty of Lisbon also assigns to the European Convention on Human Rights (ECHR), the *Albany* 'exception-to-rule' approach does not seem compatible with the jurisprudence of the Court of Strasbourg that treats the right to collective bargaining as an essential element of freedom of association under Article 11 of the ECHR and the importance assigned by this latter Court to the opinions of the ILO supervisory bodies when the Court determines the scope of the ECHR protection of collective rights.[91] This is all the more relevant since the Court of Strasbourg also recognises the freedom of association of self-employed as protected under the Convention.[92]

These elements should not be ignored in treating future potential clashes between anti-trust regulation and collective rights. Given the unequivocal recognition of these rights as fundamental and human rights – at least in European law and under ILO sources – these rights should be restricted only when they conflict with other human rights or, in ECHR terms, when a restriction is 'necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others'. The burden of proof should, therefore, be placed accordingly.

In light of what has been argued above, only self-employed individuals who do not provide 'labour', but provide services by means of an independent business organisation that they actually own and manage, and whose relevance in the provision of the service in terms of capital and work of other persons is considerably superior to the relevance of the individual's personal work, could be restricted in their right to bargain collectively. The burden of proof on the presence of these elements and the material impact of collective bargaining of these independent self-employed providers on the relevant market should be borne by those who propose the restriction, be it anti-trust authorities or other parties. Admittedly, this approach would upend the traditional functioning of anti-trust regulation, but it seems inevitable if the recognition of collective rights as fundamental and human rights must be given significance and there is a spread of non-independent workers who do not meet entirely traditional strict control and subordination tests accompanied by a consequent expansion of collective protection of those workers.

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[91] Filip Dorssemont, 'How the European Court of Human Rights Gave Us *Enerji* to Cope with *Laval* and *Viking*' in Marie-Ange Moreau (ed.), *Before and After the Economic Crisis: What Implications for the 'European Social Model'?* (Edward Elgar 2011).

[92] Nicola Kountouris, 'The Concept of "Worker" in European Labour Law: Fragmentation, Autonomy and Scope' (2017) 47(2) *ILJ* 192–225 https://doi.org/10.1093/indlaw/dwx014 accessed 12 March 2019.

6 CONCLUSIONS

This chapter aimed at shedding light on some shortcomings of the current regulation of fundamental labour rights. It argued that coverage of these rights is often still based on a binary divide that leaves self-employed workers outside the scope of labour protection. It also argued that, as the boundaries between disguised employment relationship, casual work and self-employment are currently strained by spreading business practices, and in particular by the emergence of the so-called 'platform' or 'gig' economy, there is a high need to rethink the scope of application of fundamental labour rights.

It also pointed out some specific risks that 'platform workers' face in the exercise of fundamental principles and rights at work, and remarked that many of these risks are magnified by the fact that platform work is often nominally at the border between employment and self-employment, namely an 'area' of the labour market in which the meaningful coverage of fundamental rights tends to become murky and uncertain, since, in far too many cases, self-employed work is excluded from the protection of these rights, also in industrialised countries.

This chapter also argued that this exclusion is not compatible with the recognition of fundamental labour rights as human rights and with the consequent universal character of these rights. It observed that limits to the full exercise of freedom of association and the right to collective bargaining are particularly vexatious for some non-standard workers, and particularly casual workers, platform workers and dependent self-employed worker (all forms of work with particularly blurred boundaries among themselves). This is because these workers are often subject to particularly invasive exercises of managerial prerogatives and contractual powers; a limitation of the vital role that collective rights, as 'enabling rights', may play in countering abusive managerial practices, therefore, is particularly detrimental. It was also pointed out that current anti-trust standards can have important negative implications on the collective rights of these workers and especially on the right to bargain collectively. It was finally proposed to give meaningful consequence to the recognition of collective rights as human rights and their universal nature, by reversing the current anti-trust approach to the collective bargaining of self-employed persons and shifting the burden of proof on the need to restrict collective bargaining on those who propose this restriction.