Freedom of association and collective bargaining in the platform economy: A human rights-based approach and an ever-increasing mobilization of workers

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Abstract. *This paper examines the exercise of the rights to freedom of association and collective bargaining by platform workers. It focuses on several significant developments involving the collective organization of platform workers worldwide, and considers the rights to freedom of association and collective bargaining as human rights. It contends that the shifting context of work has led to changes in modern workplaces, which, in turn, have generated a novel interest in the adoption of a human rights-based approach towards labour protection. This approach considers that all workers are entitled to rights, such as the right to collective bargaining, which derive from international human rights instruments.*

Keywords: *digital labour platforms, human rights, labour rights, collective bargaining, freedom of association, trade unions.*

1. Introduction

On 24 October 2019, the European Union (EU) Commissioner for Competition, Margrethe Vestager, said: "Platform workers should be able to team up, to defend their rights … and the fact that their employers label those workers as 'self-employed' doesn't make those collective agreements into cartels" (Espinoza 2019).[1]

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[1] This article was written before the EU Commission made publicly available its draft guidelines on collective agreements regarding the working conditions of solo self-employed people (see https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6620). Therefore, although this is an important development, it will not be covered in this article.

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Some months later, in Australia, the report of the Inquiry into the Victorian On-Demand Workforce was released.[2] It was the first extended national inquiry that attempted to address some of the main problems faced by many workers in the platform economy (Forsyth 2020, 18). Arguably, the recent changes in rhetoric and practice are not coincidental or a simple realization on the part of regulators of the poor working conditions experienced by many platform workers (see Eurofound 2019; De Stefano 2016). Rather, they are the result of pressure from an ever-increasing collective organization of and lobbying and action by platform workers, often with the support of external actors, such as the international academic community (Austrian Chamber of Labour et al. 2016). What is striking is the growing mobilization of institutional unions that are representing the interests of such workers, as well as the proliferation of workers' associations that do not necessarily fit with the traditional model of trade unions (Staunton 2018). Such processes, combined with a solidarity-based approach and a human rights rhetoric, are an indication of closer cooperation between organized labour and workers in non-standard forms of employment. This said, an essential prerequisite for such a development is the effective protection of the rights to freedom of association and collective bargaining, which, within the context of platform work, can pose specific challenges.

The remainder of this article is structured as follows. The second section discusses the impact that working arrangements in the context of platform-mediated work can have on the fundamental labour rights of workers to associate freely and bargain collectively, as well as on their overall legal protection. The third section reviews the current position of trade unions towards workers in non-standard forms of employment and explores the specific characteristics of the representation of platform workers in terms of their organization. In the fourth section, various major developments and achievements with respect to collective mobilization within the platform economy are described. Many of these initiatives have already proven beneficial for platform workers. However, the third section argues that legal obstacles continue to restrict workers' rights to freedom of association and collective bargaining. It is therefore suggested that a human rights-based approach towards the protection of such rights be adopted in order to avoid such issues. The fifth section examines the nature of the rights to freedom of association and collective bargaining as human rights. It also explores, from a legal perspective, the reasons why a human rights-based approach within labour policy may be advantageous for the overall protection of workers in the platform economy and other workers in non-standard forms of employment. The article concludes in the sixth section.

[2] See https://engage.vic.gov.au/inquiry-on-demand-workforce.

2. Platform work and problems related to the classification of workers

Platform-based work constitutes a non-standard form of employment,[3] which is facilitated by technology and digital markets. It is on demand and shares key characteristics with other casual working arrangements that are on the rise around the world, such as flexibility and precarity (De Stefano 2016). In this sense, platform-based work has been described as part of a general phenomenon in which an increasing number of workers remain in a legal "grey area" between traditional employment and self-employment, in which the scope of labour regulation is traditionally restricted (De Stefano 2016; OECD 2019). The majority of platform businesses tend to "enlist" casual workers and label them as independent contractors, even though the job may involve a disguised employment relationship, concealed behind a façade of organizational and economic independence. The number of platforms that classify their workers as employees is very small (De Stefano et al. 2021).

With forms of work becoming more heterogeneous and with self-employment on the rise, especially in the context of platform work, the number of challenges related to the scope of labour protection is increasing. This development is inextricably linked to the current limitations of the labour law framework, in which labour protection, including the exercise of collective labour rights, continues to be limited primarily to "subordinate" wage employment and, in particular, full-time and open-ended wage employment. However, self-employed workers have traditionally been considered as able to "defend themselves" on the market, with no need for state intervention, and therefore have generally been excluded from the majority of the existing forms of labour protection, and even more so from social security benefits. It can therefore be claimed that the rising use of freelance workers could lead to the exclusion of a significant portion of the workforce from the protection of fundamental collective labour rights which, as this article demonstrates, are also recognized as human rights.

Fundamental collective labour rights may be also restricted when platform workers' working activities conflict with another area of law, namely, competition law. Platform workers are often prevented from joining trade unions and they de facto fall outside the scope of collective agreements, which, for the most part, require those covered to have employee status. These limitations are due to the existence of strict antitrust laws, which consider self-employed workers (including many workers in the "grey area") as undertakings. Specifically, the introduction of minimum employment terms and conditions can be considered as price-fixing to the detriment of consumers and fair competition. Consequently, collective agreements as such are in breach of competition law (Lianos, Countouris and De Stefano 2019). Due to a strict application of these rules, a considerable number of platform workers have already been excluded

[3] These arrangements include: (i) temporary employment, (ii) part-time work and (iii) temporary agency work and other forms of employment, which fall outside the "standard employment relationship", understood as work that is full-time, indefinite and part of a subordinate and bilateral employment relationship (ILO 2016).

from coverage by collective agreements. At this point, it should be mentioned that, in addition to legal obstacles, there are also practical hurdles for platform workers when attempting to exercise their collective rights, even if they are considered as employees (Aloisi 2019). Like other workers in non-standard forms of employment, platform workers have to deal with frequent job switches and a limited attachment to a single workplace. Furthermore, many traditional trade unions, at least until recently, have been reluctant to involve such workers in their actions (Heery 2015; Gumbrell-McCormick 2011). These issues will be further discussed in the next section, which will also examine the attempts made by some unions to overcome such problems.

3. The approach of trade unions towards workers in non-standard forms of employment and the particular situation of platform workers

As mentioned above, platform-mediated work is part of the overall phenomenon of non-standard forms of employment. It has been claimed that such work arrangements have been used for a long time, with the aim of, inter alia, reducing labour costs, increasing productivity and, more recently, avoiding regulations stemming from labour legislation and collective agreements (Prassl 2018). Moreover, workers engaged in non-standard forms of employment have experienced and continue to experience serious practical and legal restrictions of the exercise of their rights to freedom of association and collective bargaining. One major issue is the difficulties that they face in relation to unionizing in order to protect their rights and interests.

The stance of trade unions regarding these types of precarious work has not been without controversy. As Keune observes, trade unions have often been accused of excluding "outsiders", namely, workers with insecure, precarious, low-paid jobs (Keune 2013, 66). This is due to the fact that the industrial relations system was created and expanded under the Fordist model of production, which was characterized mainly by the rise of mass industry and a relatively homogeneous group of potential members, comprising primarily male full-time workers in relatively secure occupations (Gumbrell-McCormick 2011, 297). Many workers with atypical jobs have also felt that their interests cannot be fully represented through the structure of traditional unions (Vandaele 2018, 8–10).

However, unions have progressively come to realize that the increase in non-standard forms of employment could weaken their own capacity to act if they do not accept workers in such employment as members (Gumbrell-McCormick 2011, 300). The history of the labour movement and the related literature describe many instances in which trade unions have developed a range of initiatives in order to engage with workers in non-standard forms of employment, including the self-employed. These strategies include the conclusion of collective agreements, the influence of national policies and legislation through social dialogue and campaigning, litigation, the organization of precarious workers and the provision of services, and the promotion of campaigns to influence public opinion (Keune 2013, 65–66; ITUC 2019). Notable examples of

attempts by unions to incorporate these categories of workers into their policies can be found around the world. In Germany, the country's largest union, IG Metall, recently amended its statutes in order to allow self-employed workers to join. Similar action was also taken in 1998 by the Swedish trade union, Unionen. In the Netherlands, the Dutch Trade Union Federation (FNV), which is the largest trade union confederation in the country, represents non-standard workers in sectors where workers face particular risks, such as domestic assistance and cleaning. In Slovenia, since 2016, Sindikat prekarcev, which is part of the main trade union confederation, the Association of Free Trade Unions of Slovenia (ZSSS), has sought to organize workers engaged in atypical employment (OECD 2019, 243). Similar examples can be found in other European countries, such as in Spain and Italy, and in the United States.

Workers in non-standard forms of employment therefore continue to be under-represented by trade unions. This trend is also part of a general decline in unionism around the world. However, there have been signs of unions gradually opening up to new members who are often in different situations and have different needs compared with standard workers. This phenomenon can be observed in relation to unionism in the platform economy.

However, the question that arises is whether the representation of platform workers by unions has any specific characteristics in comparison with that of other workers in non-standard forms of employment. In this respect, it has been claimed that the organization of platform workers is "uniquely" difficult (Lenaerts, Kilhoffer and Akgüç 2018, 72). This is not to say that all the challenges faced by platform workers are completely new for trade unions, for example their often unclear employment status, the existence of strict antitrust laws, regular switches from one job to another and, therefore, the difficulties that they face in finding a single collective identity. Such issues, arguably, have also impeded the unionization of workers in other forms of atypical employment (ITUC 2019). Yet, what is particularly challenging in the context of platform work is the fact that many of these issues can be exacerbated by other factors.

Platform businesses, through the use of new technology, have the unprecedented ability to access a wide pool of both high- and low-skilled workers, who have different occupational and even class-related identities (including many migrant and young workers), and who have very different incentives for engaging with specific platforms (Newlands, Lutz and Fieseler 2018; Vandaele 2021). This phenomenon makes it even more complicated to create a common collective identity and foster cooperation in order to address workplace-related issues. It has been observed, for example, that some workers who do not rely on platforms as their main source of income are less eager to organize (Newlands, Lutz and Fieseler 2018;Vandaele 2018, 11). Some platforms, such as Uber, seem to be well aware of this diversity and dynamic among their workers, who range from recreational to full-time drivers. Consequently, Uber's business model tends to focus on the "least invested drivers", who are less likely to unionize (Rosenblat 2018, 53–55, 72). Furthermore, many platforms do not facilitate communication among workers who experience difficulties in sharing their experiences (Newlands, Lutz and Fieseler 2018, 263). Platform workers also often face a

"heightened sense of isolation" and anonymity, especially in situations in which their work is carried out online (Johnston 2020, 29).

Despite the aforementioned practical and legal obstacles, some unions have shown an interest in the organization of platform workers. Another interesting development is the proliferation of workers' associations that do not necessarily fit with the traditional model of trade unions.

4. Worker mobilization and cooperation in the platform economy

4.1. Conclusion of collective agreements

As mentioned earlier, recent developments reveal the "vivid interest" of traditional unions in pursuing various strategies to extend their reach to platform workers. In this regard, several collective agreements have emerged at both the sectoral and enterprise level. In Austria, for example, the transport and services union, Vida, established a works council for Foodora cyclists, with the ultimate aim of negotiating a collective agreement for all bicycle delivery services.[4] While the proposed agreement does not include any provisions related to the legal classification of bike couriers, it does provide a number of statutory rights, such as a minimum wage and holiday allowances, for workers who are classified as employees (Widner 2019). Furthermore, in Spain, the General Union of Workers (UGT) and the Trade Union Confederation of Workers' Commissions (CCOO) agreed in 2019 to expand the scope of the collective agreement in the hospitality and catering sector to include platform workers with employee status.[5] Sectoral unions and employers' organizations, in particular, decided that this extension was essential, not only to reduce the risk of unfair competition in the sector due to the proliferation of platform businesses, but also to preserve the working conditions that had already been established (Hermoso 2019, 9–10). However, it has been argued that the majority of platform workers in this particular sector are not affected by this development due to their self-employed status (Hermoso 2019, 10). Furthermore, in February 2019, a new collective agreement was signed at the sectoral level in Switzerland between Swiss media and communication union, Syndicom, and the employers' association for courier services, Swissmessengerlogistic (SML). The agreement establishes minimum standards, such as the regulation of working hours and sickness benefits, for bike and city couriers (Dunand and Mahon 2019, 111). According to experts in the country, the problem with this agreement is that it does not apply to major platform businesses, such as UberEats, and therefore only covers a small number of platform workers working for other smaller platforms (Dunand and Mahon 2019, 111).

[4] See www.vida.at/cms/S03/S03_0.a/1342577497037/home/artikel/betriebsrat-fuer-fahrradzustelldienst-foodora.

[5] See https://www.boe.es/boe/dias/2019/03/29/pdfs/BOE-A-2019-4645.pdf.

Another interesting example can be observed in Italy. In 2017, some of the country's major trade unions, such as the Italian Federation of Transport Workers (Filt-Cgil), signed a collective agreement at the sectoral level, in the area of logistics, which contained a number of significant labour protection measures (Vandaele 2021, 224). The collective agreement was amended in 2018 to address the challenges arising from digital platforms and its contractual provisions now include food delivery riders, regardless of their employment status (Vandaele 2021). The Italian employers' organization, Assodelivery, which includes major platforms such as Deliveroo and Glovo, did not accept the collective agreement. Instead, it signed an agreement with the far-right-affiliated General Union of Labour (UGL), with the purpose of maintaining the status of workers as self-employed and, in exchange, provided them with a minimum wage and bonuses (Heikkilä and Tamma 2020). This development appears to have been in response to a legislative amendment made in Italy in 2019,[6] which aims to extend the scope of employment protection beyond the employment relationship to all workers who provide work organized by another party, including through a platform. As a result of the amendment, employment and labour protection will now apply to platform workers, except in situations where a collective agreement stipulates otherwise (Aloisi and De Stefano 2020). It is unsurprising that the country's most representative unions considered the UGL's agreement to be a "fake improvement" that attempted to grant workers fewer rights than the new legislation (Heikkilä and Tamma 2020). Furthermore, the Italian Ministry of Labour recently issued an opinion, albeit non-binding, stating that the agreement is not valid on the grounds that it is not in accordance with the recent national legislation, and that UGL does not sufficiently represent delivery workers in Italy (Heikkilä and Tamma 2020). This example reveals the lengths to which some platform businesses are prepared to go in order to pursue their policies by finding ways to circumvent existing legislation. It also shows that some collective agreements will attempt to further increase the number of employment regulations in order to promote the political and other interests of the union in question. This, of course, as indicated by previous literature, is not a new phenomenon (Keune 2013, 72).

Examples can also be found in other countries. In the United Kingdom, the union for professional drivers, the GMB, concluded a collective agreement with courier company Hermes in 2019. The self-employed couriers of the company are now eligible for holiday pay and have guaranteed earnings (GMB Union 2019). In Australia, in 2017, Unions New South Wales negotiated an agreement with Airtasker, a platform that facilitates the matching of home-based tasks created by customers with workers who are willing to take on the job. The agreement provides for minimum standards of protection, including rates of pay, injury insurance and safety regulations (Minter 2017, 449). Despite the fact that it was not an industrial agreement concluded under law, and therefore was not enforceable, "it provided a foothold or entry point for unions to build more effective forms of organising in the hostile terrain of the gig economy" (Forsyth 2020, 19).

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[6] *Decreto-Legge 3 settembre 2019, n. 101. Disposizioni urgenti per la tutela del lavoro e per la risoluzione di crisi aziendali.*

There have also been similar developments in Scandinavian counties. In Sweden, for instance, the Swedish Transport Workers Union concluded an enterprise-level collective agreement with the transportation start-up, Bzzt, which is an Uber-style company that uses electric taxi pods (Johnston and Land-Kazlauskas 2019, 30). This agreement provides workers with access to the same standards as traditional taxi drivers. In Norway, Fellesforbundet (United Federation of Trade Unions) concluded a collective agreement with Foodora in September 2019. The agreement established, inter alia, a wage increase, a seniority wage supplement and a per-delivery bicycle equipment allowance (Solstad 2019). It is important to note, however, that in Norway, Foodora has granted employee status to its couriers. The main demands of workers in the collective agreement included a reimbursement for equipment and remuneration for actual working time (Jesnes, Ilsøe and Hotvedt 2019).

Lastly, in Denmark, in 2018, a collective agreement was signed between the trade union 3F and Hilfr.dk, a platform offering cleaning services (Jesnes, Ilsøe and Hotvedt 2019). It was the first agreement within the platform economy that provided for protection of the personal data of a platform's employees, including consent to the use and posting of their personal data (Jesnes, Ilsøe and Hotvedt 2019). Furthermore, a decision was reached within the enterprise to introduce a "new category" of worker with employee status in addition to the existing freelancers (*Freelancehilfrs*).[7] Now, unless they decide otherwise, workers who have completed 100 hours of work are eligible for this category of employee, known as *SuperHilfrs*. Workers can also apply for this employment status even if they do not meet the aforementioned criterion, although it is up to the platform to decide whether to accept or reject their application (Vandaele 2021, 218). The agreement also provides for minimum fees for freelancers working for the platform. This development did not go unnoticed by the Danish Competition and Consumer Authority (DCAA), which took action against the agreement as it considers both *SuperHilfrs* and *Freelancehilfrs* to be undertakings that cannot fix prices.[8] As a result, Hilfr offered to address the concerns of the DCCA by removing the minimum hourly fee for *Freelancehilfrs* from the platform and by ensuring that "there is legal subordination between Hilfr and *SuperHilfrs*, and that "[the platform] will bear the financial risk for *SuperHilfrs*' cleaning work through the platform" (Vandaele 2021). These commitments appear to be indefinitely binding for Hilfr. This development, as maintained by Countouris and De Stefano, demonstrates how antitrust legislation can impede the fundamental rights of workers to associate freely and bargain collectively (Countouris and De Stefano 2020). The a priori "conclusion" of the DCCA that all the workers of the platform are undertakings, with no provision of empirical evidence or consideration of the existence of disguised employment relationships, underscores the argument put forward by the aforementioned authors.

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[7] Information on the category of *SuperHilfrs* is available at: https://blog.hilfr.dk/en/historic-agreement-first-ever-collective-agreement-platform-economy-signed-denmark/ (accessed 20 December 2020).

[8] The opinion of the Danish Competition and Consumer Authority is available at: https://www.en.kfst.dk/nyheder/kfst/english/decisions/20200826-commitment-decision-on-the-use-of-a-minimum-hourly-fee-hilfr/ (accessed 20 December 2020).

The recent proliferation of collective agreements within the platform economy is a positive sign. However, some problematic aspects can be observed. Firstly, a significant number of platform workers are considered self-employed and are therefore excluded from the coverage of existing collective agreements. As mentioned above, such workers may be considered self-employed even if their work arrangements are similar to those found in a standard employment relationship. Secondly, the majority of the aforementioned collective agreements have taken place at the enterprise level, even in countries such as Denmark, where collective agreements are mostly negotiated at the industry level (Johnston 2020, 36). This development arguably follows the general trend observed in many countries towards the decentralization of collective bargaining procedures in favour of individual agreements. Such a trend may lead to less favourable agreements for workers and, therefore, limited protection (Baccaro and Howell 2011).

4.2. Other strategies

In addition to the conclusion of collective agreements, unions have also diversified their strategies in order to extend their reach to platform workers. For instance, in Spain, the union Intersindical Valenciana helped a Deliveroo rider to be reclassified as an employee rather than an independent contractor, marking the first court victory for food couriers in Europe (ITUC 2019, 14). Furthermore, in the United Kingdom, the GMB has supported cases brought by drivers and riders against a number of platform businesses, demanding the reclassification of workers who were considered self-employed (Aloisi 2019, 19). With the GMB's assistance, approximately 30,000 drivers in the United Kingdom managed to acquire "worker" status, enabling them to access key forms of employment protection, such as minimum wage and holiday benefits. In Australia, the Transport Workers' Union has also helped platform workers to obtain reclassification from companies such as Foodora and Deliveroo (Forsyth 2020, 19). Moreover, in Italy, a group of Deliveroo drivers, backed by the Italian General Confederation of Labour (CGIL), decided to bring charges against Deliveroo before the Labour Court of Bologna in December 2019. The drivers claimed that the platform's algorithm discriminated against workers who participated in strikes or who took sick leave by gradually reducing their shifts, which sometimes even led to the termination of their contract. On 31 December 2020, the Labour Court ruled that the algorithm used by Deliveroo to allegedly assess the "reliability" of riders was indeed discriminatory as it, inter alia, unfairly penalized workers who had a legitimate reason for not working. The decision was described by members of the CGIL as "an epochal turning point in the conquest of workers" (Pulignano and Marà 2021). This example demonstrates the crucial role that trade unions can play in overcoming the challenges arising from the inappropriate use of new technological tools.

In addition to "court battles", trade unions have also found other ways to promote the interests of platform workers. According to Aloisi, such methods may differ from classic means of organization, such as collective bargaining (Aloisi 2019, 17). As noted above, one of the main difficulties that trade unions face in the representation of platform workers is related to the isolation and anonymity of such workers. In this respect, the largest industrial trade union in

Europe, Germany's IG Metall, together with the Austrian Chamber of Labour, the Swedish union, Unionen, trade unions representatives from Denmark and the United States, and a group of international experts in industrial relations, have launched a cross-border initiative, with the creation of a website which contains information and advice for platform workers and which, in particular, provides a rating system of working conditions on various platforms that is based on reviews by workers (Vandaele 2018, 22). Furthermore, in 2017, IG Metall, with the assistance of the German Crowdsourcing Association (DCV) and several digital platforms, established an ombudsperson's office in order to address complaints and resolve conflict between workers, clients and platforms.[9]

In Italy, the CGIL, with the involvement of experts in the digitalization of work and managers who cooperate with the union, has developed an online collaborative platform called *Idea Diffusa*.[10] This tool enables the parties involved to share knowledge and best practices, with the purpose of facilitating collective bargaining within digital workplaces. It also aims to place trade unionism at the centre of discussions on the ways in which new technological tools should be incorporated at work. To this end, a shared agenda, a public forum for debate and a public magazine have been created. These examples show that many trade unions around the world, outside of traditional collective bargaining, are willing to adopt different strategies and, with the assistance of specialists, develop new expertise to accommodate the specificities of platform workers' representation.

4.3. Non-traditional unions

What is striking about the mobilization of workers in the platform economy is that, in cases where traditional unions have not been proactive, or where the representation of such workers is considered impractical for the reasons outlined above, an increasing number of non-traditional organizations are representing the collective interests of workers. Examples of grassroots or independent unions can be observed worldwide. As research indicates, this representation is often provided through the use of new technologies, such as online forums and social media utilized by workers as labour campaigning tools (Aloisi 2019, 13).

In the United Kingdom, the Independent Workers Union of Great Britain (IWGB), which mainly represents precarious workers and which is not affiliated with the Trade Union Confederation, has facilitated wildcat strikes and negotiations with several platforms and has gained increased media attention (Aloisi 2019, 20) In Germany, in 2018, the Freie Arbeiterinnen- und Arbeiter-Union in Berlin founded the International Labour Confederation, together with other unions from around the world (Staunton 2018). These unions have engaged in mobilization campaigns and strikes in many European counties, such as Italy, the Netherlands, Spain and Belgium (Vandaele 2018, 18–23).

[9] See https://www.igmetall.de/download/2017_11_8_Presseinformation_OmbudsstelleCrowdworking_ef5ebcd3b52f834a38b64ec80377aee518d11009.pdf.

[10] See https://www2.cgil.it/cose-la-piattaforma-idea-diffusa/.

In the United States, the New York Taxi Workers Alliance (NYTWA), which is linked to the country's largest federation of unions, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), has also adopted a similar model of organization in order to represent workers in non-standard forms of employment. Although registered as a non-profit organization, NYTWA strongly identifies as a union and its primary goal is to improve working conditions for taxi drivers in New York City (Johnston and Land-Kazlauskas 2019, 11–12). One of the NYTWA's most significant achievements was to successfully bring a claim on unemployment benefits against Uber. However, it did not stop there. In August 2019, NYTWA won a landmark case against Uber and Lyft, which resulted in the country's first cap on ride-sharing company vehicles, forcing the two enterprises to pay their drivers a minimum wage (Brooks 2018).

It has been furthermore observed that militant unions like the NYTWA have used their political resources to lobby for several legislative texts and proposals that are designed to improve the working conditions of platform workers. The NYTWA, for instance, has pressured public authorities, such as the New York Taxi and Limousine Commission (TLC), into accepting higher wage rates and lower lease rates for its drivers, in addition to other regulatory reforms (Johnston and Land-Kazlauskas 2019, 11–12). Furthermore, the Rideshare Drivers United-Los Angeles (RDU-LA), which is a democratic and independent association of US rideshare drivers and which relies mostly on social-media-based activities, has managed to build a strong organizational base of 3,000 members (Dolber 2019, 10). The RDU-LA has been instrumental in making the conditions of platform workers in the ride-share industry a major political issue, mainly by means of strikes held in May 2019, which spread to over ten cities in the United States. What is noteworthy is the fact that the RDU-LA has created an application that allows organizers to communicate with drivers in a much easier and faster way than via social media or other forums. The application also facilitates the engagement of workers in the RDU-LA's activities (Scheiber and Conger 2020). The RDU-LA has also played a significant role in lobbying for the adoption of the California Assembly Bill No. 5 (AB5)[11] by organizing meetings between its members and state legislators to push forward the Bill (Dolber 2019, 17). In this regard, the support provided by the Transport Workers Union, such as financial aid, was important, and is indicative of solidarity unionism. Another example can be found in the territorial collective agreement concluded in Bologna between institutional trade unions, autonomous workers' collectives, the city council and the local food delivery platform Sgnam (Aloisi 2019, 2). The territorial collective agreement, although applied on a voluntary basis, contains minimum standards on working aspects, such as remuneration and working hours. Furthermore, in the United Kingdom, as a result of cooperation between the unions IWGB and GMB, the delivery platform Just Eat was forced to ensure labour protection and

[11] The AB5 was the first law in the United States that required platform companies to treat their workers as employees and provide them with all the benefits associated with employee status (Dubal 2019). However, following a ballot initiative called California Proposition 22, Uber and Lyft are now exempt from the requirement to classify drivers as employees (see https://lao.ca.gov/BallotAnalysis/Proposition?number=22&year=2020).

other benefits for 1,000 new couriers, which included sick pay and pension contributions (Bradshaw 2020).

Let us conclude this section with a reference to a recent and perhaps one of the most encouraging developments regarding the mobilization of platform workers in relation to grassroots movements. In the United States, the NDWA Gig Worker Advocates, an independent entity affiliated with the National Domestic Workers Alliance (NDWA), recently reached a new pilot agreement with the cleaning platform Handy (Andrias and Sachs 2021).[12] Although its structure does not amount to full collective bargaining, the agreement does contain significant provisions, including the establishment of a minimum wage, provision of health insurance in case of occupational accidents and the creation of an online forum to address work-related issues (Andrias and Sachs 2021). The agreement seeks to cover domestic workers who have been previously excluded from labour protection measures due to their employment status as independent contractors. Although "the pilot falls short of extending full organizing and bargaining rights to these workers" (Andrias and Sachs 2021), it constitutes a significant achievement and its results remain to be seen in practice.

4.4. Worker mobilization and cooperation in the platform economy: Final observations and the quest for a new approach in relation to the fundamental labour rights of platform workers

Recent developments have revealed positive trends in the mobilization of platform workers. Notably, as Johnston and Land-Kazlauskas observe, there is a substantial overlap between the emergence of "independent" unions and the revitalization efforts of traditional unions towards the creation of an inclusive labour movement that can respond to current and future challenges (Johnston and Land-Kazlauskas 2019, 10). As noted above, many of these collective initiatives have already been proven beneficial for a number of platform workers. For example, some workers have already been reclassified as employees, while others are now enjoying certain forms of labour protection, irrespective of their employment status.

Moreover, when the workforce diversity within the platform economy is examined, it can be considered that such developments provide a new source of members for institutional unions. This does not mean that the practical issues faced by workers with respect to the exercise of their collective labour rights have completely disappeared. For example, although encouraging messages have started to emerge regarding workers' cooperation and communication, as well as unionization (in particular thanks to the existence of online forums and action via social media), the frequent switching from one job (or platform) to another, and thus the difficulty of such workers to unionize, remain present.

Platform workers also continue to face legal obstacles which prevent many from enjoying their collective labour rights, such as the right to bargain collectively. As noted earlier, due to their status as self-employed, many

[12] The agreement will be applicable in three US states: Florida, Kentucky and Indiana.

platform workers continue to be excluded from the protective framework of collective agreements. This exclusion, as illustrated in the case of the Hilfr collective agreement, is also inextricably linked to the presence of strict anti-trust regulations.

Furthermore, most of the initiatives undertaken to date, especially with respect to trade unions' court battles, have a rather narrow scope of application. These developments mostly concern the protection of workers in the transport and delivery sectors. Legal proceedings regarding the protection of platform workers in other occupations, such as domestic services, are much less prevalent. In any case, as some have pointed out, workers' access to fundamental labour rights and protections "must not be dependent on the willingness and ability of individual workers [or trade unions] to bring claims to the courts" (Dukes and Streeck 2021). Furthermore, court proceedings can be very lengthy and costly, and therefore many workers can be discouraged from defending their rights. Lastly, it has been observed that, even in situations where the collective mobilization of workers has contributed to the adoption of legislation that could potentially benefit certain platform workers, such as in the case of the AB5 in California, their workforce has remained outside the scope of such legal measures, due to the resistance demonstrated and economic power yielded by platform operators (De Stefano et al. 2021, 25).

In light of the aforementioned developments, it can be contended that a considerable number of platform workers, by exercising their collective labour rights, have managed to illustrate the importance that such rights can have in practice. However, as mentioned above, the practice of these rights also reveals the persistence of legal obstacles. As a result of these obstacles, a considerable number of workers are excluded from the protection of fundamental collective labour rights, such as the rights to associate freely and bargain collectively which, as the next section shows, are also recognized as human rights. As a matter of law, therefore, the question that arises is how to adequately protect these rights.

A possible way forward towards better protection of workers' collective labour rights could be to adopt a human rights-based approach in labour policy, to ensure that workers can enjoy such rights regardless of their employment status. The use of this approach has also been advocated by the trade union movement, including by the European Trade Union Confederation (ETUC) which recognizes the clear need to safeguard collective bargaining as a fundamental right of all workers irrespective of their status (ETUC 2020). It should be noted, however, that this article does not argue that a human rights-based approach should be used to force the reclassification of workers who find themselves in a "grey area" between employment and self-employment, including many platform workers. It maintains, rather, that such an approach should be adopted with a view to providing a protection floor for all workers who, by exercising their rights to freedom of association and collective bargaining, will be able to improve their working conditions, and in order to establish adequate labour standards that do not depend on employment status. This outcome can be achieved without reinventing the wheel, as the legal basis already exists.

5. Freedom of association and collective bargaining as human rights

5.1. Growing recognition of labour rights as human rights

There is an extensive amount of literature that acknowledges the categorization of labour rights as human rights (Fenwick and Novitz 2010; Mantouvalou 2012; Bellace and ter Haar 2019). Such views are supported by the inclusion of fundamental labour rights in international instruments and human rights treaties, as well as in the rulings of international and national supreme courts. Labour issues are therefore increasingly being examined from the standpoint of human rights law. The United Nations Guiding Principles on Business and Human Rights and the ongoing wide discussion on corporate social responsibility for human rights are an additional illustration of the growing convergence of the two fields and of the contentious permeability of human rights in the private sphere (United Nations 2011). As a result, trade unionists and labour lawyers are now beginning to use the rhetoric of human rights to support their claims. For example, the International Trade Union Confederation (ITUC), an international coalition of trade unions, considers that the protection of both human rights and labour rights fall under its remit.[13] Conversely, numerous human rights organizations are now actively engaging in the protection of labour rights (Evans 2015).

In light of this conversation and thanks to broad international support, the rights to freedom of association and collective bargaining have been included on the "universal list" of human rights.[14] The right to associate freely, more particularly, is contained in a number of human rights instruments around the world.[15] Moreover, since 1998, this right has been enshrined in the ILO Declaration on Fundamental Principles and Rights at Work which, while not a human rights instrument, stipulates that such rights are universal and should be applicable to all workers in all Member States, by the very fact of their membership and irrespective of their ratification of the relevant Conventions. Furthermore, besides being a right per se, the right to freedom of association is an "enabling right", the effective protection afforded by which can be crucial for the actual exercise of other human rights and labour standards. This is a point that has also been made by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) (ILO 2012).

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[13] See https://www.ituc-csi.org/human-and-trade-union-rights#:~:text=The%20ITUC%20defends%20trade%20unionists,where%20these%20affect%20working%20people.

[14] The author is aware that in some legal jurisdictions these rights are not considered fundamental or human rights (for example, in China). For this reason, the word "support" has been used instead of "consensus".

[15] See, for example, Universal Declaration of Human Rights, articles 20(1) and 23(4); International Covenant on Civil and Political Rights (ICCPR), article 22; International Covenant on Economic, Social and Cultural Rights (ICESC), article 8; European Convention on Human Rights (ECHR), article 11; American Convention on Human Rights, article 16; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", article 8; Charter of Fundamental Rights of the European Union (CFREU), article 12; African Charter on Human and Peoples' Rights, article 10; European Social Charter (ESC) (Revised), article 5.

An essential element of freedom of association, as indicated on multiple occasions by the ILO Committee on Freedom of Association (CFA), is the right to collective bargaining (ILO 2018, para. 1232). This right is also enshrined as a fundamental human right in several human rights instruments,[16] as well as in the ILO 1998 Declaration which, as noted above, has universal applicability. Furthermore, although the right to collective bargaining itself is not explicitly mentioned in the Universal Declaration of Human Rights, scholars such as Roy Adams have observed that the drafters intended to include the right as a key element of freedom of association (Adams 2008, 49). This idea has been clearly confirmed by the jurisprudence and pronouncements of bodies supervising the implementation of human rights treaties. For example, in the landmark case of the European Court of Human Rights (ECtHR), *Demir and Baykara v. Turkey*,[17] it was explicitly recognized for the first time that the right to bargain collectively is an inherent feature of article 11 of the European Convention on Human Rights (ECHR) regarding freedom of assembly and association. As maintained by Klaus Lörcher, "it opened up the whole Convention to a more socially oriented interpretation" (Lörcher 2013, 4). The Strasbourg Court stated, though not for the first time,[18] that a "living instrument" approach understands rights in a way that renders them "practical and effective, not theoretical and illusory" (Lörcher 2013, 10). What was novel in the methodological approach adopted by the Strasbourg Court, however, was its systematic reliance on external instruments. It has been observed that the Grand Chamber of the European Court of Human Rights had never before dedicated so much time and space in the course of acknowledging the specific role played by instruments, such as ILO Conventions and the International Covenant on Economic, Social and Cultural Rights. For this reason, the Court's interpretation has been described as "internationally friendly" (Lörcher 2013).

Similarly, the Inter-American Court of Human Rights (IACHR) has also referred in its case law to international standards and principles, such as the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) and the ILO CEACR.[19] In 2019, the Inter-American Commission on Human Rights (OAS), which is the other supervisory body of the American Convention on Human Rights, in its request for an advisory opinion submitted to the IACHR, pointed out that "collective bargaining, as a component of trade union freedom, has a direct impact on the rights of workers as a democratic means of establishing [fair] working conditions".[20]

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[16] ECHR, article 11; CFREU, article 28; ESC, article 6; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, article 8.

[17] European Court of Human Rights, *Demir and Baykara v. Turkey*, Application No. 3450397, Judgment of 12 November 2008 (hereafter *Demir and Baykara v. Turkey*).

[18] It should be recalled that, in the case of *Schmidt and Dahlström v. Sweden*, the verdict was reached with reference to the principles protected under both the ILO and the ESC.

[19] See, for example, Inter-American Court of Human Rights, *Baena-Ricardo et al. v. Panama*, Judgment of 2 February 2001 (Merits, Reparations and Costs), Series C No. 72, para. 171; Inter-American Court of Human Rights, *Cantoral-Huamaní and García-Santa Cruz v. Peru*, Judgment of 10 July 2007 (Preliminary Objection, Merits, Reparations and Costs). Series C No. 167, para. 146.

[20] Inter-American Commission on Human Rights, *Solicitud de opinión consultiva a la Corte Interamericana de Derechos Humanos*, 31 July 2019. https://www.corteidh.or.cr/docs/solicitudoc/soc_3_2019_spa.pdf.

There is broad support, under international and regional human rights law, for the inclusion of the rights to freedom of association and collective bargaining as human rights with a binding and universal nature. The latter view has also been espoused by the ILO. In the context of the ECHR, for example, any restriction on the application of these rights must be justified under the law and must be considered necessary in a democratic society. Furthermore, according to the case law of the ECtHR, Member States may also undertake positive obligations to secure these rights.[21] The following section looks at why a human rights-based approach in labour policy can be beneficial for the overall protection of workers in the platform economy and other workers in non-standard forms of employment, including the enjoyment of their right to freedom of association and collective bargaining.

5.2. The importance of a human rights-based approach for platform workers

Now that we have explored the legal basis for a human rights-based approach towards the protection of the right to freedom of association and collective bargaining, let us examine some of the reasons why such an approach can be beneficial for platform workers, as well as other workers in non-standard forms of employment.

Firstly, a human rights-based approach moves away from a strict binary divide between employment and self-employment, as this distinction is contrary to the principles and the universal application of human rights. This universal approach was explicitly confirmed by the supervisory bodies of the Council of Europe. In *Sindicatul "Păstorul cel Bun" v. Romania*,[22] the ECtHR considered whether members of the clergy in the Romanian Orthodox Church could invoke freedom of association within their diocese. The Romanian State contested this applicability by refusing to acknowledge that members of the clergy were bound by an employment contract. The Court, however, seemed to insist only on the question of subordination, work and financial compensation. Neither the origin of this relationship nor the source of remuneration were taken into account. The European Committee of Social Rights (ECSR) also clarified, on the basis of article 6(2) of the European Social Charter (ESC), that all workers should have the right to bargain collectively, including self-employed workers.[23] The ECSR pointed out that the purpose of competition law is not to restrict the right to freedom of association and collective bargaining for those workers who may need it most (in this particular case, self-employed workers such as freelance journalists and musicians). It concluded that "an outright ban on collective bargaining of all self-employed workers would be excessive as it would run counter to the object and purpose of this provision" and that "it was not necessary in a democratic society".[24]

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[21] *Demir and Baykara v. Turkey*, para. 110.

[22] European Court of Human Rights, *Sindicatul "Păstorul cel Bun" v. Romania*, Application No. 2330/09, Judgement of 9 July 2013.

[23] European Committee of Social Rights, *Irish Congress of Trade Unions v. Ireland*, Complaint No. 123/2016, 12 December 2018.

[24] Ibid., paras 40 and 98.

In a seminal case related to undocumented workers' rights, including the freedom of association, the IACHR stated in an advisory opinion: "The safeguard of these rights for migrants has great importance based on the principle of the inalienable nature of such rights, which all workers possess, irrespective of their migratory status".[25] It is indeed the inalienable nature of these rights and an extensive international consensus that provide a strong legal basis for platform workers, as well as other workers engaged in non-standard forms of employment, to enjoy their human right to freedom of association and collective bargaining, regardless of their employment status. This is also supported by the texts of Conventions Nos 87 and 98, which explicitly state that both rights should apply to all workers, with only limited exceptions.[26] Moreover, both the CFA and the CEACR have repeatedly highlighted that their application should cover all workers, regardless of the existence of an employment relationship that is often non-existent. (ILO 2012 and 2018).

Secondly, a human rights-based approach is also relevant, given that national courts are sometimes inconsistent with regard to the adoption and application of criteria to establish the existence of an employment relationship. For example, when national courts have to rule on the classification of platform workers, they may come to different conclusions, even if the way in which the work is performed is similar to that of employees (De Stefano et al. 2021). Therefore, there are situations in which workers from one platform are considered employees, while workers from another similar platform do not have an employment relationship.[27] This can be explained by the fact that the current tests to determine employment status fail to take into consideration novel aspects of work arrangements, such as those arising from the digitalization of work, which have a detrimental impact on workers. For example, the provision of flexible working hours by platform applications can be sufficient to exclude workers from basic labour protection.[28] This occurs because the traditional definition of employment relationship assumes that continuity in time for the provision of work is a fundamental requirement for the existence of an employment relationship and, consequently, all protections afforded by this relationship. A similar issue arises with regard to the control exercised by platforms through

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[25] Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of September 17, 2003, requested by the United Mexican States, Juridical Condition and Rights of Undocumented Migrants.

[26] Such exceptions include the armed forces and the police, with regard to freedom of association, and also public servants engaged in the administration of the State, with respect to the right to collective bargaining.

[27] The rulings in the following two Australian cases are illustrative of this: Australia, Fair Work Commission, *Mr Michail Kaseris v. Rasier Pacific V.O.F (U2017/9452)*, Case No. [2017] FWC 6610, 21 December 2017 (hereafter *Mr Michail Kaseris v. Rasier Pacific V.O.F*) ; Australia, Fair Work Commission, *Joshua Klooger v. Foodora Australia Pty Ltd*, Case No. [2018] FWC 6836, 16 November 2018.

[28] For case law see: Italy, *Bonetto Sergio e Druetta Giulia contro Digital Services XXVI Italy S.R.L.*, Sentenza n. 778/2018 pubblil 07/05/2018, RG n. 4764/2017; *Mr Michail Kaseris v. Rasier Pacific V.O.F*; Brazil, Tribunal Regional do Trabalho da 03ª Região, 37a Vara do Trabalho de Belo Horizonte, *Artur Soares Neto v. Uber Do Brasil Tecnologia Ltda.*, *Uber International B.V. e Uber International Holding B.V.*, Processo n.º 0011863-62.2016.5.03.0137; Brazil, Superior Tribunal de Justiça, *Denis Alexandre Barbosa v. Uber do Brasil Tecnologia Ltda.*, Conflito de Competência N° 164.544 – MG (2019/0079952-0), 28 de agosto de 2019.

algorithms (De Stefano et al. 2021).[29] It is only recently that some courts have started to recognize the extent to which technology can enable platforms to increase their overall control over workers' activities.[30] Such acknowledgments result in companies being required to establish an employment relationship, and therefore enable the exercise of the right to collective bargaining. Consequently, a human rights-based approach can help ensure that the enjoyment of fundamental labour rights, such as the right to collective bargaining, does not depend on a worker's status, a notion that is reflected by the recognition that these rights have gained within the field of international law.

Thirdly, a human rights-based approach becomes even more relevant when the phenomenon of managerial prerogatives and the effect that they can have on workers are taken into account (De Stefano 2017). Indeed, "[t]he employment relationship is by definition based on the social and legal power of one contractual party *vis-à-vis* the other" (De Stefano and Aloisi 2019, 369). Employers are able to use their superior bargaining power, which stems, inter alia, from contract law and employment regulations, in order to dictate various features of employment, such as the setting of wages at specific levels. For these reasons, it has been argued that managerial prerogatives are not merely the outcome of economic and social phenomena, such as unequal bargaining power and possession of the means of production; they can also be found in regulations which grant employers excessive authority over their workers (De Stefano and Aloisi 2019). As many platform workers do not have an employment contract, platforms are not legally bound by labour law to enforce such managerial prerogatives. However, platforms do contractually endow themselves with managerial powers and, therefore, their relationship with their workers shares many characteristics with a typical employment relationship.[31]

Within the context of non-standard forms of employment, as De Stefano argues, such managerial prerogatives can be further increased (De Stefano and Aloisi 2019). Workers in non-standard forms of employment, including platform workers, are often in a weaker position compared with workers in standard employment relationships. This can occur for a number of reasons. For example, workers on temporary contracts, irrespective of their employment status, may be affected by an "implicit threat mechanism", meaning that they refrain from properly exercising their contractual and labour rights due to the fear that their contract will not be renewed or extended (De Stefano and Aloisi 2019). Such a mechanism may also be observed in the context of casual work arrangements, like those in the platform economy, where platforms are able

[29] See, for example: Third District Court of Appeal, State of Florida, *Darrin E. McGillis v. Department of Economic Opportunity; and Rasier LLC, d/b/a UBER*, Opinion No. 3D15–2758, 1 February 2017; Tribunal de l'entreprise francophone de Bruxelles, Jugement du 16 janvier 2019, No. A/18/02920.

[30] See, for example: Brazil, Tribunal Regional do Trabalho da 03ª Região, 33ª Vara do Trabalho de Belo Horizonte, *Márcio Toledo Gonçalves v. Uber Do Brasil Tecnologia Ltda.*, Processo nº 0011359-34.2016.5.03.0112, 13 de fevereiro de 2017; Spain, Tribunal Superior de Justicia de Madrid, Sentencia número: 1155/19, 27 noviembre 2019.

[31] For example, many platforms set minimum wages for platform workers. Furthermore, jobs may often be posted on platforms at specific times of the day and, consequently, working hours are, to a certain extent, dictated by platforms.

to punish "unwanted activism" by simply erasing the profile of workers from their database with no justification. Moreover, as noted above, workers in non-standard forms of employment are less likely to unionize for other practical reasons, such as "fissured workplaces" (Weil 2014). This can result in less bargaining power in pay negotiations and consequently a wage gap and, more generally, inferior working conditions (ILO 2016). It can be argued that such extensive prerogatives may have an adverse impact on workers' dignity as human beings, especially in the modern world of work. In this regard, a human rights-based approach towards the rights to freedom of association and collective bargaining can be essential in limiting managerial prerogatives. Collective bargaining, as a key element of freedom of association, is the "most effective way to achieve a countervailing power to the employer and re-establish a balance of forces in the employment relationship" (Aloisi 2019, 6). By effectively using this right, trade unions and other workers' associations have played a vital role in generating better jobs, increasing wages and improving working conditions and other aspects of working life (OECD 2019).

The aforementioned examples are only a few of the positive legal implications that a human rights-based approach could have for labour policy. Arguably, the benefits of such an approach may also be relevant in terms of circumventing some of the practical issues faced by platform workers and other workers in non-standard forms of employment. For instance, a human rights oratory can act as a common language for workers from different occupational and even class contexts, thus bridging some of the gaps in their social background and attracting the attention and support of non-traditional partners. These are areas for which further research is needed.

It has long been claimed that one of the chief goals of labour law is "to be a countervailing force to counteract the inequality of bargaining power, which is inherent and must be inherent in the employment relationship" (Davies and Freedland 1983). In order for this notion to remain applicable in a modern context, it is necessary for labour law to be integrated into a larger project that will enable the field to expand its scope of protection to workers who are currently outside of it. The underlying assumption of this research is that a human rights-based approach can contribute towards such a development.

6. Conclusion

The world of work is changing. Undoubtedly, work provided through platforms has the potential to offer new and more flexible – mostly in terms of time and location – opportunities for job seekers. At the same time, however, these types of work arrangements can often significantly restrict the meaningful exercise of fundamental collective labour rights, which have been also recognized as human rights. As explained above, the majority of platform workers are considered as independent contractors, rather than employees of these platforms, despite evidence of work surveillance and control mechanisms that challenged this categorization.

Nevertheless, in spite of the aforementioned legal and practical difficulties, recent events reveal a growing mobilization of platform workers and cooperation

between traditional unions and a number of non-traditional organizations that represent workers' collective interests. To a certain extent, the results of such cooperation and collective action have started to become apparent around the world, for instance, in the form of workers' collective agreements or changes in their general working conditions. As noted above, these positive developments illustrate the importance that collective labour rights, such as the rights to associate freely and bargain collectively, can have in practice. Unfortunately, for workers within the platform economy and other workers in non-standard forms of employment, legal restrictions impede the actual practice of these rights.

As explained above, a possible way forward could be to adopt a human rights-based approach towards labour protection that considers all workers, regardless of their employment status, as entitled to the rights deriving from international human rights and labour rights treaties. Under such treaties and in their interpretation by supranational bodies, there should be no distinction between employment and self-employment with respect to the enjoyment of the rights to freedom of association and collective bargaining.

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