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Digital Platforms and the Right to Just and Favorable Conditions of Work: A Business and Human Rights Perspective

Abstract:

Digital platform economy has radically changed the modes in which work is organized, stretching the functionality of legal environment of work and its governance. This article builds on a strand of labor law scholarship that advances the need to rethink the legal construction of work and work relationship in order to adapt it to the dynamically evolving socio-economic context. By applying a business and human rights lens to this process, this article confutes the mainstream argument that labor rights guarantees remain contingent on an individual's enjoying the status of an employee under national jurisdiction. We survey a largely underexamined conception of affording protection to platform workers under International Human Rights Law (IHRL). In doing so, we argue that the instruments of IHRL may in some respects be even better placed than that of national law, both strengthening and complementing areas where state protection is weak or non-existent. Through the *right to just and favorable conditions of work* perspective, we outline the non-contested, albeit partly poorly implemented obligations of states, as well as largely contentious and contested responsibilities of private actors such as digital platforms towards the rights-holders. We conclude by arguing that the leverage offered by IHRL in the struggle to curb a quasi-sovereign power of the platform largely outweighs the democratically motivated objections this avenue may raise.

Keywords: on-demand economy, platform workers, labor rights, International Human Rights Law, Business and Human Rights,

Introduction

Technological progress, digitalization and automation give rise to new business opportunities and economic models. Concomitantly, the modalities for their implementation are undermining the traditional approaches to work and work relationships. We are living in the era of "on-demand economy" marked by consumer-oriented digital marketplaces providing real-time access to goods and services. What is *on-demand* are small but multiple services ("gigs") to be performed on a flexible basis. This new economy tends to be labelled as the platform/ sharing economy[1] as the exchange of labor for money between individuals or companies is organized

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[1] *See, e.g.*, Jason Moyer-Lee & Nicola Kountouris, *The "Gig Economy": Litigating the Cause of Labour*, *in* TAKEN FOR A RIDE: LITIGATING THE DIGITAL PLATFORM MODEL ILAW NETWORK ISSUE BRIEF 6 (Mar. 2021), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ilawnetwork.com/wp-content/uploads/2021/03/Is-

via digital platforms. Whilst this economic model offers clear advantages to both technology firms and consumers, it radically affects the conditions under which work is performed.

Changing modes of work organization stretch the functionality of legal environment of work and its governance. In the last decades, technological innovations associated with Information and Communication Technology (ICT) constituted one of the most prominent, albeit not exclusive, developments which have proven the standardized patterns of social and economic regulation of employment largely inadequate.[2] This effect is exacerbated by instances such as self-employment, outsourcing and crowdsourcing labor. Not surprisingly, contemporary literature challenges the dominant paradigm of labor law centered around the contract of employment and the related elements of work relationship such as employee subordination to and control by the employer.[3] On the other hand, as is demonstrated in the following section, the normative objective to protect the (crowd-)worker vis-a-vis the platform company continues to be hijacked by the binary employee vs independent contractor approach in legal and judiciary praxis, risking to exempt a broad scope of work instances from the province of labor law.[4]

This article builds on an influential strand of labor law scholarship that advances the need to rethink the legal construction of work and work relationship so as to adapt it to the evolving social and economic environment.[5] Moreover, by applying a business and human rights lens to this process, it confutes the mainstream argument that labor rights guarantees are contingent on whether individuals enjoy or not the status of a worker under national law. The non-binary

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sue-Brief-TAKEN-FOR-A-RIDE-English.pdf; Faris Natour, *Respecting Human Rights in the On-Demand Economy: Closing the New Governance Gap*, 1 BUS. & HUM. RTS. J. 315 (2016). For critical analysis of the adequacy of the concept of sharing economy with respect to profit maximization platforms, see Yifat Solel, *If Uber Were a Cooperative: A Democratically Biased Analysis of Platform Economy*, 13(2) L. & ETHICS HUM. RTS. 239, 256ff (2019).

[2] *Cf. e.g.*, ALAIN SUPIOT ET AL., BEYOND EMPLOYMENT. CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE (2001). *See also* Dennis Arnold & Joseph R. Bongiovi, *Precarious, Informalizing, and Flexible Work: Transforming Concepts and Understandings*, 57(3) AM. BEHAV. SCIENTIST 289 (2013). The authors point to neoliberal globalization as a driving force behind changing labor trends, including a decline in attachment to employers, an increase in long-term unemployment, growth in perceived and real job insecurity, increasing nonstandard and contingent work, risk shifting from employers to employees, a lack of workplace safety, and an increase in work-based stress and harassment (*Id.* at 290).

[3] *See, e.g.,* MARK FREEDLAND FBA & NICOLA KOUNTOURIS, THE LEGAL CONSTRUCTION OF PERSONAL WORK RELATIONS (2011). The authors advance, as they claim, a new and wider scope for labor law by shifting the attention from the contract of employment to the personal work relation.

[4] Some legal systems (e.g., the US) distinguish between labor law and employment law as a body of legislation laying down respectively collective and individual workers' rights in work relations. We consciously do not follow this distinction in our article since it is neither pertinent from the perspective of IHRL, nor European Union legal discourse on labor rights, with the aspects of collective and individual workers' rights being covered under the overarching concept of labor rights.

[5] *See, e.g.,* SUPIOT ET AL., *supra* note 2; FREEDLAND & KOUNTOURIS, *supra* note 3; Karl Klare, *The Horizons of Transformative Labour and Employment Law*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES (Joanne Conaghan et al. eds., 2004); JEREMIAS PRASSL, THE CONCEPT OF THE EMPLOYER (2016).

conception of work we adopt[6] neither explores the potentials of misclassification claims[7], nor does it seek to contribute to scholarly output on collective capacities of workers decoupled from the employee status.[8] Its objective is as modest as its argument radical. The article examines a somewhat insufficiently investigated avenue of affording protection to platform workers under International Human Rights Law (IHRL). It argues that the instruments of IHRL may in some respects be even better placed than that of national law, both strengthening and complementing areas where state protection is weak or non-existent.

This article proceeds as follows: Section I briefly points out the perils of misclassifying platform workers as independent contractors and how selected national jurisdictions and the EU attempt to address them. In order to limit the scope of investigation, Section II narrows the analysis of protection afforded to platform workers under IHRL to *the right to just and favorable conditions of work* as laid down in Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Sections III and IV discuss respectively the obligations of states and responsibilities of private actors which arise in the context of platform work. The article concludes by arguing that the leverage offered by IHRL in the struggle to curb a quasi-sovereign power of the platform largely outweighs the democratically motivated objections this avenue may raise.

I. Captured by the Binary: The Enjoyment of Labor Rights in the On-Demand Economy

In the relationship between technology firms and those doing platform work the binary understanding of labor rights has not yet been overhauled. In simplified terms, it boils down to a question whether individuals doing low-paid episodic jobs in on-demand economy should be considered employees or independent contractors and consequently, be provided or not the access to labor and social entitlements.[9] Platform companies themselves purport to merely connect consumers and "suppliers" (i.e., those bidding for single gigs through digital labor platforms), thus denying their duties as employers. A substantial share of platform workers are

[6] The authors would like to thank Gali Racabi for a helpful suggestion to frame the article around the non-binary inputs of IHRL to work and work regulation.

[7] On the contrary, emerging research undermines the conventional wisdom that misclassification lawsuits always reverse work precariousness, see, e.g., Veena B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, WIS. L. REV. 739 (2017); *see also* Pamela A. Izvanariu, *Matters Settled but Not Resolved: Worker Misclassification in the Rideshare Sector*, 66 DEPAUL L. REV. (2017).

[8] *See* Gali Racabi, *Despite The Binary: Looking for Power outside the Employee Status*, 95 TUL. L. REV. 1167 (2021); Gali Racabi, *Abolish the Employer Prerogative, Unleash Work Law*, 43 (1) BERKELEY J. EMP. & LAB. L. 79 (2022).

[9] *See infra* notes 20 and 23-24.

misclassified as self-employed. As a result, these workers have either limited or no access to employment and social entitlements safeguarded under national law, including i.e., the right to a minimum pay, occupational safety and health, rest and leisure as well as protection in the event of unemployment, sickness, maternity and paternity, disability or old-age or to benefit from collective agreements covering such matters.[10] Instances such as cross-border platform work or COVID-19 pandemic only exacerbate the void of employment and social protection. Furthermore, digitalization is not only changing the nature of work and working conditions, but also the way work is allocated.[11] Algorithmic management of task allocation based on performance evaluation and customer ratings is ubiquitous on digital labor platforms. Biases in the code of algorithms may lead to inadvertent discrimination against some categories of workers, affecting their work opportunities.[12]

While this article focuses on the problem of limited and/ or lacking access to socio-economic rights by platform workers, negative impact of on-demand economy is not limited to the universally recognized labor rights.[13] Instances of infringements are reported both with respect to individual rights such as the right to privacy and personal data protection[14], as well as what is referred to in the legal scholarship as "the cross-cutting human rights principles such as participation, transparency, non-discrimination, and accountability."[15] According to Nicoletta Dentico et al., sophisticated invisible digital technologies have penetrated all kinds of human activity, not infrequently taking control of it. The authors state that

> [d]igitalization was supposed to be an equalizer of access, opportunities and resources, the condition for enhanced community-making and democracy-building. Instead, it prosecutes exacerbating extractive and exclusionary social outcomes and consolidating

[10] *Cf.* Natour, *supra* note 1, at 316-17.
[11] WILLEM P. DE GROEN ET AL., DIGITAL LABOUR PLATFORMS IN THE EU. MAPPING AND BUSINESS MODELS. 6 (May 2021), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ceps.eu/wp-content/uploads/2021/06/KE-02-21-572-EN-N.pdf.
[12] UMA RANI ET AL. WORLD EMPLOYMENT AND SOCIAL OUTLOOK: THE ROLE OF DIGITAL LABOUR PLATFORMS IN TRANSFORMING THE WORLD OF WORK 245 (2021).
[13] *See* the Universal Declaration of Human Rights arts. 23-25, Dec. 10, 1966, U.N. Doc. A/810.
[14] Waqar Nadeem et al., *The Role of Ethical Perceptions in Consumers' Participation and Value Co-creation on Sharing Economy Platforms*, 169(3) J. BUS. ETHICS 421 (2001). *See also* Piyush Bagadet al., *Data-Sharing Economy: Value-Addition from Data meets Privacy*, *in* PROCEEDINGS OF THE 14TH ACM INTERNATIONAL CONFERENCE ON WEB SEARCH AND DATA MINING (WSDM '21) (Association for Computing Machinery, New York, NY, USA) 1105, 1108 (2021), DOI:https://doi.org/10.1145/3437963.3441712.
[15] *Cf.* Sigrun Skogly, *Global Human Rights Obligations*, *in* THE ROUTLEDGE HANDBOOK ON EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS 25, 36 (Mark Gibney et al. eds., 2022).

the totalizing pattern of neoliberal economic globalization, in the absence of international normative cooperation.[16]

To date, the regulation of ICT industry has hardly taken account of possible adverse impacts on human rights. In effect, "the technology sector remains virtually a human rights-free zone."[17]

Lack of specific regulation of digital platform economy does not preclude applying the existing labour law instruments through their dynamic interpretation. There is emerging literature[18] and case law which demonstrate that, subject to exceptions,[19] hiring and working practices operated by platform companies are not substantially different from those applied in long-established, conventional modes of employment. A number of court rulings, including at national courts of the highest instance, have confirmed the existence of an employment relationship between platforms and their workers, adjudicating respective rights and entitlements.[20] This is possible since under relevant national legislation, employee status is not dependent on the designation in the contract, but actual arrangements of the work relationship. In particular, personal dependency of workers and their being subject to instructions relating to the content, execution, time and place of work allow for establishing an employment relationship with the instruction providing private entity.[21] Thus, contrary to presuppositions made in some scholarly work,[22] landmark cases such as *Roamler* in Germany[23] or *Take Eat Easy* and *Uber* in France[24] show that the absence of specific provisions under national law concerning digital platforms and their crowdworkers does not necessarily mean a legal lacuna.

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[16] Nicoletta Dentico et al., *Digitalisation: The New Extraterritorial Challenge to Extraterritorial Obligations, in* THE ROUTLEDGE HANDBOOK ON EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS, *supra* note 15, at 77, 86. The authors point inter alia to controversial legal implications of gathering patients' details and commercializing them in the health industry (*id.* at 83). It is arguable that crowd-sourced medial knowledge owned not only by public (as the authors say), but also private institutions offering medical services should be treated as public good and used accordingly. Incidentally, the distinction between public and private sector, notably in health services, may be difficult to make.

[17] See in this sense Philip Alston, UN Rapporteur on extreme poverty and human rights, as cited by Dentico et al., *supra* note 16, at 77.

[18] Moyer-Lee & Kountouris, *supra* note 1, at 9. *Cf. also* Solel, *supra* note 1, at 239, who argues that platform (online) economy is not different from offline economy insofar as platforms are in the digital age what land was in agrarian times, namely "basic resources."

[19] These involve cases of real self-employment.

[20] See in that respect judgments of courts in Belgium (Commission Administrative de règlement de la relation de travail (CRT), ruling of Oct. 26, 2020, Dossier n°: 187 – FR – 20200707) (Be.); Chile (Court of Appeal of Concepción in case Alvaro Felipe Arredondo Montoya con Pedidos Ya Chile SPA, Ruling No 395-2020 of 5 Oct. 2020) (Cl.); in France (Cour de cassation, judgments in case Mr B. v. Take Eat Easy Ruling No. 1737 of Nov. 28, 2018 (Fr.) and case Mr X v. Uber France and Uber BV Ruling No. 374 of Mar. 4, 2020) (Fr.) and Germany (Bundesarbeitsgericht, Ruling No. 9 AZR 102/20 of Dec. 1, 2020).

[21] *Cf., e.g.*, Bürgerliches Gesetzbuch [BGB] [Civil Code], § 611a, https://www.gesetze-im-internet.de/bgb/__611a.html (Ger).

[22] *Cf., e.g.*, Solel, *supra* note 1, at 240.

[23] Bundesarbeitsgericht (Federal Labor Court), Ruling No. 9 AZR 102/20 of Dec. 1, 2020 (Ger.).

[24] *Mr B. v. Take Eat Easy*, *supra* note 20; *Mr X v. Uber France and Uber BV*, *supra* note 20.

There is also a down-side of shifting the responsibility for clarifying the instances of misclassification in on-demand economy to workers' activism. Lengthy civil lawsuits are burdensome for workers and do not always bring the desired effect.[25] A more active role and intervention of public institutions increase the changes to bring about a qualitative change in terms of improved conditions of work for individuals. A criminal procedure against *Deliveroo France* and three of its former top managers for "hidden work" sets an important precedent in this regard.[26] Another promising alternative consists in addressing the problem of misclassification through regulatory policy. A noteworthy legislation was adopted in Italy in 2015[27] whereby labor and related social protection was extended beyond the traditional scope of the employment relationship (in Italian *lavoro subordinato*) so as to embrace workers whose work is externally organized (in Italian *lavoro etero-organizzato*).[28] By law no. 128 of 2 November 2019[29] the provisions in question were further extended to explicitly include workers whose work is organized by digital platforms.[30] In effect, pursuant to those provisions self-employed, but "technically dependent" workers not only benefit of guaranties concerning their remuneration (by collective agreements or a legal minimum wage)[31], but also enjoy health and occupational protection (mandatory insurance schemes)[32], protection against discrimination[33] and protection of personal data.[34] The new Italian law counts among the very few legislative measures which directly address the precarious conditions of platform work. More recently, respective initiative has also

[25] *See, e.g.*, Marcio Viera Jacob v. Uber do Brasil Tecnologia Ltda e Outros, RR - 1000123-89.2017.5.02.0038 (Brazil Superior Labor Court**)**. *See also* Dubal, *supra* note 7.

[26] According to the investigators of the French *l'Office central de lutte contre le travail illegal*, the company falsely presents itself as a delivery platform, and those who performed delivery services for it should have been salaried employees. *See Deliveroo et trois de ses anciens dirigeants jugés au pénal pour « travail dissimulé,* LE MONDE (Mar. 8, 2022), https://www.lemonde.fr/economie/article/2022/03/08/deliveroo-et-trois-de-ses-anciens-dirigeants-juges-au-penal-pour-travail-dissimule_6116542_3234.html.

[27] Decreto legislativo 15 giugno 2015, n. 81, Gazzetta Ufficiale Serie Generale n.144 del 24-06-2015 - Suppl. Ordinario n. 34 (It.).

[28] For discussion, see Antonio Aloisi & Valerio de Stefano, *Delivering employment rights to platform workers*, IL MULINO, Jan. 31, 2020, https://www.rivistailmulino.it/news/newsitem/index/Item/News:NEWS_ITEM:5018.

[29] Gazzetta Ufficiale Serie Generale n.144 del 24-06-2015 p.1; a consolidated version of the modifications can be found at p. 39 ff.

[30] *Id.* art. 2 paragraph 1 subparagraph 1 bis, new chapter V bis.

[31] *Id.* art. 47 quarter.

[32] *Id.* art. 47 septies. See also to that effect the judgment of the Italian Supreme Court of Jan. 24, 2020 (Cassazione Civile, Sez. Lav., 24 gennaio 2020, n. 1663) (It.), https://olympus.uniurb.it/index.php?option=com_content&view=article&id=21738:cassazione-civile,-sez-lav-,-24-gennaio-2020,-n-1663-applicabile-la-disciplina-sul-lavoro-subordinato-ai-riders-etero-direzione&catid=16&Itemid=138.

[33] *Id.* art. 47 quinquies.

[34] *Id.* art. 47 sexies.

been taken up at the EU level.[35] On December 9, 2021 the EU Commission proposed a Directive to improve working conditions in platform work.[36] This legislative initiative intends to establish a legal presumption of employment where there is a contractual relationship between a digital labor platform that controls the performance of work and a person performing work through that platform. Art. 4(2) of the proposed Directive provides for a list of criteria to determine such *control* (and thus that the platform is an "employer"), which relate to i) determining the level of remuneration; ii) requiring the platform workers to respect specific rules in connection to the performance of the work; iii) supervising the performance of work and/or its quality; iv) effectively restricting the freedom, including through sanctions, to organize one's work in respect of one's working hours, accepting or refusing tasks or using substitutes; v) effectively restricting the possibility to build a client base or to perform work for any third party. For the presumption of employment to apply it is enough that two of the aforementioned criteria are met. This presumption may be rebutted, but the burden of proof would rest on the digital labor platform seeking such action, with such proceedings having no suspensive effect on the application of the legal presumption.[37]

The discussed above civil and/ or penal lawsuits as well as regulatory interventions aim at addressing the problem of misclassification and its consequences for vulnerable workers. They may even be effective in achieving their goal. Still, with the notable exception of the Italian legislation, those approaches remain captured by the binary discourse on employment, whose inherent tensions and contradictions risk to leave many workers without recourse to legal protection.[38] A different avenue is offered by the IHRL, under which the conception of *work* is more inclusive and functional than that usually applied in national jurisdictions. The following sections substantiate this argument with reference to the right to just and favorable conditions of work as laid down in Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[39] This provision provides for i) the right to fair and equal remuneration for work of equal value that provides workers and their families with decent living conditions, ii) the right to safe and healthy working conditions, iii) the rights to fair and equal promotion

[35] As the European Union has recently proposed several cutting-edge legislative initiatives in the areas of Artificial Intelligence and digital services, the authors will revoke some of the proposed regulatory measures as possible ways to address selected digital challenges.

[36] *Commission Directive, Improving working conditions in platform work*, COM(2021) 762 final.

[37] *Id.* art. 5.

[38] Such tension may arise for example where the regulatory framework of a work relationship continues to construe the employer as a single entity, whereas the actual exercise of the multiple activities falling within the remit of employer's "function" is shared between multiple entities, with the effect that no responsible employer can be identified. *See* Jeremias Prassl, *The Notion of the Employer,* 129 L. Q. REV. 380, 380 (2013). That is why the author postulates a more open-ended, multi-functional conception of the employer.

[39] International Covenant on Economic, Social and Cultural Rights (ICESCR), Dec. 16, 1966, U.N.T.S. 993 3.

opportunities, and iv) the right to rest and leisure through limitation of working hours and paid holidays.

II. Beyond the Binary: *A Right to Just and Favorable Conditions of Work* Perspective on Platform Economy

In human history, technological advancement has always been one of the major factors affecting the labor market. Not bound by the constraints of a single legal culture, the concept of *work* as applied under IHRL has adapted respectively and evolved toward a comprehensive and inclusive notion, embracing all remunerative work (be it salaried employment or self-employment), non-remunerative work undertaken either in an income-producing enterprise or a household, as well as other instances of work usually not recognized, regulated, or protected under national labor law. This may be observed in the context of labor standard setting by International Labour Organization (ILO).[40] According to the ILO Employment Relationship Recommendation No. 198 (2006), the determination of the existence of an employment relationship "should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties."[41] The ILO also affirms the dynamic nature of labor relationships and recommends its Member States to regularly review and adapt the scope of relevant regulations[42]. Also the dynamic interpretation of the ICESCR by the UN Committee on Economic, Social and Cultural Rights (CESCR) demonstrates an attempt to endorse this constant socio-economic change. However, this article focuses on the ICESCR perspective as to date it constitutes the strongest treaty basis to build on when it comes to the State obligations in the context of business activities, and thus also digital platforms.[43]

The CESCR explicitly stressed that the concept of *work* has evolved from the time of drafting of the Covenant.[44] The Committee has never defined this concept *per se*, but determines its scope through the constantly evolving catalogue of specific activities and forms of employment. In this context, the CESCR classified as work, for instance, employment in both formal and

[40] ILO commonly applies the concept of "informal employment." *Cf.* Arnold & Bongiovi, *supra* note 2, at 292.
[41] ILO, Employment Relationship Recommendation R198 (2006), principle 9.
[42] ILO, *Platform Work and the Employment Relationship*, 27 ILO WORKING PAPER 6 (Mar. 2021).
[43] CESCR, General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, Aug.10, 2017, E/C.12/GC/24. MIĘDZYNARODOWY PAKT PRAW GOSPODARCZYCH, SOCJALNYCH I KULTURALNYCH. KOMENTARZ 21 (Zdzisław Kędzia & Anna Hernandez-Połczyńska eds., 2018) (Pol.). *See infra* Section III.
[44] CESCR, General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), Apr. 7, 2016, E/C.12/GC/23, para. 4.

informal economy[45], domestic and agricultural work[46], short-term, zero-hour contracts, and other non-standard (i.e., precarious) forms of employment[47], including unpaid work[48]. Even more specific guidance can be derived from the recommendations formulated under the monitoring procedure towards specific forms of employment, for instance civil law contracts (Philippines and Poland)[49], unwritten contracts (Czechia)[50], and self-employment (Belgium)[51].

A question arises whether platform work falls into the scope of the ICESCR and whether the Covenant provides some minimum standards for this kind of work.[52]

The interpretation of the Covenant included in the General Comments adopted by the CESCR provides certain guidance in addressing this question. Although not legally binding, the General Comments (GC) contain an authoritative interpretation of the Covenant and guide States in its implementation.[53] Whilst none of the General Comments addresses the on-demand economy directly, several documents are particularly relevant for answering the above mentioned question, in particular the GC on the *right to work* (No. 18); GC on the *right to just and favorable conditions of work* (No. 23), GC on State obligations under the ICESCR in the context of business activities (No. 24), and GC on science (GC No. 25).

So far, the CESCR has not directly addressed the situation of gig workers (either in the GC or under the monitoring procedure), however, this is likely to change in the future. The reasons for this are twofold. Firstly, the GC No. 23 discusses the role of private sector,[54] and the issue of ensuring labor rights by the business actors is increasingly raised by the Committee when preparing the List of Issues.[55] Moreover, in the opening paragraphs of the GC No. 23, the Committee stresses that the right to just and favorable conditions of work applies also to workers in the informal economy as well as self-employed workers and unpaid workers,[56] what clearly

[45] CESCR, General Comment No. 18: The Right to Work (Art. 6 of the Covenant), 6 February 2006, E/C.12/GC/18, art. 6, para. 10.
[46] *Id*. para. 10.
[47] CESCR, General Comment No. 23, *supra* note 44, para. 3.
[48] *Id*. para. 4. *See also* CESCR, General Comment No. 24, *supra* note 43, para. 19.
[49] CESCR, Concluding Observations from 2016: Poland, E/C.12/POL/CO/6, paras. 18-19; Concluding Observations from 2016: Philippines, E/C.12/PHL/CO/5-6, para. 27.
[50] CESCR, Concluding Observations from 2014: Czechia, E/C.12/CZE/CO/2, para. 8.
[51] CESCR, Concluding Observations from 2020: Belgium, E/C.12/BEL/CO/5, para. 32.
[52] The same would apply to ILO Conventions.
[53] Danae Azaria, *The Legal Significance of Expert Treaty Bodies Pronouncements for the Purpose of the Interpretation of Treaties*, 22 INT'L COM. L. REV. 33 (2020). *See also General comment no. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, June 25, 2009, CCPR/C/GC/33, para. 13.
[54] CESCR, General Comment No. 23, *supra* note 44, paras. 74-76.
[55] CESCR, List of issues to the report of Brazil, E/C.12/BRA/Q/3 (2021), para. 3; List of issues to the report of Germany, E/C.12/DEU/Q/6 (2017), para. 2.
[56] CESCR, General Comment No. 23, *supra* note 44, para. 5.

indicates that the form of employment is not decisive for the application of the Covenant. The decisive role is, therefore, attributed to the principle of primacy of facts which is also affirmed by the ILO as well as in many national jurisdictions.[57] In addition, in the GC No. 25, the Committee noted that the challenges posed by the algorithms can reinforce discrimination, intensify social inequalities, and increase unemployment and segregation in the labor market.[58]

Secondly, the role of online platforms—even perceived as intermediaries in providing certain services—has been already addressed by other treaty bodies, in particular the Committee on the Rights of the Child (CRC Committee). The CRC Committee highlighted that States are obliged to ensure that children are protected inter alia against economic exploitation and that their rights with regard to work in the digital environment and related opportunities for remuneration are protected[59]. Moreover, according to the principle of the best interest of the child, if certain "legal provisions are open to more than one interpretation, the interpretation that most effectively serves the child's best interests should be chosen"[60] (i.e., the interpretation in favor of stronger protection—which is usually attributed to labor law). At the same time, research carried out in many countries shows the prevalence of youth and young adults within the gig workers, in particular in the sector of online services.[61] The role of online platforms has also been addressed by the Human Rights Committee in the Concluding Observations, for instance the recommendation to develop, in cooperation with digital technology companies, a strategy to reduce online hate speech,[62] or the withdrawal from the obligation for news portals to implement mandatory identification of website visitors.[63] Furthermore, the Committee on the Elimination of Discrimination against Women (CEDAW) has recommended a State to consider penalizing with considerable financial sanctions providers of online platforms and online distributors that fail to delete or block certain criminal content from their platforms.[64]

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[57] The principle of facts is widely applied in the European and Latin American countries. *See* ILO, *supra* note 36, at 7-8.
[58] CESCR, General Comment No. 25 on Science and Economic, Social and Cultural Rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/25 (2020), para. 73.
[59] CRC Committee, General Comment No. 25 on children's rights in relation to the digital environment, CRC/C/GC/25 (2021), para. 113.
[60] CRC Committee, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14 (2013), para. 6(b).
[61] According the comparative survey-based research across seven European countries 43.3% of young gig workers have been providing online services. *See* LUIS PINEDO CARO ET AL., YOUNG PEOPLE AND THE GIG ECONOMY 38 (Juan Chacaltana & Sukti Dasgupta eds., 2021). For the methodology of the research, see URSULA HUWS ET AL., WORK IN THE EUROPEAN GIG ECONOMY: RESEARCH RESULTS FROM THE UK, SWEDEN, GERMANY, AUSTRIA, THE NETHERLANDS, SWITZERLAND AND ITALY (2017).
[62] HRC, Concluding Observations: the Netherlands, CCPR/C/NLD/CO/5 (2019), para. 16(b).
[63] HRC, Concluding Observations: Belarus, CCPR/C/BLR/CO/5 (2018), para. 49.
[64] CEDAW, Concluding Observations: South Korea, CEDAW/C/KOR/CO/8 (2018), para. 23.

Thirdly, the CESCR has recently highlighted the extraterritorial dimension of State obligations. According to the GC No. 23, States should ensure compliance with IHRL by all business entities under their jurisdiction, whether they operate transnationally or not.[65] It means that when a platform registered in a State A operates in a State B where certain regulations do not exist or are not fully enforced in practice (e.g., labor law), State A is obliged to ensure that platform's compliance with Covenant rights. The concept of extraterritorial jurisdiction is developed by several UN treaty bodies with CRC, CEDAW and CESCR being the most active ones.[66] Although there are certain differences in their approaches, the general concept can have a profound impact on the application of IHRL to digital platforms which are trying to exploit legal loopholes in domestic jurisdictions. Nevertheless, the recommendations on the extraterritorial dimension of labor rights remain significantly limited at the moment. The most active in this matter is CEDAW which recommended Suriname to ensure labor rights of women employed by foreign-owned gold-mining, petroleum extraction, and agrobusiness companies;[67] and Luxembourg to ensure that the financial secrecy, corporate tax policies, and commercial activities do not affect women's rights and the gender equality.[68]

Nevertheless, currently there is no clear guidance from the CESCR on the application of the standards of labor rights to the on-demand economy. For this reason, the following section discusses to what extent the GC and the recommendations formulated under the monitoring procedure address the State obligations toward business in the context of the right to work (Article 6) and the right to just and favorable conditions of work (Article 7). The following section, on the other hand, is devoted to the responsibility of business actors.

III. State obligations towards business entities in the context of on-demand economy

Under the obligation to protect the right to work, States should take effective measures, in particular legislative measures, to prohibit labor of children under the age of 16 and to prohibit all forms of economic exploitation.[69] According to the CRC Committee, providing digital services should be classified as a work,[70] and therefore, applies to phenomena such as "gold farming"

[65] CESCR, General Comment No. 23, *supra* note 44, para. 3.
[66] Elena Pribytkova, *Extraterritorial Obligations in the United Nations System: UN Treaty Bodies*, *in* THE ROUTLEDGE HANDBOOK ON EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS, *supra* note 15, at 95. Until March 2022, the CRC Committee mentioned the term 'extraterritoriality' (and its derivatives) in 53 recommendations, CEDAW referred to it in thirty-eight recommendations and CESCR in seven recommendations.
[67] CEDAW, Concluding Observations: Suriname, CEDAW/C/SUR/CO/4-6 (2018), para. 20.
[68] CEDAW, Concluding Observations: Luxembourg, CEDAW/C/LUX/CO/6-7 (2018), para. 16.
[69] CESCR, General Comment No. 18, *supra* note 45, para. 24.
[70] CRC Committee, General Comment No. 25, *supra* note 59, para. 113.

which describes the process of "harvesting of virtual treasures for online gamers in the developed world"[71] and involves roughly 400,000 gold-workers in the world, with at least some of them being under 18 years old.[72]

The implementation of the right to work requires States to ensure equal access to decent work without discrimination of any kind.[73] In the context of the platform-based economy, this might include the adoption of the legislative measures and ensuring access to remedy against the unintended consequences of the consumer-sourced rating systems that are reportedly leading to the reinforcement of prejudices and biases.[74] The Artificial Intelligence (AI) systems used in employment, including applications that facilitate access to self-employment, task allocation, workers management, and evaluation of work-related contractual relationships have been already identified as high-risk by the Commission of the European Union.[75] For this reason, its 2021 proposal for the AI Regulation requires such systems to ensure the requirements of "high quality data, documentation and traceability, transparency, human oversight, accuracy and robustness."[76] Further requirements are specified in the draft Directive on improving working conditions in platform work which aims to set minimum standards for the algorithmic management performed by the digital labor platforms.[77] Both instruments would facilitate transparency, access to remedy as well as shifting the burden of proof on the platforms (e.g., Article 18(3) of the Directive) and their combination could arguably provide certain protection against discrimination.

The normative content of the right to just and favorable conditions of work under Article 7 of the ICESCR includes remuneration, safe and healthy working conditions, equal opportunity to be promoted through fair and merit-based processes, as well work-life balance through rest,

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[71] Miriam A. Cherry, *The Global Dimension of Virtual Work*, 54 ST. LOUIS U. L. J. 471, 471-96 (2010).
[72] Valerio de Stefano, *The Rise of the «Just-in-Time Workforce»: On-Demand Work, Crowdwork and Labour Protection in the «Gig-Economy»*, 71 CONDITIONS OF WORK & EMPLOYMENT 1, 10 (2016), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_443267.pdf. For the analysis on the legal classification of gold farming as work, see Julian Dubbell, *Invisible Labor, Invisible Play: Online Gold Farming and the Boundary between Jobs and Games*, 3 VANDERBILT J. ENT. & TECH. L. 419, 419-66 (2016).
[73] CESCR, General Comment No. 18, *supra* note 45, para. 23.
[74] E. Gary Spitko, *Reputation Systems Bias in the Platform Workplace*, 2019(5) BYU L. REV. 1271 (2020). *See* e.g., Tribunale Ordinario di Bologna, *ILCAMS CGIL et al. vs Deliveroo Italia s.r.l.*, N.R.G., 2949/2019, of 21 December 2020 (It.) (discussing the discriminatory effects of the consumer-sourced rating systems). *See* Alex Rosenblat et al., *Discriminating Tastes: Uber's Customer Ratings as Vehicles for Workplace Discrimination*, 9 POLICY & INTERNET 256, 256-79 (2017) (discussing the proposed solutions against the unintended consequences of the rating system developed by the Uber platform).
[75] Proposal for a regulation of the European Parliament and of the Council laying down harmonized rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, COM/2021/206 final, recital 36.
[76] *Id*., Explanatory Memorandum, pt. 2.3.
[77] *See* Chapter III of the COM(2021) 762 final.

leisure, and limitation of working hours.[78] The obligation to protect this right requires States to establish through laws, policies, and adjudication an effective framework for the prevention, investigation, punishment, and redress of abuse by third parties[79]. The preventive dimension requires that platforms fall into the scope of a minimum wage (if the issues of pay are no covered by collective agreements), working time and safety regulations and that these standards are effectively enforced. This is the case, for instance, in the United Kingdom, where the landmark ruling from the Supreme Court forced Uber to guarantee 70,000 drivers with a minimum wage, vacation pay, and pensions.[80] Under the obligation to protect States should also ensure that the labor inspectorates and other protection mechanisms are provided with a mandate and capacities to ensure enforcement of the regulations in the area of working conditions as well as algorithmic work management. This would require providing labor inspectorates with necessary resources, training as well as entitlement to access to proprietary algorithms and data.

States should also ensure that the enterprises under their jurisdiction respect labor rights throughout their operations extraterritorially, in particular in countries with less advanced labor law frameworks.[81] In the context of the data-driven algorithmic work management, this should also (or particularly) apply to the data protection regulations that are still missing in more than 70 countries worldwide.[82] If access to remedy is unavailable or ineffective before the domestic court where the harm occurs, a victim should be allowed with a right to lodge a complaint before the court of the business' home-country.[83]

Under their own obligation to respect, States should refrain from procuring goods and services from enterprises that abuse rights laid down in the Covenant.[84] To ensure the fulfillment of this obligation, States could establish a system of certification, either voluntary or obligatory, and use domestic public procurement framework to promote businesses that implement human rights due diligence.[85] Although there is no such legislation, some countries require suppliers

[78] CESCR, General Comment No. 23, *supra* note 44, paras. 5-49.
[79] *Id.* para. 59.
[80] Uber BV v. Aslam, UKSC 5 (2021). *See also Uber 'Willing to Change' as Drivers Get Minimum Wage, Holiday Pay and Pensions*, BBC, Mar. 17, 2021, https://www.bbc.com/news/business-56412397.
[81] CESCR, General comment No. 23, *supra* note 44, paras. 69-70.
[82]Morrison & Foerster, *Catch Up on Privacy Around the World on Data Privacy Day 2021!*, (Jan. 29, 2021), https://www.mofo.com/resources/insights/210127-data-privacy-day.
[83] CESCR, General Comment No. 24, *supra* note 43, para. 30. *See also* EP Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability, P9_TA-PROV(2021)0073. Article 20 of the draft Directive annexed to this resolution provides for the application of the law of the forum.
[84] CESCR, General Comment No. 23, *supra* note 44, para. 59.
[85] CESCR, General Comment No. 24, *supra* note 43, para. 31.

to meet some social criteria based, for instance, on the OECD Guidelines for Multinational Enterprises (e.g. Denmark) or ILO Core Labour Conventions (e.g. Switzerland).[86]

IV. Business responsibilities to respect labor rights

In recent years the general principle of business responsibility to respect human rights has been broadly ascertained in numerous soft-law instruments adopted by the OECD,[87] Council of Europe,[88] and EU institutions.[89] This constitutes a turning point in an attempt to rethink the historically determined consensus that only States are subjects of IHRL. The current consensus enables private law entities such as transnational companies to avoid liability for human rights violations, including that committed by their foreign suppliers, since they are claiming not to be duty bearers under public international law and domestic law of their headquarters.[90] Given the capacity of technology firms to undermine traditional regulatory powers of the State,[91] a new approach to ensure the enforcement of broadly recognized human rights standards appears imperative. Arguably, to date the United Nations Guiding Principles on Business and Human Rights (UNGPs)[92] constitute the most influential soft-law instrument in that regard. In many

[86] CLAIRE METHVEN O'BRIEN ET AL., PUBLIC PROCUREMENT AND HUMAN RIGHTS: A SURVEY OF TWENTY JURISDICTIONS 42 (2016), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.oecd.org/governance/procurement/toolbox/search/Public-Procurement-and-Human-Rights-A-Survey-of-Twenty-Jurisdictions-Final.pdf.

[87] OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, 2011 EDITION (2011), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.oecd.org/daf/inv/mne/48004323.pdf; OECD, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT (2018), https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm.

[88] Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business of Mar. 2, 2016; the Council of Europe Parliamentary Assembly's Resolution 2311 (2019) and Recommendation 2166 (2019).

[89] *Cf. e.g*. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility COM(2011) 681 final; European Parliament resolution of 12 September 2017 on the impact of international trade and the EU's trade policies on global value chains (2016/2301(INI)).

[90] This problem is increasingly discussed in literature, see, e.g., GIBNEY ET AL., *supra* note 15, at 466-67. *See also e.g.,* FLORIAN WETTSTEIN, BUSINESS AND HUMAN RIGHTS: ETHICAL, LEGAL AND MANAGERIAL PERSPECTIVES (2022); Douglass Cassell, *Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence*, 1 BUS. & HUM. RTS. J. 179 (2016); Jacques Hartmann & Annalisa Savaresi, *Corporate Actors, Environmental Harms and the Draft UN Treaty on Business and Human Rights: History in the Making?*, (Zoom-in 83) QUESTIONS OF INT'L L.J. 27, 28 (2021); Izabela Jędrzejowska-Schiffauer, *Business Responsibility for Human Rights Impact under the UN Guiding Principles: At Odds with European Union Law?*, 4 EUR. L. REV. 481 (2021).

[91] *See, e.g.*, Solel, *supra* note 1 at 247-48, 261.

[92] UN Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4 (June 16, 2011. The international implementation mechanisms include the Working Group of the HRC on the issue of human rights and transnational corporations and other business enterprises and the annual Forum on Business and Human Rights.

countries, plans of action on business and human rights have been adopted. In 2013 the European Commission adopted Sector Guides on Implementing the UNGPs.[93] Increasingly legislative measures also ensure the impact of UNGPs.[94] The elaboration of a legally binding UN instrument of international law on business and human rights is also underway.[95]

Under Guiding Principle 17 (GP17), businesses are required to conduct human rights due diligence (HRDD). It remains unclear, however, what specific obligations may arise from this stipulation. The only guidance provided by GP 17 is that HRDD is to be construed as a process by which companies can "know and show" that they respect human rights, notably by "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed." Enterprise's potential adverse human rights impacts (human rights risks) are to be addressed through prevention or risk mitigation, while actual impacts should be a subject for remediation.[96]

For the purpose of enforcing corporate responsibility to respect human rights it appears appropriate to first determine what concrete obligations for businesses HRDD should involve with respect to particular situations, industries and operational contexts. A separate concern would be whether and if yes, to what extent compliance with HRDD may affect corporate liability for negative impact on people and environment.[97] Against this backdrop, the overarching argument of this contribution is that nothing justifies platform enterprises exempting themselves from respecting labor standards developed nationally and internationally over the past decades. In the same vein, neither the argument of the on-demand economy being a relatively new market nor the lack of direct reference to platform work in national or international human rights instruments frees public authorities from the obligation to apply labor standards towards platform

[93] European Commission, *Together Against Trafficking in Human Beings*, https://ec.europa.eu/anti-trafficking/publications/european-commission-sector-guides-implementing-un-guiding-principles-business-and-hum-0_en (last visited Oct. 2, 2023).
[94] In Europe, corporate HRDD laws were adopted inter alia in France (2017), the Netherlands (2019) and Germany (2020) and Switzerland (2021), other states are considering introducing such legislation. Moreover, on Feb. 23, the European Commission adopted a proposal for a Directive on corporate sustainability due diligence, COM(2022) 71 final.
[95] UN Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014).
[96] UNGPs, Commentary to GP 17. *See also* John Ruggie & John F. Sherman, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, 28 (3) EUR. J. INT'L L. 921 (2017).
[97] While this perspective is not endorsed in the UNGPs, the current business and human rights discourse conceives corporate due diligence obligations to also include environmental concerns. The French Corporate Duty of Vigilance Law establishes such human rights and environmental due diligence for business (HREDD, see Art. L. 225-102-4.-I of the Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n°0074 du 28 mars 2017) (Fr.); *see also* Article 1 of the EP's proposal for a draft Directive on corporate due diligence and corporate accountability, P9_TA-PROV(2021)0073.

enterprises.[98] This said, we argue that HRDD as a standard of care for enterprises operating in on-demand economy may sufficiently be determined based on the IHRL currently in force.

As already pointed out, at present ICESCR constitutes the strongest treaty basis to build on when it comes to the State obligations in the context of business activities. One of the fundamental obligations arising under Article 7 of the ICESCR for businesses operating in on-demand economy is providing fair wages. The organizational model of platform companies such as Uber or Lyft, however, is oriented at maximizing profit through exploiting labor of its drivers. Low-paid rides incentivize drivers to overwork and offer their services for additional hours so as to earn a remuneration safeguarding them and their families a decent standard of living. This, in turn, has a negative impact on the workers' rights to rest and work-life balance. Therefore, platform enterprises should respect the minimum wage, working time, and safety regulations established in the host country where they operate and, in the event of insufficient protection afforded to workers by that state, apply minimum standards required under international law and/or the law of their home country. The obligation for platforms to meet higher standards than those established under the law of the host country is justified to the extent that unfavorable working conditions may be exacerbated through platform work in countries where work and social protection are insufficient or unavailable.

Given the risks inherent in the allocation of work to gig workers by algorithm and unavoidable biases resulting in that context from customer ratings, platforms should be obliged to count as working hours not exclusively the time for the performance of single gigs, but also a reasonable period of time the worker was at a disposal of the platform to perform such work. Moreover, this would allow for balancing potential negative impact that algorithms may have on job opportunities of platform workers. In the EU context, it would be worthwhile exploring to what extent Article 2 of the Directive 2003/88/EC concerning certain aspects of the organization of working time[99] could be interpreted as obliging platform enterprises to count stand-by times as working hours. The provision in question defines the concept of 'working time' as "any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice." According to the established case-law of the Court of Justice of the EU,

> the determining factor for the classification of 'working time', within the meaning of Directive 2003/88, is the requirement that the worker be physically present at the place

[98] For an opposing assumption, see, e.g., Solel, *supra* note 1, at 240.
[99] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time, O.J. L 299, 18/11/2003 p. 0009 - 0019.

determined by the employer and to be available to the employer in order to be able to provide the appropriate services immediately in case of need.[100]

This does not mean that stand-by times at home are automatically excluded from the ambit of the performance of worker's duties. The Court requires, however, that the constraints imposed on a worker during that period are of such a nature as to constrain objectively and very significantly the ability of that worker to freely manage the time during which his or her professional services are not required and to devote that time to his or her own interests.[101]

Businesses using advanced technologies should generally be obliged to exercise due care to avoid all biases in algorithms that are apt to negatively affect human rights, including by abstaining themselves from negative platform ratings[102] in cases of justified refusals of workers to perform selected tasks, be it due to health, security, rest, or other legitimate reasons. To reduce the risk of biases, platforms should also enable workers to contest unfair ratings from customers.[103] Likewise, platforms should afford opportunities for communication and contestation of unfair work rejections or payment refusals.[104] Arguably, platforms could also be obliged to activate the potential offered by algorithms to not only avoid gender or other inequalities in the access to job opportunities, but also to compensate for those occurring in other sectors.[105]

Concluding remarks

The advancement of on-demand economy and commercial use of AI raise issues of human dignity and respect of human rights. While having the potential to reduce inequalities in job

[100] CJEU, Case C-518/15 Ville de Nivelles v Rudy Matzak, ECLI:EU:C:2018:82, at [59]. See to that effect also Case C-151/02 Landeshauptstadt Kiel v N. Jaeger, ECLI:EU:C:2003:437, at [65]. "Surge pricing" used by platforms based on demand can strongly influence drivers or riders to make themselves available in areas where there is a peak in demand (*see* RANI ET AL., *supra* note 12, at 95 and the literature cited there), which could be interpreted as de facto requirement that the worker be physically present at the place determined by the platform.

[101] CJEU, Case C-580/19 RJ v Stadt Offenbach am Main, ECLI:EU:C:2021:183, at [61]. Interestingly, the judgment in Case C-214/20 MG v Dublin City Council, ECLI:EU:C:2021:909, could be of relevance for platform work cases where stand-by time is not counted as working time due to the possibility for the worker to carry out another professional activity at that time, providing, however, that the platform worker could refuse, without any negative consequences for his or her future job opportunity, tasks allocated to him or her during that time by the platform.

[102] *See* RANI ET AL., *supra* note 12, at 95, 177.

[103] These may involve situations when for example customer ratings do not account for a delay in transport or delivery occurring due to traffic congestion. *Id.* at 181.

[104] Since those instances may lead to significant limitation of future task assignment opportunities and ultimately even workers' accounts being deactivated, they may potentially cause negative impact on the right to work and amount to an unfair dismissal.

[105] *Cf., e.g.*, EUROPEAN INSTITUTE FOR GENDER EQUALITY, GENDER EQUALITY INDEX 2020. DIGITALISATION AND THE FUTURE OF WORK 124-25 (2020), https://eige.europa.eu/publications-resources/publications/gender-equality-index-2020-digitalisation-and-future-work?language_content_entity=en.

opportunities, digital labor platforms are in fact doing exactly the opposite through neglecting their own role as duty bearers of labor rights. Profit-oriented platform enterprises have without any scruples circumvented existing regulations protecting workers' rights and safeguarding related social security benefits. They play an old game of creating a new universe of its own (in the discussed case, a new model of on-demand economy), thus both deluding and eluding state regulatory power. States are under the duty to counteract such developments by way of public policy and, if need be, also regulatory measures. Some local governments[106] and national courts have already developed promising practices seeking to address human rights impacts in the on-demand economy.

The lines of critique proposed in this article aim at identifying the injuries and injustices inflicted on platform workers by platform companies. By screening such developments through a *right to just and favorable conditions of work* perspective we showed that the existing lacunas of platform workers' protection under national law could effectively be addressed by implementing respective labor guarantees already enshrined in IHRL. There is no need to develop new labor standards for platform work, these have long been in place and have lost none of their pertinence. All is needed is their appropriate interpretation and enforcement at national level, if need be, through concerted regulatory activity adapting the existing instruments or codifying new ones such as the legal duty of care for platform enterprises to respect human rights.

Its allure of the inclusive conception of work could make IHRL a powerful driver of improving the conditions of work for platform-dependent micro-jobbers, if this were not overshadowed by seemingly insurmountable obstacles. Enhancing the role of international law has an inherent institutional and governance dimension. Where in concrete contexts opportunist national politics fail to fulfill otherwise uncontested international law obligations of nation-states, the resulting weak, dialogue-based enforcement mechanisms remain ineffective. In such instances, to avoid IHRL curtailing its sovereign power, national politics tends to raise democratic concerns. Such concerns are legitimate where the Sovereign chooses its own destiny in a deliberative and inclusive process, provided that it respects the rule of law and human rights. The latter are guaranteed even against the will of the majority as rights of the minority, as the only safeguards protecting everybody's human dignity.

[106] On initiatives allowing drivers for ride sharing services such as Uber or Lyft to form trade unions and creating a driver benefit fund, see Natour, *supra* note 1, at 318-19.

For the time being, it seems that the expansion of digital technologies poses a systemic threat to democratic systems. As astutely pointed out by Dentico et al.

> [d]igitalization was supposed to be an equalizer of access, opportunities and resources, the condition for enhanced community-making and democracy-building. Instead, it prosecutes exacerbating extractive and exclusionary social outcomes and consolidating the totalizing pattern of neo-liberal economic globalization, in the absence of international normative cooperation.[107]

The power and reach of global economic actors exceed the capacity of single jurisdictions and civic movements to ring-fence it.[108] IHRL is no panacea in itself but may wield effective leverage where state protection is weak or non-existent. The mechanisms of international law making may not necessarily prove better placed to resist pressures from powerful business lobby,[109] to which single state and local-government authorities tend to fall easy prey.[110] However, developing in an environment free from the constraints of immediate transposition into domestic law, IHRL could achieve remarkable conceptual strength. This makes IHRL capable of awareness-raising and preparing the ground for desirable improvements, thus compensating for its incomplete transposition into domestic law. By way of example, the conception of an extraterritorial dimension of State obligations developed by the UN treaty bodies and its increasing reception in legal scholarship[111] could contribute to the gradual improvement of labor standards in certain jurisdictions.

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[107] Dentico et al., *supra* note 16, at 86.

[108] *Cf. e.g.,* Arnold & Bongiovi, *supra* note 2, at 290.

[109] This potential may also be questioned given that the modalities of democratic consensus-building at international level bears resemblance to that of national parliamentary assemblies. This renders promoting neoliberal policies at international level as accessible to business lobby as at nation-state level. This activity basically consists in limiting the exercise of political power for egalitarian purposes by obstructing regulation or, as the case may be, superimposing its own regulatory policies. *Cf.* Klare, *supra* note 5, at 6. For an example of such activity, see, e.g. the Joint Statement on Business & Human Rights to the UN Human Rights Council (2011) (https://iccwbo.org/content/uploads/sites/3/2011/05/Joint-Statement-on-Business-Human-Rights-to-the-United-Nations-Human-Rights-Council.pdf by the International Organisation of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee (BIAC) to the OECD, which vehemently oppose introducing directly binding obligations on transnational corporations under IHRL).

[110] Political agency of industry actors may also take a more sophisticated form of supporting public regulation as long as it reinforces the status quo by codifying existing private governance standards. For such agency in the context of the legislative process leading to the adoption of the UK's Modern Slavery Act, see Genevieve LeBaron & Andreas Rühmkorf, *The Domestic Politics of Corporate Accountability*, 17 SOCIO-ECO. REV. 719, 736 (2019).

[111] *Cf. e.g.,* THE ROUTLEDGE HANDBOOK ON EXTRATERRITORIAL HUMAN RIGHTS OBLIGATION, *supra* note 15. The authors postulate shared global (extraterritorial) human rights obligations of both state and non-state actors (Notably Gamze Erdem Türkelli et al., *Conclusions the Future of Extraterritorial Human Rights Obligations, in id.*, at 463, 465-68). *See also* Dalia Palombo, *Transnational Business and Human Rights Litigation: An Imperialist Project?*, 22 HUM. RTS. L. REV. 1 (2022); Evelyne Schmid, *Le champ d'application spatial des législations nationales en matière de conduite responsable des entreprises*, 128 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 853 (2021).

To conclude, addressing gaps in human rights protection requires concerted and coordinated normative activity at all (local, national, and international) levels. Those levels have the capacity to strengthen and complement one another, providing this capacity is unleashed. This may mean the need to revisit some more human-constructed binaries relating to territorial versus extraterritorial responsibilities of public versus private actors in national versus international context.[112]

In a broader perspective, labor law instruments show a special predilection for accomplishing goals of egalitarian redistribution. To achieve such goals in the context of on-demand economy, digital labor markets would need to be scrutinized through a corrective lens of the *labor constitution,* i.e., without the bias of assuming their non-political, win-win narratives.[113] The normative ring-fencing of digital-platforms should concomitantly progress as a bottom-up process. In this respect, the Firework initiative of rating gig economy platforms in terms of the working conditions they offer[114] is an outstanding tool. It not only raises awareness amongst workers and consumers, but also exerts pressure on platform companies with the same weapon that platforms use to exploit.

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[112] *Cf.*Türkelli et al., *supra* note 111, at 465.
[113] For detailed elaboration of the concept, see RUTH DUKES, THE LABOUR CONSTITUTION. THE ENDURING IDEA OF LABOUR LAW (2014). The author argues that the concept brings to light that labour laws and institutions have not only economic, but also political functions. This double role would apply for example to trade unions (*Id*. at 6-7).
[114] *See*, *e.g.*, FAIRWORK, 2021 ANNUAL REPORT (2021), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://fair.work/wp-content/uploads/sites/17/2022/01/Fairwork-Annual-Report-2021.pdf.