

Title: *The necessary recovery of social dialogue to address regulation of the impact of new technologies on workers' rights*

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Contents:

Introduction. I. The required regulation of digital work. 1. Normative instruments. II. Positions of the European social partners. III. How can the advent of a productive model be regulated? Conclusions. Bibliography.

Abstract:

The European Union has urged the European Commission, Member States and social partners to establish rules for an economic sphere that is deregulated or has significant gaps in regulation: digitalization and the platform economy. The European Parliament has addressed a series of recommendations that establish the social guidelines necessary to regulate labor relations in collaborative platforms. Accepting changes in the fundamental nature of Labor Law requires overcoming untouchable axioms that survive in contemporary economic thought, such as the one that links rigid labor regulations to the delay in recovery from the economic crisis, to rising unemployment, and more currently, to a lack of adaptation of labor regulation to technological changes. Once again, changes in labor legislation are required in order to correctly adapt to the digital economy, although it must be emphasized that this “new regulation” cannot be made without social partners.

Key words: platform economy, normative instruments, social partners.

INTRODUCTION

As has been clearly observed in the European Union and in each of its Member States, both globalization and new technologies bring pernicious changes to the traditional articulation of labor relations' regulatory sources. In fact, the economy implies a space where changes in work in the global economy and changes generated by its digitalization converge (RODRÍGUEZ-PIÑERO ROYO and HERNÁNDEZ

BEJARANO, 2017: 15). Long ago it was said that the chaos of globalization had become a “factor of uncertainty” in the very concept of law, had “pulverized” legislative rights, provoking a marked “contractualization of the contents of the law”, as well as a progressive deterioration and technical deformation of legal forms within each of the internal systems (MERCADER UGUINA, 2003: 670-671).

The impact of Economy 4.0 on labor (the digitalization of work) poses a problem of sources of Law, in other words, the regulation of labor conditions. A detailed analysis of the regulatory spheres may become either obsolete or suitable for permanence, despite economic, social, political and legal changes. Permanence is what is presumed. In the end the key lies in the tempering of economic interests, catapulted precisely by the digital revolution, with the defense of workers’ fundamental rights. Nevertheless, the “legal approach to labor digitalization” is being carried out, to a large extent, by means of jurisdictional resolutions, and also by approaches that give prominence to the “digitizing directive power” in disfavor of the basic and fundamental rights of workers (ALEMÁN PÁEZ, 2017: 3-4). That being said, in this paper I will dwell mainly on the how and, more particularly, on the necessary participation of social partners in the pathway to legislation, because legislative reasoning requires politics, but beforehand, it requires fundamental social reasoning.

I. THE REGULATION REQUIRED FOR DIGITAL WORK

The 4.0 economic benefit model is by no means unknown to Labor Law. It closely reproduces that which is used for outsourced labor relations, with the addition that it allows for a maximum reduction in business risk, and the fact that it immediately achieves a legal invisibility of the employee, based on the apparent nonexistence of the business (TRILLO PÁRRAGA, 2016: 68-69). From here a multitude of regulatory possibilities opens up. In short, it seems non-confrontational enough to regard these new scenarios as being unable to operate within a framework of absolute freedom or lawlessness, and therefore require regulatory intervention. The difficulty lies in defining how far to go, or how to arrange these fields in order to achieve the necessary balance between the interests and expectations in play. Consequently, one must analyze whether or not there should be intervention, and if so, how to achieve it and how far reaching it should be (GARRIDO PÉREZ, 2017: 210-213).

Nothing prevents work in the digital economy from being regulated -- be it at the legislative and/or conventional level -- with an aim to establishing those basic rights that make decent work possible. Furthermore, the “flight” from the workplace does not constitute an inevitable process, but can be contained and even regulated. It is a decision of a political nature (SERRANO OLIVARES, 2017: 34). It is already accepted that the “digital law” sector is subject to general regulations, and the discussion has therefore moved to another level, whether or not they should be adapted to suit their particularities; or if it is necessary to elaborate others ad hoc (RODRÍGUEZ-PIÑERO ROYO, 2017: 201). Moreover, with the objective of preventing profit-oriented companies from abusing employment and work platforms, meanwhile engaging in illegal practices, regulation is deemed necessary, with respect to which we can discuss its form and content, but not the need for its existence (CASTELLANO BURGUILLO, 2017: 271).

1. The normative instruments

The European Union has pressed to establish rules for production models that are deregulated or have gaps in regulation¹, asking the European Commission (EC), Member States and social partners for the guidelines necessary to address the management of labor relations in collaborative platforms, and that the recommendations of the European Parliament be put into practice in order to guarantee greater legal security with respect to collaborative business models, and sufficient protection of the rights of workers who provide services through virtual platforms (LÓPEZ DE LA FUENTE, 2018: 549). A clearer and more decisive opinion was shown by the European Economic and Social Committee. They placed special emphasis on the need to redefine the concept of legal subordination in the face of the economic dependence of workers, and guarantee labor rights regardless of the formats the activity adopts².

¹ Resolution of the European Parliament, of 15 June 2017 EU, on *A European Agenda for the Collaborative Economy*. P8_TA-PROV (2017) 0271. See also the Resolution of the European Parliament of 4 July 2017 on *Working conditions and precarious employment* (2016/2221 (INI)), where it asks the European Commission and the Member States to respond to the problems arising in the scope of the collaborative economy and seek the balance between the need for greater protection of workers and the promotion of entrepreneurship and cooperation in the sector.

² EESC Opinion: *A European Agenda for the Collaborative Economy* (OJ 03-10-2017).

The Commission had already affirmed that, in many cases, the transactions of the collaborative economy did not entail a change in ownership, and that they could be developed with or without the intention of obtaining benefits. And so it is, for the collaborative economy is prey to a strong intentional ambivalence. On the one hand, it is presented as a network among equals, and frees spaces for the commercialization of the provision of certain services; but, on the other hand, it also includes business initiatives that make use of virtual platforms aiming for business benefit and equipped with a number of workers (freelancers / subordinates) to provide the service (TRILLO PÁRRAGA, 2017: 76-77).

The inclusion in labor regulations of these atypical forms of work, their coverage by labor legislation, their ‘typicality’, in other words, is essential to avoid becoming precarious employment. New rules may be required so that these new forms of employment are covered and guarantee workers a decent job. The instrument to be used by States is none other than “a set of minimum standards” on: the maintenance of opportunities to enter the labor market; the assurance of minimum wage levels; access to training and promotion; and social protection. In addition, States must ensure that social security systems fulfill their functions in new forms of atypical employment (CASAS BAAMONDE, 2017: 872-875). Furthermore, the fundamental importance of protecting workers’ rights in the collaborative services sector, most importantly, the right of workers to organize themselves and the right to action and collective bargaining in accordance with the legislation and national practice, has been stressed (par. 39 of the Resolution of the European Parliament of 15 June, 2017 on an *European Agenda for the Collaborative Economy*).

In my opinion, social dialogue and consultation must return because they inform the political aspect and management of collective bargaining. The participation of social partners in normative processes [“social democracy”] is nothing new, neither does it entail a transcendental change in the European social model of lawmaking. In the words of the CJEU, compliance with the principle of democracy requires that the peoples’ participation in the process be guaranteed, alternatively, through social partners that celebrated the Agreement to which the Council, deciding by qualified majority, at the proposal of the Commission, conferred legislative support at Community level (Judgment of the Court of First Instance of the European Communities of 17 June 1998,

Case T-135/96, paragraph 89)³. This intervention of social partners turned collective bargaining into a mode of production of labor standards that favored the active participation of citizens via social partners. With this, business and union organizations, together with public powers, were attributed with carrying out a democratic role (CASAS BAAMONDE, 1998: 12-13).

II. POSITIONS OF THE EUROPEAN SOCIAL PARTNERS

The European Commission's promotion of social dialogue forms part of a long, institutionalized process with clear "corporate features", because social partners have reached important quotas of political participation in the Union and have turned into true co-legislators. In 2016 the Commission launched a high-level conference with social partners, which resulted in a declaration that speaks of a new beginning for social dialogue⁴. There they foresaw a strengthening of the capacity of social and economic agents at the national level, and a greater participation in the design of EU policies and regulations. Specifically, this declaration foresees three fundamental lines for the role of the European social dialogue: a more substantial participation of social partners in the European Semester; the reinforcement of the capacity of social partners at the national level; and, a greater participation of social partners in the design of EU policies and regulations (GARCÍA-MUÑOZ ALHAMBRA, 2017: 19). Nevertheless, the problems of collective representation continue to affect all labor relationships, and especially those that are atypical and more precarious, thereby weakening social partners and collective bargaining. (CASAS BAAMONDE, 2017: 873).

The unequal power that national interlocutors have in each of the States, plus the diversity of labor legislation which hardly permits their harmonization has been made known, and now the experience of institutionalized negotiation -or European social

³ The social partners took a fundamental step through their agreement of October 31, 1991, which would be integrated into the Protocol on social policy of the Maastricht Treaty (1992). They declared their willingness to participate in the social governance of the EU, assuming a role of regulators through negotiation, as a complement to the legislative instruments (section 2.4 of the EESC *Opinion on The structure and organization of social dialogue in the context of an authentic Economic and Monetary Union*, 2014 / C 458/01, 19-12-2014). Social dialogue that "plays a fundamental role in strengthening social rights and sustainable and inclusive growth" (paragraph 20 of the preamble of the interinstitutional proclamation on the *European pillar of social rights*, OJ 13.12.2017).

⁴ *A New Start for Social Dialogue*, document signed by the European Commission, UEAPME, Business Europe, CEEP and ETUC, June 27, 2016.

dialogue- can be a meeting point where the European social partners negotiate working conditions for all, thanks to the intervention of community institutions. However, carried to its ultimate consequences, the informal search for “formulas of social consensus” or “prior social dialogue” can be, far from desirable, more a brake than an engine of the construction of social Europe, every time that community legislative action is subordinated to the eventual agreement of the social parties (MONEREO PÉREZ, 1989: 380-381). The truth is that the economic crisis has left social dialogue in a bad place, particularly at the inter-professional level, due to stagnation and paralysis, above all since 2010. At the sectoral level, however, European social dialogue and collective bargaining have shown greater dynamism and resilience and have continued to produce developments (GARCÍA-MUÑOZ ALHAMBRA, 2017: 88-94). When the moment had come for consolidation of social dialogue practices in Eastern Europe, initially encouraged by the Commission and the ILO, it was abandoned when the doctrine of austerity began to dominate. The new processes of “macroeconomic governance” in the countries of the euro zone also led to the “progressive deterioration” of the tripartite social dialogue, being more marked the break with the past in countries exposed to the conditions imposed by the Troika (vid., GUARRIELLO, 2015: 46 a 50).

In Spain a process of deconstitutionalization of work has taken place, and one of the central areas of reference is that of political interlocution, and in this domain union efficacy is nil if it is interpreted as the ability to obtain appreciable results for labor relations. So developing that capacity for exchange with the government in a new political situation is important, but on the condition that it produces tangible results of trade union agreement (BAYLOS GRAU, 2017a: 129). Since 2008, social dialogue has been marked by the consequences of the economic and financial crisis, as well as by the resulting political and institutional problems of the EU, which have materialized amid difficulties in finding consensus among social partners, and between these and European institutions (GARCÍA VIÑA, 2017: 250).

In EU law, the path to implementation of collective relations is proceeding in the direction opposite to what occurred in most of the member countries, where negotiations started at the lower levels, and then moved up to negotiations “in the shadow of the law”. What’s more, social dialogue at EU level should not be confused with the numerous autonomous collective bargaining systems that have been developed

in European countries. These systems are based on freedom of association, which includes the right to strike and the negotiation of agreements between organizations representing workers and employers. Yet, the right of association and the right to strike or the right to lock-out are expressly excluded from the legislative competence of the EU, and European trade unions lack the membership and social power essential for effective collective bargaining. Although, the EU's social dialogue is in line with the idea of the "democratic legitimacy of the Third Way", and in this differs from the national collective bargaining (BRUUN and HEPLÉ, 2009: 53).

The support of social dialogue and the institutional power of social partners does not mean that the representatives of political power - mainly the Commission and the European Parliament - should free themselves of the responsibility for social Europe, entrusting it to the aforementioned protagonists (POCHET y DEGRYSE, 2001: 25). And here we find a finished sample of democratic neo-corporatism and authentic social dialogue -- the social pact or agreement. It is understood as a negotiation process, as a permanent forum for a three-way meeting between the Government, business and union representatives (or most representative). Consequently, the "para-legislative" role that European social dialogue has reached in the decision-making process is still an uncomfortable social agreement, which is why some States remain on the lookout and distrust the power of social partners, which can diminish its normative power; indeed, "governments fear being blocked by veto powers and parties fear being dismantled by the dynamics of social forces" (ROMAGNOLI, 2004: 8). The agreements derived from macro-concertation, whether they have a merely programmatic content or are binding, are nevertheless the product of a political exchange between social agents and the State, which implies a certain "exchanging of roles" (MARTÍN VALVERDE, 1998: 106), without implying a "substitution of parliamentary democracy, rather its completeness through those who also aspire to represent -- by the expansive view of its original mandate -- the interest of all" (FERNÁNDEZ DOMÍNGUEZ, 2015: 21). The Luxembourg judges themselves attributed to social dialogue the role of a substitute for the European Parliament in the legislative decision-making process because it serves to democratize the life of the Union (VENEZIANI, 2011: 258).

The permeability of the labor market to technological advances raises important legal challenges that must be faced by the entire labor community and, although in

Spain we are in a phase of incipient reaction, “the rapid technological progress contrasts with a legal framework that remains anchored in the classic” (SAN MARTÍN MAZZUCCONI, 2017: 302). The fact is that Spanish law suffers from an insufficient system that distorts legal security. Indeed, our regulatory presence appears to be a dispersed, tangential and incorrect system where normative, a-normative, conventional and jurisprudential sources are intermingled (ALEMÁN PÁEZ, 2017: 8). Faced with this deregulated online labor market, it is up to the Social Right to create and maintain the necessary balance between the Digital Economy of Market and Politics, that should be adequately and dialogically oriented under the principles of Social Dialogue (MOLINA NAVARRETE, 2017: 421-422).

III. HOW CAN THE ADVENT OF A PRODUCTIVE MODEL BE REGULATED?

The Spanish lawmaker can intervene through various legal instruments, for example, regulating the use of communication technologies outside working hours, or developing a plan for the use of communication technologies. Legislative development can take references from other countries (such as: an amendment of the Labor Code in France by LOI n° 2016-1088, of 8 August, 2016 introduces a new article dedicated to the protection of workers of virtual platforms, establishing a liability regime for these platforms in the field of work accidents, contributions, professional training, certificates of professionalism and freedom of association; the State of Florida plans to approve a law (CS / HB 221: Transportation Network Companies) to regulate the provision of services of online transport companies, providing conditions for the driver to be considered a self-employed worker and an anti-discrimination protocol; the contract called “zero-hours contract” in English; or the “agile” contract introduced in Italy by Law 81/2017, of May 22) (OTERO GURRUCHAGA, 2018: 74). It can also continue to use the classic protective parameters of Labor Law aimed at guaranteeing the rights of workers subjected to intense precariousness as a result of labor digitalization. In conclusion, it is necessary to regulate all or some of the working conditions and personal rights inherent to workers in digital fields. In this case, what should the procedure be, and who should intervene?

In the era of solid law, legal control belonged to the State, which exercised it through its classic instrument: the peremptory norm. In the era of liquid law, this function has been delegated, and strong market players are opposed to the peremptory norm, they do not need it, which causes a notable increase in legal insecurity (MERCADER UGUINA, 2017: 56). What is certain is that the current transformations require legal devices suited to these systemic transformations and legislative consecrations of new rights, such as digital disconnection. These legal devices would take on the imbalances produced by the technological revolution combined with the implicit explosion of “informationalized psychosocial risks” (ALEMÁN PÁEZ, 2017: 8). To this we must add instability and lack of employment. The new forms of business organization and economic action promoted by technological change and globalization seek an ideological context that subordinates Labor Law and employment to the economy, observing a new relationship in which labor standards must serve as economic management instruments (CASAS BAAMONDE, 2014: 69-88). Immediate protection of workers’ rights is essential, and while these protections are becoming law, they can be reflected in collective agreements or other pacts that make collective bargaining the means of protection in the face of these new realities (MORENO DÍAZ, 2018: 229 and 233).

The spaces where labor law is produced have changed. For example, the Nation-State has been passed over as a central piece in lawmaking (by the cession of sovereignty in regional areas such as Europe), but what that brings to those in the interior of the Nation-State are “important shifts of the public regulatory power to social partners”; in turn, incidences of State self-containment are more frequently moving in the opposite direction, that is, in legal provisions that cancel state or collective regulation on important aspects of work, in what is known as deregulation initiatives (BAYLOS GRAU, 2017b: 490). However, no European country has adopted a model for flexibilization not governed by the State, by labor law, and social partners (CASAS BAAMONDE, 2015: 712). Looking internally at member countries of the European Union, for example in Spain, one observes that “the preponderant figure” in the processes of social agreement is State action, which monopolizes the agreed upon regulative processes with social partners. And in this sought-after connection with collective bargaining, we see that another hallmark of identity is the subsidiary role that

the system of collective bargaining always occupies in these processes for those considered autonomous (BAYLOS GRAU, 2002: 204-205).

When Labor Law is analyzed, it is often conditioned by an ideological bias that views this branch of the legal system as a burden on economic modernization. When the analysis results are on the table, the ideology of technique prevails upon the work, trying to make it invisible, hiding it behind production relations that, according to this interpretation, would be based on the freedom of workers (self-employed workers) (TRILLO PRÁRRAGA, 2016: 81). The labor test must adapt to the new digital environment, which weakens, alters or distorts the classic marks of labor (especially subordination) and -- in the not too distant future -- will allow increasingly independent forms of work. They should not necessarily be excluded from the scope of Labor Law when they could not qualify as self-employed either. That is, when these forms of work, although not subordinated in the current sense, maintain the element of alienation -- alienated in the sense of taking business risk and not in the sense of mere proportion between work and retribution. As we understand it, these jobs should maintain labor qualification (GINÈS i FABRELLAS, y GÁLVEZ DURAN, 2016: 37).

Given the important legal challenges posed by technological advances in the workplace, why not continue using the classic protective parameters of the Labor Law aimed at guaranteeing the rights of workers subjected to intense precarization as a result of labor digitalization? Or aren't these the parameters that have been under consideration by the CJEU to point out a series of anomalies that have put many professional platforms under suspicion of labor? (O'Connor v. Uber Technologies case of March 11, 2015 / Cotter v. Lyft case, of March 11, 2015 / Aslam v. Uber case, of October 26, 2016 / Case Professional Association Elite Taxi v. Uber Systems Spain, SL, of December 20, 2017.) In reality, it is about breaking with that kind of "technological determinism" that invades us, because it is likely that many of the labor definitions and institutions that we have been using can continue to be useful with an appropriate calibration (RODRÍGUEZ FERNÁNDEZ, 2017: 107).

Collective bargaining systems were swept away with the crisis, and the advantages of the sectoral collective agreement have been lost. This occurred in Europe since the approval of the Lisbon Treaty, changing an earlier trend that considered social

dialogue and collective bargaining essential. And this is happening in our country, with legislative interventions of such importance that can only be explained from a perception of collective bargaining as a mere management tool at the service of business interests. Labor Law can not respond to the challenges of digitalization and globalization, nor to the necessity to secure constitutional social rights from the national, state and collective dimensions, without first adapting the instruments, including those of collective self-rule at the supra-national level, raising the level at which national labor law policies are designed. This issue has been raised for a long time in the community dimension. What is needed is a “relocation” of Labor Law and its rules through the creation of levels of supranational decision. In short, some “international standards” of labor rights and rules are required that condition and protect national Labor Rights, avoiding their backward movement in the face of insatiable demands for deregulation of labor markets (RODRÍGUEZ-PIÑERO and BRAVO-FERRER, 2002: 4).

It is true that industrial relations are increasingly “Europeanized”, although the different national systems still preserve their own traits (BIAGI, 2001: 3-14). Therefore, with caution and without pressure, the European Parliament encourages the Commission to regulate new forms of employment in collaboration with social partners “when appropriate”. For example, once the question of Uber drivers’ qualification as employees was resolved, the European Parliament implicitly considers a Directive resulting from social dialogue as the adequate instrument for the regulation of these new forms of employment. The proposal takes an example from the “atypical” Directives and asks the Commission to review different Directives, a revision already partially obliged by the Commission itself in its political guidelines and in the Communication on the European pillar of social rights (see the Directives in CASAS BAAMONDE, 2017: 875-876).

CONCLUSIONS

At this time, some ideological-political-legislative positions have not yet been surpassed. In the case of the digitalization of the economy, productive reality is so hidden as to leave existing labor relations totally in the shadows, the objective being to eliminate fringe businesses by means of a false sharing economy, leaving Legal

relations covered with a magical layer of technological-collaborative innovation, and keeping conflict away from the surface. Herein resides the danger of this revolution -- more pernicious than fictitious -- where the shop window doesn't let you see the back room, a place where the work of both the employed and the self-employed is stored, hidden from the law and legal operators, under penalty of exceeding the limits of freedom of enterprise, now situated at the same level as the protection of data and the right to privacy of the worker. It seems we are up against an ethereal establishment-locus, but (though still a valid personification) that implies the existence of a business organization. There is no strictly defined workplace, but there are people who produce within the scope of an organization that places its product on the market. So the classic triad repeats itself: intermediary entrepreneur, service provider worker, and consumer, client or user⁵. Is the aleph of the collaborative economy really so well hidden and so well camouflaged that it becomes inaccessible to existing laws and to laws that are to come? I do not think so. Surely, through a Directive, the rights and obligations of workers in digital work can be regulated.

European social dialogue is one of the distinctive features of the European social model, which refers as much to the practice of dialogue and bilateral exchange as to a three-way exchange which includes institutions -- from early consultation to the final agreements on pacts -- passing through the various forms of negotiated legislation. According to the European Economic and Social Council: "social dialogue is bipartite, between social partners, and is completed by tripartite agreement with European institutions and political bodies, and by various forms of consultation at European and national level"⁶. The protagonism of social dialogue, in which governments and representative organizations of employers and workers are participating, is being

⁵ There is no other business model that arises in collaborative platforms that create an open market for the temporary use of goods or services often offered by individuals (Communication of the European Commission *A European agenda for the collaborative economy*, COM (2016) 356 final, Brussels, 06-06-2016, pp. 60-61.

⁶ Section 1.2 of the exploratory opinion of the European Economic and Social Committee on *The structure and organization of social dialogue in the context of an authentic Economic and Monetary Union*, OJ 19-12-2014. In this same opinion, with regard to the challenge of a new governance, precise definitions are adopted, as a reminder of the contribution of the social partners to the Laeken Summit (December 2001): "UNICE / UEAPME, CEEP and the CES stress the importance of distinguishing three types of different activities in which the social partners are involved: 1. the tripartite agreement, which designates exchanges between the social partners and European public authorities; 2. the consultation of the social partners, in order to determine the activities of the advisory committees and the official consultations, in the spirit of Article 137 of the Treaty; 3. the social dialogue that determines the bipartite

reclaimed at precisely this moment. It returns to play a key role in the governance of work, accompanied by political agreement⁷.

Accepting changes in the fundamental nature of Labor Law requires overcoming untouchable axioms that survive in contemporary economic thought, such as the one that links rigid labor regulations to the delay in recovery from the economic crisis, to rising unemployment, and more currently, to a lack of adaptation of labor regulation to technological changes. Once again, changes in labor legislation are required in order to correctly adapt to the digital economy, although it must be emphasized that this “new regulation” cannot be made without social partners. It is essential to begin a consensual regulatory process between State actions and social partners, over such aspects as: a) the new “gray areas” in Labor Law; b) the use of traditional parameters when facing new legal challenges (the need to maintain guaranteed rights for workers), and; c) the representation of workers, and the collective rights of workers in the digital economy.

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work of the social partners that derive or not from the official consultations of the Commission based on Articles 137 and 138 of the Treaty» (Section 4.1.1).

⁷ See the Reference Report for the ILO-AICESIS-OKE Conference, November 23 and 24, 2017, on *Social Dialogue and the Future of Work*.

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