Rethinking Labour Law in the Digitalisation Era

Maria Helena Andre summary bullet points for her presentation on:
Panel IV - Policy responses. “Reflections on the future of work”

Outline. Three main themes.

I - How labour law can perform its protective function when it comes to business models based on online apps or software, which are typical of the platform and gig economy

II - Identify and address the effects of AI on existing workers’ rights.

III - Determine the impact of new technologies on the (bargaining) power balance between management and workforce

General suggestions for reflections.

4 areas I would like to cover:

1. The transition to new business models with ever growing demands for flexibility from employers and customers with the emergence of digital labour platforms – what is there for the workers?

The emergence of digital labour platforms have in essence used new technologies to meet an ever growing demand for flexibility:

   Demand by employers that rely more and more on an omnipresent supply of labour that shifts risks associated with fluctuations in demand to workers.

   as well flexibility demanded by customers that expect to receive goods and services almost instantaneously.

It is important to note that technological innovations also bear great opportunities, particularly for those workers who have access and the skills to benefit from digitalisation.

Furthermore, across Europe, workers are actively demanding for greater autonomy over their working time, hopefully this will contribute to a more balanced work life balance.

However, the push to more innovative and flexible labour markets and the emergence of digital labour platforms has, in many instances, not contributed to increasing autonomy, productivity or working conditions but has led instead to greater fragmentations of the work force, lower labour protection including data...
protection and overall a worsening working conditions.

It is therefore paramount that the emergence of new forms of employment should under no circumstances infringe with retaining workers’ rights and benefits linked to a more traditional (and formal) employment relationship.

One of the main issues is that despite having little control over the work performed or direct access to the market, workers in digital labour platforms are mostly categorised as independent contractors, and thus do not enjoy the same rights as employees, including freedom of association or the right to bargain collectively.

Thus, any policy response seeking to regulate the impact of digitalisation on the labour market will have to seek promoting equality on rights for workers amongst these new forms of employment.

Most attempts at national or state level to define an employment relationship by the level of economic risk or level of authority of workers has been challenging in particular with the fast pace of innovation in some sectors as well as legal action taken by some digital labour platforms.

The Covid-19 crisis may pose a new chapter in which we may be able to regain focus of those pillars in the world of work which are required to “build back better”. However, it is crucial to ensure, that those who have suffered greatest during the crisis will also be those that benefit from its recovery.

2. The need for a Universal Labour Guarantee – role of regulators – what needs to be adapted?

The changes to labour markets due to new technologies are disruptive, as it exacerbates the ongoing fragmentation of labour.

The emergence of new forms of employments both in the platform economy and through other forms of outsourcing do not conform in any way with important recommendations which were raised for example by the ILO Global Commission Report such as time sovereignty or a Universal Labour Guarantee, which extends already existing workers’ rights to every worker regardless of employment relationship.

The latter point in particular emphasises the importance of fundamental workers’ rights, a set of basic working conditions such as a living wage, limits on working time and crucially during this pandemic, safe and healthy work places no matter your employment relationship.

And while the Centenary Declaration of the ILO has picked up some of these important aspects in a more general fashion I would like to remind everyone present that this important document constitutes a direct commitment by every Member State that:
“reaffirming the continued relevance of the employment relationship as a means of providing certainty and legal protection to workers, [including] a respect for their fundamental rights”

“harnessing the fullest potential of technological progress and productivity growth, including through social dialogue, to achieve decent work and sustainable development, which ensure dignity, self-fulfilment and a just sharing of the benefits for all;”

We know that in many instances, these conditions are not met, and it is also up to the labour movement to hold government and employers’ representatives accountable to the commitments they have signed in June 2019.

Thus, the transition to new business models will need to capture the important benefits of technological change, without infringing the need to adapt and protect workers in new forms of employment. This dichotomy, and the global nature of many labour platforms, will be a major challenge for regulators, workers’ representatives and employers alike.

Discussions will need to continue at European level as well to ensure that working conditions are not regulated solely by the terms and conditions of the platforms itself but that regulators across the European Union ensure that the sentiments of the Universal Labour guarantee are met.

This includes:

Workers should not be misclassified as self-employed if they are employees in practice.

Workers should have a legally binding way to make their needs and desires heard to platform operators, through union membership, collective bargaining, and, in countries with such structures, works councils and co-determination rights.

Payments and fees need to match the minimum wage polices of the respective countries that the workers are based in. This includes also a clear transparency of the payments and for what services are provided. Time sovereignty should also be implemented, as workers should not be punished for rejecting deadlines or working hours that do not comply with their interests or national/international standards on working time.

The role of the government is also key, now and in the upcoming years, including the emergence of e-government and its implications for the provision of more innovative public services as well as job quality and quantity in the public sector. Data protection has got to be part of the measures.
3. The need for hard law and soft law: the renewed role of collective bargaining

*Hard Law:*

Labour law plays a key role in protecting labour rights and its enforceability should be guaranteed. Reforms to include provisions to protect workers in these new forms of employment should be done in close cooperation with social partners. The work to improve labour law should encompass both, the promotion of ratification of key ILS, in particular FPRW which most European countries have ratified, and the internal legislation advancing on these protections to match the needs for a changing world of work.

Legal protection will also be a challenge to make sure that workers in these new forms of employment I was making reference before, would be protected not only via judicial litigation but also by other means of soft law mechanisms either public or private.

*Soft Law:*

We all know that judicial processes do have also their “cons” when it comes to justice delivered. In many countries, judicial processes allow diverse forms of appeal and in many examples court cases can last several years.

The famous phrase “delayed justice is injustice” has a great component of truth, even more when we deal with MNEs that can include even lost trial costs to pay in “X” amount of years as part of their financial scenario.

In many cases, MNEs can be brought to non-judicial processes, either state-based or private-based in order to promote effective responsible business conduct regarding the respect for labour rights. The human rights due diligence demands companies to identify, prevent, and/or address negative impacts of their operations, of course in our interest is clearly the impacts on the effective respect for labour rights.

Many different processes and instruments can be part of the “due diligence” responsibility that companies should implement but they are voluntary, in many cases as well it is just insufficient.

In light of this, many countries are promoting the “mandatory due diligence” and during the German presidency for the EU, there will be many concrete actions towards this.

*Collective Bargaining Agreements:*

The role of contractual arrangements at all relevant levels, in particular collective bargaining agreements will be essential to prevent violations to labour rights and regulate working conditions for these workers and will have to further adapt to the challenges of globally acting platforms and difficulties in determining both the
workers and employers involved. No need to insist on the importance of information and consultation, works councils...

We all know that many CBA, once registered in the Labour Administration get the enforcement of a binding instruments.

CBA would need to be creative enough to envision the near and medium term future scenarios where workers may end up being caught in a diversified employment relationship and provide protection broad enough to cover them.

4. Trade unions in transition – are they ready to assume new responsibilities.

Collective bargaining should be an important mean to influence in the new business models.

The ILO Centenary Declaration calls for strengthening the capacity of its tripartite constituents first and foremost by encouraging the development of strong and representative social partner-organizations.

Trade unions have enormous challenges ahead of them. Violations of trade union rights are widespread. Technological and economic changes affect the nature and type of jobs and with that the potential of organizing and representing workers both in the North and in the Global South.

Trade unions have to further assess their organizing and advocacy strategies. These type of questions should be answered:

- How to strengthen the employment relationship while ensuring adequate protection to all workers, including living wages and safety and health at work? Efforts have to be made to organize and represent new forms of employment including those workers that fall outside the employment relationship or workers in the informal economy. Think for instance of the Deliveroo or Uber drivers.

- How to convince young workers to join unions and integrate them in the union's governance structure?

- How to promote further gender equality in the world of work? Whereas some trade unions are progressing on the gender equality agenda, more has to be done to ensure equal opportunities, equal participation, equal treatment and equal remuneration.

- What can be learned from existing experiences to ensure access to lifelong learning to all workers, to support working people through the transitions they face throughout their working lives and to ensure universal access to adequate social protection?
How to broaden the union agenda to socio-economic and environmental issues that all affect the world of work, for instance when dealing with trade, industrial or macro-economic policies, or in the context of the Sustainable Development Goals?

And how to replicate and upscale innovative and successful union strategies to weigh in on policy making and sustainable enterprise behavior in a globalized economy?

The ILO Future of Work discussion is an extraordinary opportunity for all of us to build the future that we want, putting the dignity of workers at the centre of the debate. To do so it is vital that strong and representative trade unions play an active role in shaping the political process and making the voices of workers heard. COVID 19 has made all this more urgent!