

## Labour Law Beyond National Borders: Major Debates in 2017

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**Abstract:** The present article will provide an overview – the sixth of its kind since 2013, when the first “edition” was published by *Lavoro e diritto* and *Revue de Droit comparé du Travail et de la Sécurité sociale* – on the main topics analysed in the majority of the journals belonging to the International Association of Labour Law Journals (IALLJ)<sup>1</sup> throughout 2017. More specifically, the article reviews the issues addressed in twenty-four out of the Association’s thirty member journals. The remaining journals were not examined chiefly because of accessibility or language barriers<sup>2</sup>. As regards the subjects selected for consideration, the authors decided to focus on three topic groups that reflect the major interests shown by IALLJ scholars in the large number of articles under review. This overview is thus divided into three sections: 1) Towards an inclusive working society?; 2) The transformations of work: new challenges and new risks “test” the law; 3) Perspectives for collective labour law.

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Čepravje ta študija rezultat združenih intelektualnih prispevkov vseh avtorjev, želimo izpostaviti, da je § 1 napisala Daniela Izzi, § 2 Mariapaola Aimo in § 3 Rudolf Buschmann. Avtorji se zahvaljujejo kolegom (Gian Guido Balandi, Marialaura Birgillito, Silvia Borelli, Matteo Borzaga, Isabelle Daugareilh, Sebastián de Soto Rioja, Manuel Antonio García-Muñoz Alhambra, Eva María Hohnerlein, Eri Kasagi, Barbara Kresal, Sandrine Laviolette, Steven Willborn), ki so pomagali razvrstiti in prevesti vse indekse za upoštevane strokovne revije. Ta prispevek je namenjen spominu na našo kolegico Sandrine Laviolette.

<sup>1</sup> For a complete list see [www.labourlawjournals.com](http://www.labourlawjournals.com). Besides, the list of all journals’ abbreviations mentioned in this article follows at the end of the chronicle.

<sup>2</sup> We refer to the following journals: *Analisis Laboral* (Peru), *Industrial Law Journal* (South Africa), *Labour and Social Law* (Belarus), *Labour Society and Law* (Israel), *Pecs Labour Law Journal* (Hungary) and *Russian Yearbook of Labour Law* (Russia).

**Key words:** work, labour law, collective labour law, precariousness, digitalization

### **Delovno pravo preko nacionalnih meja: glavne razprave v letu 2017**

**Povzetek:** Članek predstavlja pregled - šesti te vrste od leta 2013 - ko sta *Lavoro e diritto* in *Revue de Droit comparé du Travail et de la Sécurité sociale* pripravila prvo »izdajo« o glavnih temah, ki jih je analizirala večina publikacij včlanjenih v International Association of Labour Law Journals (Mednarodno združenje revij za delovno pravo) IALLJ <sup>1\*</sup> v letu 2017. Natančneje, članek obravnava vprašanja, ki so bila obravnavana v štiriindvajsetih revijah od tridesetih članic Združenja. Preostale revije niso bile preučene predvsem zaradi nedostopnosti ali jezikovnih ovir. <sup>2\*</sup>

V zvezi s temami, ki so bile izbrane za obravnavo, so se avtorji odločili, da se osredotočijo na tri tematske sklope, ki odražajo glavne interese, na katere so opozorili znanstveniki IALLJ v velikem številu člankov, ki smo jih pregledali. Ta pregled je tako razdeljen na tri dele: 1) na poti k vključevalni družbi dela; 2) preobrazbe dela: novi izzivi in nova tveganja, ki »preizkušajo« pravo; 3) perspektive kolektivnega delovnega prava.

**Ključne besede:** delo, delovno pravo, kolektivno delovno pravo, prekarost, digitalizacija

Summary: 1. Towards an inclusive working society? – 1.1. The ongoing pursuit for gender equality. – 1.2. Older and disabled persons in the labour market. – 1.3. The widespread need for work-life balance. – 1.4. Multi-ethnic societies and work: the issue of the Islamic headscarf and the challenges of immigration. – 2. The transformations of work: new challenges and new risks "test" the law. – 2.1. Atypical work and precariousness. – 2.2. Between employment and self-employment. – 2.3. Work on platforms in the digital age. – 2.4. ICT and workers' rights: right to disconnection and right to privacy. – 3. Perspectives for Collective Labour Law. – 3.1. Dynamic structures of collective workers' representation. – 3.2. Collective Bargaining. – 3.3. Right to strike.

<sup>1\*</sup> Za popoln seznam si oglejte [www.labourlawjournals.com](http://www.labourlawjournals.com). Na koncu prispevka je na voljo seznam vseh kratic revij, omenjenih v tem članku.

<sup>2\*</sup> To se nanaša na naslednje revije: *Análisis Laboral* (PerPerù), *Industrial Law Journal* (Južna Afrika), *Labour and Social Law* (Belorusija), *Labour Society and Law* (Izrael), *Pecs Labour Law Journal* (Madžarska) and *Russian Yearbook of Labour Law* (Rusija).

## 1. TOWARDS AN INCLUSIVE WORKING SOCIETY?

Numerous essays published in the journals under review dealt with different aspects of the efforts to build more inclusive societies, an ambitious aim in which labour law and social security systems at both national and international levels are deeply involved.

Among the steps required in order to move in this direction, an important role is undoubtedly played all over the world by anti-discrimination rules which seek to overcome the problem – widely experienced in the labour sphere – of the adverse treatment of individuals belonging to groups with certain “risky” characteristics. Indeed, a large number of 2017 IALLJ articles focussed on specific sections of anti-discrimination law, considering the negative impact on employment of gender, age, disability, race and religion (see §§ 1.1, 1.2 and 1.4), while other papers investigated the related theme of work-life balance, which was also examined from the perspective of gendered, ageing and incompletely healthy working societies (see § 1.3).

Attention was also devoted to the more general debate about the current obstacles to the legal fight against the various kinds of discrimination which have prevented substantial equality at work from being achieved. As the dialogue on this topic between scholars in different common law countries has shown, there are procedural or institutional shortcomings even in nations with long-standing experience in anti-discrimination protection such as the USA and UK. Even more far-reaching difficulties have emerged on this front in Australia, notwithstanding the legal reform of a few years ago that enabled workers to bring a claim alleging discrimination beyond the limited context of termination of the employment<sup>3</sup>.

From the European standpoint, the «transformative effect» that the EU has had on UK anti-discrimination law is of particular interest in this international discussion. This effect was largely the result of the «purposive and right-centred approach» developed by the Court of Justice, whose «leavening influence» may

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<sup>3</sup> Chapman, Gaze and Orifici (2017) described the disappointing results produced in Australia by the 2009 amendment of the Fair Work Act, which had been perceived as an opportunity to provide better access to remedies for workplace discrimination and to reduce unlawful adverse treatment. On the specific problem of the subjective approach which has not been completely abandoned in the judicial management of workers' claims against discrimination and adverse action, see Meagher (2017) and Shi (2017).

survive the rupturing impact of Brexit (O'Cinneide 2017, p. 236)<sup>4</sup>. Indeed, in the old continent the debate on the building of inclusive working societies also addressed many questions relating to the uncertain identity of the European Social Model in the time of Brexit (see Ales 2017, Kenner 2017, Weiss 2017 and, with a specific focus on the European Social Pillar, Laulom, Lhernould 2017, Lörcher 2017).

### 1.1. The ongoing pursuit of gender equality

Not surprisingly, the old but still unresolved problem of gender inequalities continued to attract attention in IALL journals in 2017.

As befits its global dimension, the classical question of pay equity received worldwide consideration. The various national jurisdictions take regulatory approaches that show many areas of difference (Smith, Layton, Stewart 2017), including the tests utilized to assess whether the objective of equal remuneration for work of equal value is met (here, the choice of comparator is a crucial issue: see Smith, Stewart 2017), whether they permit individual or collective complaints, and the scope of remedies available to applicants<sup>5</sup>.

By contrast, reflections on maternity rights and anti-discrimination protection of working women during pregnancy, the postpartum period and breastfeeding have been more Eurocentric (Nebe, Graue 2017, Rodríguez Escanciano 2017, Serrano García 2017; but also, from a particular historical perspective, Ballestrero 2017). This discussion (concentrated in Spanish journals, but present also in Germany, where a new act on maternity protection was about to come into force) also considered the new legal questions posed by *in vitro* fertilization (Cardona Rubert 2017) and surrogate maternity (López Insua 2017).

An interesting essay concerning the prevention of women's occupational risks, in general rather than only in the maternity sphere, emphasized the urgency of overcoming the traditional androcentric standards adopted by regulations on

<sup>4</sup> As emphasized by O'Cinneide (2017), however, a positive influence on the evolution of British equality law has also been exercised also by the ECHR. More in general, on the relevance to labour law of the prohibition of discrimination established by Article 14 of the Convention see Sychenko (2017), p. 67 ff.

<sup>5</sup> From a different angle, for the potential of International Free Trade Agreements for improving the labour conditions of working women in global supply chains see Brooks (2017).

workers' health and safety, in view of the significant gender differences that have come to light in biomedical studies (Garrigues Giménez 2017). This revision could be considered a striking example of application to labour law issues of the feminist method, which it would be reductive to interpret as stemming solely from gender equality concerns, overlooking its broader conceptual utility for the social organization of work and its regulation (as highlighted by Conaghan 2017).

## 1.2. Older and disabled persons in the labour market

The specific demands that an ageing population poses for labour law and social security systems were the central issue in several articles published in the IALL journals, especially but not exclusively in those emanating from Europe (on the situation in Japan, for example, see Inamori 2017).

The authors focussed on the different tools that may prove useful in ensuring longer working careers and improving elderly people's chances of remaining in employment, even after retirement age. These tools include prohibiting age discrimination and strengthening the legal measures for preventing it (Vaitkeviciute 2017, examining the Finland's advanced regulatory model), as well as incentives such as employer-provided training programmes (see Berg, Hamman, Piszczeck, Ruhm 2017 and, with somewhat different conclusions, Gommans, Jansen, Stynen, Kant, De Grip 2017). Older persons' employment, in contrast with the "lump of labour" theory that in past decades encouraged the expansion of early retirement policies, is found to be positively correlated with youth employment (for an in-depth analysis see Jeong 2017). There are thus no scientific reasons to oppose labour market protections for both older and younger people (on the latter, see Rodríguez-Piñero y Bravo-Ferrer 2017).

Demographic changes, on the one hand, and the stimulus provided by the UN Convention on the Rights of Persons with Disabilities (ratified by the EU in 2010), on the other, may explain IALLJ scholars' widespread interest in disability and the related anti-discrimination provisions.

The evolution in the concept of disability called for by the Convention and reflected in recent CJEU case law involving situations of temporary work incapacity and long-term illness has put significant pressure on traditional labour rules, especially those on dismissals (Dueñas Herrero 2017, Fernández Martínez 2017, Moreno Gené 2017). This pressure is also the result of the employer's

obligation to provide reasonable accommodation for disabled workers: an obligation that plays a crucial role in the route towards full inclusion and equality for people with disabilities, and is analysed chiefly in terms of the extent to which employers are required to reorganise the workplace (Purdue 2017, Harmgardt 2017, Spinelli 2017).

Obviously, legal efforts to promote the inclusion of disabled persons in the workplace may contribute significantly to reducing public expenditure on disability benefits (Jakab, Hoffman, Konczei 2017, Gorelli Hernández 2017). Even if classical active labour market policies are still the prevalent answer to the need to help disabled people return to work, a number of innovative «inclusive human resource management» policies have attempted in recent years to involve employers in this challenging task (Borghouts-van de Pas, Freese 2017).

### 1.3. The widespread need for work-life balance

A very lively debate involving researchers from all over the world revolved around the multifaceted topic of reconciliation of work and private life. Here, private life mainly means family life and thus involves the workers' role as caregivers for dependent relatives: children, primarily (see, *inter alia*, Bernstein 2017 and García Romero 2017), but also increasingly the elderly, as a result of the demographic changes (as stressed by Inamori 2017 and Kurzynoga 2017).

The authors contributing to this debate advanced a very wide range of proposals, starting from the idea that work-life balance is not only an individual responsibility but requires support from policies at different levels<sup>6</sup>. The extreme variety of the issues addressed in the articles – from the more classical questions of working time arrangements and family leaves (Basterra Hernández 2017, De Groot 2017b, Selberg 2017, Vermeylen, Parent-Thirion, Wilkens, Cabrita 2017), to the unusual link established between work-life imbalance and short, irregular and poorly paid jobs (Warren 2017, Reilly, Masselot 2017) – makes it difficult to convey their essential contents or conclusions in a few words. However, some general points should be mentioned, such as the suggestion that enterprises can play an important role in encouraging caregiver employees in their «management

<sup>6</sup> Specifically, the intention to «close the gap between research and policy by bringing together the academic findings from several disciplines» inspired the volume edited by De Groot (2017a), which includes 16 articles by 33 authors.

of care services and division of duties» (Yajima 2017), as well as the need to address the low level of take-up for care leaves provided by legislation and the associated risk of job quitting that has been found in Japan (see respectively Inamori 2017 and Ikeda 2017).

These points are in line with the need to overcome the conception of the ideal worker as one who has no family responsibilities, which continues to prevail in law and is reinforced on a daily basis by organizations (Bernstein 2017, Matzner-Heruti 2017). A more realistic and sustainable normative model would certainly be helpful to working women and mothers, whose parental duties still curtail their opportunities on the labour market and in professional careers (as noted by Kresal 2017 and, with specific regard to the adverse consequences of the decision to become a mother, by Turki 2017 and Özçüre, Eryigit, Demirkaya 2017). Less obviously, this conceptual revision would significantly benefit men and fathers, rejecting the masculine imperatives associated with the male breadwinner model, whereby deviations from men's traditional gendered roles jeopardize both their work status and their manly façade (in this connection, see Matzner-Heruti 2017; on the problematic interplay between masculinity and caregiving see also Saito 2017).

#### **1.4. Multi-ethnic societies and work: the issue of the Islamic headscarf and the challenges of immigration**

Considering the ongoing increase in labour migrations and their global relevance, it is not surprising that in 2017, as in previous years, a sizeable number of IALLJ articles dealt with the multiple legal implications of this phenomenon, which is undoubtedly challenging from many points of view. However, a new topic associated with our multi-ethnic societies began to command attention in 2017, viz., the conflict between employees' freedom of religion and employers' interest in pursuing a policy of neutrality triggered by wearing Islamic headscarves in the workplace.

Though the issue of protection from religious discrimination is also debated outside Europe (e.g., in Canada, where – again focusing on the dress of Muslim women – the model of multiculturalism adopted for diversity management is criticized by scholars for opposite reasons: cf. Narain 2017 and Lampron 2017), it is in the old continent that the discussion became particularly animated,

and not by chance. In the *Achbita* and *Bougnaoui* judgments – two cases in which Muslim women were dismissed because they refused to remove their headscarves when coming into contact with customers – the CJEU had for the first time to address the delicate problem of the limits of the employees' rights to manifest their religion in the workplace. Following an approach largely based on human rights thinking from the ECtHR (whose achievements in protecting freedom of religion are actually rather modest: see Sychenko 2017, p. 121 *ff.*), the CJEU ruled that company policies prohibiting headscarves do not constitute direct discrimination on the basis of religion as banned by Directive 2000/78. The Court's reasoning and conclusions gave rise to many critical assessments (see; Busschaert, De Somer 2017, Dorrsemont 2017, Vickers 2017; from different perspectives Bianco, Cadène, Wolmark 2017), as well as widespread regret for a missed opportunity to serve both the equality aims of antidiscrimination law and the cause of European integration. Cases of dismissals or resignations of employees belonging to religious minorities, indeed, are by no means rare in the EU, as attested by a comparative investigation of the impact of these situations on claims to unemployment benefits (Alidadi 2017).

Another wider subject involving competing visions of an inclusive society is the management of economic migration flows and the alien workforce: a global phenomenon which, as was mentioned earlier, proved to be of particular interest to experts in labour law and social security.

Though international migration law (whose utility and current shortcomings are discussed by Servais 2017a) promotes respect for the rights of immigrant workers, national regulations and practices often contradict this trend (Elorza Guerrero 2017). Indeed, many articles investigated the interaction of migration controls and labour rules, focusing on the specific situations of different countries around the world, including Australia, Canada, South Korea and Japan (see respectively Wright, Clibborn 2017, Fudge, Tham 2017, Chung, Hosoki 2017) and, in Europe, the United Kingdom, Ireland and Spain (see respectively Bales 2017, Murphy 2017, Elorza Guerrero 2017). However, the most extensive analysis was undoubtedly centred on Italy, the state with the most critical geographical position in the EU, where IALLJ scholars attempted to clarify the protection granted to immigrant workers in the light of the principle of equality between *cives* and *non cives*, taking the multilevel legal framework into account (see above all Garilli 2017, McBritton 2017, Bologna 2017). In general, the different national regulations on temporary labour migration attracted a good

deal of attention (Ariyawansa 2017, Griffith, Gleeson 2017, Janda 2017, Martin 2017, Papa 2017), while the scientific debate did not neglect the particularly vulnerable condition of irregular migrant workers (Calafà 2017, Faraldo Cabana 2017, Monereo Pérez, Vila Tierno 2017).

## **2. THE TRANSFORMATIONS OF WORK: NEW CHALLENGES AND NEW RISKS “TEST” THE LAW**

Sweeping changes in the labour market – driven by the technological and organizational innovation associated with the so-called digital world, as well as by demographic, geographical and environmental factors – have brought new business models, new forms of work organization and new working relationships to the fore.

On this general subject, the 2017 IALLJ articles address many heterogeneous sub-topics, and some of them are of particular interest for this overview. They can be divided into four main areas: the first deals with the issue of non-standard work and precariousness; the second focuses on the “grey” area between employment and self-employment and is thus related to the third, which deals with the role of labour law protection for the emergent “digital workforce”; while the fourth and last topic addresses the impact of the expanding use of ICT on workers’ rights.

### **2.1. Atypical work and precariousness**

In 2017, as in recent years, a number of articles in IALLJ member journals dealt with the issue of non-standard work and precariousness, which has been broadly discussed in past overviews.

As we know, the standard employment contract (defined as a stable, open-ended and direct arrangement between a dependent, full-time employee and his/her unitary employer) has been the prevalent model for regulating work, while non-standard forms of work have been presented as exceptions to the norm. As such, they have often received different treatment: the debate on how to adjust existing regulation to keep pace with the rise and spread of the non-standard workforce worldwide continued in 2017 IALLJ journals, both in general

(Casas Baamonde 2017a, A. O. Goldín 2017, Treu 2017a) and with regard to issues relating to social security and collective rights. Regarding social security guarantees, different flexible forms of work may put workers at a disadvantage: either in acquiring entitlement to social insurance benefits, as their instability may prevent them from reaching the required minimum period for accessing certain benefits such as unemployment insurance or a full pension, or because their lower and slower-growing wages may be reflected in the level of these benefits (see Schoukens, Barrio 2017, who addressed the need to adapt the basic principles of social security to the atypical features of non-standard work). Concerning the regulation of collective rights, many of the existing limitations and restrictions on the freedom of association, the right to collective bargaining and the right to strike (such as antitrust bans on collective bargaining, mandatory strike ballots, the distinction between political and economic strikes, etc.) disproportionately affect non-standard workers, putting the meaningful exercise of collective rights at risk. In this connection, it has been argued that existing restrictions and limits on collective rights must be revised to ensure that they are compatible with a human rights approach (De Stefano 2017a).

Regarding the so-called atypical work relationships, IALLJ scholars most frequently examined fixed-term contracts on the one hand, and temporary agency work on the other (apart from the so-called platform work which will be examined below, in § 1.4). Some authors have also considered other non-standard forms of employment, such as seasonal work (above all of non-EU migrant workers; see Papa 2017, Zoeteweij-Turhan 2017, Janda 2017), “zero hours contracts” or casual work in the UK (Sanders 2017, Davies 2017), occasional work in Slovenia (Scortegagna Kavčnik 2017), “association in participation” contracts in Italy (Allamprese 2017), as well as some traditional forms of precarious work such as domestic work in Spain (García González 2017, García Testal 2017).

With regard to fixed-term employment, the majority of articles were published in Spanish journals or in journals of EU-wide interest.

First, some of the articles under review analysed the Framework Agreement on Fixed-term Work, later transposed into Council Directive 1999/70, discussing CJEU case-law (Krebber 2017) and questioning, in particular, whether the Directive has achieved its goal of bringing about the approximation of the domestic laws on successive fixed-term employment contracts in the EU Member States (Kamanabrou 2017). In the latter connection, Kamanabrou’s comparative study of fifteen Member States showed that, despite substantial differences in the

details, the level of protection in the Member States is essentially comparable. Nevertheless, protection against abuse of successive fixed-term contracts is still rather low, but this is due to the fact that the Framework agreement can offer protection to workers only within the limits of its provisions.

Second, the debate in the Spanish journals concentrated on the current regulation on fixed-term contracts in Spain (where the temporality rate is very high, i.e., 26.3% in 2016), emphasizing the inadequacy of this regulation and calling for its urgent reform (Sala Franco, López Terrada 2017). The law does not distinguish, as it should, between the temporary contracts that meet real seasonal and conjunctural needs of the production system and their improper, fraudulent or abusive use as an unwarranted technique of contractual flexibility (Casas Baamonde 2017b, A. O. Goldín 2017). More specifically, several authors focused on the CJEU ruling in the *De Diego Porras* case and its "sequel" in Spain. Here, the Court of Justice declared that the difference between the termination regime for temporary replacement contracts and permanent contracts is discriminatory inasmuch as compensation is provided only for the latter. This judgement set off a real "tsunami" (Sala Franco 2017) in Spanish judicial doctrine and raised questions about whether the *De Diego Porras* decision applies to other temporary contractual arrangements (López Hernández 2017).

Third, the IALLJ journals also devoted space throughout 2017 to the development of fixed-term employment in connection with certain legal systems (see, for example, Debono, Marmorà 2017) or specific categories of workers, such as public and private managers (Monda 2017), construction workers (Dechristé 2017) and researchers (Ferrara 2017).

With regard to temporary agency work, various authors provided detailed discussions of the German reform that came into force in 2017 (Hamann, Klengel 2017a; Hamann, Klengel 2017b; Ulber 2017; Maul-Sartori, Remy 2017), questioning its compliance with the Temporary Agency Work Directive 2008/104 and underlining such critical points as the prerogative granted to the collective parties to diverge from the maximum period of time for hiring out employees as well as from the basic principle of equal treatment between temporary workers and comparable permanently employed workers (Ulber 2017; on the implementation of the principle of equal treatment see also Kresal Šoltes 2017).

## 2.2. Between employment and self-employment

One can certainly say that «determining whether a person performing work falls within the scope of the notion of “employee” has become increasingly difficult due to the complexity of work arrangements in the grey area between employment and self-employment» (Schoukens, Barrio 2017, p. 309).

With regard to this topic, many articles in the 2017 IALLJ journals examined the national legislation and case-law in many areas of the world.

The Italian regulation of employment and self-employment attracted considerable attention, especially in the Italian journals, where essays focused mainly on the legislative reforms introduced in 2015 and 2017. The 2015 reform extended the protection afforded to classic subordinate employment to the so-called “employer-organised work” (see Santagata 2017, Martelloni 2017, Mezzacapo 2017, Riccobono 2017, Bini 2017), while in 2017 a new law on self-employment introduced new protective measures for independent contractors which are deeply rooted in contract law (Perulli 2017a called this reform «the return of self-employment to contract law»; see also Santoro-Passarelli 2017, Giubboni 2017, Martelloni 2017).

The German situation was also studied, discussing the legal position of “solopreneurs” (i.e., the growing number of entrepreneurs who do not employ other persons) to understand ways of providing them with more protection, and more generally analysing the notion of employee under § 611a *BGB* as amended in 2017 and the failed attempt to introduce the first indicators in the German Civil Code to be used by the courts when determining whether an employment relationship exists (Waas 2017, Wank 2017). Employee status is a particularly sensitive area in most countries. In the UK, for instance, studies examining the problem of “availability”, when workers are not actively engaged in core work tasks at the workplace but are not fully at liberty either, were of particular interest (Davies 2017)<sup>7</sup>, while in Spain a reform regarding self-employed work was introduced in 2017, resulting in a rather contradictory regulation (Alfonso Mellado, Fabregat Monfort, Pardo Gabaldón 2017)<sup>8</sup>.

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<sup>7</sup> See also Böttcher (2017); on the question of the employment status of limited liability partnership (LLP) members, see Berry 2017.

<sup>8</sup> See also Todolí-Signes (2017a) on the issue of false self-employed workers in Spanish franchises, and Duval, van Maren (2017) on the labour status of professional football players in the EU.

The question is also open in the US: Treu, for example, analysed American case-law concerning the status of workers for the so-called platform economy firms (see below, § 1.3), arguing that the remedial approach adopted by common law may also be interesting for other judges and lawmakers because it is better able than the traditional classifying approach to identify the set of protections and rights applying to these “platform” workers (Treu 2017b). In this regard, the fact that platforms provide companies with the attractive opportunity to divide permanent tasks into internet-based “microtasks” which can be offered to an indefinite number of interested parties could bring about a further increase in self-employment in the near future (Waas 2017). Most of these workers will still be precarious and vulnerable: what is new about the platform economy is the development of technologies which enable companies «to claim not to employ those that work for them» and create «a pseudo employment market where workers are said to be independent self-employed receiving work from and providing services via a digital platform created by the company» (Sargeant 2017; see also Todoli-Signes 2017b). However, workers still need protection, and throughout 2017 many authors debated how labour law could answer this need.

### **2.3. Work on platforms in the digital age**

In all IALLJ journals, there was extensive debate on the role of labour law protections for the heterogeneous “digital workforce” arising from the new economy (interchangeably called the “platform”, “gig”, “sharing”, “on demand” or “collaborative” economy, among other names), where the use of digital platforms to perform or organise work is growing apace. Interest in how labour law changes in the platform economy has spread among scholars, who wondered (in many articles and in several special issues of IALLJ journals such as Italy’s *RGL* and Spain’s *TL*) how labour law can rethink its borders and adapt its protection to the «challenge of “uberisation”» (Fabre, Escande-Varniol 2017; see, for a general labour relations perspective on these major changes, Villalon 2017a).

There has been litigation around the world on the employment classification of workers in the “gig economy” (González Ortega 2017, Pasquier 2017, Sargeant 2017, Ratti 2017). It is not surprising that many articles in IALLJ journals dealt with the recent suits brought against the colossus Uber by its drivers and which led to some interesting judgments (in particular by courts in the UK, in the US

and by the CJEU: see Auriemma 2017, De Stefano 2017b, Prassl 2017, Trillo Párraga 2017).

For employment law, a very important question is whether platform workers count as employees (see Perulli 2017b, Todoli-Signes 2017, De Stefano 2017b), and whether the platforms can be held responsible as employers (see Prassl, Risak 2017). The matter has also been tackled by the EU Commission's Communication on "A European agenda for the collaborative economy", which warned that the more flexible work arrangements generated within the collaborative economy create uncertainty as to the applicable rights and the level of social protection. However, the guidance that the Communication provides to EU Member States (particularly on how the traditional distinction between self-employed and workers applies in the collaborative economy) has been found to be quite useless (Perulli 2017b; see also Ratti 2017, Casas Baamonde 2017b, Rodríguez-Piñero Royo 2017).

Chinese courts and lawmakers have also addressed issues that are directly or indirectly relevant to determining the status of drivers in the ride-hailing sector, as reported by a scholar who suggested adopting a purposive approach to the existing criteria in Chinese labour law for establishing the status of these workers, arguing that such an approach will be more useful for addressing the basic question of whether drivers should be protected than creating new categories of employment classification would be (Zou 2017; for the US, see Treu 2017b). Studies of the distribution of risks between platforms and platform workers were also of particular interest and suggested that the social rights of workers who perform their work using digital platforms should be determined on the basis of their social risk exposure, independently of how they are classified in their contract (Loi 2017). Special attention was also devoted to the issues that have arisen in the legal framework for industrial relations, collective bargaining and strikes (see Faioli 2017), and to the role that could be played by trade unions (Engblom 2017, Mensi 2017).

## **2.4. ICT and workers' rights: right to disconnection and right to privacy**

Technological innovation is increasingly affecting the "world of work" and aspects such as working time and place, health and safety, instruments of employer control, etc. (Villalon 2017b, Sánchez-Rodas Navarro 2017). Accordingly, the

articles which, from different perspectives, addressed the impact of information and communication technologies on two sensitive workers' rights (the so-called right to disconnection and the right to privacy) will be grouped into two subtopics.

It is not surprising that the majority of the IALLJ articles on employees' right to disconnection, i.e., the right to be unavailable outside of normal working hours, focused on recent French and Italian legislation on the matter. The French "droit à la déconnexion" introduced from 1st January 2017 by the "Loi Travail" (amending the French Labour Code), which required companies of a certain size to negotiate the right to non-availability with the representative unions, was analysed in detail in some interesting articles (Cialti 2017; Durlach, Renaud 2017, Molina Navarrete 2017, Senčur Peček 2017). In addition, comparisons were made with the Italian 2017 regulation on "lavoro agile" or "smart work", viz., work performed partly outside the employer's premises through the use of technological tools, which – more than traditional forms of work – raises the question of the distinction between working time and rest periods and hence the workers' right to disconnect (see the *DRI* special issue on "lavoro agile", particularly Dagnino 2017; see also Casillo 2017, Allamprese, Pascucci 2017).

From a second perspective, technological innovations can also affect the inviolable rights of the human person, especially the employee's privacy and dignity: we well know that, with firms' expanding use of new technologies, the worker is potentially subject to constant, delocalized, indiscriminate and increasingly pervasive control (Colapietro 2017, Cervilla Garzón 2017). IALLJ scholars devoted special attention to the ECtHR Grand Chamber judgment in the case of *Bărbulescu II v. Romania* held in September 2017, in which the Strasbourg Court, examining a case concerning the monitoring of an employee's electronic communication by a private employer, found a violation of Article 8 of the Convention and reversed the previous 2016 Chamber judgment (Gallardo Moya 2107, Ancel 2017). In particular, several authors in Spanish IALLJ journals compared ECtHR case-law with that of the Spanish Supreme Court and Constitutional Court, particularly with regard to the scope of employees' information rights (Valdés Dal-Ré 2017, Terradillos Ormaetxea 2017, González Biedma 2017a), while other authors discussed the need for Spanish privacy legislation and case-law to comply with the EU General Data Protection Regulation (GDPR), which came into force on May 25, 2018 (Goñi Sein 2017). The issue of monitoring employees in the workplace is also quite problematic in other countries, such as Italy and the US (see, respectively, Aniballi 2017 and

Ancel 2017) because of the difficulty in balancing the opposing interests at stake and securing adequate protection of any employee within the inherently unequal employment relationship.

### 3. PERSPECTIVES FOR COLLECTIVE LABOUR LAW

As in previous years, also in 2017 collective labour law had a very special focus in the IALLJ Journals. One common feature of these publications is their historical perspective. The presentations sometimes have gone back a long way, such as: early academic research on Australian labour law: 1920-60 (Naughton 2017). *AuR* has even instituted a special column figuring as "work and legal history" issued every two months with contributions to: Strikes in the public service (Keller 2017); *Arbeit-Nordwest* and *METALL NRW* (employers' association) (Mallmann 2017); The (US) Wagner Act (Kohler 2017); The Emergence of the statutory accident insurance (Fuchs 2017); The History of the Employment Promotion Acts (Buschmann 2017a); The general strike in Mössingen of 31 January 1933 (Däubler 2017b). Numerous essays in other journals illuminated important judgements or developments of the last twenty years such as: The Strasbourg Court judgment *Svenska Transportarbetarförbundet and Seko v. Sweden* (Ewing, Hendy 2017b); Lessons from the 2009-2010 USW Local 6500 Strike in Sudbury, Ontario (King 2017); The impact of the Law on Industrial Disputes Revisited: A Perspective on Developments over the Last Two Decades (Elgar, Simpson 2017); Establishing the Right to Bargain Collectively in Australia and the UK (Forsyth, Howe, Gahan, Landau 2017); The reform of Greek Labour Law by Memoranda I, II and III (Sideris, Triadafyllidis 2017).

In 2017, similar questions and challenges have arisen worldwide. Often, structural changes in workers' representation were subject to academic discussions, including new trade union strategies in a changing political and working environment. Numerous essays, especially in southern European qualified journals, tended to focus on structural issues of collective bargaining, changing forms and contents of collective bargaining agreements (CBA). On the one hand, they reacted to consequences of legislative intervention, and on the other, to changes in the social framework and forms of production. A global discussion has been going on about the diverse forms of industrial action and guarantees of the right to strike. While collective bargaining autonomy

and the right to strike have come under considerable political pressure, new perspectives have opened up, above all, through an increased reliance on international catalogues of human rights and comparative law.

### **3.1. Dynamic structures of collective workers' representation**

Profound observations addressed the applicability of collective law (Freedland, Kountouris 2017, Levannier-Gouël 2017, Banerjee, Mahmood 2017), the relationship between individualism and collectivism (against the image of a dichotomy: Bogg 2017) and the new perspectives on Collective Labour Law, Trade Union Recognition and Collective Bargaining (Ewing, Hendy 2017a). Like individual labour law (see above), collective labour law is always seeking new solutions for precarious (Rolland 2017) and non-standard employees who are largely denied collective human rights (De Stefano 2017a). Different views were expressed on whether legislators should open up new forms of collective action outside the union context (Rogers, Archer 2017, Taras 2017, respectively, on Canada). For some countries, authors registered a tendency to shift from national to sectoral, from branch to company collective agreements.

Mostly, this tendency was not based on the concepts of shop floor collective bargaining that were discussed years ago with the intention of involving rank and file union members in shaping their own affairs. Today it is rather a predominantly government-induced decentralization, with the consequence of concession bargaining on behalf of the unions and widening unprotected sectors. The trade union pluralism issues already known in the past have led to a greater attention given to union representativeness as a legal category (Pérez Infante 2017, de Val Tena 2017). The open questions and consequences associated with these developments were also subject to legal observations in 2017.

Collective labour law has just fallen into a heavy sea. Neoliberal "reforms" have vehemently tried to influence the structure and the results of collective bargaining, often in the sense of a trend towards downsizing. Consequently, some fundamental labour law reforms were presented and analyzed with reference to France (Jeammaud 2017), Brazil (Cavalcanti Boucinhas Filho 2017), Spain (Bodas Martín 2017, Carrizosa Prieto 2017, García Jiménez 2017) and Italy (Romagnoli, Cazzetta 2017; Lai 2017). In Spain, the normative validity of CBAs was weakened by the amendment to Art. 82 of the *Estatuto*

*de los Trabajadores*, in which, under certain circumstances, derogations are permitted (Sáez Lara 2017). Legal structural reforms are usually justified with a labour market policy objective. Often, however, amendments to the law have achieved their stated objectives only to a limited extent. Instead, new problems were raised, such as in Germany. Here, the controversial amendment to the Collective Agreements Act (in cases of union plurality in an establishment, CBAs of a minority union should no longer be applicable there) has provoked a ruling of the Federal Constitutional Court (Bepler 2017) and an application to the ECtHR, the result of which is eagerly waited for.

A whole series of articles raised the question of whether the traditional forms and contents of the collective organization should be continued or re-thought (Sateriale 2017) or redefined. Requirements for equality have set conditions for unions to shape social policy, but at the same time have opened up new fields of responsibility for them (Gagne, Dupuis 2017). In view of the economic crisis, especially in southern European countries, several authors (Valente 2017, Baylos Grau 2017a) addressed the question of whether and what contributions unions can make to tackle them. Finally, the unions also have gained new opportunities for information, consultation and internal presence by using new electronic media (Navarro Nieto 2017). Although the TFEU has opened a special procedure for social partner negotiations and agreements, there has been little progress here in recent years. In particular, the European Commission failed to pass on agreements negotiated by social partners in several sectors to the Council of Ministers. Thus, they could not acquire the status of directives. The so-called autonomous social partner agreements at European level do not have the same validity in the Member States. In order to promote social dialogue, there is need for more commitment to the results found (Franca 2017).

Only few countries know a work constitution as it has been established in Germany, combined with works councils' rights to co-determination. The widespread perception that a cordial social partnership is taking place here has already been refuted by the large number of litigations between works councils and employers over the scope and the exercise of rights to co-determination. Some articles traced these debates and above all critically accompanied the jurisdiction on subjects like: Works council's general right and duties (Zimmermann 2017); Works council's co-determination on working time (Eylert 2017); Agreements on working time – the role of power in operational bargaining (Halbgmann 2017); Act on European Works Councils – *status quo* and further development (zu Dohna-

Jaeger 2017); amendments to the act on European Works Councils with regard to seafarers – participation in works council meetings via videoconference (Hayen 2017). Thannisch (2017) gave an overview on board level Co-determination.

Despite all differences in national procedural laws, a couple of essays focused on subjects that are certainly of interest also outside the scope of the respective journal's readers. The Additional Protocol to the European Social Charter on Collective Complaints was signed on 9 November 1995 and has been ratified by most (not all) of the European states. Lukas (2017) described the collective complaint mechanism contained therein (see also Buschmann 2017b, review of the commentary to the ESC). Further procedural paths standing besides the usual court proceedings and mentioned in contributions were grievance arbitration (Shilton 2017) or alternative labour dispute resolutions (Maggio 2017). Judicial Intervention and Industrial Relations in West Bengal were presented by Banerjee, Mahmood (2017). Rataj (2017) drew a comparison on Selected Best Practices of EU Member States' Supreme Courts and Possibilities of Their Use in Labour and Social Disputes.

### **3.2. Collective Bargaining**

The landscape of CBAs is diverse and shows different facets in the national states. Some authors discussed different structures of collective bargaining. They distinguished for example bargaining at different levels (Milan, Ferkane 2017), in centralized or decentralized structures (Bavaro 2017), in transition from national to sectoral collective agreements (Carrizosa Prieto 2017). New economic structures have led to new levels of negotiation, such as the group level, the results of which can be evaluated ambivalently (Florence Milan, Ylias Ferkane 2017). Questions of borderlines were raised between CBAs and statutory law (Magnani 2017, Lai 2017). Particular problems have emerged with regard to collective bargaining and CBAs for civil servants (Pérez Guerrero 2017); a problem that we will face again and more sharply with regard to civil servants' rights to strike. Not all countries have passed statutory regulations on the conclusion and operation of CBAs. However, even informal bargaining and agreements should enjoy the protection of freedom of association (Gonzalow Biedma 2017b). Finally, Liu (2017) described the special relationship between The State, The Unions, and Collective Bargaining in China mentioning the Sergio

Leone's well-known movie title "The Good, the Bad and the Ugly".

Not surprisingly, legal guidelines also have a considerable impact on the content of regulations in CBAs. There is an indication that, for example, an economically and politically induced flexibilisation of working time will result in an increased need for collective regulation through CBAs (De La Flor Fernández 2017). The same effects have occurred with the regulation of temporary work. In view of the special risks related to temporary agency work, which in many countries has the potential to destroy established structures of collective representation, collective bargaining policy also could have a corrective function (Vila Tierno 2017). In some countries, statutory law, subject to optional deterioration by CBAs, has proved particularly problematic. One might ask oneself whether it is at all the task of trade unions to lower social standards. However, in times of trade union weakness, they could be inclined to make concessions that they would not have accepted years ago. In this respect, the notions of reasonableness and the proportionality principle could serve as a tool to limit the excessive power that could be exerted through collective agreements (Santagata de Castro 2017). Also problematic are the so-called "orphelin" clauses, i.e. wage disparity clauses based solely on the different hiring dates of the persons concerned (Gagne, Dupuis 2017). Tiraboschi (2017) rather recognized deficits of legislation and collective bargaining policy as regards "agile work". Klein (2017) described the protection of the *Sozialkassenverfahren* in the building industry, a specific German institution which - based on collective agreements declared generally binding - guarantees to employees in the construction industry the effectiveness of their entitlement to holidays and a company pension scheme. This system was recently confirmed by landmark judgments of the European Court of Human Rights and the German Federal Labour Court. The legal concept of a "negative freedom of association" (whether this exists is still disputed) does not stand in the way either.

### **3.3. Right to strike**

The right to strike has come under pressure worldwide. Discussions on this issue are going on in international organizations as well as at national level. Numerous authors examined the interventions in the right to strike by national legislators or courts. Others rather discussed national deficits in the implementation of

global or European standards or the requirements for the national guarantees of freedom of association. Finally, numerous authors dealt with particular questions concerning the exercise of the right to strike.

In Germany, the law on temporary agency work was slightly reformed. In recent years, the use of temporary workers as strikebreakers had become an effective weapon for employers to undermine trade union industrial action. This has now been limited, although gaps do remain (Klein, Leist 2017). In particular, Spanish authors expressed their concern about the rising interventions in the right to strike. Lopez Lopez (2017) noted a dangerous tendency to weaken trade union bargaining power, for example by criminalizing pickets, based on the domestic labour market reform in 2012: Pérez Rey (2017) viewed a technological strike-breaking following a ruling by the Spanish Constitutional Court, while Sánchez (2017) put the focus on the freedom of expression in connection with trade union actions, also following a ruling by the Supreme Court.

Supranational guarantees of the right to strike result above all from the law of the International Labour Organization (ILO), the international Covenant on Economic, Social and Cultural Rights, the (Revised) European Social Charter (RESC) and the European Convention on Human Rights (ECHR). This context in the “multi-level system” of various catalogues of human rights has gained importance since the ECtHR, in its jurisdiction, has pursued the so-called comprehensive approach since the fundamental judgement of the Grand Chamber *Demir and Baykara* on Art. 11 ECHR, i.e. it takes greater account of the rulings of other bodies responsible for the interpretation of the different supranational norms. The Convention and the case law of the ECtHR, on the other hand, have a considerably greater binding force than other instruments of international law and the case-law of the committees responsible for their interpretation. This could also serve as a counterweight to the “traumatism” of the ECJ rulings *Viking* and *Laval* (Marguénaud, Mouly, Nivard 2017). This conflict is intensively going on in sectors formerly organized under public law, such as railways and air traffic, as well as strikes in the public sector, in particular by civil servants. Some European countries such as Germany have not yet fully internalized the clear ECtHR case-law, according to which restrictions are only permissible in a few areas of direct state administration. The arguments put forward against the right to strike in these areas often have used terms such as “essential services” or “general interest” as well as a specific requirement of loyalty for civil servants. Thus, numerous authors have discussed these doctrines. Another occasion

was the conference *Zur Fundierung des Streikrechts im ILO-Normensystem* (Foundations of the right to strike within the ILO legal system) in Berlin on 1 and 2 April 2016 with the participation of scholars from all over the world giving lectures which were later published in IALLJ journals.

In *CLL&PJ* (2017a), Novitz analyzed the ILO case-law on the Public Sector and Essential Services, similarly as in *AuR* (2017b). Strikes in essential services in terms of international law were also subject to an essay by Schlachter (2017) with regard to Germany as well as by Baylos Grau (2017b) with regard to Castilla-La Mancha. In all these analyses the case-law of the ILO Committee of Experts (CEACR) on essential services played an important role. The Right to take Industrial Action and the ILO Supervisory Mechanism Future (Servais 2017b) and the International Developments Regarding the Implementation of the Right to Strike (Smit 2017) were further important subjects. The background to the newly flared up disputes is the quarrel in the ILO over the guarantee of the right to strike under ILO Convention 87, which has been erupting for several years. Pursuant to Art. 37 of the ILO Constitution, the International Court of Justice in The Hague would have to give a final clarification of the matter, although it has not yet been called on (on procedural possibilities in this context see La Hovary 2017).

Strikes in civil aviation and at airports, especially in Germany, have led to a couple of court rulings critically monitored from a scholarly or practical point of view. The background to this is that previously uniformly managed public services have become privatized and decentralized. The results are new organizational forms and disputes, such as strikes only by pilots, cabin crews or air traffic controllers. This has created completely new confrontations. The topics were: Compensations for third party companies' damages caused by strikes (Wendeling-Schröder 2017), Trade union liability for damage amounting to millions (Däubler 2017a), Current aspects of procedural law concerning industrial action's interim legal protection (Bram 2017), Judicial findings concerning the genuine objectives of a strike and the scrambled eggs theory (Bücker 2017). The so called scrambled eggs theory argues that a spoiled egg spoils a whole scrambled egg. This impressive, but certainly oversimplistic parable is the basis for the doctrine according to which a trade union claim that a court assesses as unlawful should have the effect to illegalize a whole labour dispute, even though the union has brought along a bundle of other absolutely legitimate demands. At least that was the view of the German Federal Labour Court, in clear contrast with the ECtHR judgment no.

36701/09, *Hrvatski Liječnički Sindikat (HLS) v. Croatia*. There the European Court has confirmed that a labour dispute in which the union had put forward an ordinary demand for salary increase in addition to two legally problematic claims was lawful.

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## LIST OF JOURNAL ABBREVIATIONS

Arbeit und Recht (Germany) = AuR  
Australian Journal of Labour Law (Australia) = AJLL  
Bulletin of Comparative Labour Relations (Belgium) = BCLR  
Canadian Labour & Employment Law Journal (Canada) = CLELJ  
Comparative Labor Law & Policy Journal (United States) = CLLPJ  
Derecho de las Relaciones Laborales (Spain) = DRL  
Diritti Lavori Mercati (Italy) = DLM  
Diritto delle Relazioni Industriali (Italy) = DRI  
Employees & Employers: Labour Law & Social Security Review / Delavci in delodajalci: Revija za delovno pravo in pravo socialne varnosti (Slovenia) = E&E  
E-journal of International and Comparative Labour Studies (Italy) = E-JICLS  
Europäische Zeitschrift für Arbeitsrecht (Germany) = EuZA  
European Labour Law Journal (Belgium) = ELLJ  
Giornale di Diritto del Lavoro e delle Relazioni Industriali (Italy) = DLRI  
Industrial Law Journal (UK) = ILJ  
International Journal of Comparative Labour Law & Industrial Relations (The Netherlands) = IJCLLR  
International Labour Review (ILO) = ILR  
Japan Labor Review (Japan) = JLR  
Lavoro e Diritto (Italy) = LD  
Revista de Derecho Social (Spain) = RDS  
Revue de Droit Comparé du Travail et de la Sécurité Sociale (France) = RDCTSS  
Revue de Droit du Travail (France) = RDT  
Rivista Giuridica del Lavoro e della Previdenza Sociale (Italy) = RGL  
Temas Laborales (Spain) = TL  
Zeitschrift für ausländisches und internationales Arbeits und Sozialrecht (Germany) = ZIAS