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Representation and Collective Bargaining of Brazilian Trade Unions in an Era of Apps

Between the old corporatism and the gig economy[1]

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Abstract

In a context of intense development on Artificial Intelligence (AI) and of labor solidarity in crisis, the role of the trade unions for platform workers may be considered one of the most complex themes for these traditional Labor Law organizations. The rideshare drivers in the USA had, for the first time, the right to unionize utilizing an ordinance of the City of Seattle, in 2015. Nonetheless, a debate involving Antitrust Law arose. In New York, Uber reached an agreement with an affiliate of the Machinists Union, creating the Independent Drivers Guild (IDG), which represents approximately 70,000 people. In the UK, in turn, the trade union GMB – which represents both taxi and Uber drivers – took part in July 2015 on the legal debates about the *status* of Uber drivers. In Brazil, we have to step back for a moment and consider its trade union system – as well as all the problems involving the freedom of association. Legislation of the 1930s – deeply influenced by corporatist theories – is still the basis, due to its reaffirmation in the Federal Constitution of 1988 (CF), currently in force. The

[1] This was the title of our proposal to the COGENS Project event "Collective Bargaining and the Gig Economy: New Perspectives," that would have taken place in Santiago de Compostela, Galicia, Spain, on September 17 and September 18, 2020.

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We have translated the norms from Portuguese to English. We apologize in advance for any inaccuracies or mistakes.

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"exclusiveness" *(unicidade)* determines that trade unions must organize themselves according to professional and economic "sectors" *(categorias)* – respectively employees and employers, as the Portuguese word "*sindicato*" (trade union) refers to them both –, and in a "territorial base" *(base territorial)* – which shall not be smaller than a municipality. Focusing on the Brazilian experience – including some features brought by the Covid-19 pandemic – and adopting a narrative literature review with a qualitative approach, this paper aims to discuss the challenges that collective bargaining in the gig economy may face.

Keywords: Labor Law; platform workers; trade unions; gig economy; collective bargaining.

1. Introduction

Artificial Intelligence (AI) can both: (i) subordinate workers to its calculations; and (ii) empower them. In the latter, AI may be seen as Augmented Intelligence. According to the Cambridge Dictionary, Artificial Intelligence is "the study of how to produce machines that have some of the qualities that the human mind has, such as the ability to understand language, recognize pictures, solve problems, and learn." The same Dictionary defines Augmented Intelligence as "the study of how machines that have some of the qualities of the human mind, such as the ability to understand language and recognize pictures, can help humans to solve problems, deal with information, etc."[4] So, Artificial Intelligence has its foundation in technological development, while the Augmented Intelligence focuses on the gain of this development to human life.

The path (i) described above puts apart the work itself from its context, translating activities into data models, with input and output variables, as well as with the processes involved. The algorithms can recalculate at a hard-to-predict moment the existing arrangement of these activities and point out to humans the immediate changes to be taken. This approach leaves little – or no – room for human opinion and, in the world of work, generally means disregarding workers' voices. The "objective" functionalities and efficiencies of digital platforms make the workers' disagreements futile and time-wasting, a dynamic in which data managers and scientists are exclusively legitimized to express ideas. The workers are provided with the necessary means to execute their activities, but they become easily replaceable and, as a consequence, they suffer a relevant loss in bargaining power. However, if we take the path (ii) above, AI may offer transparency about processes and elements to positive changes. The humans have been facing the challenges of algorithm interpretation yet, which allows

4 Florian Butollo: Designing AI tools to benefit workers. *Social Europe,* April 8, 2020. https://www.socialeurope.eu/designing-ai-tools-to-benefit-workers (Accessed June 23, 2020.); Artificial Intelligence. In: *Cambridge Dictionary* (n.d.1). https://dictionary.cambridge.org/pt/dicionario/ingles/artificial-intelligence (Accessed June 23, 2020.); Augmented Intelligence. In: *Cambridge Dictionary* (n.d.2). https://dictionary.cambridge.org/pt/dicionario/ingles/augmented-intelligence (Accessed June 23, 2020.)

decisions that consider work realities and build on experience, reasoning, and intuition. In other words, path (ii) makes the worker an active actor towards technology, as the worker's understanding values to the automated decision-making.[5] Will the further advancements in Artificial Intelligence bring Augmented Intelligence attached to it?

The non-stop development of robotization and digitalization – with Artificial Intelligence and algorithms as powerful symbols – are causing new debates about the future of Labor Law. The impact of technology in the world of work is a well-known phenomenon, like dishwashers, traffic lights, mobile phones, and computers changed the way we work and replaced jobs. The matter nowadays is that the technological pace goes much faster than ever before, bringing changes to the work environment and taking jobs at an arguable faster pace. As a result of this process, the collective pillar in work relations is also questioned, as solidarity and organizing capacity of workers face pressures. Trade union density is globally falling, collective bargaining loses its power, capital goes beyond national borders. The "super-capitalism" seems to be incompatible with the workplace democracy and the collective organization idealized decades ago.[6] In tune with this order of observations, Hungler highlights that elements like isolation, identity crisis, and existential fear do not contribute to the creation of "genuine group cohesion." Solidarity is in crisis, but workers still have tools to improve their daily lives – the system of collective bargaining, for example. Nonetheless, trade unions have increasing difficulties to truly connect with the workers they represent.[7]

The debate on the "end of work" has regained importance, but this debate relates to a broader one: what is the "future of work"[8]? The origins of the recent debate on the future of work recall the mid-1970s, with books like *False Promises* – Aronowitz, 1972 –, *Where Have All the Robots Gone?* – Sheppard, 1972 –, and *Work in America* – Special Task Force, 1973. At that moment, workers promoted strikes in the USA to deny the promised correlation between productivity and wages. This correlation had made possible the deal proposed by companies to trade unions in the auto industry in the 1940s. In the mid-1990s, while terms such as "work displacement" and "downsizing" became more and more frequent in the managerial vocabulary, books like *The Jobless Future* – Aronowitz and De Fazio, 1994 –, *The Labor of Dionysius* – Hardt and Negri, 1994 –, and *The End of Work* – Rifkin, 1995 – gave a new panorama for work relations. The difference between the referred decades

5 Butollo (2020) op. cit.

6 Frank Hendrickx: *Social justice and labour rights: EU and ILO face palms in the governance web.* The University of Leiden, Inaugural Social Justice Lecture, 2017. https://www.universiteitleiden.nl/en/law/institute-of-public-law/labour-law-and-social-security/research/paul-van-der-heijden-social-justice-chair (Accessed April 26, 2020.) 6.

7 Sara Hungler: Freedom of services and trade unions: could alliance be provided as a cross-border service? *Hungarian Labour Law E-Journal*, vol. 1., no. 1. (2017) 50–59. http://hllj.hu/letolt/2017_1_a/A_05_Hungler_HLLJ_2017_1.pdf (Accessed August 31, 2020.) 52–53.

8 We have approached some features of this theme via analyses on the intense litigation regarding the gig economy in Brazil: Antonio Rodrigues de Freitas Júnior – Victor Raduan da Silva: *Gig economy and Labor Courts: notes about recent Brazilian experiences.* Sao Paulo, SP, Brazil, 2019.: Brazil–Japan Litigation and Society Seminar 2: Cultural Diversity and Global Challenges.; Antonio Rodrigues de Freitas Júnior – Luciana Barcellos Slosbergas – Victor Raduan da Silva: The uberization of work and the legal subordination: the Brazilian case. *Shinshu Economics and Law Review*, vol. 1., no. 5. (2018) 265–287. http://hdl.handle.net/10091/00021416 (Accessed May 12, 2020.)

would be – ironically – summarized this way: if the 1970s experienced workers refusing to work, the 1990s opened the possibility to capitalists refuse workers.[9]

Nonetheless, these 1970s and 1990s popular references have recently reappeared, sometimes blended with pinches of hysteria.[10] Going specifically to the contributions – mentioned above – from Jeremy Rifkin, in his book *The End of Work: The Decline of the Global Labor Force and the Dawn of the Post-Market Era*, Churchwell points out differences between the 1995 version and the 2004 one. In the former, Rifkin foresees the end of work as the reduction of the labor force on a global scale would not refer to the increasing demand for human work, but to the opposite trend. In the 2004 version, Rifkin suggests that the scenario has worsened. He interestingly compares this early 2000s moment – i.e. some years before the 2008 Crisis – with the pre-1929 Crisis one, in which consumers had high debts. According to traditional economic theories, increased productivity leads to reduced unemployment. However, Rifkin states that these theories fail to explain the recent world because economic indicators may increase while unemployment remains high.[11]

As we see, these debates are shaped by diverse points of view. Nonetheless, they are often unsuccessful to differentiate work as a social activity – developed by humans – and work as an element of socioeconomic systems – relating to hours, salaries, conditions, benefits, etc. Work fulfills a two-fold purpose: people work because they want to build a living – accessing certain protections and rights – and to pursue some goals – and gain recognition, which relates to self-affirmation and self-development. The end of work – and the basic income implementation, a trending topic during moments of high and persistent unemployment, as Europe in the aftermath of the 2008 Crisis – is typically approached without its social significance.[12] And this lack of social significance may be seen in the detailed compartmentalization that the Labor Law historically confers to work.

The Brazilian Labor Law gives a great value to the legal subordination, dividing the workers into two big groups: independent contractors and employees[13]. However, the law admits that some activities have specific regulations, which lead us to some concepts: liberal profession, differentiated professional sector, intellectual work, and regulated profession. Nonetheless, the Consolidation of

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9 George Caffentzis: The end of work or the renaissance of slavery? A critique of Rifkin and Negri. *Common Sense: Journal of the Edinburgh Conference of Socialist Economists*, no. 24. (1999) 20–38. https://commonsensejournal.org.uk/1999/12/01/issue-24/ (Accessed October 4, 2020.) 20–21.

10 Michael A. Peters: Deep learning, the final stage of automation and the end of work (again)? *Psychosociological Issues in Human Resource Management*, vol. 5., no. 2. (2017) 154–168. https://link.gale.com/apps/doc/A518901510/AONE?u=capes&sid=AONE&xid=9b0778f3 (Accessed October 4, 2020.) 164.

11 Cynthia D. Churchwell: What happens after high unemployment? *Harvard Business School Working Knowledge*, November 1, 2004. https://hbswk.hbs.edu/archive/the-end-of-work-the-decline-of-the-global-labor-force-and-the-dawn-of-the-post-market-era (Accessed October 4, 2020.)

12 Gérard Valenduc – Patricia Vendramin: *The mirage of the end of work.* European Trade Union Institute, 2019. https://www.etui.org/Publications2/Foresight-briefs/The-mirage-of-the-end-of-work (Accessed April 25, 2020.) 2., 12.

13 A definition that rises debates: "Art. 3 – It is considered an employee any individual who provides services of a non-casual nature to an employer, under the dependence of the latter and for a salary." [Brazil: Decreto-Lei nº 5.452, de 1º de maio de 1943. Aprova a Consolidação das Leis do Trabalho. *Presidência da República*, 1943. http://www.planalto.gov.br/ccivil_03/decreto-lei/del5452.htm (Accessed May 6, 2020.)]

the Labor Laws (CLT) determines equality among technic, intellectual, and manual work[14].[15] By the way, these two big groups of the Brazilian system – independent contractors and employees – express similarities with the traditional Hungarian one. Gyulavári describes the latter as a "binary system of working relations," with the civil law relationships and the employment ones.[16]

The Judiciary Branch in Brazil, when asked to determine if a person is an employer or an independent contractor – in the so-called classification litigation –, uses the traditional elements of the employment relationship: (i) legal subordination; (ii) work performed by a person; (iii) habitual work; (iv) work performed by someone specifically; and (v) work that is paid. There is a wide debate regarding the adequacy of this employment test, as the complexities of work forms become increasingly explicit. If a person is considered an independent contractor, he/she is almost ignored by the Brazilian Labor Law. The work conditions and social needs of some workers are simply unknown to a broader public, which makes, for example, the policies and representation dedicated to them not enough.[17]

This misunderstanding seems to be an inherent aspect of many debates on platform workers. The role of the trade unions for them may be considered one of the most complex challenges for these traditional Labor Law organizations. Focusing on the Brazilian experience, this paper aims to analyze the role of the trade unions in the gig economy, as well as the collective bargaining that may arise from this. Firstly, we provide a brief – and surely incomplete – update on relations between technology and work, approaching some recent developments. Secondly, we analyze foundations of trade unionism in the International Labor Law, mainly in the centenarian International Labor Organization (ILO). Thirdly, the gig economy and trade unions meet each other. We concisely report how trade unions in the USA, in Europe, and in Brazil have been interacting – or if they interact – with platform workers. Regarding Brazil, we delve into the intricate trade union system – with its problematic corporatist roots and terms, like "exclusiveness" *(unicidade)*, "sectors" *(categorias)*, and "territorial base" *(base territorial)* – and some possible reforms in this area. The recent legal regulations on road transportation, as well as those impacting the work of taxi drivers, offer us a parameter to imagine the trade unionism of platform workers. Fourthly, we conclude with some general reflections, perhaps offering the reader more doubts than answers.

To do so, we adopt a narrative literature review as our methodology. Trying to give some explanation, the literature review is the basis for academic research. Nonetheless, there are many types of literature review, that may range from very systematic and formulaic ones to unsystematic overviews. We adopt here more specifically a narrative overview. In other words, we deal with previously published

14 "Art. 3 – […] Sole paragraph – There will be no distinctions regarding the type of employment and the condition of the worker, nor between intellectual, technical, and manual work." [Brazil (1943) op. cit.].

15 Ana Virginia Moreira Gomes – Patrícia Tuma Martins Bertolin: Desafios para a regulação: trabalho autônomo e o Direito do Trabalho. *Revista do Direito do Trabalho e Meio Ambiente do Trabalho*, vol. 2., no. 2. (2016) 79–95. https://indexlaw.org/index.php/revistadtmat/article/view/1234 (Accessed May 2, 2020.) 82.

16 Tamás Gyulavári: A bridge too far? The Hungarian regulation of economically dependent work. *Hungarian Labour Law E-Journal*, vol. 1., no. 1. (2014) 82–103. http://hllj.hu/letolt/2014_1_a/01.pdf. (Accessed October 6, 2020.) 82.

17 Gomes–Bertolin (2016) op. cit. 84–85.

information and offer a comprehensive narrative synthesis of it. Narrative reviews may build or evaluate a theory but may have less ambitious goals, such as: (i) surveying the state of the knowledge on a specific theme, which can provide useful integrations of a research area and present information for professors, teachers, scholars, etc.; (ii) identifying problems, pointing out the contradictions, weaknesses, or controversies in an area, as well as raising questions that would be useful in future researches; and (iii) offering the path that resulted in research or theory in the field, which gives us the chronology of some fundamental ideas.[18]

2. An Update on Technology and Work

Uber is largely referred to when there are debates about the gig economy. An interesting – and somehow astonishing – report is that Uber is expanding its on-demand model relied upon precarious work to temporary staffing businesses, which are already known for overexploitation. The new app is called Uber Works and was launched in November 2019 in Chicago, aiming for jobs like warehouse work, bartending, and commercial cleaning. Uber and temporary staffing agencies – for example, TrueBlue – are partners in this new app. Uber provides the assignment to the worker via the app, and the agency employs and pays this worker, which would be a good deal to everybody. However, these companies are often thinly-capitalized and the competition among them is fierce. So, the companies may illegally cut their labor costs in the name of the maintenance of their contracts. The temporary workers, in turn, fear that their complaints about illegal workplace conditions would make them lose their jobs or avert their transition to permanent employment.[19]

Outsourcing may be seen in the Uber's famous practice of treating its drivers as independent contractors, despite all the controls that the company has over the drivers. We highlight the clear interference on the route to reach a destination, the rate for a ride, and the customer that is served. This situation differs from the one faced by the traditional independent contractor. The traditional one negotiates prices with a client, makes investments to grow and sustain a business, builds a client base, while the Uber driver depends on the platform. The expansion of Uber's outsourcing tends to expand also the boundaries of precarious work, with its well-known working conditions, wages, social protection, etc.[20]

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18 Roy F. Baumeister – Mark R. Leary: Writing narrative literature reviews. *Review of General Psychology*, vol. 1., no. 3. (1997) 311–320. https://psychology.yale.edu/sites/default/files/baumeister-leary.pdf (Accessed April 25, 2020.) 312.; Bart N. Green – Claire D. Johnson – Alan Adams: Writing narrative literature reviews for peer-reviewed journals: secrets of the trade. *Journal of Chiropractic Medicine*, vol. 5., no. 3. (2006) 101–117. http://www.sciencedirect.com/science/article/pii/S0899346707601426 (Accessed April 25, 2020.) 103.; Mari Juntunen – Mirjam Lehenkari: A narrative literature review process for an academic business research thesis. *Studies in Higher Education*, (2019) 1–13. https://www.tandfonline.com/doi/full/10.1080/03075079.2019.1630813 (Accessed April 25, 2020.) 1.

19 Laura Padin: Uber's dangerous expansion into temporary labor. *National Employment Law Project*, December 5, 2019. https://www.nelp.org/blog/ubers-dangerous-expansion-temporary-labor/ (Accessed April 25, 2020.)

20 Padin (2019) op. cit.

But it is not commonplace to talk about LinkedIn, ZipRecruiter, and their competitors. Perhaps they do not fit in the gig economy, but they certainly indicate new interfaces between technology and work. They may be considered at a glance as mere social networks, but they also serve to employment as an international or national mediator. The kind of employment agency that charges a fee from its user represents the intermediary between a worker and an employer and raises money from this intermediation. We may say that LinkedIn and ZipRecruiter provide "employment services." The terminology applied to platforms may be diverse and legal questions could emerge, but the offer/demand that LinkedIn-type platforms intermediate make them close to the mediation agencies in their traditional role of matching prospective employers and employees.[21]

De Stefano and Wouters underscore that the subjects of these employment services should be discussed nowadays. If we restrain here the concept of the employer in its original legal terms, we may face serious shortcomings, since an independent contractor may be later reclassified as an employee. Considering the lack of social protection, what would be the legal consequences of this reclassification for both the employment service and the employer? Regulations on the employment services should refer far beyond the employment contract *strictu sensu*. The labor markets are overwhelmingly fluid and a growing number of people is in the "grey area" – between self-employment and employment, being platform workers, casual workers, dependent self-employed people, etc. –, a reality that should lead to the regulation of employment services beyond the milestones of employment contracts. Labor markets would gain more regulatory coherence and guarantee basic protections for the most vulnerable workers – such as the domestic workers, who are frequently recruited via digital labor platforms but are often ignored in the discussions on platform-based work.[22] So, we need to consider the gig economy and their platform workers as part of a wider phenomenon, namely the impact of technology – as the above-mentioned Artificial Intelligence (AI) – in work, which is well known and challenging at the same time.

But what about workers' participation here? Its enhancement may have various degrees, from coping with the existing institutions to deeply reforming the company structures. The Japanese management in the 1980s inspired companies to institute team production and employee involvement. Updating the traditional Labor Law could also foster the workers' voice. Constitutional rights, like free speech, should be applied more often in the workplace, making democratic dialogues more noticeable. And the focus of corporate governance should shift, benefiting not only shareholders but also stakeholders. In the gig economy, one option is the deep transformation of platform companies in cooperatives. If it is done, all the discussions on classification litigation are put aside, as coop members are by definition both employees and owners of the business. The challenge is related to the feasibility of this idea,

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21 Valerio De Stefano – Mathias Wouters: *Should digital labour platforms be treated as private employment agencies?* European Trade Union Institute, 2019. https://www.etui.org/Publications2/Foresight-briefs/Should-digital-labour-platforms-be-treated-as-private-employment-agencies (Accessed April 26, 2020.) 3.

22 De Stefano–Wouters (2019) op. cit. 7.

at times when neoliberalism tends to reduce people to market participants, eliminating other social roles, like the political ones. Nonetheless, our present may open possibilities towards political and institutional restructuring, in which people's voices may be valued and fix our democratic deficits.[23] Participation, voice, democracy: keywords for the study of trade unions.

3. Some Core Ideas on Trade Unions

The International Labor Organization (ILO) emerged in 1919, as a result of the Treaty of Versailles[24], which symbolized the end of World War I. The belief that motivated the creation of the ILO was that there would be no lasting universal peace without social justice, and it would require different driving forces, as the economic and political ones. The ILO Constitution states the main objectives of the Organization, like the enhancement of social protection, promotion of rights at work, and empowerment of the dialogues between workers, governments, and employers – which is the basis for the so-called tripartism. The ILO has a meaningful impact on many work and employment relations, setting international labor standards, expanding the social protection, defining a Decent Work Agenda, and fostering other measures.[25]

One of the most important elements here is the international labor standards, legal instruments generated by the ILO parties – in other words, workers, governments, and employers – to define basic norms at work. These standards may address the challenges and needs of the ILO parties in the global economy, with considerations related to the diverse historical and cultural backgrounds, economic developments, and legal systems held by the countries – or Member States. Conventions and Recommendations are the instruments to set international labor standards. Conventions are international treaties that must be observed, and recommendations supplement the conventions, providing the former with more details. The Member States decide when and if they want to ratify a Convention. As part of the core ILO Conventions, there are: (i) No. 87, from 1948, on the "freedom of association and protection of the right to organize"; and (ii) No. 98, from 1949, on the "right to organize and collective bargain."[26]

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23 Augustus Bonner Cochran III: Democracy is more than choice: the necessity of voice. *Revista Jurídica UniCuritiba*, vol. 4., no. 49. (2017) 1–26. http://revista.unicuritiba.edu.br/index.php/RevJur/article/view/2281 (Accessed May 10, 2020.) 24–26.

24 "Part XIII [Labour] – The Constitution of the International Labour Organisation." In: *Treaty of Peace with Germany (Treaty of Versailles).* The Library of Congress, (1919). https://www.loc.gov/rr//program/bib/ourdocs/versailles.html (Accessed May 6, 2020.) 227.

25 Evance Kalula – Chanda Chungu: The ILO into the second century: freedom of association and collective bargaining, prospects for renewal and the future of work. In: Ana Virginia Moreira Gomes – Antonio Rodrigues de Freitas Júnior – José Francisco Siqueira Neto (org.): *O centenário da Organização Internacional do Trabalho no Brasil*. Belo Horizonte, Brazil, Virtualis, 2019. 183–204., 183–184.

26 Kalula–Chungu (2019) op. cit. 184–185.

ILO Conventions Nos. 87[27] and 98[28] are the milestones for the action of trade unions, as they define freedom of association and collective bargaining. Freedom of association is supported by previous ILO instruments, as its Constitution[29] – from 1919 – and the Declaration of Philadelphia[30] – or Declaration Concerning the Aims and Purposes of the International Labor Organization, from 1944 –, relating freedom of association to sustained progress. In 1998, the Declaration on Fundamental Principles and Rights at Work[31] determined that all Member States must promote, respect, and realize the fundamental rights, and the freedom of association is one of their principles. The same approach

27 "Article 2 – Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation. Article 3 - 1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof." [*C087 – Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).* International Labor Organization (hereinafter: ILO), 1948. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312232:NO (Accessed May 6, 2020.)]

28 "Article 2 – 1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration. 2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article." [*C098 – Right to Organise and Collective Bargaining Convention, 1949 (No. 98).* ILO, 1949. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312243:NO (Accessed May 6, 2020.)]

29 "Preamble – [...] recognition of the principle of freedom of association […]." [*ILO Constitution.* ILO, 1919. https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO (Accessed May 4, 2020.)]

30 "I. The Conference reaffirms the fundamental principles on which the Organization is based and, in particular, that: […] (b) freedom of expression and of association are essential to sustained progress; […]." [*Declaration Concerning the Aims and Purposes of the International Labour Organisation (Declaration of Philadelphia).* ILO, 1944. https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#declaration (Accessed May 4, 2020.)]

31 "2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; […]." [*1998 Declaration on Fundamental Principles and Rights at Work (Annex revised 2010).* ILO, 1998. https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453911:NO (Accessed May 6, 2020.)]

is noticed in the Universal Declaration of Human Rights[32], the Decent Work Agenda[33], the 2008 Social Justice Declaration[34], and the 2019 Centenary Declaration for the Future of Work[35].[36]

Freedom of association refers to the right of employers and workers to join and form organizations that they choose, without any kind of discrimination, distinction, or intervention, and utilizing a democratic system of civil liberties and fundamental rights. The right to collective bargaining is intertwined with the principle of freedom of association, as they both contribute to an equalization of workers' and employers' voices in the negotiation of their relationship. Collective bargaining is a specific form of social dialogue, in which its result – the collective agreement – plays a central role in, for example, working conditions[37].[38]

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32 "Article 20 – (1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association." [*Universal Declaration of Human Rights.* United Nations, 1948. https://www.un.org/en/universal-declaration-human-rights/ (Accessed May 6, 2020.)]

33 This agenda is part, for example, of the UN 2030 Agenda for Sustainable Development: "Sustainable Development Goals – […] Goal 8. Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all […]." [*Transforming our world: the 2030 Agenda for Sustainable Development.* United Nations, 2015. https://sustainabledevelopment.un.org/post2015/transformingourworld (Accessed May 6, 2020.)]

34 "Convinced that the International Labour Organization has a key role to play in helping to promote and achieve progress and social justice in a constantly changing environment: […] – drawing on and reaffirming the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998) in which Members recognized, in the discharge of the Organization's mandate, the particular significance of the fundamental rights, namely: freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation; […] I. Scope and principles - The Conference recognizes and declares that: A. In the context of accelerating change, the commitments and efforts of Members and the Organization to implement the ILO's constitutional mandate, including through international labour standards, and to place full and productive employment and decent work at the centre of economic and social policies, should be based on the four equally important strategic objectives of the ILO, through which the Decent Work Agenda is expressed and which can be summarized as follows: […] (iv) respecting, promoting and realizing the fundamental principles and rights at work, which are of particular significance, as both rights and enabling conditions that are necessary for the full realization of all of the strategic objectives, noting: – that freedom of association and the effective recognition of the right to collective bargaining are particularly important to enable the attainment of the four strategic objectives; […]." [*Declaration on Social Justice for a Fair Globalization.* ILO, 2008. https://www.ilo.org/global/about-the-ilo/mission-and-objectives/WCMS_099766/lang--en/index.htm (Accessed May 6, 2020.)]

35 "II. The Conference declares that: A. In discharging its constitutional mandate, taking into account the profound transformations in the world of work, and further developing its human-centred approach to the future of work, the ILO must direct its efforts to: […] (vi) promoting workers' rights as a key element for the attainment of inclusive and sustainable growth, with a focus on freedom of association and the effective recognition of the right to collective bargaining as enabling rights; […]." [*ILO Centenary Declaration for the Future of Work.* ILO, 2019. https://www.ilo.org/ilc/ILCSessions/108/reports/texts-adopted/WCMS_711674/lang--en/index.htm (Accessed May 6, 2020.)] The Declaration also expresses concerns on the platform workers: "III. The Conference calls upon all Members, taking into account national circumstances, to work individually and collectively, on the basis of tripartism and social dialogue, and with the support of the ILO, to further develop its human-centred approach to the future of work by: […] C. Promoting sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all through: […] (v) policies and measures that ensure appropriate privacy and personal data protection, and respond to challenges and opportunities in the world of work relating to the digital transformation of work, including platform work." [ILO (2019) op. cit.].

36 Kalula–Chungu (2019) op. cit. 186., 200–201.

37 "Article 1 – 1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. 2. Such protection shall apply more particularly in respect of acts calculated to: (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours." [ILO (1949) op. cit.].

38 *Report III(1B): Giving globalization a human face (General Survey on the fundamental Conventions).* Geneva, Switzerland, ILO, 2012. https://www.ilo.org/ilc/ILCSessions/previous-sessions/101stSession/reports/reports-submitted/WCMS_174846/lang--en/index.htm (Accessed May 4, 2020.) 21.; Kalula–Chungu (2019) op. cit. 186–187.

4. Trade Unions in the Gig Economy

Before talking about the scenario in Brazil, it is relevant to know more about the evolvements in developed countries, as the disruption caused by current technologies seems to affect even the institutions of core economies in the capitalism. As the reports below show, the functions of trade unions in the daily activities of platform workers and, at the same time, the emergence of new forms of organizations – sometimes quite informal ones – in this field are examples of themes that deserve attention on our studies.

We should also pay attention to the importance of employment relationships in these different contexts. Employment relations should be analyzed utilizing multi-level approaches, taking into account the sectoral, national, and global levels. This may be considered a research agenda, fostering approaches beyond the national systems and embracing a more diverse and dynamic array of regulations. Phenomena like the gig economy could be better perceived this way.[39]

4.1. In the USA and Europe

The rideshare drivers in the USA had, for the first time, the right to unionize – and collective bargain for benefits – utilizing an ordinance of the City of Seattle, in 2015. However, this right was threatened by the US Chamber of Commerce, which filed a lawsuit on behalf of Lyft, Uber, and other companies. They tried to invalidate the norm, pointing out that the drivers run their own business as independent contractors. If they unionize, the competition would be reduced and the prices would rise, violating Antitrust Law.[40]

Uber also offers its solutions to drivers' organization in some large cities. In New York, Uber reached an agreement with an affiliate of the Machinists Union, creating the Independent Drivers Guild (IDG). The IDG represents approximately 70,000 people. One of the achievements of the IDG was related to the benefits for families when drivers die on the road, but the Guild does not have collective bargaining powers – traditionally regarded to employees in a trade union. The IDG may look like a trade union, but its lack of independence from Uber averts true representation of the drivers' interests.[41]

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39 Chris F. Wright et al.: Beyond national systems, towards a "gig economy"? A research agenda for international and comparative employment relations. *Employee Responsibilities and Rights Journal*, vol. 29., no. 4. (2017) 247–257. https://link.springer.com/article/10.1007/s10672-017-9308-2 (Accessed April 26, 2020.) 249., 255.

40 Sam Harnett: How Uber thwarts drivers' organizing efforts. *KQED*, January 22, 2019,. https://www.kqed.org/news/11719321/uber-continues-push-to-keep-paying-drivers-as-contractors-and-stanch-collective-bargaining-efforts (Accessed April 24, 2020.); Michael Sainato: "I made $3.75 an hour": Lyft and Uber drivers push to unionize for better pay. *The Guardian*, March 22, 2019. https://www.theguardian.com/us-news/2019/mar/22/uber-lyft-ipo-drivers-unionize-low-pay-expenses (Accessed April 24, 2020.)

41 Harnett (2019) op. cit.; Sainato (2019) op. cit.

A July 2018 report related to the New York City Taxi and Limousine Commission revealed that nearly 40% of rideshare drivers receive Medicaid, 20% receive food stamps, and 16% do not have health insurance. This report allegedly influenced the enactment of the USD 17.22 minimum wage to rideshare drivers – the first wage increase in the country for this group – in January 2019. In Los Angeles, there are 2,700 people organized in the Rideshare Drivers United. They debate questions such as deactivation, wages, and recognition from the companies – which would allow them to negotiate on behalf of their drivers. A 2018 California Supreme Court decision makes it harder to classify workers as independent contractors, which led Uber and other firms to search for negotiation with trade unions in the State. Suggestions like more non-unionized worker guilds and portable benefits were seen.[42]

Although Instacart is not so mentioned when we talk about platform workers, it plays a significant role in the gig economy. Instacart is a USD 7.8 billion company founded in 2012 in San Francisco, USA. It operates on the same model of the legitimized ride-hailing symbols Lyft and Uber, which grew rapidly due to the billions in venture capital subsidies and to the millions of low-cost contracts with their workforce. Ride-hailing drivers allege that the companies sell them the illusion of advantageous bonuses but slowly reduce their pay. In turn, Instacart workers deal with grocery delivery and say that the company interferes in the receipt of their tips and lowers their pay via algorithms. These workers are considered independent contractors and, as a result, are not protected by unemployment, overtime, or minimum wage guarantees. And do not have the right to unionize.[43]

One of the origins of the collective organization of workers against Instacart was a change in the payment process in September 2016. Instacart determined that it would stop collecting the tips due to the workers, and the tips represent approximately half of the workers' income. The reactions were seen on Instagram via the "#boycottinstacart," which helped the annoyed workers to find each other, create Facebook networks, and approach other Instacart workers at their workplaces – in other words, the grocery stores. When Instacart decides something that harms the workers' interests, activist workers refuse to do their regular activities to Instacart and shame the company on social media. Therefore, Instacart may alter the changes and make some concessions. Activists, via Facebook or phone, also debate strategies, plan strikes, and create informal councils.[44]

An example is an initiative taken by an informal council of female Instacart workers. Trade unions can help their workers to receive lost wages when a strike occurs, but independent contractors do not have this protection. The women in the council debated the length and the days of an upcoming strike and considered a variety of options, such as accepting and canceling Instacart app orders or turning off the app. This strike started on November 3, 2019, and assembled thousands of Instacart workers.

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42 Harnett (2019) op. cit.; Sainato (2019) op. cit.

43 Nitasha Tiku: She was Instacart's biggest cheerleader. Now she's leading a worker revolt. *The Washington Post*, December 10, 2019. https://www.washingtonpost.com/technology/2019/12/10/she-was-instacarts-biggest-cheerleader-now-shes-leading-worker-revolt/ (Accessed April 25, 2020.)

44 Tiku (2019) op. cit.

At the same moment, Instacart customers deleted the app and promoted the "#boycottinstacart" and "#deleteinstacart" in solidarity. Some days after this strike, Instacart published that it would cut the USD 3 quality bonuses, paid when a worker received a five-star evaluation. Activists' supporters looked at this as a retaliation, generating another wave of criticism on social media. Former Google workers are mentioned to offer guidance on how the protests could spread their messages and keep noticed in the news.[45]

In Europe, the challenges to trade unions also exist. In the UK, the trade union GMB – which represents both taxi and Uber drivers – took part in July 2015 on the legal debates about the *status* of Uber drivers. GMB hoped to prove that the startup – considering its drivers as "partners" – was disrespecting their workers' rights. In Italy, the main trade unions related to the taxi sector asked a Milan court to rule if the activities of Uber were legal. In May 2015, the court determined that Uber must take its platform offline in 15 days. In Spain, the traditional General Union of Workers (UGT) demanded, in September 2014, measures from the public administrations against Uber. The trade union argued that Uber "promotes underground economy," endangering jobs and destabilizing the transportation sector in the country.[46]

Talking about Spain, a taxi drivers' association in Barcelona claimed, in 2014, that Uber was promoting unfair competition and misleading practices. In December 2017, this case was decided by the Court of Justice of the European Union (CJEU), which ruled that Uber is not merely an app, but a transportation service provider. The European Trade Union Confederation (ETUC) welcomed this judgment, inviting Uber to open dialogues with the trade unions in the transportation sector.[47]

All these examples may give us a wrong perception. They generally describe obstacles to social protection and solutions adopted to remove or bypass these obstacles. However, as the gig economy evolves at a highly unpredictable pace in so many societies, it seems that new obstacles may emerge anytime, anywhere.

4.2. In Brazil

In tune with reports above from the USA and Europe, it is worth noticing some recent mobilizations in Brazil. For example, motorbike couriers – called *motoboys* in the country – have been organizing protests in the City of Sao Paulo against delivery apps, especially considering their precarious working conditions amid the Covid-19 infections. The protesters fight for insurances that would cover them

45 Tiku (2019) op. cit.

46 Duncan Adam et al: Digitalisation and working life: lessons from the Uber cases around Europe. *Eurofound*, January 25, 2016. https://www.eurofound.europa.eu/sv/publications/report/2016/eu-member-states/digitalisation-and-working-life-lessons-from-the-uber-cases-around-europe (Accessed April 24, 2020.)

47 *After CJEU ruling, Uber must now negotiate with trade unions.* European Trade Union Confederation, December 20, 2017. https://www.etuc.org/en/pressrelease/after-cjeu-ruling-uber-must-now-negotiate-trade-unions (Accessed April 24, 2020.)

in case of robbery, accident, and death, pay rises, the end of the points system, vouchers to buy personal protective equipment (PPE) – like gloves and masks, bought in general by the motorbike couriers themselves –, etc. The protesters also asked the costumers to give negative feedback to the delivery apps and not to use these apps on a specific day. During the Covid-19 pandemic, motorbike couriers see their working conditions getting worse, while they provide a great part of the stay-at-home population with its needs.[48] The unemployment growth in Brazil may explain the high number of bike and motorbike couriers in delivery apps. A famous food delivery app in Brazil called iFood counts on around 170,000 delivery people across the country and saw the numbers of applicants to work in delivery more than double in March 2020. Some interviewed delivery people expressed that the demand growth has been causing stricter requirements and lesser payment amounts from the app. The growth in the number of motorbike couriers in the City of Sao Paulo may be one of the causes of the increase in the number of their deaths in the City traffic. The number of motorbike couriers that died in the City of Sao Paulo in May 2020 – considering the Covid-19 pandemic scenario – rose by 37.9%.[49]

Questions that may pop up from this description: are these protesters unionized? If they are not, do they have the right to join/form a trade union? What is the advantage to join/form a trade union in Brazil?

4.2.1. Trade Union System

In Brazil, we have to step back for a moment and consider its trade union system. The Federal Constitution of 1988 (CF), currently in force, guarantees freedom of association. However, legislation from the 1930s – which generated the Consolidation of the Labor Laws (CLT), Decree-Law No. 5,452, of May 1, 1943 – is still the basis, due to its reaffirmation in the CF. The so-called "exclusiveness" *(unicidade)* determines that trade unions must organize themselves according to professional and economic "sectors" *(categorias)* – respectively employees and employers, as the Portuguese word *"sindicato"* (trade union) refers to them both –, and in a "territorial base" *(base territorial)* – which shall not be smaller than a municipality[50]. Therefore, a private association must comply with certain requirements

48 Júlia Moura: Motoboys organizam boicote a aplicativos de entrega em 1º de julho. *Folha de São Paulo*, June 14, 2020. Https://www1.folha.uol.com.br/mercado/2020/06/motoboys-organizam-boicote-a-aplicativos-de-entrega-em-1o-de-julho.shtml (Accessed June 23, 2020.)

49 Bárbara Muniz Vieira: Entregadores se unem por melhores condições de trabalho nos aplicativos: "Entrego comida com fome", diz ciclista. *G1*, June 21, 2020. Https://g1.globo.com/sp/sao-paulo/noticia/2020/06/21/entregadores-se-unem-por-melhores-condicoes-de-trabalho-nos-aplicativos-entrego-comida-com-fome-diz-ciclista.ghtml (Accessed June 23, 2020.)

50 The CF states: "Art. 8 – The professional or trade union association is free, observing the following: […] II – it is forbidden to create more than one trade union organization, in any degree, representing a professional or economic sector, in the same territorial base, which will be defined by the interested workers or employers, and cannot be smaller than the area of a municipality; […]." [Brazil: Constituição da República Federativa do Brasil de 1988. Presidência da República, 1988. Http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm (Accessed May 6, 2020.)] And the CLT: "Art. 516 – No more than one representative trade union of the same economic or professional sector, or liberal profession, will be recognized in a given territorial base." [Brazil (1943) op. cit.].

to be considered a trade union. Notice that the coexistence of freedom of association and trade union exclusiveness establishes a paradox. A trade union is classified as "legal" when it is registered in the systems of the Ministry of Economy (ME) and the Ministry of Justice and Public Security (MJSP)[51]. A Ministry dedicated solely to labor issues – like the Ministry of Labor and Employment (MTE) and the Ministry of Labor (MTb), names that varied depending on the Federal Administration in charge – does not exist in President Jair Messias Bolsonaro's Administration[52].[53] It means a considerable shift in the Brazilian public policy. The labor issues became mere annexes of Ministries focused on other themes, with other agendas and concerns. So, a more intense engagement from this Federal Administration in core ILO guidelines – social dialogue, tripartism, etc. – seems to be unlikely.

Approaching some details of the trade union registration, the cooperation between the Ministries of Economy and Justice aims to develop technological solutions, which would eliminate the need for in-person services, and to fight against corruption. The MJSP, utilizing the National Secretariat of Justice, is the competent body to grant the trade union registration, and the National Record of Trade Union Entities (CNES) is the related system. The current Government says that the concession of trade union registrations was investigated by the Federal Police (PF), due to alleged fraud traces operated by a group of politicians and civil servants. The investigations point out that the registrations used to be bought, and the former Minister of Labor left the office in 2018 after a decision from the Federal Supreme Court (STF).[54]

When a trade union is legally registered, it can exercise collective bargaining. The documents that may result from the negotiations are the collective labor agreements (ACT) – between a company and one or more trade union(s) of the professional sector – and the collective labor covenants (CCT) – between a trade union of the economic sector and a trade union of the professional one[55]. But who

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51 "Art. 8 – [...] I - the law shall not require authorization from the State for the foundation of a trade union, except for the registration in the competent body, being forbidden to the State the interference and the intervention in the trade union organization; […]" [Brazil (1988) op. cit.].

52 There is a recent concentration of labor issues in the Ministry of Economy: "Art. 31 – They are areas of competence of the Ministry of Economy: [...] XXXI – policy and guidelines for the modernization of labor relations; XXXII – labor inspection, including port work, and application of sanctions expressed in legal or collective norms; [...] XXXV – safety and health at work; [...] XLI – trade union registration. (Included by Law No. 13,901, 2019)." [Brazil: Lei nº 13.844, de 18 de junho de 2019. Estabelece a organização básica dos órgãos da Presidência da República e dos Ministérios; altera as Leis nºs 13.334, de 13 de setembro de 2016, 9.069, de 29 de junho de 1995, 11.457, de 16 de março de 2007, 9.984, de 17 de julho de 2000, 9.433, de 8 de janeiro de 1997, 8.001, de 13 de março de 1990, 11.952, de 25 de junho de 2009, 10.559, de 13 de novembro de 2002, 11.440, de 29 de dezembro de 2006, 9.613, de 3 de março de 1998, 11.473, de 10 de maio de 2007, e 13.346, de 10 de outubro de 2016; e revoga dispositivos das Leis nos 10.233, de 5 de junho de 2001, e 11.284, de 2 de março de 2006, e a Lei nº 13.502, de 1º de novembro de 2017. Presidência da República, (2019b). http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/lei/L13844.htm (Accessed May 7, 2020.)]

53 Gabriela Coelho: Registro sindical será feito pelos ministérios da Economia e Justiça. *Consultor Jurídico*, March 29, 2019. https://www.conjur.com.br/2019-mar-29/registro-sindical-feito-pelos-ministerios-economia-justica (Accessed May 7, 2020.); Maria Lucia Ciampa Benhame Puglisi: A negociação coletiva dos motoristas de aplicativo: uma possibilidade legal no ordenamento jurídico brasileiro? *Migalhas*, May 10, 2019. https://www.migalhas.com.br/dePeso/16,MI302006,81042-A+negociacao+coletiva+dos+motoristas+de+aplicativo+uma+possibilidade (Accessed April 24, 2020.)

54 Coelho (2019) op. cit.; Filipe Matoso – Guilherme Mazui: Helton Yomura pede demissão do Ministério do Trabalho. *G1*, July 5, 2018. https://g1.globo.com/politica/noticia/helton-yomura-pede-demissao-do-ministerio-do-trabalho.ghtml (Accessed May 7, 2020.); *Registro Sindical – Secretaria Nacional de Justiça.* Ministério da Justiça e Segurança Pública, 2019. https://www.justica.gov.br/seus-direitos/registro (Accessed May 10, 2020.)

55 "Art. 611 – Collective Labor Covenant is the normative agreement, whereby two or more Trade Unions representing economic and professional sectors stipulate working conditions applicable, within the scope of the respective representations, to the individual labor relations. (Wording given by Decree-Law No. 229, of 2.28.1967). § 1 – It is allowed to the Trade Unions representing

are the workers in the trade unions? The Brazilian norms end up confining the representation of a trade union of professional sector to employees, excluding other types of workers, such as volunteers, interns, or casual workers. The trade union that represents an independent contractor is of an economic sector – employers –, not of a professional one – employee.[56] In other words, if a person is an employee – i.e. works according to all the elements of the employment relationship, e.g. legal subordination, as we listed above –, he/she joins a trade union that offers him/her the benefits from the Labor Law and the Social Security Law. If a person is considered an independent contractor – even if he/she is socially vulnerable and overexploited –, he/she joins a trade union of employers, as an entrepreneur. In the Brazilian trade union system, an employee and an independent contractor – even if their routines look quite alike – are on opposite sides.

But would the employee reject to join the assigned trade union? No. The employee does not voluntarily join a trade union, but he/she is registered in a trade union by his/her employer. The company provides its data to the trade union of the professional sector, and all its employees are automatically registered in the mentioned trade union.[57] That is why it is worth highlighting the fundamental role of employment classification in Brazilian Law. And these bureaucratic and strict regulations would affect the labor negotiations in the gig economy via trade unions. Needless to say, the ILO has already expressed its discontent about the Brazilian system.[58] But before giving details about this theme, we should analyze its origins.

4.2.1.1. Corporatist Roots

Getulio Vargas is the founder of the industrialized and urban Brazil and essential institutions that he designed still exist. Concerning labor issues, during the Vargas Era there was the creation of:

professional sectors to enter into Collective Agreements with one or more companies of the corresponding economic sector, which stipulate working conditions, applicable within the scope of the company or the parties concerning the respective working relations. (Wording given by Decree-Law No. 229, of 2.28.1967). § 2 – The Federations and, in the absence of those, the Confederations representing economic or professional sectors may enter into collective labor covenants to govern the relations of the sectors linked to them, unorganized in Trade Unions, within the scope of their representations. (Wording given by Decree-Law No. 229, of 2.28.1967).” [Brazil (1943) op. cit.].

56 Puglisi (2019) op. cit.

57 Puglisi (2019) op. cit.

58 An example of discontent: “The Committee’s recommendation – 374. In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations: [...] c) While noting with interest that several provisions of the new Constitution have enhanced the freedom of trade unions vis-à-vis the State, the Committee considers that the provisions of article 8 of Brazil’s Constitution of 5 October 1988, concerning the prohibition of creating more than one trade union for a given occupational or economic category of workers, regardless of the level of organisation, in a given territorial area which, in no case, may be smaller than a municipality, and those concerning the financing of the confederational system, are not compatible with the principles of freedom of association. d) The Committee expresses the hope that trade union legislation compatible with the principles of freedom of association, and in particular with the right of workers to establish and join organisations of their choice, whether by occupational category or at the level of the enterprise, and the right of workers’ organisations freely to draw up their by-laws and run their affairs autonomously, in particular as regards the financing of the confederational system, will soon be adopted. [...].” [*Report in which the committee requests to be kept informed of development – Report No 265, June 1989 – Case No 1487 (Brazil) – Complaint date: 23-JAN-89 – Closed.* ILO, (1989). https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2901820 (Accessed October 5, 2020.)]

(i) the Consolidation of the Labor Laws (CLT), as the labor rights would be legally prescribed and by this mean enforced; (ii) the official trade unions that cover employers and workers, a structure that attached these organizations to State controls and authorizations and was an alternative to the previous anarchist trade unionism; and (iii) the specialized Labor Justice, that mandatorily intervene in the case, for example, of strikes – considered antisocial by the 1937 Constitution[59]. The State corporatist motto – directly influenced by the fascist regime of Benito Mussolini in Italy – would be something similar to: "Nothing before, above, or beyond the State." And Vargas in his "New State" (*Estado Novo*) regime followed this motto accordingly.[60]

Nonetheless, the Brazilian experience under Vargas was not isolated. Particularly between the 1930s and 1940s, we see the erosion of many Western liberal democracies and the emergence of State corporatist regimes, as in Spain, Italy, Argentina, Portugal, and Peru. State corporatism advocates a shift in the institutional center of a country, more specifically from the Parliament – which holds the democratic sovereignty and mediates the political disputes utilizing political parties – to professional/social chambers – workers and employers associations. The idea was to avoid the ideological conflicts – an element of division among compatriots – and to value the associative bonds according to functions in the society. In Italy, a central chamber symbolized this new core in the country's political life. Although the 1937 Constitution in Brazil expressed the will to a similar path[61], no corresponding instance ended up working.[62]

State corporatism mistrusts the ability of ideologies, political parties, autonomous associations, and other institutions from liberal democracies to support a collaborative and peaceful society, in which, for example, both employers and workers could benefit from the country's welfare. Conservative modernizations that occurred in semi-peripheral countries until the 1950s – or until the late 1970s, as in Portugal, Spain, Brazil, and Argentina – had state corporatism as a pillar. The Brazilian trade union system ended up based on economic activities, not on enterprises – which characterizes, for example, the American and Japanese trade unionism. The rule of exclusiveness exists in all Brazilian Constitutions since the 1937 one.[63]

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59 "Art. 139 – In order to settle the conflicts arising from the relations between employers and employees, regulated in the social legislation, the Labor Justice is instituted, which will be regulated by law and to which do not apply the provisions of this Constitution regarding competence, recruitment, and prerogatives of the common Justice. The strike and the lock-out are declared anti-social resources harmful to work and capital and incompatible with the superior interests of the national production." [Brazil: Constituição dos Estados Unidos do Brasil, de 10 de novembro de 1937. Presidência da República, 1937. http://www.planalto.gov.br/ccivil_03/constituicao/constituicao37.htm (Accessed May 8, 2020.)].

60 Antonio Rodrigues de Freitas Júnior: Outlines of the recent Brazilian legal changes in the field of labor and industrial relations. *Shinshu Economics and Law Review*, vol. 1., no. 5. (2018) 23–35. http://hdl.handle.net/10091/00021404 (Accessed April 30, 2020.) 26., 28–29.

61 "Art. 57 – The National Economy Council is composed of representatives of the various branches of the national production designated, among people qualified by their special competence, by the professional associations or trade unions recognized by law, being guaranteed the equality in the representation between employers and employees. Sole paragraph – The National Economy Council will be divided into five Sections: a) Industry and Craft Section; b) Agriculture Section; c) Commerce Section; d) Transportation Section; e) Credit Section. Art. 58 – The appointment of the representatives of the associations or trade unions is made by the respective deliberative collegiate bodies of higher level." [Brazil (1937) op. cit.].

62 Freitas Júnior (2018) op. cit. 26–27.

63 Freitas Júnior (2018) op. cit. 27–28.

4.2.1.2. Exclusiveness, Sector, Territorial Base

As we mentioned, the trade union representation in Brazil is sustained in economic and professional sectors according to the 1988 Constitution (CF)[64] – currently in force. The concept of "sector" is not clarified by the Brazilian Law and its reference is an article of the CLT[65]. Until the 1988 Constitution, the sector was a State creation, by means of a proposal to the Ministry of Labor elaborated by the Trade Union Framework Commission (CES)[66]. As the 1988 Constitution prohibits the interference of the State in the trade unions, the Commission no longer exists. Nonetheless, a trade union must have a trade union registration to be officially considered as one. This procedure was validated by the Federal Supreme Court (STF)[67] and aims to preserve the constitutional principle of the trade union exclusiveness[68]. This exclusiveness, in turn, means the representation monopoly of a trade union concerning a sector in a territorial base. Freedom of association, however, is also guaranteed in the 1988 Constitution. To understand this paradoxical freedom of association, a trade union must consider three elements: (i) representation of a sector, that may be professional or economic; (ii) operation in a territorial base, that must be at least the dimension of a municipality; and (iii) monopolist condition, in which it is the sole trade union for a sector in a territorial base.[69]

An economic sector is recognizable via the "solidarity" among the entrepreneurs[70] of similar, identical, or related activities[71]. For example, a group of companies fully dedicated to design, build, and reform buildings would join the construction sector. If a company has two or more activities that have no connection with each other, the economic sector of this company is identified by the main

64 Art. 8 of the CF.

65 Art. 511 of the CLT.

66 "Art. 570 – The trade unions will be commonly constituted by specific economic or professional sectors, in accordance with the discrimination of the framework of activities and professions referred to in art. 577 or according to the subdivisions that, under the proposal of the Trade Union Framework Commission, referred to in art. 576, are created by the Minister of Labor, Industry, and Commerce. Sole paragraph - When the practitioners of any activities or professions are constituted, either by the reduced number, or by the very nature of these activities or professions, or by the affinities existing between them, under conditions such that they cannot effectively unionize by the criterion of sector specificity, they are allowed to unionize by the criterion of similar or connected sectors, being understood as such those that are included within the limits of each group displayed in the Activities and Professions Framework." [Brazil (1943) op. cit.].

67 "Summula No. 677 – Until the law provides for it, it is up to the Ministry of Labor to proceed with the registration of trade union entities and ensure compliance with the principle of exclusiveness." [Súmula nº 677. Supremo Tribunal Federal, 2003. http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=677.NUME.%20NAO%20S.FLSV.&base=baseSumulas (Accessed May 8, 2020.)

68 Art. 8, II, of the CF.

69 Renan Bernardi Kalil: A inserção dos profissionais liberais na estrutura de representação sindical brasileira. *Jus*, October 2012. https://jus.com.br/artigos/22775/a-insercao-dos-profissionais-liberais-na-estrutura-de-representacao-sindical-brasileira (Accessed May 2, 2020.)

70 The definition of "employer" provided by the CLT creates debates: "Art. 2 – It is considered an employer the individual or collective company, which, bearing the risks of the economic activity, hires, pays, and directs the personal provision of a service. § 1 – To employer are equated, for the exclusive purposes of the employment relationship, liberal professionals, charity institutions, recreational associations, or other non-profit institutions, who hire workers as employees." [Brazil (1943) op. cit.].

71 "Art. 511 – It is lawful the association for purposes of the study, defense, and coordination of its economic or professional interests of all those who, as employers, employees, agents or self-employed workers or liberal professionals exercise, respectively, the same activity or profession or activities or similar or connected professions. § 1 – The solidarity of economic interests of those who undertake identical, similar, or connected activities constitutes the basic social bond that is called the economic sector." [Brazil (1943) op. cit.].

activity. In turn, a professional sector emerges from the similarities of "living conditions" that a job in an economic activity offers[72]. For instance, people that melt and shape iron in the same factory from Monday to Friday may join the metalworkers' sector. Nonetheless, there are other possibilities. The "differentiated professional sector" *(categoria profissional diferenciada)* assembles the employees who have specific functions due to "unique living conditions" or special regulations on their work[73]. The aeronauts are an example, as they have a specific law regulating their work[74]. The CLT also expresses the possibility of trade unions of liberal professionals, but it does not present meaning to "liberal profession."[75] Facing this vagueness, the former Ministry of Labor and Employment established some definitions – and expressed that professional drivers[76] constitute a differentiated professional sector[77]. Liberal professionals have their activities regulated by specific norms and inspected by Professional Councils. Analyzing the Ministry norm, we may point out that a liberal profession has two core distinctions regarding a differentiated professional sector: (i) the former assembles independent

72 "Art. 511 – [...] § 2 – The similarity of living conditions arising from the profession or work in common, in a situation of employment in the same economic activity or in similar or connected economic activities, composes the elementary social expression understood as a professional sector." [Brazil (1943) op. cit.].

73 "Art. 511 – [...] § 3 – Differentiated professional sector is that formed by employees who exercise differentiated professions or functions by virtue of special professional statute or as a result of unique living conditions. (See the Law No. 12,998, of 2014)." [Brazil (1943) op. cit.].

74 "Art. 1 – This Law regulates the profession of aircraft pilot, flight attendant, and flight mechanic, called aeronauts." [Brazil: Lei nº 13.475, de 28 de agosto de 2017. Dispõe sobre o exercício da profissão de tripulante de aeronave, denominado aeronauta; e revoga a Lei nº 7.183, de 5 de abril de 1984. Presidência da República, 2017. http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2017/Lei/L13475.htm (Accessed May 8, 2020.)]

75 One reference may be the CLT Annex: "National Confederation of Liberal Professions – Groups – 1st Lawyers. 2nd Physicians. 3rd Dentists. 4th Veterinarians. 5th Pharmacists. 6th Engineers (civil, mining, mechanic, electrician, industrial, architect, and agronomic ones). 7th Chemists (industrial chemists, agricultural industrial chemists, and chemical engineers). 8th Midwives. 9th Economists. 10th Actuaries. 11th Accountants. 12th Teachers (private ones). 13th Writers. 14th Theatrical authors. 15th Artistic, musical, and visual composers." [Brazil (1943) op. cit.].

76 Look at the high level of social protection: "Art. 1 – It is free the exercise of the profession of professional driver, subject to the professional conditions and qualifications established in this Law. Sole paragraph – The professional sector referred to in this Law includes motor vehicle drivers whose driving requires professional training and who exercise the profession in the following activities or economic sectors: I – road passenger transportation; II – road cargo transportation. Art. 2 – The rights of professional drivers referred to in this Law, without obstacle to others provided for in specific laws, are: I – having free access to professional training and improvement programs, preferably by means of technical and specialized courses provided for in item IV of art. 145 of Law No. 9,503, of September 23, 1997 – Brazilian Traffic Code, regulated by the National Traffic Council – CONTRAN, in cooperation with the public authorities; II – counting, by means of the Unified Health System – SUS, with prophylactic, therapeutic, rehabilitative care, especially in relation to the diseases that most affect them; III – receiving protection from the State against criminal behaviors directed at them in the exercise of the profession; IV – relying on specialized services of occupational medicine, provided by public or private entities of their choice; V – if they are employees: a) not reporting to the employer for damage to property resulting from the behavior of a third party, except the driver's intention or negligence, in these cases upon proof, in the performance of his/her duties; b) having a workday controlled and recorded in a reliable manner by noting it in a logbook, slip or external work card, or electronic system and means installed in the vehicles, at the employer's discretion; and c) having the benefit from mandatory insurance guaranteed and paid by the employer, intended to cover natural death, death by accident, total or partial disability resulting from an accident, transfer and funeral assistance related to their activities, in the minimum amount corresponding to 10 (ten) times the salary level of their sector or higher value established in a collective labor covenant or agreement. Art. 3 – To the professional drivers who are addicted to psychoactive substances are guaranteed full assistance by the health unities of municipalities, states, and the federal ones, within the scope of the Unified Health System, being possible agreements with private entities to fulfill the obligation." [Brazil: Lei nº 13.103, de 2 de março de 2015. Dispõe sobre o exercício da profissão de motorista; altera a Consolidação das Leis do Trabalho – CLT, aprovada pelo Decreto-Lei nº 5.452, de 1º de maio de 1943, e as Leis nº 9.503, de 23 de setembro de 1997 – Código de Trânsito Brasileiro, e 11.442, de 5 de janeiro de 2007 (empresas e transportadores autônomos de carga), para disciplinar a jornada de trabalho e o tempo de direção do motorista profissional; altera a Lei nº 7.408, de 25 de novembro de 1985; revoga dispositivos da Lei nº 12.619, de 30 de abril de 2012; e dá outras providências. Presidência da República, 2015. http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13103.htm (Accessed May 10, 2020.)]

77 "8. In the world of work, as notorious examples of differentiated sectors are mentioned the aeronaut workers and professional drivers." [Nota Técnica CGRT/SRT n. 11/2006. Ministério do Trabalho e Emprego, 2006. http://www.sinfito.org.br/arquivos/contribuicao/MTE_Nota_Tecnica_11.pdf (Accessed May 2, 2020.)]

contractors or employers, not employees; and (ii) the former has Professional Councils setting the scientific and technical conditions to the activities[78].[79]

The CLT does not define "liberal profession," but it may be interpreted as a part of the norm that refers to the differentiated professional sectors – CLT, art. 511, §3. To clarify this situation, the Law Project (PL) No. 6,320/2009 included the liberal professions as a type of differentiated professional sector. This Law Project had been elaborated in the Chamber of Deputies and sent to the Federal Senate in 2014 – when the Law Project received the name Law Project from the Chamber of Deputies (PLC) No. 77/2014 –, but it was discontinued by the Senate in 2018.[80]

A regulated profession – whose norms are sometimes really specific – is not necessarily a liberal profession, as we see in the cases of archivists and secretaries. The CLT[81] offers a very outdated table on sectors, which provoked some stakeholders to discuss the *status* of differentiated professional sectors in the Judiciary Branch. This is the case of the surveillance workers, who had a judgment from the Superior Labor Court (TST) in favor of their *status* as a differentiated professional sector. Nonetheless, the *status* of a sector does not overcome the dichotomy independent contractor/employee.[82] We give an example of a framework:

Table 1 – Trade union framework in road transportation services, Annex of the CLT

National Confederation of Land Transportations (CNTT) – National Confederation of the Transportation (CNT) nowadays	**National Confederation of Workers in Land Transportations (CNTTT)**
2nd Group: Road transportation companies (activities or economic sectors)	2nd Group: Workers in road transportation companies (professional sectors)
Passenger transportation companies; cargo vehicle companies; garage companies; baggage handlers and carriers in general (independent contractors)	Employees in offices of road transportation companies; road vehicle drivers (including helpers and porters, bus changers, car washers)

Adapted from: Brazil (1943) op. cit.

The trade union framework concerning a worker from a differentiated professional sector is based on his/her profession. So, this organization is apart from the main economic activity held by the company

78 "20. It is observed, for the foregoing, that the technical criterion adopted by the Information Coordinator on Labor Relations is in line with the legal criteria that define the liberal professionals and the workers belonging to differentiated sectors, that is: a) liberal professionals are those who carry out their activities in an autonomous way, or as an employer, legally qualified and registered in the Professional Councils, after meeting the technical and scientific requirements provided for in the legislation for the performance of the profession; and b) workers belonging to the differentiated sectors are the employees who exercise their functions having as working conditions those provided for in specific, special legislation, or the performance of their activities results in equality of living conditions. 21. It is therefore proposed to adopt the above criteria at the time of insertion of the sector in the trade union registration system." [Ministério do Trabalho e Emprego (2006) op. cit.].

79 Kalil (2012) op. cit.

80 Câmara dos Deputados: PL 6320/2009. Câmara dos Deputados, (n.d.). https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=457389 (Accessed May 2, 2020.); Gomes–Bertolin (2016) op. cit. 82–83.; Projeto de Lei da Câmara nº 77, de 2014. Senado Federal, (n.d.). https://www25.senado.leg.br/web/atividade/materias/-/materia/118214 (Accessed May 2, 2020.)

81 "Art. 577 – The Activities and Professions Framework in force will establish the basic plan of the trade union framework." [Brazil (1943) op. cit.]. And the Annex of the CLT continues: "Annex – Table referred to in art. 577 of the Consolidation of the Labor Laws." [Brazil (1943) op. cit.].

82 Gomes–Bertolin (2016) op. cit. 83.

where he/she works. As a result, the collective bargaining that benefits this worker is conducted by the trade union that represents his/her differentiated professional sector.[83]

The case of lawyers is another that portraits the challenge in the definition of the trade union representation. Here we have a very traditional and institutionalized occupation, not a typical gig economy one. A lawyer – whose work is regulated by the so-called Layers' Statute[84] – can be an independent contractor or an employee concerning a law firm. The difference between these two situations is subtle, demanding investigations concerning the subordination. If the lawyer is an employee, he/she may work exclusively to one law firm, have the obligation to be at the law firm's offices at certain periods of the week, use the facilities provided by the law firm, and perform given tasks requested by his/her law firm's bosses.[85] So, we go back to the employment classification debates, which again will determine the trade union representation. What calls our attention here is that defining this type of representation is a challenge inherent to the Brazilian trade union system, comprising both traditional and disruptive occupations. But are there perspectives of legal reforms on trade unions?

4.2.2. Notes on Trade Union Reforms

According to Gomes and Prado, Brazil maintains its state corporatist trade union because different groups – especially the trade unions, that behave without the worries to represent properly the people they formally represent – benefit from this structure. Making reforms here may generate resistance against future ones. The 1988 Constitution, guaranteeing both state corporatism and freedom of association, offers more difficulties. A structure relied upon freedom of association may be a value in itself. From another point of view, it may be an instrument to protect or promote other values, like economic growth and democracy. If a reform on trade unions in Brazil is promoted, it should have multiple elements. The stakeholders claiming for change need to be active, mobilized. The ILO can help them, providing information and ways to organize and requesting the Brazilian Government. The Brazilian Government, in turn, should reduce the resistances via political actors that are more open to the reforms. The Legislative Branch is not a good option because some parties are supported by trade unions, but the Judicial – utilizing jurisprudence – and the Executive – via regulations – ones are not. Although these two *loci* of power can foster small changes, they can ultimately affect the whole system.

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83 Idem.

84 It is interesting to see the role of the Brazilian Bar Association (OAB), a Professional Council, related to the trade union system: "Art. 3 – The practice of law in the Brazilian territory and the denomination of lawyer are exclusive to those registered in the Brazilian Bar Association (OAB). [...] Art. 47 – The payment of the annual contribution to the OAB exempts those enrolled in its records from the mandatory payment of the trade union contribution." [Brazil: Lei nº 8.906, de 4 de julho de 1994. Dispõe sobre o Estatuto da Advocacia e a Ordem dos Advogados do Brasil (OAB). *Presidência da República*, 1994. http://www.planalto.gov.br/ccivil_03/leis/l8906.htm (Accessed May 10, 2020.)]

85 Gomes–Bertolin (2016) op. cit. 84–85.

Nonetheless, a reform should avert an up-tempo pace. Representativeness is not immediately created, a fact that will call attention to alternative transitory representations in the absence of the current system. This transition would unveil the Brazilian needs and specificities to operate its freedom of association. Eliminating trade unions that are poorly representative and identifying the ones with high representativeness may be useful.[86]

Freedom of association is traditionally avoided when we talk about normative reforms in Brazil. The preservation of the state corporatist roots calls the attention. The Brazilian political elite has no intention to move the country's trade union system to the ILO pattern, which elevates the freedom of association amid the fundamental human rights. The state corporatist system is apart from the Brazilian political agenda, which keeps the ILO Convention No. 87 unratified. Perhaps the boldest move happened in the 2017 Labor Reform, with the suppression of the compulsory aspect of the "trade union contribution" *(contribuição sindical)*, paid by employers and workers to fund their respective trade unions. The 2017 Labor Reform gave the possibility of state norms be derogated by collectively negotiated ones, even if this may harm the workers' interests. This transformation impacted one of the core interpretative instruments in the Brazilian legal doctrine, the so-called "principle of the most favorable norm to the worker," applied when there was normative conflict. As the 2017 Labor Reform went deep in some core aspects – including constitutional ones –, its approval paves the way for long and intense debates, that may all end in the Federal Supreme Court (STF).[87] Nonetheless, the 2017 Labor Reform did not affect the rule of exclusiveness, one of the key aspects to talk about trade unionism of platform workers in Brazil. Looking at the regulation of road transportation and of the work of taxi drivers may help our analysis.

4.2.3. Road Transportation and Taxi Drivers

Talking about the STF, this Court judged in April 2020 that the Law No. 11,442/2007[88], about cargo road transportation, is constitutional. According to the judgment, the 1988 Constitution does not

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86 Ana Virginia Moreira Gomes – Mariana Mota Prado: Flawed freedom of association in Brazil: how unions can become an obstacle to meaningful reforms in the Labor Law system. *Comparative Labor Law and Policy Journal*, vol. 32., no. 4. (2011) 843–890. http://www.direito.usp.br/faculdade/eventos/eventos_2012/arquivos/texto_base_reforma_sindicatos.pdf (Accessed May 2, 2020. 888–889.)

87 Freitas Júnior (2018) op. cit. 30–31.

88 "Art. 1 – This Law provides for the Road Cargo Transportation – TRC carried out on public roads, in the national territory, by third parties and for remuneration, the mechanisms of its operation and the transporter's responsibility. [...] Art. 2 – The economic activity referred to in art. 1 of this Law is of commercial nature, exercised by individuals or legal entities under a free competition regime, and depends on prior registration of the interested party in its development in the National Record of Road Cargo Transporters - RNTR-C of the National Land Transportation Agency – ANTT, in the following conditions: I – Self-employed Cargo Transporter – TAC, an individual who has in the road cargo transportation his/her professional activity; II – Company of Road Cargo Transportation – ETC, legal entity constituted by any form provided for by law that has in the road cargo transportation its main activity." [Brazil: Lei nº 11.442, de 5 de janeiro de 2007. Dispõe sobre o transporte rodoviário de cargas por conta de terceiros e mediante remuneração e revoga a Lei nº 6.813, de 10 de julho de 1980. Presidência da República, 2007. http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2007/Lei/L11442.htm (Accessed May 12, 2020.)]

prohibit the outsourcing of activities, and cargo road transportation leads to commercial relationships, not to employment relationships. On the one hand, the National Confederation of the Transportation (CNT) – formerly named National Confederation of Land Transportations (CNTT), as in Table 1 above – demanded the constitutionality of the Law No. 11,442/2007, as its application had been avoided by the Labor Justice. On the other hand, labor judges and labor prosecutors pointed out that the mentioned law allowed distortions, as it avoids the employment relationship.[89] At first glance, this case is a quasi-classification litigation one and may affect the work of other drivers, as taxi and ride-hailing ones. However, this is not so simple. We start by displaying the story and the *status* of two trade unions of taxi drivers operating in the City of Sao Paulo.

The Trade Union of the Taxi Drivers had its "trade union letter" *(carta sindical)* emitted on March 25, 1946, by the Ministry of Transportation. The origin of the trade union is the Professional Association of Self-employed Drivers, which had been created by 25 chauffeurs two years before the foundation of the trade union. Its first name was Trade Union of Self-employed Drivers of Road Vehicles of Sao Paulo, and its territorial base was the City of Sao Paulo. In 1948, there was only one trade union in the countryside of Sao Paulo – more specifically in the Western zone, centered in the City of Bauru –, which made the trade union in the City of Sao Paulo expand its territorial base. The new name was Trade Union of Self-employed Drivers of Road Vehicles in the Northern, Eastern, and Southern State of Sao Paulo. However, municipality-based trade unions emerged, a fact that forced the trade union to return to its representation solely in the City of Sao Paulo. In a 1990 session of drivers, the name was changed to Trade Union of Drivers of Road Vehicles of Sao Paulo, and, in a 1992 session, to the current one: Trade Union of Self-employed Taxi Drivers of Sao Paulo (Sinditaxi). It is affiliated to the Trade Union Force (FS) Trade Union Center.[90]

In turn, the Trade Union of Drivers and Workers in Taxi Companies in the State of Sao Paulo (Simtetaxi-SP) – affiliated to the General Union of Workers (UGT) Trade Union Center, the National Confederation of Workers in Land Transportations (CNTTT), the Federation of Land Transportations of the State of Sao Paulo, and the International Transport Workers' Federation (ITF) – includes all the cities of the State. One of its activities is fighting against illegal transportation. The foundation occurred when a group of fleet taxi drivers organized themselves on September 20, 1994, dividing the sector hitherto represented by another trade union. The formalization of Simtetaxi-SP was only achieved in 2011, by means of an STF decision. This judgment occurred close to the enactment of Law

89 STF julga constitucional lei sobre transporte rodoviário de cargas. *Migalhas*, 2020, April 15. https://www.migalhas.com.br/quentes/324716/stf-julga-constitucional-lei-sobre-transporte-rodoviario-de-cargas (Accessed May 3, 2020.)

90 Sindicato dos Taxistas Autônomos de São Paulo. 70 anos de lutas e conquistas. *Sindicato dos Taxistas Autônomos de São Paulo*, (n.d.). https://sinditaxisp.org.br/voz-do-presidente/ (Accessed May 3, 2020.)

No. 12,468/2011[91], which regulates the work of fleet taxi drivers. Simtetaxi-SP has a record of legal and political initiatives against Uber.[92]

Table 2 – Sinditaxi and Simtetaxi-SP in the official records of trade unions

Denomination	Group	Coverage/territorial base	Sector
Sinditaxi – Trade Union of Self-employed Taxi Drivers of Sao Paulo	Employers	City of Sao Paulo	Economic sector. Self-employed drivers of road vehicles. National Confederation of the Transportations (CNT).
Simtetaxi-SP – Trade Union of Drivers and Workers in Taxi Companies in the State of Sao Paulo	Employees	State of Sao Paulo	Professional sector. Drivers, vehicle maintenance officers and helpers, and all the workers, except telephone and radio table operators. Taxi companies in the State of Sao Paulo. National Confederation of Workers in Land Transportations (CNTTT).

Adapted from: Ministério da Economia: Entidades sindicais cadastradas no ME. Ministério da Economia, (2020, April 23). http://trabalho.gov.br/cadastro-de-entidades-sindicais/entidade-sindical-registrada. *Accessed May 8, 2020.*

So, we notice that two taxi drivers working in the City of São Paulo may be in completely different positions in terms of trade union representation, as one may be represented by the trade union of independent contractors – who are, for trade union proposes, employers – and the other may be represented by the trade union of employees. Bearing these long analyses in mind, we try to figure out what trade unionism of platform workers in Brazil would be, focusing on Uber.

4.2.4. A Platform Workers' Trade Unionism?

In March 2018, the Law No. 13,640/2018[93], regulating transportation services by apps – like Cabify, Uber, and 99 Pop – was published. The law gave to the Federal District (DF) – where Brasilia, the

[91] This law may impact the work of app drivers because it expresses the type of activity as private for taxi drivers: "Art. 2 – It is the private activity of the professional taxi drivers to use a motor own self-propelled or third-party vehicle for paid individual public transportation of passengers, whose capacity will be a maximum of 7 (seven) passengers." [Brazil: Lei nº 12.468, de 26 de agosto de 2011. Regulamenta a profissão de taxista; altera a Lei nº 6.094, de 30 de agosto de 1974; e dá outras providências. Presidência da República, 2011. http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2011/Lei/L12468.htm (Accessed May 8, 2020.)]. This law also admits the taxi driver who is an employee: "Art. 6 – The rights of the professional taxi driver who is an employee are: I – salary level adjusted between the trade unions of the sector; II – application, where applicable, of the legislation that regulates labor law and that of the general social security regime." [Brazil (2011) op. cit.].

[92] Sindicato dos Motoristas e Trabalhadores nas Empresas de Taxi no Estado de São Paulo: Simtetaxi-SP. *Sindicato dos Motoristas e Trabalhadores nas Empresas de Taxi no Estado de São Paulo*, (n.d.). http://www.simtetaxis.com.br/quem-somos.html (Accessed May 3, 2020.)

[93] "Art. 1 – This Law amends Law No. 12,587, of January 3, 2012, which establishes the guidelines of the National Urban Mobility Policy, to regulate the private paid transportation of passengers, pursuant to item XIII of art. 5 and the sole paragraph of art. 170 of the Federal Constitution." [Brazil: Lei nº 13.640, de 26 de março de 2018. Altera a Lei nº 12.587, de 3 de janeiro de 2012, para regulamentar o transporte remunerado privado individual de passageiros. *Presidência da República*, 2018. http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2018/Lei/L13640.htm (Accessed May 8, 2020.)] The mentioned CF norms are: "Art. 5 – Everybody is equal before the law, without distinction of any kind, guaranteeing to Brazilians and foreigners residing in the country the inviolability of the right to life, freedom, equality, security, and property, under the following terms: [...] XIII – the exercise of any work, trade or profession is free, subject to the professional qualifications established by law; [...]. Art. 170 - The economic order, founded on the valorization of human work and free initiative, aims to ensure a dignified existence for all, according to the dictates of social justice, observing the following principles: [...] Sole paragraph – To everyone is guaranteed the free exercise of any economic activity, regardless of authorization from public bodies, except in cases provided for by law. (See the Law No. 13,874, of 2019)." [Brazil (1988) op. cit.]. We also highlight the new item that the Law No. 12,587/2012 received, characterizing specifically the ride-hailing services: "Art. 4 – For the purposes of this Law, it is considered: [...] X – individual private paid transportation of passengers: paid passenger transportation service, not open to the public, for individual or shared trips requested exclusively by users previously registered in applications or other network communication platforms. (Wording given by Law No.

Brazilian capital, is located – and municipalities the exclusive competence to inspect and further regulate these services. These governments shall collect local taxes and demand that the app drivers: (i) contract the Compulsory Insurance for Personal Damage caused by Land Motor Vehicles (DPVAT); (ii) contract the insurance of Personal Accidents for Passengers (APP); and (iii) register as an individual contributor of the National Social Security Institute (INSS). Moreover, the driver must: (i) drive a vehicle that matches the requirements from the authorities; (ii) have a driver's license (CNH) of "B" or superior level, displaying that he/she exercises a paid work; (iii) present his/her clearance certificate of criminal records; and (iv) keep the Vehicle Registration and Licensing Certificate (CRLV). Those who do not comply with these norms work in illegal transportation of passengers.[94] Nonetheless, the previous authorization from the local government, the use of special license plates, and other prerequisites are not necessary.[95]

Uber considered this law an advance in the Brazilian regulation, as the final text eliminated red tapes from some proposals, that would ultimately treat ride-hailing vehicles as taxis. When the regulation was debated, Uber released a campaign calling these stricter proposals the "Law of Regression." The campaign's online page includes a video showing people who defend the importance of Uber in their lives, in a scenario of 20 million users, 500 thousand "partner drivers," and more than BRL 971 million – approximately USD 170 million – paid in taxes in 2017. Moreover, the page launched the "#LeidoRetrocesso" – a Portuguese equivalent to "Law of Regression" – and listed the Federal Deputies – displaying their political parties, states, and Facebook addresses – who voted for Uber, or against the stricter proposals.[96]

The Law No. 13,640/2018, as we highlighted, explicitly allowed the economic activity of private transportation of passengers via apps, having as its core the Economic and Public Law, not the Labor Law. Nonetheless, the norm which demands the registration of the app driver as an individual contributor to the Social Security (INSS) may influence the classification litigation. This requirement is not a novelty, as the Social Security Law in Brazil traditionally permits this type of registration to those who are independent contractors, small growers and farmers, business managers and partners, miners, religious leaders, etc. So, the debates about the classification litigation enter another round after the Law No. 13,640/2018.[97]

13,640, of 2018)." [Brazil: Lei nº 12.587, de 3 de janeiro de 2012. Institui as diretrizes da Política Nacional de Mobilidade Urbana; revoga dispositivos dos Decretos-Leis nºs 3.326, de 3 de junho de 1941, e 5.405, de 13 de abril de 1943, da Consolidação das Leis do Trabalho (CLT), aprovada pelo Decreto-Lei nº 5.452, de 1º de maio de 1943, e das Leis nºs 5.917, de 10 de setembro de 1973, e 6.261, de 14 de novembro de 1975; e dá outras providências. Presidência da República, 2012. http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2012/Lei/L12587.htm (Accessed May 8, 2020.)]

94 Requirements stated in the art. 3 of the Law No. 13,640/2018.

95 Agência Senado: Publicada sem vetos regulamentação de aplicativos de transporte. *Senado Notícias*, March 27, 2018. https://www12.senado.leg.br/noticias/materias/2018/03/27/publicada-sem-vetos-regulamentacao-de-aplicativos-de-transporte (Accessed May 8, 2020.)

96 Uber: *Lei do Retrocesso.* 2018. https://www.uber.com/br/pt-br/lei-do-retrocesso/ (Accessed May 8, 2020.)

97 Marco Aurélio Serau Junior: Transporte individual de passageiros por plataformas de aplicativos: contribuição previdenciária dos motoristas (Decreto 9.792/2019). *GenJurídico*, 2019, May 23. http://genjuridico.com.br/2019/05/23/transporte-individual-de-passageiros-por-plataformas-de-aplicativos-contribuicao-previdenciaria-dos-motoristas/ (Accessed June 22, 2020.)

To make the analysis even more complex, Decree No. 9,792/2019 was published in May 2019, regulating the Law No. 13,640/2018. The article 2, sole paragraph, of the Decree No. 9,792/2019[98] gives the option to the app driver to be an Individual Microentrepreneur (MEI)[99] in his/her registration in the Social Security (INSS). The MEI program was created more than 10 years ago to foster the low-cost formalization of the economic activities – currently around 500 types of activities – held by independent contractors and small businesses, like confectioners, electricians, hairdressers, manicurists, and even bike couriers – called *bikeboys* in Brazil. The MEIs have access to some social benefits, such as sickness allowance, disability retirement, maternity pay, and death pension, and the guidance from the Brazilian Micro and Small Business Support Service (Sebrae). Moreover, the period in which the MEIs pay for their program can be computed in the period required to receive the benefits from retirement due to age. The "Entrepreneur's Website," from the Brazilian Government, points out 1,256 MEIs on July 31, 2009, and a shocking number of 10,158,857 MEIs on May 31, 2020, a fact that is deeply related with the Brazilian economic crises in the period. Going back to Decree No. 9,792/2019, we may see a "symbolic effect" caused by it, but we may not affirm that the *status* of app drivers was finally determined. This is because the regulated law – Law No. 13,640/2018 – does not mention this *status*, and the novelties in the Brazilian legal order must not be introduced by decrees – principle of legality.[100]

Admitting collective bargaining – involving the agreements (ACT) and covenants (CCT) mentioned above – between Uber and its drivers requires that a trade union represents the employees of Uber and has "legal existence," either in the prevalent or in the differentiated sector. To verify the economic sector of Uber, we need to search for its main economic activity, which is expressed in the company's registration in the Federal Revenue of Brazil (RFB). The economic activities are organized according

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98 "Art. 2 – The registration as an individual contributor will be made directly by the driver of individual paid private transportation of passengers, preferably using the electronic service channels of the National Institute of Social Security – INSS. Sole paragraph – The driver may choose to register as an individual microentrepreneur, as long as he/she meets the requirements referred to in art. 18-A of Complementary Law No. 123, of December 14, 2006." [Brazil: Decreto nº 9.792, de 14 de maio de 2019. Regulamenta o inciso III do parágrafo único do art. 11-A da Lei nº 12.587, de 3 de janeiro de 2012, que dispõe sobre a exigência de inscrição do motorista de transporte remunerado privado individual de passageiros como contribuinte individual do Regime Geral de Previdência Social. Presidência da República, 2019(a) http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2019/Decreto/D9792.htm (Accessed June 22, 2020.)]

99 "Title II – On the Individual Microentrepreneur (MEI). Chapter I – Definition. Art. 100 – The MEI is the businessperson referred to in art. 966 of the Civil Code or the entrepreneur who carries out the activities of industrialization, commercialization, and provision of services in the rural scope, who opts for the '*Simples Nacional*' taxation scheme, who has earned accumulated gross revenue in the previous calendar years and in the current one of up to BRL 81,000.00 (eighty-one thousand reais), and who: (Complementary Law No. 123, of 2006, art. 18-A, § 1 and § 7, item III) I – exercises independently only the occupations listed in Annex XI of this Resolution; (Complementary Law No. 123, of 2006, art. 18-A, §§ 4-B and 14) (Wording given by the CGSN Resolution No. 145, of June 11, 2019) II – has only one establishment; (Complementary Law No. 123, of 2006, art. 18-A, § 4, item II) III – does not participate in another company as a holder, partner, or manager; and (Complementary Law No. 123, of 2006, art. 18-A, § 4, item III) IV – does not hire more than one employee, observing the provisions of art. 105. (Complementary Law No. 123, of 2006, art. 18-C)." [Resolução CGSN nº 140, de 22 de maio de 2018. Dispõe sobre o Regime Especial Unificado de Arrecadação de Tributos e Contribuições devidos pelas Microempresas e Empresas de Pequeno Porte (Simples Nacional). Receita Federal do Brasil, 2018. http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?visao=anotado&idAto=92278 (Accessed June 22, 2020.)]

100 Governo Federal: Acumulado de MEIs por dia do ano/mês selecionado. *Portal do Empreendedor*, June 20, 2020. http://www.portaldoempreendedor.gov.br/estatisticas (Accessed June 22, 2020.); Alexandro Martello: Motorista de aplicativo poderá aderir a programa de microempreendedor individual. *G1*, August 8, 2019. https://g1.globo.com/economia/pme/noticia/2019/08/08/motorista-de-aplicativo-ganha-autorizacao-para-ser-microempreendedor-individual.ghtml. (Accessed June 22, 2020.); Serau Junior (2019) op. cit.

to the National Classification of Economic Activities (CNAE).[101] The registration of Uber offers us the following useful information:

Table 3 – Uber registration in the Federal Revenue of Brazil (RFB)

Business name: Uber do Brasil Tecnologia Ltda.
Opening date: April 9, 2013
Code and description of the main economic activity: 74.90-1-04 – Intermediation activities and agency of services and business in general, except real estate
Code and description of the secondary economic activities: 62.02-3-00 – Development and license of customizable computer programs 62.09-1-00 – Technical support, maintenance, and other services in information technology 70.20-4-00 – Consulting activities in business management, except specific technic consulting 73.19-0-04 – Marketing consulting 63.19-4-00 – Websites, content providers, and other information services on the internet 46.43-5-02 – Wholesale of purses, bags, and travel items 46.86-9-02 – Wholesale of packages

Adapted from: Receita Federal do Brasil: Comprovante de Inscrição e de Situação Cadastral. Receita Federal do Brasil, (2020, May 9). http://servicos.receita.fazenda.gov.br/Servicos/cnpjreva/Cnpjreva_Solicitacao.asp?cnpj=17895646000187. *Accessed May 9, 2020.*

The trade union of the economic sector that will represent Uber is the one that represents the economic activity "74.90-1-04 – Intermediation activities and agency of services and business in general, except real estate." And the trade union of the professional sector that will represent the Uber employees is the one that represents the employees in the economic activity, except if there is a differentiated professional sector. As we mentioned earlier, an employee in Brazil automatically and compulsorily joins a trade union via the data his/her employer provides. So, the administrative employees of Uber will be registered in the employees' trade union referred to the economic activity "74.90-1-04 – Intermediation activities and agency of services and business in general, except real estate." However, if the Uber drivers are classified as independent contractors, they will not be covered by this employees' trade union.[102] By the way, it was surprising for us that Uber has no mention of transportation in its economic activities records in Brazil, a situation that turns out to be curious or strange when we see something like "46.86-9-02 – Wholesale of packages."

Explaining differently: the trade union which represents independent contractors is seen as an employers' trade union on an economic sector – which happens with self-employed taxi drivers. An employees' trade union, in turn, is the one representing the workers who develop their activities under the labor contract, the symbol of the employment relationship in the Brazilian Labor Law. Imagining the collective bargaining between Uber and its drivers in Brazil involves the verification of the company's economic sector. If the Uber drivers are deemed employees, they can be represented by the employees' trade union: (i) of all Uber employees, such as the administrative ones; (ii) dedicated, for example, to other types of drivers who are employees, such as taxi ones, considering that Uber

101 Puglisi (2019) op. cit.

102 Idem.

drivers could be absorbed by it as members of an existing differentiated professional sector; or (iii) of their own, arguing that ride-hailing app drivers compose *per se* a differentiated professional sector. On the other hand, if the Uber drivers are considered independent contractors, they cannot be represented by this type of trade union and, therefore, cannot exercise collective bargaining concerning Uber.[103]

On the foundation of a specific trade union for Uber drivers, or ride-hailing app drivers in general, this initiative seems to be unlikely, as they do not essentially differ from other drivers. One distinction may be the form they are called, by an app, but it may be considered a weak argument. The core of the work is the same. The representation of Uber drivers by a trade union – and the collective bargaining involving them – is feasible if these drivers are classified as Uber employees. In other words, if Uber drivers are not considered employees of Uber, they will not be allowed to join a trade union of employees and, as a consequence, will not count on the benefits from collective bargaining. Our trade union system is defective in many ways. One of them is that it just covers employees while the employment relationship exists, not workers in general. Outside the system, an association may call itself a trade union, but it will be a mere association, without any bargaining power of a trade union and, therefore, without the prerequisites to sign an ACT or a CCT.[104]

Ride-hailing app drivers founding "trade unions" – in reality, mere associations – may negotiate with Uber, but do not have trade union representation, do not represent *erga omnes* a professional sector, and do not oblige Uber to take part in negotiations[105]. If a negotiation occurs in a situation like this, it will be a liberality of the company and will benefit only the members of the drivers' association. So, there is a considerable difference between the power of a collective bargaining and the one of a common negotiation. An example of these difficulties is the foundation: (i) in December 2016, of the Trade Union of the Individual Private Transportation App Drivers (Simtrapli-PE), in the City of Recife, State of Pernambuco, affiliated to the Sole Center of Workers (CUT) Trade Union Center; and (ii) in 2017, of the Association of App Drivers of São Paulo (Amasp), which intends to "represent the drivers towards the public authorities and the apps." In consultation with the Ministry of Economy records of trade unions, neither Simtrapli-PE nor Amasp was found. The amendment of the 1988 Constitution towards full freedom of association is urgent. Brazil needs a system allowing every trade union design and affiliation, fostering wide negotiation possibilities. It may strengthen the Brazilian trade unionism, putting aside the plethora of trade unions that do not defend those who are legally represented.[106]

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103 Idem.

104 Idem.

105 Look at the power conferred by the CLT to the trade unions: "Art. 616 – The Trade Unions representing economic or professional sectors and the companies, including those that do not have trade union representation, when called, cannot refuse the collective bargaining. (Wording given by Decree-Law No. 229, of 2.28.1967)." [Brazil (1943) op. cit.].

106 *Quem somos: um pouco da nossa história.* Associação dos Motoristas de Aplicativo de São Paulo, (n.d.). http://amasp.org/quem-somos/ (Accessed April 25, 2020.); *Entidades sindicais cadastradas no ME.* Ministério da Economia, April 23, 2020. http://trabalho.gov.br/cadastro-de-entidades-sindicais/entidade-sindical-registrada (Accessed May 8, 2020.); Puglisi (2019) op. cit.; Vanessa Rodrigues: *Motoristas do Uber criam sindicato no Pernambuco e se filiam à CUT.* Central Única dos Trabalhadores

5. Conclusion

It calls our attention that the "good old" employment classification on platform workers needs to be mentioned here. It proves how fundamental this debate remains, mainly in a country that insists on a state corporatist trade unionism like Brazil. Nonetheless, the legal uncertainty on this theme – as the Judiciary Branch frequently offers colliding decisions, not only in Brazil but in developed regions symbolized by the USA and Europe – leaves the huge number of platform workers with no or poor social protection. We are ultimately facing the future of Labor Law.

Uber drivers and other platform workers in Brazil have the concrete possibility to never join a formal trade union or formally collective bargain, which would relegate them to the outer rims of the labor system. Perhaps worse than this, they may join associations that seem to be trade unions and are not, providing them a false perception of inclusion in the system. We may witness the social scenario in which a growing number of platform workers in Brazil just rely on hashtags on social media – against the hashtags of the gig economy companies –, informal committees defining initiatives of self-empowerment that are not regulated by law – like strikes that are not legally strikes –, and naming-and-shaming strategies – with questionable effects in the long run. To deal with this, we should go back to the workplace democratization, to the voice of workers, not necessarily via the traditional trade unions.

It seems that this paper raises more questions than answers.

– Pernambuco, January 10, 2017. https://pe.cut.org.br/noticias/motoristas-do-uber-criam-sindicato-no-pernambuco-e-se-filiam-a-cut-d298 (Accessed April 25, 2020.)