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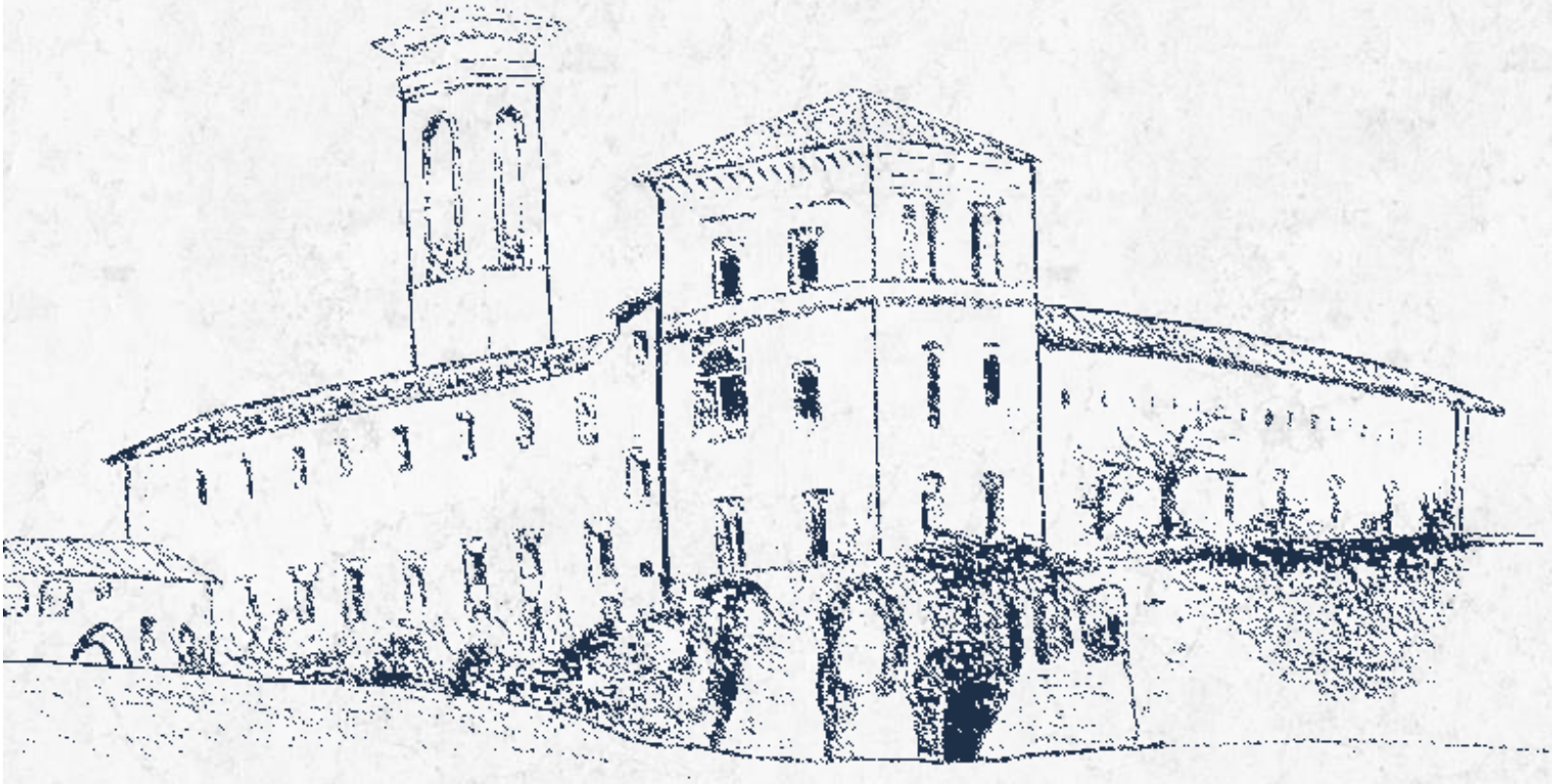

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What (if anything) May Justify a New Policy Regulation for Gig-delivery Workers? The Case of *Rappi* in Argentina

Kevin Hartmann-Cortés [*]

Abstract

There is an ongoing discussion regarding the disruptive effects of the 'gig' or 'platform' economy on labour law. The debate focuses on whether gig-work is a new typology of work that might overcome traditional employment categories. However, there is little acknowledgement of that discussion in developing countries. This article aims to contribute to fulfilling that gap by analysing the case of *Rappi* in Argentina. *Rappi* is a Colombian delivery platform created in 2015 in 27 cities and six countries in Latin America. We evidence that current legal frameworks are insufficient to explain the gig-work that *Rappi* riders perform. It is argued that there is a room to propose a new regulation in order to effectively capture the essence of this new type of work. The article develops four main features that such regulation should include. This new law might serve an optimal basis to encourage the protection of the gig-workers positions whilst encouraging the growth of these type of platforms.

Keywords: Labour law; gig economy; platform-economy.

Introduction

In July 2018, food-delivery riders in Buenos Aires spontaneously organised a protest against on-demand (gig) platforms such as Uber Eats,

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Glovo and *Rappi*. The trigger was a sudden reduction of the fixed commission per delivery. Shortly after, on October 1, 2018, the constitutional assembly of the trade union "*Asociación de Personal de Plataformas ("APP")"* was held with an attendance rate of 170 delivery-riders from these platforms. All the procedures established in the law regarding the constitution of a trade union were followed. Yet, until today, the Labour Authority has not yet recognized them formally.

The literature on the effects of the 'gig' or 'platform' economy on labour regulations have been centred in case-studies of some developed countries. However, little attention has been paid to those very effects in legal frameworks of developing economies, which suffer from different labour challenges such as high unemployment and informality rates. This article aims to start fulfilling that gap by studying the case of a gig-platform named *Rappi*. *Rappi,* is a Colombian multinational created in 2015 that operates in 27 cities and 9 countries in Latin America with similar labour law traditions.[1]

In all these countries there is an ongoing discussion regarding the nature of the legal relationship between the platform and its riders also called '*Rappitenderos*'. It seems that several aspects of the work deployed by the riders are controlled unilaterally by the platforms' algorithm, starting from the commission's fixation per delivery. Therefore, it would denote a subordination which would amount to as typical employment relationship. In fact, a similar reasoning was followed by the Spanish Supreme Tribunal that considered how delivery riders were, in fact, typical employees of the company that administered the platform. The argument was centred on the labour coordination and organisation of a standardised service by the platform.[2]

On the other hand, *Rappi* claims that its riders are, in fact, self-employed entrepreneurs. That is to say, they serve as 'agents' for a final user, which acts as a principal. In that narrative, platforms are merely intermediaries of the relationship between the principal (user) and the agent (delivery worker). According to Argentina's legal framework, as it is for the

[1] Miranda, B. *Rappi, el "Amazon de Colombia" que se convirtió en el emprendimiento más exitoso del país (y que genera protestas en algunas ciudades de América Latina)*, BBC World, Oct. 26, 2018 at: https://www.bbc.com/mundo/noticias-america-latina-45975280

[2] *Sentencia Número 805/2020* (Tribunal Supremo de España, Sala de lo Social, Pleno, 2020). Recurso de casación para la unificación de doctrina. MP: Excmo. Sr. D. Juan Molins García-Atance. (Sept. 23, 2020). Moreover, after that ruling, the Country issued a new regulation for workers associated to these types of platforms and recognized the relationship between riders and the platform was covered within the typical employment relationship in *Real Decreto-Ley 9/2021*. España, 11 May, 2021.

majority of the legislations in which *Rappi* operates, being either self-employed or an employee triggers a different set of rights, and duties. Moreover, the costs associated with one or another type of relationship are also different.

Typically, self-employed workers are owners of their organisation, tools and materials to perform a job. They have the necessary independence to choose whether to accept or reject a task, thus bearing its associated risks. On the other hand, employees are dependent on another person or organisation who provides precise instructions, tools, and materials to perform a job. As opposed to the independence of the self-employed, the subordination of employees implies being part of a company's disciplinary sphere. It means that employees would have to follow and comply with specific rules and procedures. Moreover, be subject to a certain degree of control in their job performance.[3] Nevertheless, it seems that, at least for the case of Argentina, neither of those categories might be able to fully capture the underlying legal relationship between the user, a platform and its riders.

The question that arises is whether (if at all) it is justified to create a new category in that legislation to regulate these relationships. In the affirmative, what would be its main characteristics. A normative claim is made which implies that this regulation should comply with a sufficiency criterion with respect to two elements: (i) the protection of minimum labour rights. (ii) the flexibility needed to encourage these types of businesses. To address this question, the methodology to be followed is a mix between comparative and critical legal analysis and qualitative analysis of riders' conditions. One of the main sources used for this article is a recent study conducted by the International Labour Organization (ILO) in Argentina.[4]

There are four sections in this article, including this introduction. In the first chapter, after a literature review and a critical legal analysis, it will be evidenced that the current legal framework in Argentina is insufficient to explain the relationship between *Rappi* and its riders, hence opening a path for a new category and regulation. The second section presents and details each of the minimum features such new regulation might have

[3] See also Todolí-Signes, A. *The 'gig economy': employee, self-employed or the need for a special employment regulation?* European Review of Labour and Research. At 23(2). Pp. 193-205. (2017).

[4] Madariaga, J., Buenadicha, C., Molina, E. y Ernst, C. *Economía de plataformas y empleo ¿Cómo es trabajar para una app en Argentina?*, CIPPEC-BID-OIT. Buenos Aires (2019)

considering comparative experiences and policy developments. Finally, the article will draft some conclusions.

1. *Rappi:* The Two Sides of its Success

Labour markets and industrial relations in developing countries have not been exempted from the impact of new technological improvements. Two simultaneous yet different phenomena may be identified: automatisation and digitalisation. The first one relates to how technological innovations and developments would impact employment rates and inequality. The second one entails a disruptive and expansionary revolution over established economic relations. In sum, whilst automatisation impacts employment substitution, digitalisation affects the quality and forms of employment.[5]

The challenges posed by these new modes of production to labour law are similar in all latitudes, thus becoming a phenomenon that may be better addressed globally.[6] Nevertheless, its impact differs depending on the geographical location of its operation. As for today, only a few articles have covered the impact of these models in developing countries' legal systems. As a result, there is a gap regarding whether there might be a case arguing for a new regulation that overcomes the classical divide in the legislation between employment relationships and independent or self-employed contractors. This article aims to contribute to the fulfilment of such a gap.

The so-called 'platform economy' includes several business models and transversely affect different economic sectors –with their characteristics and markets– and thus, an all-embracing definition may not be fully reached.[7] That is why, frequently, these concepts are used indistinctively

[5] Molina, O. & Pastor, A. *Digitalización, Relaciones Laborales y Derecho del Trabajo*. In Fausto Miguélez (coord.) *La revolución digital en España. Impacto y Retos sobre el Mercado de Trabajo y el Bienestar*. Bellaterra: Universitat Autònoma de Barcelona. Available at: https://ddd.uab.cat/record/190328 (2018).

[6] In fact, Globalisation and technological innovation, together with an agenda of deregulation and flexibilisation, radically transform the production and accumulation models in western societies. This transformation is also partly supported by a narrative encouraging 'entrepreneurship' that moves away from the social and trade union movements, triggering an escape from the labour law regulations and labour perspectives. Rodríguez-Piñero Royo, M. *La agenda reguladora de la economía colaborativa. Aspectos laborales y de seguridad social*. Temas laborales. Oct. 9th, 2017, at 138. 125-161.

[7] See Petropolous, G. *An economic review of the collaborative economy*. Policy Contribution. Issue 5. Bruegel (2017) P-1. Also, refer to Schneider, H. *Creative Destruction and the Sharing*

and alternately in the literature.[8] Furthermore, almost all scholars researching this topic come up with a different categorisation of the same phenomenon. For instance, 'crowd-work' and 'work-on-demand via app', or 'generic and specific on-demand via app platforms"[9]. However, regardless of the specificities of each categorisation, there is a common denominator. These business models perform a matching or connecting role for direct or indirect exchange[10].

What is relevant for this article is the type of service provided by *Rappi*. It is a delivery service that includes food delivery or the innovative category of 'whatever you would like'.[11] This service is done physically through their delivery men. They access the platform, accept a command from a user and provide the service. *Rappi* has fulfilled up to 200.000 orders a day, making it one of the most important digital platforms in Latin-America and thus, attractive to investment funds[12]. In fact, in September 2018, *Rappi* became the second Latin American 'unicorn', defined as a company with a market valuation of one billion dollars or more.[13]

The literature has identified five causes: to explain the expansion of these type of platforms: i) the rising rentability of capital; ii) an increasing purchasing power; iii) the improvement of market functioning (including

Economy. Uber as disruptive innovation. *New Thinking of Political Economy*. Edward Elgar Pub. Ltd. Cheltenham, UK. (2018). P-24.

[8] See Stewart, A. & Stanford, J. *Regulating work in the gig economy: what are the options?* The Economic and Labour Relations Review. At 28(3) P. 420-437, (2017). Also, see Sargeant, M. *The Gig Economy and the Future of Work*. E-Journal of International and Comparative Labour Studies. 6(2). Pp.1-11, (2017)

[9] De Stefano, V. *The rise of the 'just-in-time workforce': On-demand work, crowd work and labour protection in the 'gig-economy'*, in Comparative Labor law and Policy Journal, 37 (3): 471- 503 (2016). See also Todolí-Signes, *supra* n. 2.

[10] Stanford, J. *The Resurgence of gig work: Historical and theoretical perspectives*. The Economic and Labour Relations Review, at 28(3), P.382-401 (2017).

[11] It consists in asking to a person would provide a service of your preference like buying a book or a pack of cigarettes or delivering a package to another address.

[12] Recently, *Rappi* received an investment of 200 million US dollars. See Miranda, *supra* n. 3. In fact, the number of digital platforms that are rising as a consequence of this 'digital revolution' expresses all its potentially disruptive effects. According to a study of *PriceWaterhouseCoopers* these types of business are projected to represent almost 335 billion dollars of revenue in 2025 –in contrast to the 15 million dollars it represented in 2014–, corresponding to a growth rate of more than 35% per year. For further reference, see Montel, O. *L'economie des platformes: enjeux pour la croissance, le travail, l'emploi et les politiques publiques*. Document d'études. Direction de l'animation de la recherche, des études et des statistiques (DARES). No. 213, (2017).

[13] Fan, J.S. *Regulating Unicorns: Disclosure and the New Private Economy*. Boston College Law Review. April 5th, 2016, at 583, 583-642.

growing atomisation of the markets due to the reduction of entry barriers and a decrease of information asymmetries); iv) digital innovation and, finally, v) the diversification of the skills of individuals in a competitive labour market[14]. I would add a sixth cause: the grey zones of the labour relationship between platforms, users and workers that allow these business models to use less costly legal figures regarding their payroll fixed costs like self-employment relationships.

1.1. The Dispute in the Literature: Between Regulation And Enforcement

In the literature, it is possible to find five solutions to the legal challenge posed by the operation of platforms like *Rappi*: i) confirming and enforcing the existing laws through litigation; ii) clarifying or expanding the definitions of employment to consider the set of new activities as equivalent to employment[15]; iii) creating (or enforcing) the third category in between typical employment and self-employment relationships; iv) establish a set of rights for workers as a broader concept that goes beyond the employee status and lastly, v) redefine the notion of 'employee'. [16]
These five options are not incompatible with each other. For instance, it would be possible to imagine creating a third category that establishes a set of rights for workers considering a broader concept than the employee relationship. Thus, in synthesis, there are two options: i) fitting the platform-delivery worker relationship to the already established categories in the legislation. Alternatively, ii) create another category of a different nature that would include some fundamental rights from one relationship whilst maintaining the freedom associated with the other.
The question to be addressed is whether the disruption of *Rappi* and other similar platforms in Argentina challenges current legal categories in the country. In the affirmative, then explore whether it would be desirable to create a new category in the legislation or enforce the current ones. Finally, if accepting the thesis of new regulation, what are its overall

[14] Montel, *supra* n.14, 21-24
[15] Within this category it is interesting to analyse the more radical proposal of redefinition of a worker where the concept of 'worker' should include the perspective of an economic subordination more than a legal one: "This way of thinking upholds the concept that an employment relationship should be applied to any worker who has an objectively weak bargaining position regardless of how he/she executes the work, albeit under dependency or with autonomy". See Todolí-Signes, *supra* n. 11, P.198.
[16] Stewart & Stanford, *supra* n.10, 429-431

features. This last question will be discussed in the next section. Firstly, let us frame the first question in recent discussions held in the literature.

In the literature, it is possible to categorise those who depict the need of a third category and those who defend such a position: we might label them as *orthodox* and *heterodox*. The first group includes the authors who argue that the platform-service economy such as *Rappi* does not constitute a different mode of production. Therefore, it could be perfectly explained through classical categories of employees and self-employed as exists in most legislations. The second one holds the opposite. It considers that these disruptive businesses entail a new mode of production. Hence, there is a need for a new regulation overcoming the classical binary discussion of employee-independent contractor.

Among the arguments provided by the orthodox position, authors like De Stefano[17] explain how the business model of the platforms such as *Rappi* resembles classical casual work. Thus, the application of existing legal regulations towards labour should be enforced to protect these workers. Cherry & Aloisi arrive at a similar conclusion. After engaging in comparative legal analyses of the three most quoted 'third categories' existing in Canada, Spain and Italy, they found out that these are not enforceable to gig-relations[18]. Their main critique focuses on various reasons such as: i) the vagueness of the definition of the addressed relationship; ii) the unintended risks and consequences that it could have regarding a typical employment; relation; iii) the potential increase of arbitrage by those who are dissatisfied with the classification and, finally, iv) the fact that a comprehensive regulation might discourage the usage of these platforms by those people who use them as a mean to earn extra money besides their established job.

Similarly, some arguments between the orthodox position consider that gig-work is a self-employment relationship between workers and user, whilst the platform serves as a mere intermediary between the latter two[19]. Moreover, these intermediation types have been a practice since the 19th

[17] De Stefano, *supra* n.11, P.13.

[18] Cherry, M.A. & Aloisi, A. *"Dependent Contractors" In the Gig Economy: A Comparative Approach,* American University Law Review, at, vol. 66 : Iss. 3. (2017)

[19]. Cavallini, G.G. *The (Unbearable?) Lightness of Self-Epmloyed Work Intermediation: The cases of Uber, Foodora and Amazon. Mechanical Turk In The Light of the Italian Labor Law*. Working Paper. Università degli Studii de Milano. (2017). However, the relationship between the final user and the worker is even more blurry than the one between the platform and the worker. As Stewart & Stanford, *supra n.*10, argue, "the relationship between the gig worker and the ultimate user of their services is more ambiguous. It depends on the business model adopted by the intermediary, and how it is characterized by regulators".

century when the 'long-standing management-labour extraction strategy' was enforced. Nonetheless, what is new, is the use of digital techniques involving a new system to plan, supervise, pay and allocate resources. However, these new means to execute work does not have the entity to change the nature of the work. In sum, these platforms use on-demand contingent workers to perform particular productive work associated with a deemed supply service.[20]

The heterodox posture defends that even if the strength of the authors' arguments mentioned above is not to be disputed, current definitions of labour were determined and well placed before the entrance of these disruptive models. Thus, their aim was not regulating a new employment relationship but protecting certain other kinds of work framed within the classical industrial mode of production. Hence, those categories are not associated with the new challenges raised by digital on-demand platforms, like the new modes of control and a new definition of dependency created by the digitalisation of labour relations.[21] Furthermore, a new regulation would necessarily harm the already established typical labour relations presumed to be the default relationship of all working schemes in most legislations.

The heterodox position recognises that the platform economy has created legal uncertainty regarding workers' classification and such is the main challenge to be addressed by a new regulation. A new category would thus ascertain predictability among the parties regarding the relationship under which they are involved[22]. Furthermore, this becomes relevant as some companies would have less risk in providing a set of benefits to its workers without the fear of them being categorised as *faux indépendants* and actual employees.[23]

Furthermore, there are two other arguments in advocating for the heterodox position: the first is that the authors arguing in favour of extending the employee relationship to these workers would drastically increase the cost structure of those business models. Hence it would potentially lead to a decrease in consumer welfare and the platforms'

[20] Stanford *supra* n.12 386-396

[21] Sierra Benítez, E.M. *El tránsito de la dependencia industrial a la dependencia digital: ¿qué Derecho del Trabajo dependiente debemos construir para el siglo XXI?*. Rev. Intnal y Comp. Rel. Lab. Dcho Empl., at vol 3, n 4, (Oct. 2015).

[22] Nadler, M. L. *Independent Employees: A New Category of Workers for the Gig Economy*. North Carolina Journal of Law & Technology, at 19(3) pp. 443-496 (2018).

[23] Madariaga et al, *supra* 4, 30.

collapse.[24] The second one is that it is an excellent opportunity to engage in a regulation based on tripartism. It is argued that an efficient regulation depending on the job performed could be achieved more adequately through collective agreements. The best example is how Denmark decided to approach this issue.[25]
Recent judicial and policy decisions in some developed countries have mostly seemingly agreed with the orthodox position[26]. However, the following sections of this article will argue that there might still be a case to argue in favour of adopting a new regulation after considering the specificities of Argentina's regulation.

1.2 Rappitenderos: Neither Agents nor Employees

Rappi is the employer of 1.500 workers under an employment relationship and 25.000 *Rappitenderos* (riders) who are considered, according to the terms and conditions in Argentina, as "independent delivery men".[27] That is to say, self-employed *via* an agency relationship. This section aims to address whether it is possible to describe the underlying relationship between *Rappi* and its riders through an 'agency relationship' as claimed by the platform or as an employment relationship as claimed by the riders?
Categorising this relationship impacts not only the set of rights and obligations to both the platforms and riders. Moreover, according to recent case law, it seems that collective rights also depend on that. For instance, in some legislations, being entitled to the right of association and collective bargaining depends on the definition of a precise legal relationship.[28] As Cherry & Aloisi indicate, "classification as an employee is a "gateway" to determine who deserves the protections of labour and employment laws"[29]. In the Argentinian legal framework, there is nothing

[24] Buenadicha, C.; Cañigueral Bagó, A. & De León, I.L. *Retos y posibilidades de la economía colaborativa en América Latina y el Caribe.* Sector de Instituciones para el Desarrollo. División de Competitividad, Tecnología e Innovación. Doc. No. IDB-DP-518. Banco Interamericano de Desarrollo. (June 2017).
[25] Todolí-Signes, *supra* n.11
[26] See *Sentencia Número 805/2020 supra,* n 3.
[27] See *Rappi Términos y Condiciones.* Available at: https://legal.*Rappi*.com/argentina/terminos-y-condiciones-*Rappi*-2/. [Accessed 14th May 2021].
[28] Vega Pérez-Chirinos, C. *Lo que el caso Deliveroo puso sobre la mesa: autónomos y acción colectiva.* Revista Crisis y Renovación del Sindicalismo, at 36, 123-132. (2017).
[29] See Cherry & Aloisi *supra* n. 19 p.638.

to suggest that it would be the case. However, the latest judgement on *Rappi* and its workers in Argentina seems to suggest the contrary.[30]

Argentinian legislation includes two common legal categories present in most legislations: employee (worker) and independent contractor (agent or self-employed). Each one of them triggers a different set of rights, duties and protections. Although it is commonplace to situate the emergence of these categories in the industrial revolution after the workers' struggle to gain their rights, the literature suggests that these figures could be actually traced back to the Roman civil law tradition[31]. Legal categories *locatio-conductio rerum* and *locatio-conductio operarum* were the concepts through which both subordinated and autonomous work was regulated in the Roman Empire legislation. The difference between them is that the worker would fall into the orbit of personal subordination *vis-à-vis* his employer in the first one, whilst in the second one, there would be absolute autonomy to perform the work.[32] In other words, the discussion on the binary divide in modern labour legislation based on subordination was opened since that time. Despite the different revolutions that have changed the social relations of production, they remain essentially unaltered.

In both common law or civil law traditions, the most critical feature that distinguishes an employee from an independent worker is the level of control of the counterparty over the worker or its job performance.[33] Thus, the notions of subordination, dependency and alienation are the key when speaking about typical employment relationships, whilst autonomy, freedom and independence, are the main features of an independent relationship[34]. Henceforth, the set of rules governing one or the other relationship change.

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[30] This discussion will be developed in section 2.

[31] At that time, the legal regime that covered the relations of production was based on property relations that were, in any case, vertical and strictly hierarchical. See Sierra Benítez *supra n* 22, 5.

[32] See Sierra Benítez, *supra* 22.

[33] See Cherry & Aloisi *supra* n. 19

[34] See Sierra-Benítez *supra* n. 22. Indeed, dependency and subordination do not only refer to the submission and compliance of a worker to the employer in terms of following instructions, but also the insertion of the worker to the disciplinary circle of the enterprise. For instance, there would be subordination when the worker complies with the disciplinary codes of conduct and determined tasks that are controlled by the employer. That notion has demonstrated a huge resilience capability to the new economic and technological realities.

Rappi considers its platform as an intermediator that facilitates the relationship between the 'independent delivery man' and the 'users' (both a natural or physical person) through its 'technological and mobile platform'. The legal narrative[35] used by this company is that the service they provide is claimed to be executed through an 'agency contract'[36]. In those relationships, the user is the principal, and the delivery man is the agent, thus escaping labour-law regulations and falling into the civil or commercial set of rules[37].
However, specific features of such a relationship would reveal that their role between them and their delivery-men goes beyond mere intermediation or agency. Thus, suggesting that there may be some subordination features with mechanisms of discipline and control.

1.2.1. *Rappitenderos* as Agents

Civil and commercial contractual relations are the 'fundamental act of the private autonomy'. Being susceptible to economic valuations, they constitute the essential legal instrument for capital circulation.[38] As mentioned, *Rappi* argues that their role consists of intermediating in the agency contract between their delivery men and the final user. However, it seems that its role goes beyond neutral intermediation.
The agency contract relationship is regulated in the Civil and Commercial Code of the Nation (CCCN) Law 26,994 of 2015 within articles 1319 to 1334. Such a contract is defined as when a person gives another one the power to represent them to execute a legal act. Among other characteristics, the agency contract could be either written or verbal, and it could be expressly or tacitly accepted by both parties involved. According to article 1904 of the Civil Code, the agency contract implies that if there is acceptance of the mandate by the agent (in *Rappi*, it would be the acceptance of a command requested by a user), then it is the agent who is

[35] See Molina & Pastor *supra n. 5*. They argue how "it seems like Adam Smith's invisible hand would have embodied itself into these digital platforms and what is more important and overall, lucrative for these kinds of enterprises is that if they are not considered a service provider, the enforcement of labour, social security or consumer laws cannot be properly done. That situation would put them in a sort of legal limbo that would report them undoubtedly competitive advantages in terms of social costs savings".
[36] See *Rappi supra* n.27.
[37] An employment relationship according to the Argentinian law would be costlier than a self-employed one for the platform.
[38] Hinestrosa, F. *De los principios generales del derecho a los principios generales del contrato*. Revista de derecho privado, at 5, Pp.3-22. (Jan/June, 2000).

obliged to fulfil its duty by himself. Hence it would be the agent who could be held liable for potential breaches in the execution of the mandate. However, that is not what happens with a command in *Rappi* when a command is unfulfilled. The platform counts with a channel to attend to final users in case of any problem with the commands. Therefore, it is the platform which directly held responsible by the consumer for the service failure, not the rider.[39] This peculiarity would break down one of the essential elements of an agency contract. Moreover, it would contradict the pure 'intermediation' function claimed to be performed by *Rappi*.

Another essential feature of the agency contract is the possibility to subcontract with a different agent to fulfil the object of the contract. However, according to *Rappi*'s T&Cs, the rider cannot subcontract the command once it is assigned to him or her. In fact, 100% of the workers from *Rappi* indicated that they had never subcontracted their work.[40] Furthermore, the agency contract is, in general terms, a generic contract, not a special one (i.e. *intuitu personae*)[41]. Hence, the prohibition set by *Rappi's* T&C is an exogenous element to such kind of relationship. The consequence of imposing that clause to all potential contracts between riders and users implies an unnatural restriction to private autonomy that governs agency agreements, hence constituting itself as an element of control of the service provided by *Rappi* riders.

Another example of how the assumptions of a civil or commercial agency contract are not fully useful to accurately describe the underlying relationship for the case of *Rappi* is the platform's ability to block riders[42] who do not comply with certain requirements. In an agency relationship, the task is performed independently and autonomously with the tools owned by the agent. However, *Rappi* demands its riders to acquire and wear company advertisement (among which there are hats, t-shirts, and carry-bags) under the risk of being penalised by not receiving any further commands. Moreover, the platform seems to have a control mechanism called the 'acceptance rate', according to which riders are supposed to accept all and every single command offered to them, even if not

[39] See Madariaga et al, *supra* n.4.
[40] See *Idem,* 111.
[41] It could potentially be an '*intiutu personae*' contract, but it has to be clear in the contract.
[42] The contract modality between the platform and the riders referring to the acquisition of the elements of work and advertising of the platform is supposedly a 'loan agreement' which requires the return of the material once the legal relationship finishes. See *Rappi supra* n.27.

convenient for their location.[43] Seemingly, riders are controlled, uniformized and identified with the brand of the company. The use of control mechanisms evidence that *Rappi* is seeking a standardised service even if they are not providing any training for their delivery riders. Hence, there is little autonomy for riders to perform their job. With these elements, it seems the argument of *Rappi* as being just an intermediary between a user and a rider could be rejected.

1.2.2. *Rappi* Workers as Employees

This section will explore whether the typical employment relationship might fully explain the underlying relationship between user, platforms and riders like *Rappitenderos* argue, or there might be a case for a *sui generis* category. The position of the trade union *APP* is to recognise that between the platform and its riders, there is a hidden typical employment relationship.

The history of labour law starts in Argentina in 1853 when the National Constitution recognised the freedom to work. As in the rest of Latin America, Labour Regulations were developed after the first decades of the XXth Century, especially after the constitution of the ILO[44]. There was a recognition of a maximum workday, social security regulations, collective bargaining rules and basic protections for workers such as occupational health[45]. However, it was not until May 15, 1974 when the Labour Contract Regime [*Régimen de Contrato de Trabajo*] (Ley No. 20.744) was created. Such legislation remains today the leading framework regulating these types of relations[46]. The individual employment contract is the antithesis of the civil contracting model, as it recognises the inherent asymmetry between employers and employees. Hence, the weak party of the relation would need to receive statutory protection to equilibrate the relationship.[47]

Article 21 of the Labour Contract Regime indicates the two concurrent conditions to hold an employment relationship: i) a person obliges him or

[43] See Miranda *supra* n. 3

[44] See Villasmil Prieto, H. *Pasado y presente del derecho laboral latinoamericano y las viscicitudes de la relación de trabajo (segunda parte)* Revista Latinoamericana de Derecho Social. 2016, P. 2

[45] See Madariaga *supra* n 4, p.131.

[46] Arg. Lab. Cont. Reg. (Law 20.744) (1976).

[47] Such vision is evidenced by Article 17Bis in Arg. Lab. Cont. Reg. (Law 20.744) (1976) where it is stipulated that "inequalities created by this law in favour of one of the parties shall only be understood as a way of compensating for other inequalities in the relationship" (own translation).

herself towards another to perform a service or execute a task in exchange for a salary. ii) It does so under the dependency or subordination of the other person[48]. Article 23 of the Law of the Labour Contract also recognises a 'presumption' of an employment relation whenever there is a relationship with some aspects of an employment relationship, yet it is not expressly recognised.[49] This would mean that the burden of proof for an autonomous relation is higher, as the law assumes that the default option for those cases is the employment relationship.

Subordination is a notion that has not been adequately developed in positive legislation, but in the case law. High Courts in Argentina have adopted multiple criteria to establish when would a self-employment relationship hide typical employment. The two most important ones are dependency and identification. Dependency could be either economic or legal. Economic dependency considers the regularity and predictability of the remuneration. Legal dependency analyses if the job is performed under precise instructions and subjected to the disciplinary power of an employer-like figure. On the other hand, identification relates to the possibility of detecting elements that could associate a worker having a link with a determined company.[50] All things considered, this is the main point to consider when analysing the platform-rider relationship.[51]

There might be good reasons to declare that *Rappi* riders might fall within the category of the typical employment relation. Indeed, there are some

[48] Public employees are covered by another set of rules. The Labor Contract Law only regulates the employment relationship between private individuals and entities. Article 21 Arg. Lab. Cont. Reg. (Law 20.744) (1976) indicates "[a] contract of employment, whatever its form or name, exists whenever a natural person undertakes to perform acts, execute works or render services in favour of another and under the dependence of the latter, for a specified or unspecified period of time, against payment of remuneration. Its clauses, as regards the form and conditions of the performance, are subject to the provisions of public policy, the statutes, collective agreements or awards having the force of such, and customs and usages." (own translation)

[49] Arg. Lab. Cont. Reg. (Law 20.744) (1976), Art 23. "The fact of the provision of services gives rise to a presumption of the existence of a contract of employment, unless the circumstances, relations or causes that motivate it demonstrate the contrary. This presumption shall also apply even if non-employment figures are used to characterise the contract, and insofar as the circumstances do not allow the person providing the service to be classified as an employer." (own translation"

[50] See Madariaga *supra* 4, P.133.

[51] See De Wilde D'Estmael, J. & Marique, E. *La fonctoion d'intermédiaire des plateformes: une nouvelle clé pour réglementer les relations de travail qu'elles in-/produisent?*. In Lamine, A and Wattecamps, C. (coord.) *Quel droit social por les travaillerus de plateformes? Premiers diagnostics et actualités législatives*. UCLouvain. Pp.241-295. (Feb. 2020).

hints of legal dependency because of the elements of control described in the last sub-section. Furthermore, there might be good reasons to argue that these riders also have an economic dependency. As far as 95.5% and the number of hours dedicated to that job is, on average is 58.13 hours a week. This working time exceeds 10 hours: the maximum working time per week allowed in a typical labour relationship without extra charges.[52] Moreover, there are normative reasons such as the benefits these workers could derive from being in an employment relationship: paid vacations, licences and a guaranteed resting day.

However, current employment categories used in the Labour Contract regime are not functional for the type of work performed by *Rappitenderos* nor for the type of business model attained by *Rappi*. Indeed, it might be inconvenient to argue for a declaration of an employment relationship. Moreover, there is one feature of typical employment relationships that would lead to rejecting the idea of categorising these workers as traditional employees: its inflexibility. This inflexibility manifests itself in the legal restrictions employees and employers have in a typical employment relation regarding a minimum and maximum working time.

The law regulating the employment contract establishes a uniform length of the working day for all the nation[53]. It is established at 8 hours per day and a maximum working time of 48 hours per week[54]. This feature would break the backbone of gig-work: the freedom these workers have in setting up their working schedules however they want. [55] In fact, some riders would rather prefer to do extra work on certain days to compensate for others in which they would preview to work less time.[56] In that way, there are some days or even weeks in which a gig worker would exceed the maximum working time set up by law[57]. It would be highly artificial to

[52] See Madariaga et al. *supra* 4, P.83.

[53] Arg. Lab. Cont. Reg. (Law 20.744) (1976), Art 196. "The length of the working day is uniform throughout the Nation and shall be governed by Law 11.544, to the exclusion of any provincial provisions to the contrary, except as modified or clarified in this Title." (own translation)

[54] Arg. Work. Day. Law (Law 11.544) (1929), Art 1. "The duration of work may not exceed eight hours a day or forty-eight hours a week for any person employed in public or private undertakings, even if they are not for gainful employment. (…)" (own translation)

[55] See Molina & Pastor *supra n. 5*

[56] See Madariaga *supra* 4.

[57] I acknowledge a potential objection of such freedom as entailing and encouraging self-exploitation behaviour. However, attending that discussion exceeds the scope of the current paper. Moreover, it exceeds the scope of a potential legal regulation in terms of the type of work deployed by gig or any other type of workers. for further reference on

apply the argument according to which the delivery worker, because of his schedule choices, certain days of the week is covered by the standard employment relationship and some other days by the partial employment relationship. [58] Furthermore, it is of the essence of this type of business to offer such freedom to workers. Around 80% of *Rappi* workers consider flexibility understood as freedom to schedule their own time as the best feature of this type of business[59]. The reason argued by those workers is that they do not consider that job as an opportunity to develop a career in the long-term but as a way to overcome the shock of unemployment and generate income whilst there is an opening in the formal labour market.[60] Hence, the restrictions offered by this type of relationship in forcing these workers and platforms to comply with this particular restriction do not seem suitable to explain the gig-work performed by *Rappi* riders.

An objection might be raised at this point: current developments in labour law have incorporated new types of employment with new categories, such as the recent law of teleworking adopted in Argentina as part of the Labour Contract Regime.[61] This regulation establishes that the minimum

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the paradox of freedom in a performance society and its potential derived risks of self-exploitation, please refer to Han, B-C *Die Müdigkeitsgesellschaft (La Sociedad del Cansancio)*. Traducción: Arantzazu Saratxaga Arregi y Alberto Ciria. Editorial Herder. Barcelona, 2017.

[58] See Arg. Lab. Cont. Reg. (Law 20.744) (1976), Art 92 TER "1. A part-time employment contract is a contract under which the worker undertakes to provide services for a certain number of hours per day or per week, less than two thirds (2/3) of the normal working day of the activity. In this case, the remuneration may not be less than the proportional remuneration corresponding to a full-time worker, established by law or collective agreement, in the same category or position. If the agreed working time exceeds this proportion, the employer shall pay the remuneration corresponding to a full-time worker. 2. Part-time workers may not work overtime or overtime, except in the case of Article 89 of this Act. The violation of the working day limit established for part-time contracts shall generate the obligation of the employer to pay the salary corresponding to the full working day for the month in which the violation occurred, without prejudice to other consequences that may arise from this non-compliance. (…) 5. Collective bargaining agreements shall determine the maximum percentage of part-time workers in each establishment who shall work under this contractual modality. They may also establish the priority of such workers to fill full-time vacancies occurring in the undertaking." (Own translation)

[59] See Madariaga et al *supra,* n 5

[60] See Madariaga et al *supra,* n 5

[61] Arg. Lab. Cont. Reg. (Law 20.744) (1976), Art 102Bis incorporated by Law 27.555 of the 14th August 2020. "There shall be a telework contract when the performance of acts, execution of works or provision of services, in the terms of Articles 21 and 22 of this law, is carried out totally or partially at the domicile of the person working, or in places other than the establishment or establishments of the employer, by means of the use of

requirements to perform such work should be established by a special law and the specificities of regulation by activity should be negotiated in a collective bargaining process.

The Argentinian Government presented in 2017 a project to reform Law 20.744. This project introduces a new category of employment: the 'economically engaged autonomous professionals,' *[Profesionales autónomos, económicamente vinculados*]. The figure aims to formalise the working conditions of individuals who receive remuneration for delivering a service also having an economic dependency. The project argues that an individual is economically dependent when a person receives at least 80% of their yearly income by working under this 'new figure'. However, the individual must not have worked over 22 hours per week under this type of contract. Otherwise, there would be a typical employment relationship[62].

The problem with this proposal is that such legislation remains part of the Labour Contract Regime, which means that the inflexibilities derived from an employment relationship remain the same for this new way of working. Moreover, such regulation as proposed is virtually inapplicable. Essentially no riders would benefit from this regulation as their average working hours per week is beyond that time limit[63]. Moreover, there is an additional risk associated with such a proposal. It is hard to embrace all

information and communication technologies. The minimum legal requirements for the telework contract shall be established by a special law. The specific regulations for each activity shall be established by collective bargaining considering the principles of public order established in this law." (own translation) This regulation does not apply to *Rappi* riders as their delivery job is done physically.

[62] See Madariaga et al *supra* n 3, p. 22.

[63] According to Madariaga et al *supra* n 3, P. 85, the number of hours dedicated to that job in average for the delivery-men in *Rappi* is 58,13 hours a week, which exceeds in 10 hours the maximum working time per week allowed in a typical labour relationship without extra charges. Moreover, this project does not define what would be the regulation to be applied to those workers who comply with the requirements set by the reform but have an even higher degree of dependency translated, for example, in a higher number working hours per week. Would they be considered as being entitled to a typical employment relationship? And in the affirmative, then the understanding of dependency in the labour legislation in Argentina would switch from the perspective of legal dependency to an economic one. The economic dependency, as described are sensible to income sources and the time spent working for an employer. Once the legislation is changed, other forms of autonomous work would be endangered if analysed through this new category. Hence, the consequences of this proposal, although well-intentioned, would most likely increase the legal uncertainty for these workers. It will further create more confusion regarding the enforcement of certain laws and, ultimately, making the new regulation unenforceable or too risky to follow

types of gig-work in a single regulation because within the rigidity of the Labour Contract Regime. As described, not even the literature has agreed on a single classification of such phenomenon. Hence, a policy regulation might create new grey zones within the gig-workers, leaving them more susceptible to precarity.

Thus, we can agree that *Rappitenderos* are neither agents nor typical employees. None of those legal figures might fully explain the underlying relation between the platform and its riders. This would have consequences in the collective labour law analysis of this platform which will be discussed in the next section. Moreover, it opens the door to regulate a new figure to capture the essence of this *sui generis* relationship.

2. A *sui Generis* New Category? Minimum Requirements for Adequate Regulation

The case of *Rappi* in Argentina opens up a possibility of a new policy regulation overcoming the limits of both the civil-law and labour law current frameworks. This new figure must attend to the disruptive flexibility which is reflected in the freedom of riders to set up their schedule along in exchange for a less costly contract. Based on the literature, comparative proposals and the overall discussion on the Argentinian legal framework, the new regulation should at least include the following four elements: i) explicit recognition of platform workers as collective bargaining actors; ii) reinforcement of the presumption of employment relationships; iii) agreement on a set of fundamental principles governing the relationship such as a shared payment of social security contributions, enjoyment of regular licenses, paid vacations and resting hours; and, finally, iv) respect the rider's freedom to set up working hours and schedules.

2.1. Platform Workers as Collective Bargaining Actors

There are three reasons to consider platform workers as collective bargaining actors in the case of *Rappi* in Argentina. The first one is of a legal character: (i) recent judicial decisions have been ambiguous on recognising the right of association and collective bargaining to these workers; (ii) national and comparative developments of new regulations in different jurisdictions lead to the same conclusion and, finally, (iii) because of the differences between gig-work performed with different platforms, a comprehensive regulation on the subject might have undesirable consequences such as the creation of new grey zones in the legislation,

fostering the uncertainty of these workers. With respect to the first reason, as it was argued in another article[64], recent judicial developments in Argentina subordinated fundamental collective labour rights to the clarification of the type of relationship held between platforms and their riders.[65] The *Cámara Nacional de Apelaciones del Trabajo* ('CNAT') ruled that it was impossible to judge *a priori* whether blocking *Rappitenderos* as a consequence of creating a trade union might breach their collective fundamental rights. The reasons focus on the 'impossibility to determine the relationship between the platform and its deliverymen[66]. In fact, the Chamber indicates[67]:

> [I]t is clear that it is impossible for this Chamber to qualify the relationship between the parties, because that would imply anticipating the criterion to be applied only when the file can return to the Court for a final judgment establishing the full extent of the parties' rights. Given this impossibility of qualifying the link, there is no other solution - it is reiterated, at this stage of the proceedings - than to provisionally annul the measure issued at first instance.[68]

Seemingly, this interpretation suggests that the fundamental right to association and its subsequent protections are consubstantial only to employment relationships[69]. The objection to this particular judgement is that there is not a single requirement in the legislation in Argentina, labour or competition law, conditioning the assessment of an anti-trade union behaviour or simply the right of association to the resolution of an employment relationship. The three riders were seeking *Rappi* to stop a

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[64] See Kevin Hartmann-Cortés. How did a food-delivery platform's judgement transform freedom of association into a second-class right? Dispatch 37, Argentina. Comp. Labor Law & Pol'Y Journal. August, 2021. 1-9.

[65] *Rojas Luis Roger Miguel y otros v Rappi Arg. SAS*. S.Nº1141; Exp.Nº. 46618/2018. Juzgado Nacional de Primera Instancia del Trabajo Nº 37, (March 19, 2019).

[66] *Rojas Luis Roger Miguel y otros v Rappi Arg. SAS*. CN°: 46618/2018. Cámara Nacional De Apelaciones Del Trabajo - Sala IX, (July 19th, 2019). P.1-3.

[67] "[E]s claro que esta Sala se encuentra imposibilitada de calificar el vínculo entre las partes, porque ello implicaría anticipar el criterio con el que solamente corresponde resolver cuando el expediente pueda volver al Tribunal para dictar una sentencia definitiva que establezca en toda su extensión los derechos de las partes. Dada esa imposibilidad de calificar el vínculo, no cabe otra solución –se reitera, en este momento del trámite del expediente- que dejar provisoriamente sin efecto la medida dictada en primera instancia" *Rojas Luis Roger Miguel y otros v Rappi Arg. SAS*. CN°: 46618/2018. Cámara Nacional De Apelaciones Del Trabajo - Sala IX, (July 19th, 2019). P.1.

[68] *Ibidem*. Own translation.

[69] See Kevin Hartmann-Cortés *op cit* P.7-8.

potential anti-trade union behaviour triggered by the prohibition to access the platform after constituting a Trade Union. It was the essence of their procedure. However, the ruling leads to an unusual interpretation of the right of association. Such interpretation of collective fundamental rights such as the right of association creates an unjustified differentiation between individuals who have different type of employment status.

Furthermore, and what is more salient, the CNAT should have applied Article 2 of Convention 87 from the ILO, ratified by Argentina and thus part of its ordinary legislation[70]. This article protects the right of association for *all workers* independently of whether they are entitled to an employment relationship or not. According to multiple reports and interpretations from the Committee on the Right of Association of the ILO, the word 'workers' in the mentioned article has to be interpreted not to be restricted to those who have a standard employment relation, but extensively. This means that the underlying relationship between the platform and the rider is irrelevant to grant protection of collective rights such as the ones derived from the right to association and collective bargaining. The Committee of Freedom of Association also highlights that trade union freedoms and guarantees should at all times be enjoyed without being subordinated to any *ex ante* legal relationship.[71]

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[70] Convention 087 Freedom of Association and Protection of the Right to Organize Convention, Article 2. "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their choosing without previous authorization."

[71] To the extent to which the ILO agrees with such vision, see the following report-cases of the ILO: Case No. 2556, *349th Report of the Committee on Freedom of Association* (2008) "The Committee recalls in this regard that the status under which workers are engaged with the employer should not have any effect on their right to join workers' organizations and participate in their activities. The Committee likewise recalls that all workers, without distinction whatsoever, whether they are employed permanently, for a fixed term or as contract employees, should have the right to establish and join organizations of their choosing". Para 754; P.174-175. Furthermore, 376th Report of the Committee on Freedom of Association "the Committee again recalls that all workers must be able to enjoy the right to freedom of association regardless of the type of contract by which the employment relationship has been formalized." Para 560; P.145 (2015). Finally378th Report of the Committee on Freedom of Association "the legal status of the workers' employment relationship should not have any effect on their right to join workers' organizations and participate in their activities" Para 158; P.44, (2016) Dorssemont & Lamine, arrive to a similar interpretation of Convention 87. By quoting the report 2888 of the Committee of Freedom of Association on Poland it is established that the definition of the word 'workers' needs to be extended to cover categories of precarious workers like agricultural workers and independent workers. Moreover, the authors illustrate the consequences of such interpretation and rightfully conclude: "the

Considering this recent judgement, the new regulation policy must be careful in establishing explicitly that platform workers are collective bargaining actors. That would be the way in which *tripartism* that inspires the labour legislation in Argentina could be ensured. Moreover, as referring to the second argument announced at the beginning of this sub-section, there is a need to explicitly recognise such right explicitly in the general legislation to avoid situations like the ones triggered by the legislation implemented in the Netherlands.

That country enhanced a regulation called the 'min-max contracts'. It stipulates a "threshold and ceiling values for working hours so that part-time work can be organised in response to fluctuating volumes"[72]. Gig-workers, however, are still essentially considered by the platforms as 'autonomous workers or 'independent contractors'. Therefore, the possibility of collective bargaining is annulled.[73] Furthermore, the experience of other countries is similar. American Senator Warren from Virginia in the United States proposed the Bill H.R. 5367 from march 21, 2018 to "[A]mend Rule 23 of the Federal Rules of Civil Procedure to protect the "gig economy" and small businesses that operate in large part through contractor services from the threat of costly class action litigation, and for other purposes". Such regulation aims to protect the potential misclassification of workers in these platforms as 'independent contractors'. However, it does not mention any collective bargaining rights or a minimum floor of social security standards enjoyed by gig-workers.[74]

committee has thus decided to not dissociate the recognition of trade union freedoms from collective bargaining rights. In principle, that approach implies that the recognition of the right to create or affiliate to a trade union acknowledges the recognition of the essential means in seeking the defence of the interest of its members. Within them, there is the right of collective bargaining of the trade union in question.". See Dorssemont, F. and Lamine, A. *Quels droits collectifs pour le travailleur de plateformes? Champ d'application des droits fondamentaux et obstacles à leur exercise*, In Lamine, A and Wattecamps, C. (coord.) (2020) *Quel droit social por les travaillerus de plateformes? Premiers diagnostics et actualités législatives*. UCLouvain. Pp. 299-350.

[72] Valenduc, G.; Vendramin, P. *Work in the digital economy: sorting the old from the new*. Working papers - European Trade-Union Institute (ETUI). P.35 (March 2016).

[73] See De Stefano *supra* n 11, P.486 and Rodríguez-Piñero Royo *supra* n 6, P 143-144.

[74] For common law countries, it would be better to set a judicial test that could set a minimum legal standard for such workers. As summarised by Pinsof: "[t]he common law control test was the first legal standard to emerge to determine which workers fell into which category. It consists of ten factors: control, supervision, integration, skill level, continuing relationship, tools and location, method of payment, intent, employment by more than one company, and type of business. No single factor is dispositive. Courts

Finally, considering the third argument, the work made by riders could be different from the work performed by another type of gig-workers. Thus, an over comprehensive regulation may miss the differences between their situation and the type of job performed. For that reason, encouraging autonomous bargaining might be a way to allow the parties to find a suitable regulation of their work through collective agreements. Moreover, the trade-union density[75] and history in Argentina and its collective bargaining legal framework would allow for such procedure to be followed. This option is the one followed by Denmark and it has resulted in positive consequences[76].

2.2. Reinforcing the Presumption of Employment Relationships

Even if this presumption already exists in the legislation[77], it seems necessary to reinforce it in the new regulation due to the potential risk of using this new category as a scapegoat to undermine typical employment relationships. For example, after their flexible regulation on gig-work that facilitates the possibility to dispose of the workforce, countries such as England or the Netherlands are experiencing a significant increase in work arrangements such as zero-hour and on-call contracts, which are undermining typical employment relationships.[78]
In England, the regulation does not include a retribution for the platform-worker while looking for a gig and making the contract. That means the new workforce is paid per project, task, or unit of output, not per hour.

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evaluate each of the ten factors with an eye towards determining which party generally has control over the work process: if the employer controls, the worker is deemed an employee, and if the worker controls, he is deemed an independent contractor". See Pinsof, J. *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 Mich. Telecomm. & Tech. L. Rev. (2016), p.347

[75] According to the ILO, the tradeunion density in Argentina is one of the highest in Latin-America with an average of 30% in the last decade. See ILO, ILOSTAT (2019), available at: https://www.ilo.org/ilostat/faces/wcnav_defaultSelection?_afrLoop=3534642212010866&_afrWindowMode=0&_afrWindowId=null#!%40%40%3F_afrWindowId%3Dnull%26_afrLoop%3D3534642212010866%26_afrWindowMode%3D0%26_adf.ctrl-state%3De8d32kudp_4

[76] "Strong unions are associated with reduced wage dispersion, enhanced welfare state generosity, and increased electoral participation among low-income groups" Andrias, K. *The New Labor Law*. Yale Law Journal, at 126, no. 1. P.77-78 (2016).

[77] See Arg. Lab. Cont. Reg. (Law 20.744) (1976), Art 23, *supra* n 48.

[78] See De Stefano *supra* n 11, p.481.

Thus, the figure adopted in that country does not recognise remunerated resting time (i.e. vacations or lunch hours) for those workers. Thus, finally, there is a reinforcement to the competence of "hire and fire" or, more precisely, "to mobilise and demobilise a significant portion of the workforce on an on-demand and 'pay-as-you-go' basis"[79].

Considering that, in Spain they adopted a regulation which reinforced the presumption of an employment relationship. *Real Decreto-Ley 9/2021* was adopted May 12 2021. It consisted of a tripartite negotiation on the categorisation of these type of workers. It decided two things: the first is that any digital work is assumed to be performed under an employment relationship. The presumption already existed in the law. However, it was reinforced explicitly in this new legislation. The second decision fo that law implied that workers would be informed about the parameters, rules and instructions used by the algorithm to decide on how it shares the information and allocates the work between its riders. This feature is important to avoid potential arbitrariness by the platform via automatised control mechanisms such as performance or acceptance rates.

Hence, to prevent potential interpretations of the new regulation that might lead to a race-to-the-bottom to already established labour rights, it would be necessary to reinforce the presumption of the employment relation already established in the legislation. In that way, the norm's scope would be targeted to its legitimate destination: current platform workers facing the legislation's grey zone.[80]

[79] See De Stefano *supra* n 11, p.481.

[80] There is an idea of an intermediate category that could be useful for the Argentinian case. In Colombia, bill PL-082/2018-C creates the figure of *trabajador digital* ('digital worker') as an intermediary relationship in-between the dependent labour relationship and the independent civil relationship. It procures the creation of a basic social security safety net for these workers that are unprotected by the legislation. This law bill ensures a joint social security contribution (pensions, health and occupational safety) as well as the recognition of basic collective labour rights to improve the digital-worker's bargaining position to autonomously negotiate better conditions of work considering the specificities of these business model. This proposal would be a better fit for Argentina as it contemplates the flexibility of the nature of this type of job, a basic standard social protection and the recognition of collective rights which would enhance a direct negotiation between digital workers and platforms regarding the specificities of the work offered by each platform.

2.3 Agreement on Fundamental Social Rights

In developing economies that suffer from high informality rates, platform work constitutes the main source of income for the people performing these tasks. In the case of Argentina, the level of economic dependency from *Rappi* workers to its platform is high. This job constitutes the primary source of income for around 90% of the workers and their families.[81] Therefore, certain fundamental benefits derived from the new relationship must be the ground. If the new regulation seeks to overcome the divide between the typical employment and the self-employed or autonomous relationships, it would be possible to guarantee a set of fundamental rights for platform workers: for instance, a shared payment of social security contributions.

Social Security is also one of the main topics regarding the regulation of these platforms. Usually, the social security system is nurtured through contributions that usually depend on the type of relationship a worker has with his or her employer. The way to contribute to the social security system in Argentina depends on the modality of contract a person would hold. According to the Law 24.241, the contribution under a typical labour relationship would be made jointly by both the employee and the employer according to specific proportions. For autonomous workers, the category in which *Rappi* riders are currently included, Law 25.865 created a regime oriented to facilitate the contribution of independent workers through a more flexible scheme called the 'social unified tax'. Nevertheless, the contribution to social security relies exclusively on the autonomous worker.

It seems that allocating the responsibility to contribute to the social security system to the rider might not be a good idea. It might encourage evasion of the payments which leads to deprotection of their social security rights. For that reason, new regulation might try to imitate the employment relationship by sharing with the riders the contributions to social security. Nonetheless, it could be done in a different proportion than the employment rule due to the flexibility and rotation rates in delivery-jobs like *Rappi* in Argentina. This could be decided in the collective agreements reached after the collective bargaining of each platform with the trade union. In that way, the platform would gain because the weight of the contribution under a typical employment relationship is, in any case, costlier due to the proportion the employer

[81] See Madariaga et al *supra* n 5

must assume. In addition, the platform worker would also benefit as the autonomous workers must assume the totality of the contribution to the social security system. Some other fundamental rights might be needed to be regulated, like the enjoyment of standard paid leaves like maternity, paternity, illness or bereavement. Furthermore, paid resting hours and vacation time according to the business production model. However, as it is a new regulation, the rights might be announced as a general rule in the new regulation leaving the details on their application open to collective bargaining. A similar approach was adopted by the new teleworking legislation, which is still to be regulated through collective agreements once the pandemic had reached an end.[82]

2.4 Respecting the Rider's Freedom to Set Up Working Hours and Schedules

The following minimum feature of this regulation aims to ensure not only the expectations of *Rappi* and other platform workers regarding the job to be performed but also to encourage the expansion of these types of platforms. Indeed, flexibility and liberty to schedule the riders' work are among these types of platforms' main disruptive elements. In that sense, as insisted in previous sections of this article, protecting a minimum standard of flexibility regarding the schedule and working time by law might be an essential feature to differentiate these types of working arrangements from the classical employment relationship. It seems the most critical feature of both the riders and the platform as the disruptive mechanism to be held in a future regulation through collective agreements.

Conclusions

Current legal frameworks fail to fully explain or capture the type of relationship hidden between users, *Rappi* and its delivery-men in Argentina. The inflexibility of the typical employment relationships cannot resist the disruption of on-demand work schedules. In fact, it might be inconvenient to be applied to that relationship. Moreover, autonomous self-employment relationships seem to be insufficient to include control features such as the organisation and coordination of

[82] See Arg. Lab. Cont. Reg. (Law 20.744) (1976), Art 102Bis, *supra* n 61.

delivery jobs through acceptance rates. Therefore, there is a good case to justify an innovation in policy regulation regarding new types of work.

Policies adopted in developed countries seemed not to be applicable in the Argentinian context either because they are too risky to follow, or they might not entirely capture the subtilities of *Rappi* work. Yet, it does not reduce the urgency to adopt a new regulation. According to the recent judicial developments in Argentina, there is a need to decide on the nature of work performed by those riders as an *ex-ante* condition to determine whether they enjoy some collective rights. Nonetheless, the current proposal of regulation drafted by the Government has several risks. It lacks precision and could lead to impossible enforcement if approved.

Consequently, there is an opportunity for a new regulation that might constitute itself a model for other developing countries. Considering the Argentinian legislation and its development, it seems that *at least* four essential features should be included in this regulation: i) explicit recognition of platform workers as collective bargaining actors; ii) reinforcement of the presumption of employment relationships; iii) agreement on a set of fundamental principles governing the relationship such as a shared payment of social security contributions, enjoyment of regular licenses, paid vacations and resting hours; and, finally, iv) respect the rider's freedom to set up working hours and schedule. This new law would serve as a basis to be further developed in collective agreements between the platforms and trade unions from the sector.

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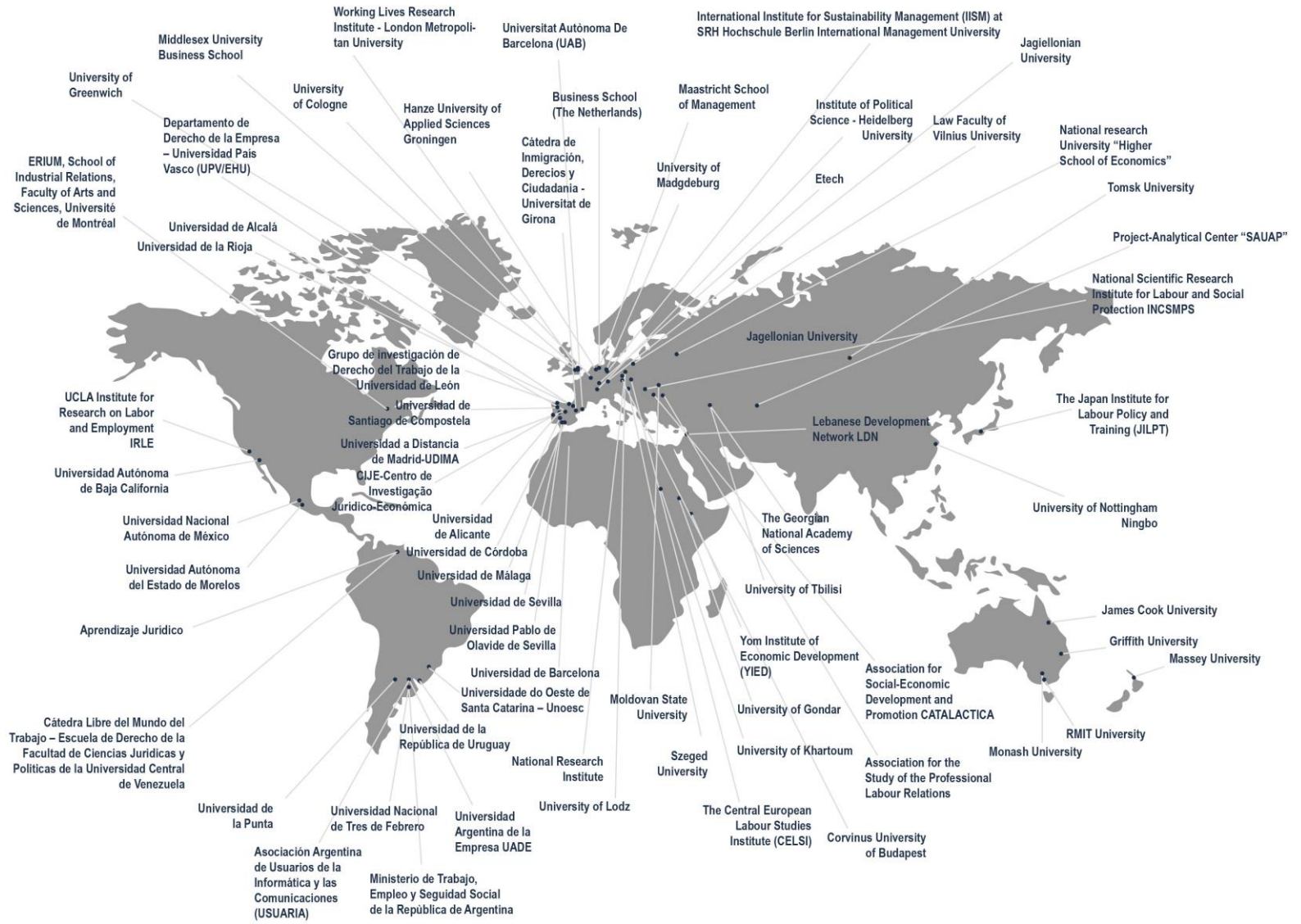

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