HUNGARIAN LABOUR LAW
E - J O U R N A L

# Exploring a Human Rights Approach to 'decent' Digital Work

*What happens when Freedom of Association and Expression are Combined?*

**Tonia Novitz***

## Abstract

This article explores how a human rights approach could assist in the translation of 'digital work' to 'decent work'. In so doing, the ubiquity of the digital in the contemporary world of work is acknowledged, as almost all working arrangements are likely to be affected by new technologies whether directly or indirectly. In this sense, a human rights approach is appealing as a way in which to overcome the employment status problem, but also to recognise the universal character of the relevance of the digital in working lives. The article examines the pros and cons of a regulatory strategy which relies on human rights protections, as regards access to such issues as algorithmic management and design, utilisation of and generative artificial intelligence (AI), while also considering the effects of changes to location of the workplace. The limitations of strategic human rights litigation are recognised, which must be complemented by other forms of mobilisation to be effective. In particular, the article observes the significance of the 'right to have rights' and the potential 'architectonic' role played by freedom of association and expression when combined. The article goes on to analyse recent jurisprudence of the European Court of Human Rights which regards these freedoms of speech and association as mutually reinforcing rather than conflicting, but also places significant constraints on their application. It is suggested that a richer vision of a European human rights approach to digital work would be advisable.

**Keywords:** human rights, digital work, decent work, freedom of expression, speech, freedom of association, collective bargaining, strike, protest

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## 1. Introduction

On 24 September 2023, after 146 days of strike action which had profound effects on the film and television industry across the globe, the Writers' Guild of America (the WGA) announced that a tentative agreement had been reached with Alliance of Motion Picture and Television Producers (the AMPTP).[1] Issues raised (and at the time of writing provisionally settled) have included streaming rights but also use of generative Artificial Intelligence (AI), such as ChatGPT, in the creation of scripts. As an article published in the *Los Angeles Times* has now pronounced "the humans have won",[2] suggesting that the potential for decent work in a digital era can be realised. This dispute did not include human rights litigation, but was resolved in a context framed by expectation of entitlements to freedom of speech and association, including collective labour rights, namely the right to strike. The question of how to make 'digital' work also 'decent' work is understandably the current preoccupation of leading labour law scholars.[3] It is argued in this article that engagement with and reliance on human rights could have a significant role to play here.

This article takes as its starting point that it is now self-evident that digital aspects of the world of work extend well beyond online 'crowdwork' or the physical task-based work allocated by a platform.[4] Adaptation to new technologies has become a facet of the life of the 'nine-to-fiver' employee and in various kinds of jobs and working relationships, whether inside or beyond Hollywood.[5]

Certainly, algorithmic allocation, structuring and performance of work (and determination of its rewards) are now ubiquitous in platform work but also are now common in what was previously assumed to be a 'standard employment relationship'.[6] In addition, as was illustrated in the provisional terms of the WBA agreement, fierce debates are emerging regarding the extent to which artificial intelligence (AI) can and should play contribute to the wider design of working lives and expectations.[7] Human discretion and autonomy at work is at stake here, as well as the capacity to voice concerns

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1 Negotiations Update: Tentative Agreement. *WGA Contract,* 24 September 2023., available at: https://www.wgacontract2023.org/announcements/negotiations-update-tentative-agreement

2 Brian Merchant: The writers' strike was the first workplace battle between humans and AI. The humans won. *Los Angeles Times*, 25 September 2023.

3 For an excellent example, see Tamás Gyulavári – Emanuele Menegatti (eds.): *Decent Work in the Digital Age: European and Comparative Perspectives*. Oxford, Hart Publishing, 2022.; see also Adalberto Perulli – Tiziano Treu (eds.): *The Future of Work: Labour Law and Labour Market Regulation in the Digital Era*. Alphen aan den Rijn, Wolters Kluwer, 2020.

4 See for helpful analysis of these types of digital work, Jeremias Prassl: *Humans as a Service: The promise and perils of work in the gig economy*. Oxford, Oxford University Press, 2018.; and Valerio De Stefano: The Rise of the 'Just-in-time Workforce': On-demand work, crowdwork and labour protection in the 'gig-economy. *ILO Conditions of Work and Employment Series Working Paper,* No. 71, 2016.

5 Nicola Ens – Mari-Klara Stein – Tina Blegind Jensen: *Decent digital work: Technology affordances and constraints*. Thirty ninth International Conference on Information Systems, San Francisco 2018. Available at: https://tinyurl.com/ytyvy484

6 Sharon K. Parker – Gudela Grote: Automation, Algorithms, and Beyond: Why work design matters more than ever in a digital world. *Applied Psychology,* vol. 71, no. 4. (2022) 1171–1204.; and cf. Valerio De Stefano – Ilda Durri – Charalampos Stylogiannis –Mathias Wouters: Platform work and the Employment Relationship. *ILO Working Paper,* No. 27, 2021.

7 Ashley Braganza – Weifeng Chen – Ana Canhoto – Serap Sap: Productive Employment and Decent Work: The impact of AI adoption on psychological contracts, job engagement and employee trust. *Journal of business research,* vol. 131. (2021) 485–494.

and influence the terms of work through collective action. Additionally, remote work (or 'telework', as it can be described), has become an everyday feature of employment. This may be due to a change of expectations regarding attendance in an office after the COVID-19 pandemic,[8] but also reflects increasing access to 'Self-Monitoring, Analysis and Reporting Technology' (SMART) technology, due to which it has been possible to work from home, when travelling, and in a variety of private and public spaces using computers, tablets and other devices.[9] This means that previous assumptions regarding what is the 'workplace' have to be revisited, alongside the places where protest against working conditions can legitimately be situated.

The first part of this article begins by interrogating the role that human rights could play at the intersection of decent and digital work, referring to International Labour Organization (ILO) sources and the United Nations (UN) 2030 Agenda for sustainability.[10] It highlights the relevance of the universality of human rights in a context where employment status is given as a reason to deny collective labour rights (particularly in the context of platform work). This part also considers the significance of strategic human rights litigation especially when pursued by trade unions, and wider options for human rights mobilisation.

The second part addresses the counter-arguments, namely that a human rights approach is inherently too individualistic, too reliant on judicial intervention (which is innately conservative) and too minimalistic to have meaningful impact. While it must be acknowledged that these are legitimate concerns, it is suggested here that they can be overcome by Hannah Arendt's perspective on the preconditions for a 'right to have rights', which has to be embedded in voice within a community and the capacity to exercise solidarity to be meaningful.[11] Indeed, freedom of expression together with freedom of association can operate in ways described in a capabilities discourse as 'architectonic' enabling collective responses to changes and challenges in working lives in dynamic and constructive ways.[12]

The third part considers the outcome of recent litigation concerning the intersection of freedom of association and expression before the European Court of Human Rights. The Court has not yet tackled the issue of digital work directly, but its findings on related issues offer some indication of how this could be done.

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8 *Healthy and Safe Telework Technical Brief.* Geneva, ILO, 2021. 1. Cf. Angel Belzunegui-Eraso – Amaya Erro-Garcés: Teleworking in the Context of the Covid-19 Crisis. *Sustainability,* vol. 12, no. 9. (2020) 1–18.; and Antonio Aloisi – Valerio De Stefano: Essential Jobs, Remote Work and Digital Surveillance: Addressing the COVID-19 pandemic panopticon. *International Labour Review,* vol. 161, no. 2. (2022) 289–314. [Hereinafter: Aloisi–de Stefano (2022a)]

9 Peter Holland – Anne Bardoel: The Impact of Technology on Work in the Twenty-First Century: Exploring the smart and dark side. *The International Journal of Human Resource Management,* vol. 27, no. 21. (2016) 2579–2581.; Savvas Papagiannidis – Davit Marikyan: Smart Offices: A productivity and well-being perspective. *International Journal of Information Management*, vol. 51. (2020) 1–11.

10 UN General Assembly Resolution Transforming Our World: *The 2030 Agenda for Sustainable Development*. 25 September 2015. A/Res/70/1. https://sustainabledevelopment.un.org/post2015/transformingourworld/publication [Hereinafter: *2030 Agenda*]

11 Hannah Arendt: *Origins of Totalitarianism*. London, Penguin, 2017., discussed further below.

12 Martha Nussbaum: *Creating Capabilities: The Human Development Approach.* Cambridge, Harvard UP, 2011. 8–19. and 33–39.

## 2. The potential role of human rights in establishing 'decent' digital work

This part begins by explaining how human rights issues arise in relation to 'decent' and 'digital' work. It then considers how their connections may be conceived at the ILO in relation to protection of 'fundamental rights' and in the UN General Assembly Resolution on the 2030 Agenda relating to sustainable development.[13] This part goes on to consider how regulatory participation in determining decent digital work could be promoted with reference to human rights norms. In this context, the universality of human rights as a normative base is considered, alongside scope for strategic litigation and wider mobilisation.

### *2.1. Digital and 'decent' work: the challenge*

As platform work, or as it is often termed 'gig' work, emerged, academic analysis has responded to that aspect of new technologies at the workplace.[14] However, the issues raised by the transformation of working life in a digital era are potentially more extensive and profound.

The contemporary reach of these issues has been mapped by Ruth Dukes and Wolfgang Streeck in their important text, *Democracy at Work*.[15] For example, they highlight the closure of opportunities for speech in increasingly digitalised work through: surveillance (as communications are monitored and discouraged, which poses a privacy problem); subcontracting (which means that those providing their labour are less likely to be working alongside colleagues with whom they can communicate); and the creation of algorithmic competition for work rather than cooperation. In response, they advocate the creation of 'occupational communities' organizing collectively to exercise influence over these process. However, they have to observe that employers can seek to prevent such action by organizing work "so as to make informal communication among workers difficult or impossible".[16] Hence their firm commitment to a right to strike as a means of resistance but also influence.[17]

It is in this working environment, described by these authors so powerfully, that we are faced with the challenge to introduce legal restrictions on the digital transformation of workplaces so as to inscribe the conditions for 'inclusive solidarity'.[18] In this context, Brishen Rogers refers to 'technology' and its uses (perhaps a broader and more apt term), particularly as a mode of domination and differentiation

13 *2030 Agenda* op. cit.

14 See for example, De Stefano (2016) op cit. and Prassl op cit.

15 Ruth Dukes – Wolfgang Streeck: *Democracy at Work: Contract, Status and Post-Industrial Justice*. Cambridge, Polity, 2023.

16 Dukes-Streeck op. cit. 121.

17 Dukes-Streeck op. cit. 136–137.

18 See Julia López López: Inscribing Solidarity in Labor Law. In: Julia López López: *Inscribing Solidarity*. Cambridge, Cambridge University Press, 2023. 1–23.; and see also Julia López López: Pursuing democratic depth in the age of multilevel power and soft labour law: The case of platform workers protest. In: Angela Cornell – Mark Barenberg (eds.): *Handbook on Labor and Democracy*. Cambridge, Cambridge University Press, 2021. 307–318.

of working people.[19] He identifies interference with privacy and power over data as key ways in which employers' authority is retained and expanded. Nevertheless, his argument (comparable to that of Dukes and Streeck) is that labour can exercise greater forms of control over new technologies at work than is often acknowledged.

This is an aspiration shared by Antonio Aloisi and Valerio De Stefano who recognise that workers seem "caged in the virtual assembly line",[20] but the impact of the digital is that the 'workplace' is no longer a single site but is potentially 'everywhere'.[21] They seek to enable "Collective Voice versus Digital Despotism".[22] The crucial question then, shared by all these authors, is how to achieve national, regional and global regulation that enables collectivism and voice. The aim in this article is to explore how this could be achieved through a human rights approach, which could complement *ad hoc* or specialised legislation seeking to keep pace with changes in new technologies.

### *2.2. ILO instruments and the 2030 Agenda SDGs: aspirations for decent digital work*

To date, issues of digital work and human rights protections would seem to have been treated as distinct on the international stage. However, they can of course be linked by their connection to 'decent work'. We can arguably find these connections in key ILO declaratory instruments and the UN 2030 Agenda.

For example, 'decent work' as envisaged under Article 1(A) of the 2008 Declaration consists "four equally important strategic objectives": (i) promoting employment; (ii) developing and enhancing measures of social protection; (iii) promoting social dialogue and tripartism, but also (iv) respecting, promoting and realizing the fundamental principles and rights at work. In particular, freedom of association and collective bargaining are recognised as 'enabling rights' for achievement of other facets of decent work, being linked also to social dialogue and tripartism. The 2008 Declaration further recognises that the forms of 'globalization' that the ILO and its members aspire to regulate is "characterized by the diffusion of new technologies".[23] Their effects are considered in relation to one aspect of decent work, namely "the extension of social security to all, […] adapting its scope and coverage to meet the new needs and uncertainties generated by the rapidity of technological, societal, demographic and economic changes", as envisaged in Article 1(A)(ii). What does however seem to

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19 Brishen Rogers: *Data and Democracy at Work: Advanced Information, Technologies, Labor Law and the New Working Class*. Cambridge (Massachusetts) – London (England), The MIT Press, 2023.

20 Aloisi–De Stefano (2022a) op. cit. 73.

21 Antonio Aloisi – Valerio De Stefano: *Your Boss is an Algorithm: Artificial Intelligence, Platform Work and Labour*. Oxford–London–New York–New Delhi–Sydney, Hart, 2022. 27.; and Paolo Tomassetti: Labor Law and Environmental Sustainability. *Comparative Labour Law and Policy Journal*, vol. 40. (2018) 63.

22 Aloisi–De Stefano (2022a) op. cit. 155.

23 ILO Declaration on Social Justice for a Fair Globalization 2008, preamble.

be missing, both in the 2008 Declaration and in the 1998 Declaration on Fundamental Principles and Rights at Work on which its treatment of core rights is based, is the alignment of and connection between "freedom of expression and of association" in the 1944 Declaration of Philadelphia, where Article I(b) states that they are together "essential to sustained progress".

Article III(C)(v) of the 2019 Centenary Declaration called upon ILO 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", promoting "decent work" through *(inter alia)*: "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". Again, freedom of speech is not expressly linked to this regulatory process. There is however a helpful statement in Article II(A)(vi) to the effect that there is to be "a focus on freedom of association and the effective recognition of the right to collective bargaining as enabling rights", repeating this appreciation of their function which had previously been stated in the 2008 Declaration.

The UN 2030 Agenda adopted in 2015 provides a fuller recognition of 'decent work' as an essential component of Sustainable Development Goal (SDG) 8.[24] SDG 8 targets specifically seek the eradication of forced labour, the elimination of child labour, and the elimination of discrimination. "Freedom of association and collective bargaining" appear only in an 'indicator' adopted later (see 8.8.2), but these collective labour rights would seem to be covered by the obligation to "protect fundamental freedoms" in SDG target 16.10.[25] We may also assume that freedom of expression is also intended to be encompassed by target 16.10, especially since SDG target 16.7 aims to "[e]nsure responsive, inclusive, participatory and representative decision-making at all levels", for which free speech must logically be a precondition. There is also an overarching ambition in the Introduction to the Declaration on the 2030 Agenda to "respect, protect and promote human rights and fundamental freedoms for all".[26] That commitment would seem to tally with the determination that "no one will be left behind" set out in the Preamble to the UN Resolution.[27]

Elsewhere in the 2030 Agenda, the role of 'technology' in promoting achievement of various SDGs is treated as vital, including SDG 1 (on poverty),[28] SDG 4 (on education),[29] and SDG 5 (on gender

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24 See the *2030 Agenda* op. cit.; also Tonia Novitz: Sustainable Development Goal 8: Promote Sustained, Inclusive, and Sustainable Economic Growth, Full and Productive Employment, and Decent Work for All. In: Jonas Ebbesson – Ellen Hey (eds.): *Cambridge Handbook on the United Nations Sustainable Development Goals and International Law.* Cambridge, Cambridge University Press, 2022. 208–230.

25 Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association. 7 August 2018, A/73/279, paras. 6 and 58, also paras. 87–89. [Foreinafter: Report of the Special Rapporteur]

26 *2030 Agenda* op. cit., paras 8 and 19 for example.

27 For analysis of the scale of problems posed by 'gig' work for compliance with the SDGs and the *2030 Agenda*, see Tonia Novitz: Gig Work as a Manifestation of Short-Termism: Crafting a sustainable regulatory agenda. *Industrial Law Journal*, vol. 50, no. 4. (2021) 636–661.

28 SDG target 1.4.

29 SDG target 4.b.

equality).[30] There is an overarching commitment to partnership under SDG 17 for these and related purposes.[31] The importance of overcoming the 'digital divide' (namely inequalities in technological access) is also mentioned in the 2030 Agenda,[32] but the concrete implications of technological including digital developments for 'decent work' (under SDG 8) are not expressly addressed.

Nevertheless, in 2018 the UN Special Rapporteur on the rights to freedom of peaceful assembly and association, Clément Nyaletsossi Voulé, offered some important insights into the relevance of the 2030 Agenda for Sustainable Development. For example, the connections between free speech and free association were articulated as follows: "The overall conditions for civil society participation and action are considered as enabling when the environment, composed of legal norms and practices, respects the fundamental freedoms to peaceful assembly, association, expression and the protection of human rights defenders."[33] In particular, he advocated "use of public space, participation in public debate and the possibility of organizing associations", which would "all contribute to enabling civic space within the framework of the Sustainable Development Goals, which provides for peaceful, inclusive and just societies with effective, accountable and inclusive institutions".[34] So, if workplaces are now hugely variable and may even consist in practice of public spaces such as libraries or coffee shops, there are new and further claims for these to be a legitimate site of protest, just as the factory or workshop might once have been. Further, at the close of the report, the Special Rapporteur, made an interesting observation on the role of the digital not only as a source of oppression by employers, but as a basis for connections which an employer should not block: "Any restrictions to online access or expression must be necessary and proportionate and applied by a body independent of any political, commercial or other unwarranted influences, and there should be adequate safeguards against abuse. The practice of blocking communications – impeding the organization […] of an assembly online – rarely satisfies the requirements of international human rights standards."[35]

### *2.3. Actors and institutions: universality, strategic litigation and more*

It is evident that human rights protections can provide potential protections for those at work not otherwise legally deemed 'employees' or 'workers'. This form of universal entitlement to certain key facets of labour law has been extremely attractive to advocates of labour rights confronting the

30 SDG target 5.b.

31 SDG 17.6, 17.7. and 17.8 and 17.16; see also SDG targets 7.a and 7.b.

32 *2030 Agenda* op. cit., Introduction to the Declaration of the 2030 Agenda, para. 15.

33 Report of the Special Rapporteur op cit., para. 16.

34 Ibid., para 17.

35 Ibid., para. 100.

exploitation associated with hire of services through platforms.[36] It is of course possible to provide broader coverage of labour rights in other ways, for example through labour legislation at the national level,[37] or through a 'Universal Labour Guarantee' (ULG) as advocated by the ILO appointed Global Commission on the Future of Work.[38] Indeed, the adoption of other legal norms could be more extensive. For example, the ULG would cover health and safety working time, holidays and pay, not generally previously acknowledged as universal civil and political rights under international law.[39]

What a human rights approach offers are established principles and a basic floor of entitlement, which legislative entities can exceed but cannot drop below. So human rights may best be regarded as a medium to expose the most egregious forms of injustice and provoke debate as to how these should be remedied. Established as a legal vehicle for this purpose in the international sphere in the wake of the second world war, the so-called international 'Bill of Rights' has gained credibility and influence,[40] spawning regional systems for human rights protections, for example, in Africa, the Americas and Europe.[41]

I have argued elsewhere that there are benefits that may follow from strategic human rights litigation, insofar as this is a way to garner interest in vital issues, shame governments into taking appropriate action and prompt changes in the behaviour of not only state actors, but also private commercial and corporate actors who hire the labour of others.[42] There is an emerging recognition of the potential benefits of a human rights discourse in the sphere of digital work. For example, a convincing argument has been presented that the international human rights framework could provide a defence against the most problematic aspects of algorithmic management.[43]

In other contexts, labour lawyers have advocated strategic litigation, as a way for trade unions to engage with the challenges experienced in digital work.[44] This is consistent with the increasing stress placed by current labour commentators on access to collective worker voice and universal access to

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36 Valerio De Stefano: Non-Standard Work and Limits on Freedom of Association: A Human Rights-Based Approach. *Industrial Law Journal*, vol. 46, no. 2. (2017) 185–207.; Joe Atkinson: Employment Status and Human Rights: An Emerging Approach. *Modern Law Review* vol. 86. (2023) 1166–1196.

37 *Work for a Brighter Future*. Geneva, ILO, 2019. 39.

38 See the Status of Workers Bill 2021 proposed by Lord John Hendy KC available at: https://publications.parliament.uk/pa/bills/cbill/58-02/0242/210242.pdf

39 Cf. the rights protected under the UN Covenant on Civil and Political Rights 1966.

40 Consisting of the Universal Declaration on Human Rights 1946, the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966.

41 For an early classic analysis, see Burns H. Weston – Robin Ann Lukes – Kelly M. Hnatt: Regional Human Rights Regimes: A Comparison and Appraisal. *Vanderbilt Journal of Transnational Law*, vol. 20, no. 4. (1987) 585–638.

42 Tonia Novitz: Human Rights as a Regulatory Tool for 'Just Transition' in Europe (and Beyond). *International Journal of Comparative Labour Law and Industrial Relations*, vol. 39, no. 3. (2023) 439–452.

43 Lorna Mcgregor – Daragh Murray – Vivian Ng: International Human Rights Law as a Framework for Algorithmic Accountability. *International & Comparative Law Quarterly,* vol. 68, no. 2. (2019) 309–343.

44 See for e.g. Giovanni Gaudio: Litigating the Algorithmic Boss in the EU: A (Legally) Feasible and (Strategically) Attractive Option for Trade Unions? *International Journal of Comparative Labour Law and Industrial Relations* vol. 40, no. 1. 91–130.; Michael Doherty – Valentina Franca: Solving the 'Gig-saw'? Collective Rights and Platform Work. *Industrial Law Journal*, vol. 49, no. 3. (2020) 352–376.; Jason Moyer-Lee – Nicola Kountouris: The "Gig Economy": Litigating the Cause of Labour. In: *Taken for a Ride. Litigating the Digital Platform Model.* Issue Brief. Washington DC, ILAW, March 2021.
See: https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf

collective labour rights, representing the interests of those at work in the context of platform and digital work.[45] This includes insistence on engagement with 'independent' or 'syndicalist' unions seeking to protect those in marginalized occupations in the gig economy who do not qualify as 'workers' and therefore cannot access standard forms of trade union representation, such as state endorsed collective bargaining.[46]

At a fundamental level, engagement with what is 'digital' does prompt us to consider what makes us "human" and (in ILO terms) what a 'human-centred' regulatory strategy should look like. That said, this does not have to be a binary, oppositional stance; forms of learning and compromise seem likely as new technological innovations are encountered. Moreover, human rights may have their limitations if seen as static and limited to literal prescriptions in existing international instruments. They may be better understood as principles to be applied in a range of circumstances that, through that process of application, will evolve and develop as appropriate as those circumstances change.

## 3. Problems associated with a human rights approach – reasons to be cautious?

There are however potential limitations associated with a human rights framework, which are familiar to labour lawyers. For example, there is a longstanding judicial bias towards protection of the individual rather than the realisation of collective aspirations.[47] Anthony Forsyth has for example observed the tendency of courts to "prioritise the free speech rights" of an employers over collective action by their workers and to do so now in the context of platform work.[48] Free speech emerges in this context as the neo-liberal anathema to collective bargaining rather than its enabler.

Linked to this concern is the way in which individual rights can 'trump' outcomes of collective decision-making,[49] which could create too great a capacity for courts to shape the forms of digital work, as opposed to representative decision-making, which involves engaging in social dialogue

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45 Anthony Forsyth: *The Future of Unions and Worker Representation.* Oxford, Hart, 2022.; Alan Bogg – Ricardo Buendia: The Law and Worker Voice in the Gig Economy. In: Valerio De Stefano - Ilda Durri – Charalampos Stylogiannis -Mathias Wouters (eds.*): A Research Agenda for the Gig Economy and Society*. Cheltenham, Edward Elgar, 2022. 73–92.; and Philippa Collins – Joe Atkinson: Worker Voice and Algorithmic Management in Post-Brexit Britain. *Transfer: European Review of Labour and Research,* vol. 29, no. 1. (2023) 37–52.

46 Francisco Fernández-Trujillo Moares – Gomer Betancor Nuez: The Mobilisation of Food Delivery Gig Economy Workers (Riders). *Capital & Class*, vol. 47, no. 3. (2023) 353–359.; Holger Pötzsch – Kerem Schamberger. Labour Struggles in Digital Capitalism: Challenges and opportunities for worker organisation, mobilisation, and activism in Germany. *tripleC: Communication, Capitalism & Critique. Open Access Journal for a Global Sustainable Information Society*, vol. 20, no.1. (2022) 82–100.; and Vera Weghmann: Theorising Practice: Independent trade unions in the UK. *Work in the Global Economy*, vol. 2, no. 1. (2022) 132–147.

47 Kevin Kolben: Labor Rights as Human Rights. *Virginia Journal of International Law*, vol. 50. (2009) 449–484; see also the reporting of concerns expressed by John Hendy KC in Alan Bogg: Can We Trust the Courts in Labour Law? Stranded Between Frivolity and Despair. *International Journal of Comparative Labour Law and Industrial Relations*, vol. 38, no. 2. (2022) 103–136.; also see more directly Hendy's views in K. D. Ewing – John Hendy: The Trade Union Act 2016 and the Failure of Human Rights. *Industrial Law Journal,* vol. 45. (2016) 399–422.; and Lord John Hendy KC: Reflections on the Role of the Trade Union Lawyer. *International Journal of Comparative Labour Law and Industrial Relations*, vol. 38, no. 2. (2022) 91–102.

48 Forsyth op. cit. 214.

49 Ronald Dworkin: *Taking Rights Seriously*. London, Duckworth, 1977.

with those affected. Another arguably related concern is that human rights institutions seek to avoid that democratic deficit by tightly circumscribing the scope for interference, so that a right is a bare entitlement, minimally defined which only bites in the cases of the most egregious breaches.[50] In such a scenario, the worker can only claim when the most punitive disciplinary action is taken against them for exercising their rights to freedom of association.

It is conceded that there is cause to pay attention to these potential limitations and their applicability to the three problems of digital work outlined above: algorithmic management, application of AI and shifts in workplaces. For example, human rights claims seem unlikely to offer an actual route to access to effective collective bargaining but may rather merely prevent only the most outrageous harms inflicted by an employer when workers seek such access. However, it may also be observed that promotion of freedom of association, when accompanied by protection of freedom of speech, has both a collective and dynamic quality that enables human agency, as well as solidarity, and thereby genuine transformational possibilities.[51]

A right to have rights is "a right to belong to some kind of organized community".[52] Hannah Arendt in her famous essay, "The Rights of Man: What are They?", published in 1949 before any digital revolution, offered the conceptual distinction between bare 'human' rights (*zöe*) and 'political' rights (*bios politikos*).[53] In the *Origins of Totalitarianism*, she elaborated on this difference where she observed that: "The fundamental deprivation of human rights is manifested first and above all in the deprivation of a right to a place in the world which makes opinions significant and actions effective."[54] In other words, it is not enough that someone has the bare means to survive. It may be possible to gain subsistence income through short term 'gigs' on a digital platform, which satisfies the requirements of a bare right to life, but this is not enough.[55] Translating Arendt's views into the world of digital work, the meaningful protection of human rights consists of the capacity to have agency over the terms and conditions of hire. This involves the capacity to speak with and work collaboratively with others to ensure their improvement. Collective engagement with digital and technological issues at the workplace also offers a form of flexible reflexive engagement.[56] Policies can be crafted in ways

50 Arendt (2017) op. cit. 297., refers to the "abstract nakedness of being human and nothing but human".

51 Meeting the preconditions for community, identified by Arendt (ed., 2017) op. cit.; see also Melissa Stewart: 'A New Law on Earth', Hannah Arendt and the Vision for a Positive Legal Framework to Guarantee the Right to Have Rights. *Virginia Journal of International Law,* vol. 62, no. 1. (2021) 115–179.

52 Hannah Arendt. The Rights of Man: What are they? *Modern Review,* vol. 3, no. 1. (1949) 24–36.

53 Arendt (1949) op. cit. 30.

54 Arendt (2017 ed.) op. cit. 387–388.

55 *The Role of Digital Labour Platforms in Transforming the World of Work.* World Employment and Social Outlook (Weso) Report. Geneva, ILO, 2021.

56 Ulla Liukkunen: The Role of Collective Bargaining in Labour Law Regimes: A global approach. In: *General Reports of the XXth General Congress of the International Academy of Comparative Law-Rapports généraux du XXème Congrès général de l'Académie internationale de droit comparé.* Berlin–Heidelberg, Springer, 2021. Cf. Rolf Rogowski: *Reflexive Labour Law in the World Society.* Cheltenham, Edward Elgar, 2013.

sensitive to complex particular circumstances. In this way, human rights do not merely only dictate minimum standards but support joint agency in how they are to be applied.

In this context, Martha Nussbaum's conception of capabilities theory may be helpful. Like Arendt, the concerns arising from digital technology were not the issues which she was chiefly addressing at the time she developed her theoretical adaptation of Amartya Sen's notion of *Development as Freedom*.[57] Seeking to prevent "entrenched social injustice and inequality",[58] she presented a list of "central capabilities", which have potential connections to the promotion of freedom of association and collective voice.[59] For Nussbaum, 'practical reason' (number 6) and 'affiliation' (number 7) come later in her list, but are 'architectonic' – "they organize and pervade" other capabilities.[60] Practical reason consists of the capacity to "engage in critical reflection about planning of one's life", while affiliation includes freedom of assembly and speech. The related "control of one's environment" (number 10) includes political participation manifesting free expression and association.[61] She offers a complementary assertion of the importance of agency, comparable to that of Arendt, when she says that she seeks to promote "a set of opportunities, or substantial freedoms, which people may or may not exercise in action: their choice is theirs".[62] By analogy, we might think of freedom of association and collective bargaining as 'architectonic', or as the ILO Declarations of 2008 and 2019 would have it, "enabling rights", especially when combined with freedom of expression.

The question is whether, given the objections identified above, human rights litigation has the capacity to offer this kind of meaningful agency for those engaged in platform work or (more broadly) those affected in various respects by certain forms of digitised working life. For Grainne De Búrca, the dynamic process of 'Reframing Human Rights' is what is important through "iterative engagement with an array of domestic and international institutions and processes over time".[63] A single court case is only part of this larger process. Jack Meakin has offered 'three tenets' of strategic litigation, which could be indicators of relative success: effective legal arguments; state law's institutional capacity; and political objectives.[64] Curiously, in the 'multiple boomerang effect' that De Búrca observes,[65] it may be the last of these that changes the climate in which litigation is decided, a judgment received

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57 Amartya Sen: *Development as Freedom*. Oxford, Oxford University Press, 1999.

58 Martha Nussbaum: *Creating Capabilities: The Human Development Approach.* Cambridge, Mass., Harvard University Press, 2011. 18–19.

59 See Tonia Novitz: Supply Chains and Temporary Migrant Labour: The Relevance of Trade and Sustainability Frameworks? In: Diamond Ashiagbor (ed.): *Re-Imagining Labour Law for Development: Informal Work in the Global North and South*. Oxford, Hart, 2019. 207–208.; and for a more thorough domestic constitutional law perspective, Alan Bogg: The Constitution of Capabilities: The Case of Freedom of Association. In: Brian Langille (ed): *The Capability Approach to Labour* Law. Oxford, Oxford University Press, 2019.

60 Nussbaum op. cit. 33–39.

61 Nussbaum op. cit. 34.

62 Nussbaum op. cit.

63 Grainne De Búrca: *Reframing Human Rights in a Turbulent Era.* Oxford, Oxford University Press, 2021. 3–4.

64 Jack Meakin: Labour Movements and the Effectiveness of Legal Strategy: Three Tenets. *International Journal of Comparative Labour Law and Industrial Relations*, vol. 38, no. 2. (2022) 187–210.

65 De Búrca op. cit. 22–24, and 30–47., describing the "multi-level co-creation of human rights law and practice" (at 46).

and how it is implemented. Moreover, it may be worth reflecting also on the wide array of human rights actors that operate in ways exercising influence outside courts or social movements, such as the UN special rapporteur system.[66] The modes of human rights engagement can be more various than is often acknowledged.

## 4. Appreciation of connections between freedom of expression and association at the European Court of Human Rights

This part of this article examines the connections and tensions between free expression and association before the European Court of Human Rights. Others have written on the relationship between privacy and freedom of expression in a digital context,[67] and more recently on workplace privacy and associational power,[68] but there has been little exploration of my subject.

Despite past treatment of freedom of speech under Article 10 of the European Convention on Human Rights as being in opposition to Article 11, a recent judgment from the Court offers a potentially significant departure from that approach. While not a case directly concerning digital facets of work, this may have consequences for trade union representations regarding new technologies. Nevertheless, the restrictive approach taken by the Court to admissibility of claims under Article 11 poses difficulties in a digital era where subcontracting and false self-employment remains rife.

### *4.1. Making connections between free expression and freedom of association*

Collective bargaining in the context of labour relations is concerned with protecting those who cannot speak individually in the context of reliance on work for income. So it has long been acknowledged that with collective voice comes bargaining power for those at work.[69] Freedom of association is dependent on the ability to assemble and speak freely, whether in a room or online on social media. The ideal is inclusive speech, familiar from the literature on deliberative democracy at work,[70] so that those who are most vulnerable and most likely to be excluded from standard protections under domestic labour legislation, for example in "gig" platform work, need to be part of the conversation.

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66 Report of the Special Rapporteur op cit.

67 Philippa Collins: *Putting Human Rights to Work: Labour Law, the ECHR, and the Employment Relation*. Oxford, Oxford University Press; see also the excellent chapter from András Koltay: Social Media and Freedom of Speech In Employment: Limitations on employees' right to self-expression. In: Gyulavári–Menegatti op. cit. chapter 17.

68 Rogers op. cit., chapter 4.

69 Otto Kahn-Freund: *Labour and the Law*. London, Stevens & Sons, [2]1977. 14.

70 For example, Alan Bogg: *The Democratic Aspects of Trade Union Recognition.* Oxford, Hart, 2011.; see also Anna Drake: *Activism, Inclusion and the Challenges of Deliberative Democracy.* Vancouver, UBC Press, 2021.

There is also a link to sustainable development and the 2030 Agenda here, to the extent that if "no one is to be left behind" as that UN General Assembly Resolution advocates,[71] everyone at work should have the opportunity to speak and to be heard. Moreover, the effective right to collective bargaining (as advocated as we have seen at the ILO) is dependent on the ability to relay the collective views reached to an employer without fear of reprisals for that act of free speech. Strikes (and other industrial action) can be understood as vital forms of protest speech in response to the employer's determination of how digital technology will affect working life.[72] The ability of precarious workers to exercise a right to strike would seem to be vital if their attempt at collective bargaining is not reduced to 'collective begging'.[73]

The right of workers (and their representatives) to speak up at the workplace and to take collective action to protect their interests has recently been addressed by the European Court of Human Rights in the cases outlined below. It should be acknowledged that in the Court's early case law, free speech was juxtaposed with trade union activity, namely as a species of individual liberty opposed to what is presented as collective coercion by trade unions. For example, in *Young, James and Webster v UK*, the Court very sensibly observed that: ''The protection of personal opinion afforded by Articles 9 and 10 […] in the shape of freedom of thought, conscience and religion and of freedom of expression is also one of the purposes of freedom of association as guaranteed by Article 11." [74] However, this statement was made in the context of a judgment in which the right of workers not to join a trade union was protected as a species of individual conscience, with reference to Articles 9 and 10 of the ECHR, such that their rights to negative freedom of association (the individual right not to associate) were given priority over positive collective entitlements under Article 11.[75]

In 2022, the Court took a position which was more favourable to collective labour rights in the case of *Straume v. Latvia*.[76] This was a judgment which recognised the free speech and associational rights of the chairperson of the Latvian Air Traffic Controllers' Trade Union, Aušra Straume. She was disciplined by her employer for sending a letter on behalf of and expressly authorised by the union. The letter had set out concerns regarding training, working time and pay, itemising past failures to address or resolve these problems. Her employer retaliated by suspending Straume on full pay pending an 'investigation', while requiring that she undergo two mental health examinations, although both times she was found to be healthy. Her employer failed in an attempt to dismiss her, which had been resisted

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71 See the *2030 Agenda* op. cit. See also Marit Hammond: Sustainability as a Cultural Transformation: the role of deliberative democracy. *Environmental Politics*, vol. 29, no. 1, 2020. 173–192.

72 See Dukes–Streeck op. cit.; also Bogg (2011) op. cit. 270–271.

73 See Eric Tucker: Can Worker Voice Strike Back? Law and the Decline and Uncertain Future of Strikes. In: Alan Bogg – Tonia Novitz (eds.): *Voices at Work: Continuity and Change in the Common Law World.* Oxford, Oxford University Press, 2014. Chapter 23.

74 App 7601/76 and 7806/77 *Young, James and Webster v UK*, 13 August 1981, para. 57.

75 For a comparable approach, prioritising individual choice over trade union action, see App 47355/06 *Redfearn v UK*, 6 November 2012.

76 App no. 59402/14 *Straume v. Latvia*, 2 June 2022.

strongly by her colleagues and the trade union. The employer did however succeed in preventing her from re-entering the premises and refusing to provide her with work. The Latvian courts endorsed the employer's decision to suspend her employment in this way.

The European Court of Human Rights found that this disciplinary action was an interference with Straume's Article 10 and 11 rights under the European Court of Human Rights and was disproportionate. The Court's reasoning repeats the principle stated in *Young, James and Webster,* but in a very different setting: "the question of freedom of expression is closely related to that of freedom of association within a trade union context. The protection of personal opinions, as secured by Article 10, is one of the objectives of freedom of assembly and association, as enshrined in Article 11".[77] This amounts to an interesting recognition of the rights of trade unions and their officials to speak out in the representation of workers' interests: "A trade union must […] be free to strive for the protection of its members' interests, and its individual members have a right, in order to protect their interests, that that trade union should be heard […] One of the essential elements of the right of association is the right for a trade union to seek to persuade an employer to listen what it has to say of behalf of its members."[78]

However, the reasoning in the case also confirms some of the suspicions of those critical of reliance on a human rights approach as a regulatory basis for labour relations. This is because the Court demonstrates a reluctance to provide a strong endorsement of free speech in the context of work. There is a notable sympathy in the judgment for protection of managerial prerogative and the need to protect an employer's property interests and prevent reputational harms. In particular, the exceptions under Articles 10(2) and 11(2) were deemed applicable on the basis that "the impugned measures were aimed at protecting the rights and freedoms of the employer, and therefore served the legitimate aim of protecting the rights and freedoms of others".[79] The Court considered there was the need for "a fair balance", with reference to principles of proportionality and a margin of appreciation.[80] For example, it was considered relevant that the communication was not public (exposing the employer to public criticism) but made directly to the employer with the aim of changing the employer's conduct, rather than risking reputational damage.[81]

Perhaps anticipating such a conservative approach, the European Trade Union Confederation (ETUC) had made submissions to the effect that a distinction should be drawn between "employee expression" and "trade union expression", with the latter being deserving of a higher degree of protection akin to that established for free speech by the media. The ETUC position was summarised in the Court's judgment as requiring that priority "be given to the examination of the case in the

77 Ibid. para. 89.

78 Ibid. para. 91

79 Ibid. para. 100.

80 Ibid. para. 101.

81 Ibid. para. 102.

light of the trade union rights guaranteed by Article 11, their level of protection being strengthened by the right to freedom of expression enshrined in Article 10".[82] This was the argument that the Court ultimately relied upon, emphasising that "advocating for the interests of trade union members is the very function of trade union representatives and constitutes a fundamental element of trade union freedom. It should also be distinguished from situations in which employees express their own personal opinions, as actions and statements aimed at furthering the interests of trade union members as a whole call for a particularly high level of protection". In this respect, the Court also set out certain factors that would be relevant, namely "the context within which the statements were made (including whether they formed part of a legitimate trade union activity); the nature of the statements (including whether the limits of acceptable criticisms were crossed); the damage suffered by the employer or other persons".[83] Unlike trade union representatives, it was said that "employees have a duty of loyalty, reserve and discretion to their employer and certain expressions that may be legitimate within other contexts are not appropriate in labour relations".[84] This means that collective representation through a trade union is prioritised over individual free speech rights in a workspace. In some ways, this finding might appear a significant endorsement of collective labour rights, useful to trade unions seeking to rely on freedom of association and expression to tackle digital issues in contemporary workplaces. However, the Court in making this finding would also seem to be limiting access to these human rights protections, given what we have learnt to date of platform work and digital transformations of work more generally.

### *4.2. Limiting freedom of association (and expression) rights*

Prior to the *Demir and Baykara* judgment of 2008,[85] the European Court of Human Rights had been notoriously reluctant to find that collective bargaining was a necessary element of freedom of association to be protected under Article 11.[86] While that omission has since been remedied, and the right to strike can also be protected under Article 11, as demonstrated by cases such as *Enerji Yapi-Yol Sen*[87] and *Ognevenko*,[88] it now emerges that the Court will only protect what it designates to be 'trade union' activity, as opposed to collective action by workers more broadly. This is a limitation

82 Ibid. para. 82.

83 Ibid. para. 103.

84 Ibid. para. 108.

85 App 34503/97 *Demir and Baykara v Turkey*, 12 November 2008, para. 154.

86 Keith D. Ewing – John Hendy: The Dramatic Implications of Demir and Baykara. *Industrial Law Journal*, vol. 39, no. 1. (2010) 2–51.

87 App 68959/01 *Enerji Yapi-Yol Sen v Turkey*, 21 April 2009.

88 App no 44873/09, *Ognevenko v Russia*, 20 November 2018.

accompanied by the Court's determination to limit "the right to form and join trade unions" in Article 11 to those at work who possess the appropriate employment status.

The Court now relies on the ILO Employment Relationship Recommendation 2006 No. 198,[89] so as to determine what is an 'employee' capable of creating and joining a trade union. This is despite clear findings from ILO supervisory bodies that the freedom of association and collective bargaining must also be available to self-employed workers.[90] We now know that Romanian priests do not qualify by virtue of Article 11(2),[91] but what of platform workers and those whose access to work is algorithmically selective or who suffer from the outsourcing arrangements that have become endemic in the newly digitalized twenty-first century workplace?

More recently, the Court has refused to hear cases brought relating to the right to strike in reliance on freedom of association under Article 11, which have been brought by individuals rather than trade unions.[92] This refusal would seem to follow from the wording of Article 11, because of the reference in that provision to "the right to form and join trade unions".[93] This is an odd interpretation, given that freedom of association is stated in Article 11 to be 'including' those rights, not excluding others. It is also highly problematic, given that trade union representation is not available in many European legal systems where access to membership is demarcated in restrictive ways, excluding for example in the UK Deliveroo food delivery couriers hired through platforms.[94] In this way, access to inclusive speech and association is lost. Those most in need of the political community to which Arendt aspired are made to do without, in ways that promote exploitation and economic hardship.[95] As barriers between 'employees' (or in the UK context 'workers') and others providing services breakdown due to technological changes in algorithmic allocation of work or use of AI, and where the site where digital work is executed changes from the 'workplace' to any space, the Court's attempted demarcations do not make much sense, and indeed can be seen as obstructing access to collective labour rights where they are most likely to be of assistance.

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89 App no. 2330/09 *Sindicatul 'Pastorul Cel Bun'* v. *Romania*, 9 July 2013.

90 *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization.* Report of the Committee of Experts on the Application of Conventions and Recommendations. ILO, 2012. paras. 53 and 209.; the Governing Body Committee on Freedom of Association (CFA) Report No. 391 Case No. 3271 *Cuba* (2019), para. 212; see CFA Report No. 389 Case No. 358 *El Salvador* (2019), para. 341.

91 See for comment, Philippa Collins: The Inadequate Protection of Human Rights in Unfair Dismissal Law. *Industrial Law Journal,* vol. 47, no. 4. (2018) 504–530.

92 App 66828/16 *Bariş v Turkey*, 14 December 2021.; App 52051/17 *Ateş and Others v. Turkey*, Decision 28 February 2023.; and App 46183/12 *Ekelik and Others v. Turkey*, Decision 28 February 2023.

93 See Filip Dorssemont: Bariş and Others v. Turkey (ECHR, 66828/16) – How wild are spontaneous strikes? *European Human Rights Updates Annotations*, Annotation to European Court of Human Rights, 14-12-2021, ECLI:CE:ECHR:2021:1214DEC006682816 (EHRC-2022-0094*)*, para. 13.

94 *R (IWGB) v. CAC and Roofoods Ltd t/a Deliveroo* [2018] EWHC 3342 (Admin), para. 37, approved by the Court of Appeal and the Supreme Court in *IWGB v CAC and another* [2021] EWCA Civ 952 and [2023] UKSC 43. For criticism of this line of reasoning, see Tonia Novitz: Collective Labour Rights for Working People: The Legal Framework Established by the International Labour Organization. In: Sanjukta Paul – Shae Mccrystal – Ewan Mcgaughey: *The Cambridge Handbook of Labor in Competition Law*. Cambridge, Cambridge University Press, 2022. 11–26.

95 See Arendt (1949) op. cit.

It may also be observed that the stance currently taken by the European Court of Human Rights need not be viewed as inevitable, given the bold statement of the Inter-American Court of Human Rights on the right to strike in 2021. In an Advisory Opinion requested by the Inter-American Commission on Human Rights, the Court took a multidimensional perspective on the right to freedom of association, the right to collective bargaining and the right to strike, and their relation to other rights. The Opinion concluded that: "The rights to freedom of assembly and freedom of expression, as they relate to freedom of association, the right to collective bargaining and the right to strike, are fundamental rights for allowing workers and their representatives to organize and express their specific demands concerning working conditions and for them to be able to take part in matters of public interest with a collective voice".[96] That Court also stressed that: "states have the obligation to adapt their laws and practices to new conditions in the labor market, regardless of the type of technological developments that bring about such changes, and in consideration of the obligations to protect worker rights under the terms of international human rights law."[97] This Opinion thereby offers model for how freedom of speech and association could be combined to more actively promote voice, rather than prevent egregious breaches, while also prompting states to act as regulators.

## 5. Conclusions

This article has examined the potential for a human rights approach to address the need for decent digital work. This began with analysis of advocacy for protection of human rights in 'decent work' to be found in ILO declaratory instruments and the UN 2030 Agenda. The appeal of the universalism of human rights has been outlined, with respect to problems of employment status rife in the gig economy. Broader arguments have also been made that freedom of association together with freedom of expression can assist in addressing algorithmic management, resisting outsourcing through AI and even enhancing the case for protest and strikes relating to digital terms and conditions of employment. The role of human rights courts in strategic litigation has been highlighted, but also a wider view has been taken of the capacity for mobilisation of a variety of human rights actors and institutions. It has been argued that while a human rights approach may have limitations, its influence can be enhanced if conceived of as a dynamic mode of participation in decision-making. The 'right to have rights' has meaning when grounded in a community of voice and interests, and can then enhance the capabilities of those at work, as freedom of association and expression have 'architectonic' qualities as 'enabling rights'. The last part of this article has examined how the European Court of Human Rights has addressed the potential to combine protections under Articles 10 and 11 of the European Convention

96 Inter-American Court of Human Rights *Advisory Opinion OC-27/21* 5 May 2021, p.74.

97 *Advisory Opinion OC-27/21*, para. 202; and p. 74. See the Court's acknowledgement of the "fast-changing labor market" and the relevance of "new technologies" (paras 29 and 190). See also in support of a wide-ranging right to strike in another judgment, *Case of the Former Employees of the Judiciary v. Guatemala*, 26 July 2022.

on Human Rights. While it is evident that a breakthrough of sorts has been reached, which could have noteworthy implications for decent digital work, the distinction between the rights of trade unions representing 'employees' and others at work is problematic. It is reassuring though that this is far from inevitable, as the Inter-American Court of Human Rights has demonstrated. A human rights approach may be viewed with some justifiable hesitance, but the possibilities presented here regarding the combination of free speech and association could yet be significant for the digital transformation of work.