

# Labour Rights and Technology:

Mapping Strategic Opportunities for Workers and Trade Unions

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**INTERNATIONAL  
LAWYERS ASSISTING  
WORKERS NETWORK**

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The International Lawyers Assisting Workers (ILAW) Network is a membership organization composed of trade union and workers' rights lawyers worldwide. The core mission of the ILAW Network is to unite legal practitioners and scholars in an exchange of information, ideas and strategies in order to best promote and defend the rights and interests of workers and their organizations wherever they may be.

Design: Natalie Tate

Cover photo: Street cleaners in India, where some employers have required sanitation workers to use GPS and camera-enabled smart watches.

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# Glossary

<b>Algorithmic management</b>	A machine-based system that can make predictions, recommendations, or decisions influencing real or virtual environments.
<b>BPO</b>	Business Process Outsourcing, a delegation of one or more business processes to a third party, often based on the use of information technology.
<b>CJEU</b>	Court of Justice of the European Union
<b>Data work, Digital economy</b>	Economic activity reliant on digital inputs, including digital technologies, digital infrastructure, digital services, and data. <sup>1</sup>
<b>Digital Microwork</b>	Complex projects are split into smaller tasks, which are allocated to a large number of individual workers through digital platforms. The work and performance are typically algorithmically managed.
<b>GDPR</b>	General Data Protection Regulation (European Union)
<b>ICT</b>	Information and communications technology
<b>ILO CEACR</b>	International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations
<b>OSH</b>	Occupational Safety and Health

<sup>1</sup> OECD, A ROADMAP TOWARD A COMMON FRAMEWORK FOR MEASURING THE DIGITAL ECONOMY: REPORT FOR THE G20 DIGITAL ECONOMY TASK FORCE (2020), <https://web-assets.bcg.com/e0/bf/80846dc24bad9f41e684ec393fe4/roadmap-toward-a-common-framework-for-measuring-the-digital-economy.pdf>.

# 1. Introduction

As the production of goods and services is increasingly mediated by digital technology, the workers whose labour creates those goods and services are bearing the brunt of the impact in terms of wages and working conditions.<sup>2</sup> Globally, workers are also subjected to near permanent surveillance, tech-powered harassment and discrimination, and wage theft.<sup>3</sup>

In the face of these changes, workers have responded in a number of ways, including through organizing, collective bargaining, and litigation. For example, in 2018, Rappi delivery riders organized the first transnational digital strike in Latin America over the company's unilateral changes to the algorithmic allocation of orders, which affected working hours and wages.<sup>4</sup> In 2022 and 2023, moderators of Facebook content in Kenya took Meta to court over abusive working conditions and unjust redundancies.<sup>5</sup> At the same time, doctors, teachers, and sanitation workers in India protested against mandatory attendance monitoring systems using biometric data.

It is no accident that these examples are from low to middle income countries as this is where most of the labour in digital supply chains comes from.

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<sup>2</sup> Veena Dubal, *On Algorithmic Wage Discrimination*, U.C. SAN FRANCISCO RESEARCH PAPER SERIES (2023), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4331080](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4331080); TREBOR SCHOLZ, *UBERWORKED AND UNDERPAID: HOW WORKERS ARE DISRUPTING THE DIGITAL ECONOMY* (2016).

<sup>3</sup> BRISHEN ROGERS, *DATA AND DEMOCRACY AT WORK: ADVANCED INFORMATION TECHNOLOGIES, LABOR LAW, AND THE NEW WORKING CLASS* 74-78 (2023).

<sup>4</sup> LAURA PERELMAN, MARCELO MANGINI, BÁRBARA PERROT, MARÍA BELÉN FIERRO & MARTINA SOL GARBARZ, *FRIEDRICH EBERT STIFTUNG, PROUDLY DELIVERED BY APP: THE STRUGGLE OF LATIN AMERICA'S FIRST UNION FOR PLATFORM WORKERS* 6-7 (2020), <https://library.fes.de/pdf-files/iez/16615.pdf>; see also *infra* sec. 3.2.

<sup>5</sup> See *infra* sec. 2.4.

According to Online Labour Index,<sup>6</sup> which measures the global demand for online platforms, half of the world's remote workers are located in India, Pakistan, Bangladesh, and the Philippines.<sup>7</sup> The key sectors in this digital space are transport, delivery, e-commerce, domestic work, content moderation, data annotation and data creation. However, expansion of the use of digital technology for labour management is well under way across industries, including in mining, oil and gas exploration (South Africa<sup>8</sup> and the Democratic Republic of Congo<sup>9</sup>); telemedicine (Peru, Mexico, Colombia, Brazil, Chile);<sup>10</sup> sanitation and waste manage-

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<sup>6</sup> Otto Kässi & Vili Lehdonvirta, *Online labour index: Measuring the online gig economy for policy and research*, 137 *TECH. FORECASTING & SOC. CHANGE* 241 (2018), <https://doi.org/10.1016/j.techfore.2018.07.056>

<sup>7</sup> Mohammad Amir Anwar, Susann Schäfer & Slobodan Golušin, *Work futures: globalization, planetary markets, and uneven developments in the gig economy*, *GLOBALIZATIONS* (2023), <https://www.tandfonline.com/doi/full/10.1080/14747731.2023.2236876>.

<sup>8</sup> Digital transformation in the South African mining industry: Part 1-4, *MINING REV. AFR.* (May 17, 2023), <https://www.miningreview.com/gold/digital-transformation-in-the-south-african-mining-industry-part-4/>. For details on the use of digital technology in mining in response to the COVID-19 pandemic, see *How is COVID-19 acting as a springboard for the adoption of digital technologies in mining?*, *INVESTING IN AFRICAN MINING: UNLOCKING THE FUTURE OF MINING THROUGH DIGITALISATION* (June 11, 2020), <https://miningindaba.com/Articles/unlocking-the-future-of-mining-through-digitalisation>.

<sup>9</sup> Ruth Lago, *Mining industry opens up to technological solutions*, *AFR. NEWS* (June 29, 2023), <https://www.africanews.com/2023/06/29/mining-industry-opens-up-to-technological-solutions/>; Filipe Calvão & Matthey Archer, *Digital extraction: Blockchain traceability in mineral supply chains*, 87 *POL. GEOGRAPHY*, art. no. 102381 (2021), <https://doi.org/10.1016/j.polgeo.2021.102381>.

<sup>10</sup> ATLANTICO, *LATIN AMERICA DIGITAL TRANSFORMATION REPORT 2022*, at 124, <https://www.atlantico.vc/latin-america-digital-transformation-report-2022>.

ment (South Asia);<sup>11</sup> and fast fashion.<sup>12</sup>

This issue brief maps some of the legal initiatives and strategies undertaken by workers and unions, and outlines opportunities for workers to challenge breaches of technology-driven labour rights through organizing, regulation, and litigation. The goal of this brief is to inform a debate on effective strategies for the global labour movement vis-à-vis technology.

## 1.1 Methodology

Research for this publication was carried out between February and October 2023. It consisted of 11 country interviews with experts and ILAW Network members (covering Georgia, India, Japan, Kenya, Nepal, the Netherlands, Pakistan, Serbia, the United States, Uruguay, and Spain) and five regional interviews with ILAW members in Sub-Saharan Africa, South Asia, Latin America, Asia-Pacific and Europe and Central Asia. Participants of the group interviews were from Kenya, Nigeria, Uganda, Zambia, Bangladesh, India, Pakistan, Sri Lanka, Argentina, Ecuador, Colombia, Georgia, Italy, Kazakhstan, Kyrgyzstan, Serbia, the United Kingdom, Ukraine, Japan, South Korea, and Thailand.

The interviews focused on the following: (1) key concerns in the relationship between labour and technol-

<sup>11</sup> Companies like Skrap, Saahas Zero Waste, Crapbin, Bintix, and Waste4Change use apps to “hire” informal workers. SABRINA DEWAN & KAUSHIKI SANYAL, JUSTJOBS NETWORK, EMPOWERMENT OR EXPLOITATION? GLOBAL PERSPECTIVES ON WOMEN’S WORK IN THE PLATFORM ECONOMY (May 2023), [https://www.justjobsnetwork.org/files/empowerment-or-exploitation-global-perspectives-on-womens-work-in-the-platform-economy\\_may-2023.pdf](https://www.justjobsnetwork.org/files/empowerment-or-exploitation-global-perspectives-on-womens-work-in-the-platform-economy_may-2023.pdf).

<sup>12</sup> Inditex, Zara’s and Bershka’s parent company, announced a plan for digital transformation and investment of 1.7 billion Euros into developing ‘Inditex Open Platform’, which, among other things, takes over central managing functions in the sourcing and logistics process by calculating the ideal location and transport routes for production and store replenishment orders. Tatiana López, Tim Riedler, Heiner Köhnen & Michael Fütterer, *Digital value chain restructuring and labour process transformations in the fast-fashion sector: Evidence from the value chains of Zara & H&M*, 22 GLOBAL NETWORKS 684–700 (2021); see also Ethan Than, *INDITEX: Fashion Leader Case Study of ZARA in the Transformation Era*, MEDIUM (Apr. 25, 2023), <https://medium.com/sfiacorporation/inditex-zara-digital-transformation-canvas-adf3a9b7bae0>.

ogy in the given country or a region, (2) the challenges and barriers in enforcing workers’ rights in a digitalized workspace, and (3) the areas of law—data protection, occupational safety and health, labour law, anti-discrimination law and other—that lend strategic opportunities for the labour movement.

During the interviews, the participants discussed the existing case law on labour and technology, as well as the gaps in the current regulation.

The data from the interviews were corroborated by extensive analysis of the law and available case law, which included:

- Analysing of data protection regulations and the provisions relevant for workers introduced across the countries covered by this brief since 2019;
- Reviewing of decisions of data protection authorities in cases when companies breached workers’ data rights;
- Assessing guidelines and regulation of the digital platforms;
- Exploring regulations that protect workers’ rights to social security in the digital economy;
- Analysing two types of cases brought by workers: (1) those challenging pricing algorithms, and (2) those challenging digital outsourcing of labour.

This brief also draws on a review of the relevant literature, including papers, monographs and reports on the following topics:

- digital platform work,
- microwork,
- domestic work,
- surveillance and monitoring of workers,
- algorithmic transparency, future of work,
- occupational safety and health, and

- digital outsourcing.

The criteria for selecting papers to review for this research were thematic relevance and geographical focus on the countries covered by interviews.



## 2. Labour and Technology: Interventions

The use of technology in labour management systems enables companies to extract data from workers through constant surveillance, while also evading labour laws and other legislation that protects workers' rights.<sup>13</sup> While labour organizers and journalists have already exposed surveillance of app-based delivery and ride-hailing workers, as well as warehouse workers in the e-commerce space, there is growing evidence of the widespread use of technology to permanently surveil workers in other sectors. For example, sanitation workers in India reported that they were required by their employers to use GPS and camera-enabled smart watches, which track their movement and controlled performance.<sup>14</sup> Because watches are used as an attendance tool, workers worry about possible deductions in their wages in the event of technical problems with the watches, or if they took a rest break.<sup>15</sup>

In May 2022, the All India Lawyers Association For Justice (AILAJ) and the Internet Freedom Foundation (IFF) sent a joint letter to the National Commission for Safai Karamcharis (sanitation workers) concerning this practice. Among other things, the letter stated:<sup>16</sup>

*Ostensibly, the use of GPS enabled*

<sup>13</sup> Dubal, *supra* note 2.

<sup>14</sup> Qadri Inzamam & Haziq Qadri, *How Digital Snooping on Sanitation Workers Is Worsening Their Struggles*, THE WIRE INDIA (May 3, 2022), <https://thewire.in/labour/how-digital-snooping-on-sanitation-workers-is-worsening-their-struggles>.

<sup>15</sup> Soibam Rocky Singh, *Modern Times: watches keep an eye on Chandigarh sanitation workers*, THE HINDU (June 12, 2022), <https://www.thehindu.com/news/national/modern-times-watches-keep-an-eye-on-chandigarh-sanitation-workers/article65520716.ece>.

<sup>16</sup> Anushka Jain, Joint letter to the National Commission for Safai Karamcharis against the increasing surveillance of Safai Karamcharis in the country #SaveOurPrivacy, INTERNET FREEDOM FOUND. (May 30, 2022), <https://internetfreedom.in/joint-letter-to-the-national-commission-for-safai-karamcharis-against/>.

*tracking devices is to record attendance of the Safai Karamcharis, monitor their work performance, and to safeguard against any falsification of attendance. However, the tracking devices would essentially enable the constant and dehumanising surveillance of Safai Karamcharis by the authorities. The surveillance also proliferates existing casteist discrimination faced by the Safai Karamcharis, who predominantly belong to Dalit and Adivasi communities as well as other oppressed sections of the society. The Safai Karamcharis have compared the usage of these tracking devices and the constant monitoring it entails to the ancient practice of upper castes exerting control over lower caste workers.*

AILAJ and IFF reminded the National Commission of a 2017 ruling of the Supreme Court of India, which held that privacy was a fundamental human right,<sup>17</sup> and although that right is not absolute, any interference with privacy must meet the requirements of legality, necessity, and proportionality. In September 2022, the National Commission instructed four municipalities using the smart watches to present a factual report about the situation.<sup>18</sup> At the time of this writing, there was no publicly available response from the

<sup>17</sup> *Judgment of the Court in Plain English (I): Fundamental Right to Privacy (Justice K.S. Puttaswamy vs. Union of India)*, SUP. CT. OBSERVER (Aug. 24, 2017), <https://www.scobserver.in/reports/k-s-puttaswamy-right-to-privacy-judgment-of-the-court-in-plain-english-i/>.

<sup>18</sup> Letter of Ankush Chug, Assistant Director, National Commission for Safai Karamcharis (Sept. 12, 2022), available at <https://drive.google.com/file/d/1LQY55HfSZXOS5DWX-f7Qkk-8EfCT-EFOt/view?ref=static.internetfreedom.in>.

municipalities.<sup>19</sup>

Personal data protection laws offer a new powerful tool for the labour movement to hold employers and companies accountable for the negative impact of digital technology on labour rights or equality rights at work. This area involves initiatives aimed at improving the governance of how data are collected, processed, and used in a workplace.<sup>20</sup> There is a growing urgency to empower workers, trade unions, and workers' representatives to challenge employers' practices of relying on digital extraction of workers' data to feed automated decision-making and monitoring systems with information that could, and in fact does, undermine labour rights. Although data protection regulations focus primarily on the protection of individual rights, the following examples of interventions indicate the ways in which they can be used collectively.<sup>21</sup>

## 2.1. Data Governance

Among other things, data protection regulation can provide opportunities for workers to access and protect their data, to challenge the use of that data in the workplace, and to challenge automated decision-making. To protect workers from significant and unforeseen consequences of rights violations, regulation often includes financial sanctions in the form

<sup>19</sup> Anushka Jain, *6 months on, still no update from municipal corporations on the ongoing surveillance of sanitation workers*, INTERNET FREEDOM FOUND. (Mar. 30, 2023), <https://internet-freedom.in/ncsk-follow-up-surveillance/>.

<sup>20</sup> Salome Viljoen, *A Relational Theory of Data Governance*, 131 YALE L.J. 573, 577 (2021); Brishen Rogers, *The Law and Political Economy of Workplace Technological Change*, 55 HARV. C.R.-C.L. L. Rev. 531 (2020).

<sup>21</sup> Joanna Bronowicka & Mirela Ivanova, *Resisting the Algorithmic Boss: Guessing, Gaming, Reframing and Contesting Rules in App-Based Management*, in AUGMENTED EXPLOITATION: ARTIFICIAL INTELLIGENCE, AUTOMATION AND WORK 149 (Phoebe Moore & Jamie Woodcock eds. 2021); Isabel Ebert, Isabelle Wildhaber, & Jeremias Adams-Prassl, *Big Data in the workplace: Privacy Due Diligence as a human rights-based approach to employee privacy protection*, 8 BIG DATA & SOC. (2021), <https://doi.org/10.1177/20539517211013051>; Giovanni Gaudio, *Algorithmic Bosses Can't Lie! How to Foster Transparency and Limit Abuses of the New Algorithmic Managers*, 42 COMP. LAB. L. & POL'Y J. (forthcoming 2023), available at <https://ssrn.com/abstract=3927954>.

of administrative fines. Systems that rely on the processing of large and detailed volumes of workers' data face a high risk of violating data protection laws.<sup>22</sup> In the EU, severe violations of data protection regulation could mean penalties of up to 4% of company's global annual turnover.<sup>23</sup> As of 2021, there were several cases in EU member states in which data protection authorities fined companies over unlawful processing of workers' data. For example, the **Italian** Data Protection Authority (Garante) fined the food delivery company Foodinho 2.5 million Euros for unlawfully processing workers' data from chat, emails and phone calls in 2021. Processing such data was a violation of the GDPR's requirements of transparency and data minimisation.<sup>24</sup> Furthermore, Garante held that the company failed to inform the workers about the automated processing of their rankings,<sup>25</sup> which was accomplished by its automated "excellence system" and order allocation system, neither of which were subjected to human review, which violated the GDPR's prohibition of fully automated processing.<sup>26</sup> The Foodinho case points also to the investigative powers of national data protection authorities. Garante's inspectors arrived at the company's headquarters without prior notice, accessed the company's workforce management system, "Admin Platform", and

<sup>22</sup> Giovanni Gaudio, *Litigating the Algorithmic Boss in the EU: A (Legally) Feasible and (Strategically) Attractive Option for Trade Unions?*, 40 INT'L J. COMP. LAB. L. & INDUST. REL. 91 (2024).

<sup>23</sup> For violations listed in Article 83(5) GDPR, the fine framework can be up to 20 million euros, or, in the case of an undertaking, up to 4 % of their total global turnover of the preceding fiscal year, whichever is higher. INTERSOFT CONSULTING, GENERAL DATA PROTECTION REGULATION (GDPR) KEY ISSUES: FINES / PENALTIES, <https://gdpr-info.eu/issues/fines-penalties/>.

<sup>24</sup> Press Release, Garante per la protezione dei dati personali (GDPR), Abstract of Italian SA's order as issued against Foodinho S.r.l. (July 5, 2021), <https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9677611> [hereinafter Garante Foodinho Order Abstract]. According to the European Data Protection Supervisor, "The principle of "data minimisation" means that a data controller should limit the collection of personal information to what is directly relevant and necessary to accomplish a specified purpose." *Online Glossary*, EUR. DATA PROT. SUPERVISOR, <https://www.edps.europa.eu/data-protection/data-protection/glossary/d>.

<sup>25</sup> This action was found to be in breach of Article 13(2)(f) GDPR.

<sup>26</sup> See Garante Foodinho Order Abstract, *supra* note 24.

assessed the nature and scope of data processed.<sup>27</sup> Across EU member states, data protection authorities have also been using their investigative and enforcement powers to act against entities breaching the GDPR through algorithmic management. For example, in February 2022, the **Spanish** Data Protection Authority (AEPD) imposed a fine of 2 million Euros on Amazon Road Transport Spain S.L. (Amazon) for violating Articles 6.1 (Lawfulness of data processing) and 10 (Processing of personal data relating to criminal convictions and offences) of the GDPR.<sup>28</sup> The complaint was filed by the trade union *Federación Estatal de Servicios, Movilidad y Consumo de la Unión General de Trabajadores* (FeSMC UGT) over the data processing of the criminal records of “self-employed” drivers, on the grounds that this was unlawful processing of sensitive data.<sup>29</sup> The AEPD held that Amazon was not authorized to process this type of personal data, and rejected the company’s argument that processing personal records of criminal convictions was necessary for the performance of a contract.<sup>30</sup>

Interventions of data protection authorities against companies that breached consumers’ data protection rights provide guidance for the labour movement, particularly when presenting the evidence and establishing the scale of the violation. For example,

in **South Korea** in September 2022, in the first case against two digital platforms over the collection of user data, the country’s Personal Information Protection Commission (PIPC) imposed a fine of an equivalent of US\$71 million.<sup>31</sup> It held that the companies, a US-based search engine and a social media platform, “substantially violated” the consent requirements by collecting personal information without users’ consent in order to target them with online ads.<sup>32</sup> Shortly after the decision, in his inaugural speech, PIPC chairperson Ko Hak-soo announced a commitment to take “stern legal actions against data leaks in both the private and public sectors and reinforce prevention-oriented protection systems”.<sup>33</sup>



Rappi workers in Colombia. Credit: iStock.com/Jair Fonseca

<sup>27</sup> Claudio Agosti, Joanna Bronowicka, Alessandro Polidoro & Gaetani Priori, Eur. Trade Union Inst., *Exercising workers’ rights in algorithmic management systems*, rep. no. 2023.11, at 21 (2023), [https://www.etui.org/sites/default/files/2023-10/Exercising%20workers%20rights%20in%20algorithmic%20management%20systems\\_Lessons%20learned%20from%20the%20Glovo-Foodinho%20digital%20labour%20platform%20case\\_2023.pdf](https://www.etui.org/sites/default/files/2023-10/Exercising%20workers%20rights%20in%20algorithmic%20management%20systems_Lessons%20learned%20from%20the%20Glovo-Foodinho%20digital%20labour%20platform%20case_2023.pdf).

<sup>28</sup> Agencia Española de Protección de Datos (AEPD), Expediente No. PS-00267-2020: Resolución de Procedimiento Sancionador (2022), available at <https://www.aepd.es/es/documento/ps-00267-2020.pdf> (Spain); see also Jennifer O’Mahony, *Spanish Court: Amazon Violated Labor Law with Delivery App*, AP (Feb. 3, 2023), <https://apnews.com/article/technology-amazon-com-inc-spain-madrid-business-9f51c1112f04bc55fb67d-3248f42bafb>.

<sup>29</sup> *Spain: AEPD fines Amazon Road Transport €2M for unlawful processing of criminal conviction data*, ONETRUST DATAGUIDANCE (Feb. 15, 2022), <https://www.dataguidance.com/news/spain-aepd-fines-amazon-road-transport-2m-unlawful>.

<sup>30</sup> *AEPD (Spain) - PS/00267/2020*, GDPRHUB (Nov. 24, 2022), [https://gdprhub.eu/index.php?title=AEPD\\_\(Spain\)\\_-\\_PS/00267/2020](https://gdprhub.eu/index.php?title=AEPD_(Spain)_-_PS/00267/2020).

In several low to middle income countries, group interview participants reported that workers lacked personal data protection, due to either a dearth of specific legislation, or a failure to implement the relevant legislation that was on the books. For example, digital platform workers in **Colombia** are under strict surveillance without accountability. As one worker

<sup>31</sup> Kate Park, *Google, Meta fined \$71.8M for violating privacy law in South Korea*, TECHCRUNCH (Sept. 14, 2022), <https://techcrunch.com/2022/09/14/google-meta-fined-71-8m-for-violating-privacy-law-in-south-korea>.

<sup>32</sup> Personal Information Protection Commission (PIPC), *PIPC Sanctions Google and Meta for Illegally Collecting Personal Information* (Sept. 14, 2022), [https://www.pipc.go.kr/eng/user/ltm/new/noticeDetail.do?bbsId=BBSMSTR\\_00000000001&nttid=1901](https://www.pipc.go.kr/eng/user/ltm/new/noticeDetail.do?bbsId=BBSMSTR_00000000001&nttid=1901)

<sup>33</sup> PIPC, *Chairperson Ko’s Inauguration Speech* (Oct. 7, 2022), [https://www.pipc.go.kr/eng/user/ltm/new/noticeDetail.do?bbsId=BBSMSTR\\_00000000001&nttid=1921](https://www.pipc.go.kr/eng/user/ltm/new/noticeDetail.do?bbsId=BBSMSTR_00000000001&nttid=1921)

explained, “Rappi always knew where workers were even when they were not working. This is something we were dealing with when negotiating with the company”.<sup>34</sup> The participants of the Latin American regional group interview compared the level of surveillance to harassment. They reported that workers received many notifications on their apps all day long, through which the companies were letting them know they were being constantly monitored and evaluated. The participants raised concerns that the tech-based surveillance interfered with workers’ right to occupational safety and health, as it increased their stress and impacted their ability to take bathroom breaks. Importantly, it also interfered with the right to strike: because the companies collect workers’ geolocation data, their whereabouts during strike days are known, and those who participate are punished by blocking/deactivating them on the app.<sup>35</sup>

## 2.2 Regulatory Interventions

Data protection legislation, together with its core principles of lawfulness, fairness, and transparency of personal data processing,<sup>36</sup> provide an opportunity for workers in progressively more countries<sup>37</sup> to reclaim their autonomy and to challenge harmful decisions in workplaces. Between 2021 and 2023, several low to middle income countries either amended or adopted new data protection regulations/legislations that guarantee certain rights for data subjects; require data processing to be necessary, proportionate, and transparent; limits automated data processing; and introduce administrative or criminal sanctions for breaches.

<sup>34</sup> ILAW Network, Regional Interview: Latin America (May 24, 2023) (in Spanish with translation).

<sup>35</sup> *Id.*

<sup>36</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) art. 5, 2016 O.J. (L 119), 1, 6-7.

<sup>37</sup> John Ndirangu, *How employers can use Artificial Intelligence in data protection era*, DLA PIPER AFR.: INSIGHTS (May 23, 2023), <https://www.dlapiperafrica.com/en/kenya/insights/2023/how-employers-can-use-Artificial-Intelligence-in-data-protection-era.html>

### 2.2.1 Africa

The 2023 **Nigeria** Data Protection Act<sup>38</sup> requires that a data controller (including an employer that controls and processes workers’ data) provide certain information to a data subject prior to collection. Workers and other data subjects can rely on this provision and seek damages from the data controller through civil proceedings.<sup>39</sup>

This law fills certain gaps created by the previous legislation.<sup>40</sup> It introduces “legitimate activities”<sup>41</sup> as one of the options in which lawful processing of personal data is permitted, which can be overridden if it is incompatible with the data subject’s fundamental rights and freedoms.<sup>42</sup> It also bans automated data processing, including profiling.<sup>43</sup>

In the regional interview, ILAW Nigeria members raised concerns over practices of some employers who use attendance systems powered by facial recognition technology.<sup>44</sup> Workers affected by this can rely on the provisions of the Data Protection Act, which sets strict limits and requires safeguards for processing of sensitive data, such as biometric data, for protection.<sup>45</sup>

The Protection of Personal Information Act (POPIA) in **South Africa** provides for data subject rights, transparency, and a sanctioning mechanism. Importantly for workers, it prohibits processing special category

<sup>38</sup> Breaking! President Tinubu signs Data Protection Bill into law, ITEDGE NEWS.AFRICA (June 14, 2023), <https://www.itedge news.africa/breaking-president-tinubu-signs-data-protection-bill-into-law/>

<sup>39</sup> *Id.*

<sup>40</sup> For an analysis of the 2019 Nigeria Data Protection Regulation, see Olumide Babalola, *Nigeria’s data protection legal and institutional model: an overview*, 12 INT’L DATA PRIVACY L. 44 (2021).

<sup>41</sup> Nigeria Data Protection Act, 2023 Cap. (A37), § 25(1)(b)(v). However, the law does not define or list what activities of data processing are considered to be “legitimate.”

<sup>42</sup> *Id.* § 25(2)(a).

<sup>43</sup> *Id.* § 37.

<sup>44</sup> ILAW Network, Regional Interview: Sub-Saharan Africa (May 8, 2023).

<sup>45</sup> Nigeria Data Protection Act, 2023 Cap. (A37), § 6.

ries of data, including trade union membership.<sup>46</sup> Although Parliament assented to this legislation back in 2013, its official commencement date was July 1, 2020.<sup>47</sup> The businesses initially had a one-year period to prepare for compliance. At the time of writing, the law was fully in effect.<sup>48</sup>

**Kenya's** 2019 Data Protection Act introduced the principles of transparency, lawfulness, and fairness of data processing, including in employment relations.<sup>49</sup> The Act generally prohibits the processing of sensitive personal data, such as biometric information, unless the processor meets the safeguards and requirements of necessity and legitimacy.<sup>50</sup> These provisions are relevant for workers as biometric time and attendance systems, promoted by developers in Kenya, are introduced.<sup>51</sup>

## 2.2.2 Americas

In **Brazil**, a GDPR-inspired law entered into force in August 2021.<sup>52</sup> Data processing is governed by principles

<sup>46</sup> Protection of Personal Information Act (POPIA) 4 of 2013 § 26 (S. Afr.).

<sup>47</sup> PROTECTION OF PERSONAL INFORMATION ACT (POPI ACT), <https://popia.co.za/> (explaining the details related to the act's commencement date).

<sup>48</sup> Western Cape Government (South Africa), *An Introduction to the Protection of Personal Information Act (POPI Act or POPIA)* <https://www.westerncape.gov.za/site-page/introduction-protection-personal-information-act-or-popi-act-or-popia> (last accessed May 9, 2024).

<sup>49</sup> The Data Protection Act, 2019 No. 24 § 25 (Kenya); see also *Data Protection Issues Arising During the Recruitment Process*, KENYA EMP. L. (Jan. 11, 2024), <https://kenyaemploymentlaw.com/posts/data-protection-issues-arising-during-the-recruitment-process>.

<sup>50</sup> The Data Protection Act, 2019 No. 24 §§ 44–45 (Kenya).

<sup>51</sup> Ayang Macdonald, *The Gambia, Kenya county choose biometrics to identify, weed out absent public servants*, BIOMETRIC UPDATE (Feb. 23, 2023), <https://www.biometricupdate.com/202302/the-gambia-kenya-county-choose-biometrics-to-identify-weed-out-absent-public-servants>; *A Case for Biometric Time and Attendance Software in Kenya*, WORKPAY (Mar. 30, 2020), <https://www.myworkpay.com/blogs/a-case-for-biometric-time-and-attendance-software-in-kenya>.

<sup>52</sup> *Data Protection Laws of the World: Brazil*, DLA PIPER (Jan. 28, 2024), <https://www.dlapiperdataprotection.com/index.html?t=law&c=BR#:~:text=The%20LGPD%20is%20Brazil's%20first,enforceable%20on%20August%201%2C%202021>.

of transparency, purpose limitation, adequacy, necessity, prevention, data quality, non-discrimination, and accountability.<sup>53</sup> Workers have the right to access the data that is collected from them,<sup>54</sup> and they can also request to review decisions that are made solely on the basis of automated processing.<sup>55</sup> However, privacy experts in Brazil raised concerns over the future of the personal data protection in the light of a new legislative initiative—Draft Bill on AI—that contradicts the transparency principles in the 2021 law.<sup>56</sup>

**Uruguay** amended its data protection law in 2022, increasing the protection of workers and other “data subjects” from decisions based solely on automated data processing.<sup>57</sup> This amendment also strengthened transparency obligations of employers and companies, requiring them to inform workers in advance about technology and software used in such processing.<sup>58</sup>

In **Argentina**, the government submitted a new Personal Data Protection Bill to the National Congress in June 2023.<sup>59</sup> The proposed legislation mirrors the data protection framework of GDPR and empowers workers to challenge not only lack of transparency, but also unrestricted data collection. It also gives workers the right to be informed about automated processing (Article 16), provides them with data subject rights (Art. 27), and guarantees the right to a human review

<sup>53</sup> Lei Geral de Proteção de Dados Pessoais (LGPD), Lei No. 13.709 de 14 de Agosto de 2018, Diário Oficial da União [D.O.U.] de 15.08.2018, at art. 6 (Braz.).

<sup>54</sup> *Id.* art. 9.

<sup>55</sup> *Id.* art. 20.

<sup>56</sup> Luca Belli, Yasmin Curzi, & Walter B. Gaspar, *AI regulation in Brazil: Advancements, flows, and need to learn from the data protection experience*, 48 COMP. L. & SEC. REV. art. no. 105767 (2023), <https://doi.org/10.1016/j.clsr.2022.105767>.

<sup>57</sup> Ley de Protección de Datos Personales, Ley N° 18331, Aug. 11, 2008, at art. 16 (Uru.).

<sup>58</sup> *Id.* art. 13(G); see also *Uruguay: Unpacking the changes to the Uruguayan data protection system*, ONETRUSTDATAGUIDANCE (Feb. 2023), <https://www.dataguidance.com/opinion/uruguay-unpacking-changes-uruguayan-data-protection>.

<sup>59</sup> *Argentina Personal Data Protection Bill Sent to Congress*, HUNTON ANDREWS KURTH (July 18, 2023), <https://www.hunton-privacyblog.com/2023/07/18/argentina-personal-data-protection-bill-sent-to-congress/>.

in automated processing (Article 31).<sup>60</sup>

These provisions can be utilized by workers who are subjected to profiling and rating systems. For example, in an ILO survey among domestic workers hired through digital platforms in Argentina, 20% of respondents stated they did not understand the rating system, while those who said they understood it reported that rating depended on factors outside their control—such as when a client decides they no longer want the service.<sup>61</sup>

### 2.2.3 Asia

The Parliament of **Sri Lanka** adopted the Personal Data Protection Act No. 9 of 2022, which empowers data subjects to object to the processing of their data, in addition to giving them the right to access their data and the right to a human review of automated decision.<sup>62</sup>

Legislation with similar provisions on data subject rights was adopted in **Thailand** as well. The Thai law also includes a strong sanctioning mechanism, featuring both administrative fines and criminal penalties.<sup>63</sup>

With rapid growth of the digital platforms and digitalization of garment industry, both of which increase surveillance, monitoring, and the workers' pace of work, data protection laws could play an important role for workers in **Bangladesh** and **India**, which until recently did not have data protection laws.<sup>64</sup>

<sup>60</sup> See AGENCIA DE ACCESO A LA INFORMACIÓN PÚBLICA ARGENTINA, MENSAJE 87/2023: PROYECTO DE LEY DE PROTECCION DE DATOS PERSONALES (June 2023), [https://www.argentina.gob.ar/sites/default/files/mensajeyproyecto\\_leydpdp2023.pdf](https://www.argentina.gob.ar/sites/default/files/mensajeyproyecto_leydpdp2023.pdf)

<sup>61</sup> FRANCISCO PEREYRA, LORENA POBLETE & ANIA TIZZIANI, ILO ARGENTINA, PLATAFORMAS DIGITALES DE SERVICIO DOMÉSTICO Y CONDICIONES LABORALES: EL CASO DE ARGENTINA 59 (2023), [https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/---ilo-buenos\\_aires/documents/publication/wcms\\_877416.pdf](https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/---ilo-buenos_aires/documents/publication/wcms_877416.pdf).

<sup>62</sup> Personal Data Protection Act No. 9 of 2022 (Mar. 19, 2022) (Sri Lanka).

<sup>63</sup> *Data Protected – Thailand*, LINKLATERS (Aug. 2022), <https://www.linklaters.com/en/insights/data-protected/data-protected---thailand>.

<sup>64</sup> Regarding such innovations in India,

In 2023, **India** adopted the controversial Digital Personal Data Protection Act.<sup>65</sup> Although it guarantees the rights of data subjects and introduces limitations on data processing, it has raised concerns because it gives the government significant power over personal data,<sup>66</sup> especially by explicitly prohibiting civil courts to exercise jurisdiction over data protection claims.<sup>67</sup> Workers will therefore have to rely on the decisions of the government-appointed Data Protection Board.<sup>68</sup>

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*Indian garment manufacturers have introduced digital sewing machine networks, in which each individual sewing machine possesses a sensor that automatically records data on machine activity and sends it to a central cloud server via Wi-Fi. Thereby, digital sewing machine networks allow manufacturers to monitor various parameters of individual worker performance — such as idle time, dexterity, efficiency, and fatigue levels — in real time. To provide workers incentives for enhancing productivity, an HR manager at a major Indian supplier for H&M and Inditex suggests using bonuses and pay ranks to link productivity parameters to wage components.*

López et al., *supra* note 12, at 692.

<sup>65</sup> The Digital Personal Data Protection Act, 2023, Bill no. 22 (India).

<sup>66</sup> Trisha Ray, *Carte Blanche? The Digital Personal Data Protection Act lays an incomplete foundation*, OBSERVER RSCH. FOUND. (Aug. 23, 2023), <https://www.orfonline.org/expert-speak/the-digital-personal-data-protection-act-lays-an-incomplete-foundation/>.

<sup>67</sup> This prohibition appears as follows:

*No civil court shall have the jurisdiction to entertain any suit or proceeding in respect of any matter for which the Board is empowered under the provisions of this Act and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power under the provisions of this Act.*

The Digital Personal Data Protection Act, 2023, Bill no. 22, at § 39 (India).

<sup>68</sup> For an analysis of the concerns of this bill, see Raktima Roy & Gabriela Zanfir-Fortuna, *The Digital Personal Data Protection Act Explained*, FUTURE PRIV. F. (Aug. 15, 2023), <https://fpf.org/blog/the-digital-personal-data-protection-act-of-india-explained/>.

Additionally, the Bill does not provide adequate protection to employees who are required to provide biometric data at work, such as for the purposes of attendance monitoring.<sup>69</sup> Workers in India, however, have a history of collectively organising against unrestricted processing of biometric data. In December 2022, for example, doctors in Jharkhand boycotted the biometric attendance system, which they claimed resulted in deductions from wages due to a technical error.<sup>70</sup> As part of the boycott, instead of using the biometric attendance, the doctors signed in using manual attendance register. Similarly, in 2022-23, both teachers and sanitation workers in Andhra Pradesh spoke out against the use attendance apps<sup>71</sup> that collect and process biometric data, including facial features, retinas, irises, or fingerprints.<sup>72</sup>

In India, attempts to limit the use of biometric data for identification purposes through legal routes has produced mixed results. In a 2018 ruling on the government's Aadhaar Program,<sup>73</sup> the Supreme Court in India held that the collection of biometric data is legal, legitimate, and proportionate. It did strike down some provisions as disproportionate, however, including the requirement linking the biometric data to a bank

<sup>69</sup> Srinivas Kodali, *Ten Reasons Why the Digital Personal Data Protection Law Doesn't Empower Citizens*, THE WIRE INDIA (Aug. 7, 2023), <https://thewire.in/law/will-the-data-protection-law-empower-the-public>.

<sup>70</sup> *Jharkhand docs boycott biometric attendance system*, THEPRINT (Dec. 31, 2022), <https://theprint.in/india/jharkhand-docs-boycott-biometric-attendance-system/1291916/>.

<sup>71</sup> Vallari Sanzgiri, *Why is Andhra government pushing facial recognition attendance on all its workers?*, MEDIANAMA (Jan. 31, 2023), <https://www.medianama.com/2023/01/223-andhra-government-facial-recognition-attendance-sanitation-workers/>.

<sup>72</sup> Anushka Jain, *#PrivacyofthePeople: The Harms of Biometric Attendance Apps*, INTERNET FREEDOM FOUND. (Mar. 7, 2023), <https://internetfreedom.in/privacyofthepeople-harms-of-biometric-attendance-apps/>.

<sup>73</sup> An Aadhaar number is a unique 12-digit identification number for which a resident of India may apply. *What is Aadhaar*, UNIQUE IDENTIFICATION AUTHORITY OF INDIA, <https://uidai.gov.in/en/my-aadhaar/about-your-aadhaar.html> (last visited Feb. 18, 2024). In order to receive an Aadhaar number, the application must submit certain demographic and biometric information, the latter of which includes "Ten Fingerprints, Two Iris Scans, and Facial Photograph." *Id.*

account or a sim card.<sup>74</sup>

In 2023, the government of **Bangladesh** presented a new draft of the Data Protection Act, the country's first legislation on personal data. It introduces data subject rights, including the right of workers to access their data,<sup>75</sup> and the principles of accountability and transparency.<sup>76</sup> The draft also restricts international transfers of sensitive personal data by requiring consent from the data subject.<sup>77</sup> While the draft attracted criticism regarding the significant powers of public authorities to access individuals' data,<sup>78</sup> it presents an opportunity for workers to challenge data-driven practices of labour law violations. This is particularly relevant given the size of the digital economy in the country: "with 650,000 freelancers, Bangladesh is the world's second-largest supplier [after India] of online labour... with digital platforms like Uber, Pathao, Truck Lagbe and Foodpanda expected to generate 500,000 jobs [in 2023]."<sup>79</sup> Bangladesh also has numerous domestic digital platforms that provide on-demand ser-

<sup>74</sup> *Constitutionality of Aadhaar Act: Judgment Summary*, SUP. CT. OBSERVER (Sept. 26, 2018), <https://www.scobserver.in/reports/constitutionality-of-aadhaar-justice-k-s-puttaswamy-union-of-india-judgment-in-plain-english/>. (full judgment available at [https://www.scobserver.in/wp-content/uploads/2021/10/Aadhaar\\_35071\\_2012\\_FullJudgement.pdf](https://www.scobserver.in/wp-content/uploads/2021/10/Aadhaar_35071_2012_FullJudgement.pdf)).

<sup>75</sup> The Data Protection Act, 2023, ch. VI (Bangladesh) (unofficial first draft English text), available at [https://ictd.portal.gov.bd/sites/default/files/files/ictd.portal.gov.bd/page/6c9773a2\\_7556\\_4395\\_bbec\\_f132b9d819f0/Data%20Protection%20Bill%20en%20V13%20Unofficial%20Working%20Draft%2016.07.22.pdf](https://ictd.portal.gov.bd/sites/default/files/files/ictd.portal.gov.bd/page/6c9773a2_7556_4395_bbec_f132b9d819f0/Data%20Protection%20Bill%20en%20V13%20Unofficial%20Working%20Draft%2016.07.22.pdf).

<sup>76</sup> *Id.* ch. VII.

<sup>77</sup> *Id.* ch. X.

<sup>78</sup> CHRISTABEL RANDOLPH, ATLANTIC COUNCIL SOUTH ASIA CENTER, ISSUE BRIEF: BANGLADESH DRAFT DATA PROTECTION ACT 2023: POTENTIAL AND PITFALLS (2023), <https://www.atlanticcouncil.org/wp-content/uploads/2023/05/Bangladesh-Draft-Data-Protection-Act-2023-Potential-and-Pitfalls.pdf>; Zyma Islam, *Data Protection Act: Everyone dealing with citizens' data must register*, THE DAILY STAR (Mar. 15, 2023), <https://www.thedailystar.net/news/bangladesh/news/data-protection-act-everyone-dealing-citizens-data-must-register-3271366>.

<sup>79</sup> ZARIF MUNIR, SAIBAL CHAKRABORTY, & TAUSIF ISHTIAQUE, BOSTON CONSULTING GRP., THE TRILLION-DOLLAR PRIZE: LOCAL CHAMPIONS LEADING THE WAY 6 (2022), <https://web-assets.bcg.com/6e/15/0081bc4b4871b53ea0f25348bb0d/the-trillion-dollar-prize-local-champions-leading-the-way.pdf>.

vices in the fields of healthcare, logistics, transport, and domestic work,<sup>80</sup> which promise personalized solutions by relying on data analytics and machine learning.

Although there are elements of data protection in various pieces of legislation, **Pakistan** had no specific data protection regulation in force at the time of this writing. In 2023, the government approved the Personal Data Protection Bill, which UK-based NGO Privacy International criticised for falling short of international human rights standards.<sup>81</sup> Meanwhile, concerns over excessive surveillance of workers continued. According to a Pakistan-based labour lawyer interviewed for this project,

*There are data-related concerns: for example, we know that the [platform] companies are using software because the workers tell us. If they are far from the place where the restaurants are, they would receive a call. 'Why are you standing so far? Why don't you come near and stay at the place where you would receive all this?' And I'm sure it can be used to know who was involved in a strike or a protest or not. But the problem is that the legislation does not even recognize them [as employees].<sup>82</sup>*

## 2.2.4 North America

Meanwhile, in the Global North, several U.S. states<sup>83</sup> increased legislative protection of personal data. While the U.S. model is evolving around protection of

<sup>80</sup> *Id.* at 12.

<sup>81</sup> Privacy International raises concerns regarding Pakistan's Personal Data Protection Bill, PRIVACY INT'L (Aug. 8, 2023), <https://privacyinternational.org/news-analysis/5090/privacy-international-raises-concerns-regarding-pakistans-personal-data>.

<sup>82</sup> ILAW Network, Country Interview: Pakistan (June 2, 2023).

<sup>83</sup> Which States Have Consumer Data Privacy Laws?, BLOOMBERG LAW (Nov. 27, 2023), <https://pro.bloomberglaw.com/insights/privacy/state-privacy-legislation-tracker/> (citing the Colorado Data Privacy Act, the Connecticut Data Privacy Act, the Utah Consumer Privacy Act, the Virginia Consumer Protection Act, and others).

consumer privacy,<sup>84</sup> the legislation enacted also presents opportunities for workers. For example, the California Consumer Privacy Act,<sup>85</sup> which came into force in January 2023, covers data rights of workers employed by large businesses.<sup>86</sup> This law limits the use of electronic monitoring and algorithmic management for narrow business purposes, even if such use does not cause direct harm to workers.<sup>87</sup> It also gives workers and consumers the right to opt out from the sale of their data to third parties.<sup>88</sup>

## 2.2.5 Europe

While the **EU's General Data Protection Regulation** (GDPR) protects individual rights, it also includes a provision that gives the member states the discretion to regulate the collective pursuit of personal data protection. Regarding the use of technology in workplaces, the GDPR complements labour law in member states by requiring companies to notify workers—and provide them with meaningful information—if they are being subjected to automated decision-making, including profiling.<sup>89</sup> Additionally, GDPR Article 80 provides for collective redress, and empowers civil society organizations and associations that are active in the protection of data subjects' rights and freedoms to lodge a complaint to courts or data protection authorities (DPAs) on behalf of the data subjects.

Despite this, the use of data protection rights by

<sup>84</sup> Ruben de Bruin, *A Comparative Analysis of the EU and U.S. Data Privacy Regimes and the Potential for Convergence*, 13 HASTINGS SCI. & TECH. L.J. 127 (2022).

<sup>85</sup> Annette Bernhard, *California takes a first step towards worker data rights*, UNIV. OF CALIF. (Jan. 19, 2023), <https://www.universityofcalifornia.edu/news/california-takes-first-step-towards-worker-data-rights>.

<sup>86</sup> "As of January 1 of the calendar year, had annual gross revenues in excess of twenty-five million dollars (\$25,000,000) in the preceding calendar year, as adjusted pursuant to paragraph (5) of subdivision (a) of Section 1798.185." CAL. CIV. CODE § 1798.140(d)(1)(A) (2023).

<sup>87</sup> Bernhardt, *supra* note 84.

<sup>88</sup> CAL. CIV. CODE § 1798.120 (2023).

<sup>89</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) arts. 13(2)(f) & 14(2)(g), 2016 O.J. (L 119), 1, 14, 15.



workers and trade unions in the European Union is still in an early stage. This is partially due to the member states' wide margin to decide which type of collective redress—opt in or opt out—they introduce.<sup>90</sup> In addition, in order to be able to represent workers in data rights claims under GDPR, a trade union would either need to be “active in the field of the protection of data subjects' rights and freedoms”,<sup>91</sup> or partner with an organization that meets this requirement. That said, trade unions in the EU could rely on CJEU's interpretation of eligible entities to bring collective claims in consumer rights cases, which should involve organizations that pursue public interest and work in the field of data subjects' rights.<sup>92</sup>

In 2021, recognizing the need to regulate workers' rights in increasingly digitalized work environments, **Spain** adopted amendments to the *Ley Rider (Riders' Law)*.<sup>93</sup> The amendment introduced the right of works councils to be informed and consulted about “the parameters, rules and instructions on which the algorithms or artificial intelligence systems are based that affect decision-making that may affect working conditions, access and retention of employment, in-

cluding the development of profiles.”<sup>94</sup>

This provision applies to all companies, not just digital platforms. However, in the summer of 2023—two years after the adoption of *Ley Rider*—app delivery workers criticized the persistent lack of transparency of algorithms used by the platforms, which continued to affect their pay. They urged the Ministry of Labour to carry out more inspections to ensure the enforcement of the law.<sup>95</sup>

<sup>90</sup> “Member states *may* provide that any body, organisation or association... independently of a data subject's mandate, has the right to lodge, in that Member State, a complaint with the supervisory authority.” Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) art. 80(2), 2016 O.J. (L 119), 1, 70. See also Gaudio, *supra* note 22, at 112.

<sup>91</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) art. 80(1), 2016 O.J. (L 119), 1, 70.

<sup>92</sup> Gaudio, *supra* note 22, at 112.

<sup>93</sup> Real Decreto-ley 9/2021, de 11 de mayo, por el que se modifica el texto refundido de la Ley del Estatuto de los Trabajadores, aprobado por el Real Decreto Legislativo 2/2015, de 23 de octubre, para garantizar los derechos laborales de las personas dedicadas al reparto en el ámbito de plataformas digitales (B.O.E. n. 113, sec. I, p. 56733, 2021) (Spain) [hereinafter *Ley Rider*]; see also *Gig Economy Shifts: Spain Makes Delivery Drivers Employees*, AP (Mar. 21, 2021), <https://apnews.com/general-news-b74bfd4c1e8da05271853b069cb012b9>.

<sup>94</sup> *Ley Rider* art. 64.4.

<sup>95</sup> Raul Novoa González, “La Ley Rider no está funcionando”: los repartidores organizan huelgas y critican las irregularidades de Glovo, EL SALTO (Aug. 9, 2023), <https://www.elsaltodiario.com/repartidores/ley-rider-no-funcionando-repartidores-organizan-huelgas-critican-irregularidades-glovo>.

# 3. Organising, Bargaining, and Litigation

Across the regions, ILAW members underscored that, to be successful, litigation must be integrated in workers' organizing and advocacy strategies. This requires new approaches, as traditional forms of organizing, which centred a largely male manufacturing workforce, no longer corresponds with today's reality. As a participant in Latin America regional interview explained it:

*We have displaced workers, workers who are in a precarious situation working wherever they can to survive. This is a new type of union organizing. We are starting from zero. Workers have very low awareness of their rights. We have to look at how these workers can have a presence.*<sup>96</sup>

## 3.1 Case Studies: Workers' Data Strategies

Labour lawyers must continue to consider how to effectively expose and remedy the harms experienced by workers that result from methods employers use to oversee their workers. This section presents two new ways that this challenge has been met, offering case studies on workers' strategies to deal with performance monitoring in Germany and Japan.

### 3.1.1 Case Study: Action Against Permanent Monitoring in Germany

Tech workers at Amazon Alexa in Berlin used a combination of organizing, bargaining, and litigation to limit the company's system of extensive performance monitoring. Under the German Works Constitution Act (*Betriebsverfassungsgesetz*, or *BetrVG*), works councils have a co-determination right, which empowers them to seek an agreement with employers

<sup>96</sup> ILAW Network, Regional Interview: Latin America (May 24, 2023) (in Spanish with translation).

on the use of devices designed to monitor the behaviour or performance of employees.<sup>97</sup> The law also obliges employers to provide works councils with information about the use of technologies that affect workers' privacy.<sup>98</sup> This includes submission of an overview of all data processing procedures or programmes used, in particular systems that may enable the monitoring of employees. If the works council is not satisfied with the information and answers provided, it may appoint an external IT expert to investigate the matter further.<sup>99</sup>

Additionally, under the Germany Occupational Safety and Health Act, works councils should be involved in conducting health risk assessments.<sup>100</sup> An employer is obligated to conduct this type of assessment if the workplace can generate physical or mental stress.<sup>101</sup> If the assessment determines that the technology could cause mental stress, the employer must undertake necessary measures to mitigate it.

In January 2019, the works council at Amazon Alexa

<sup>97</sup> *Betriebsverfassungsgesetz (BetrVG)* [Works Constitution Act] § 87(1)(6), Sept. 25, 2001, BGBl. I p. 2518 (Ger.), English translation available at [https://www.gesetze-im-internet.de/englisch\\_betrvg/index.html](https://www.gesetze-im-internet.de/englisch_betrvg/index.html).

<sup>98</sup> See *id.* § 80(2).

<sup>99</sup> DIRK HAMMANN, KARL SCHMITZ, & WOLFGANG APITZSCH, IG METALL, ÜBERWACHUNG UND ARBEITNEHMERDATENSCHUTZ 137-8 (2017), [https://www.heidelberg.igm.de/static/geschaeftsbericht.2016-2019/\\_/docs/25\\_Ueberwachung-und-Arbeitnehmerdatenschutz\\_2017-07.pdf](https://www.heidelberg.igm.de/static/geschaeftsbericht.2016-2019/_/docs/25_Ueberwachung-und-Arbeitnehmerdatenschutz_2017-07.pdf).

<sup>100</sup> Arbeitsschutzgesetz (ArbSchG) [Occupational Safety and Health Act] § 10(2), Aug. 7, 1996, BGBl. I p. 1246 (Ger.), English translation available at [https://www.gesetze-im-internet.de/englisch\\_arbschg/](https://www.gesetze-im-internet.de/englisch_arbschg/).

<sup>101</sup> *Id.* §5(3); see also MARTIN KRZYWDZINSKI, SABINE PFEIFFER, MAREN EVERS, & CHRISTINE GERBER, MEASURING WORK AND WORKERS. WEARABLES AND DIGITAL ASSISTANCE SYSTEMS IN MANUFACTURING AND LOGISTICS, at 18 (WZB Berlin Soc. Sci. Ctr. Disc. Paper SP III 2022-301, Mar. 2022), <https://bibliothek.wzb.eu/pdf/2022/iii22-301.pdf>.

in Berlin requested that the company stop processing data of individual workers in connection with performance reviews. Two months later, the works council started to negotiate the matter with Amazon. In May 2019, when those negotiations failed, the works council turned to the *Arbitration Board*, a dispute-resolution mechanism provided by law.<sup>102</sup> In December 2020 (after more than 18 months), Amazon and the works council reached an agreement limiting the processing of individual workers' performance data. Under the agreement, the company can no longer use algorithmically generated performance feedback of individual workers, as there are no legal grounds to do so.<sup>103</sup> The use of workers' performance data is also prohibited in any human resources decisions on promotions, dismissals, etc.

During the arbitration process, the works council was represented by a lawyer and benefited from an advice of an IT expert. As a team, they reviewed the technology used for tracking workers' performance and the data collected. Through the process, workers learned that the company was using 22 different systems to monitor their performance, a fact which, on its own, highlights the key importance of transparency regarding the technical details of employee surveillance.

This case relied on a 2017 ruling of the Court of Justice of the European Union, which held that personal data includes that which measures individual performance.<sup>104</sup> Under EU law, in the employment context, processing of personal data must be necessary and proportionate.<sup>105</sup> In the case of Amazon Alexa workers, there was no clear purpose of such an extensive performance monitoring and workers' surveillance.

<sup>102</sup> Betriebsverfassungsgesetz (BetrVG) [Works Constitution Act] §§ 74, 76, Sept. 25, 2001, BGBl. I p. 2518 (Ger.), English translation available at [https://www.gesetze-im-internet.de/englisch\\_betrvg/index.html](https://www.gesetze-im-internet.de/englisch_betrvg/index.html).

<sup>103</sup> German-language summary on file with ILAW.

<sup>104</sup> Case C-434/16, Peter Nowak v. Data Prot. Comm'r, ECLI:EU:C:2017:994 ¶¶ 49-50 (Dec. 20, 2017).

<sup>105</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) art. 5, 2016 O.J. (L 119), 1, 6-7; Charter of Fundamental Rights of the European Union art. 52(1), Oct. 26, 2012, 2012 O.J. (C 326) 391, 406.

### 3.1.2 Case study: Data-Driven HR System to Calculate “Wage Adjustments” in Japan

In Japan, wage determination has three elements: (1) automatic periodic wage increases by the companies; (2) annual pay increases, which are subject to collective bargaining; and (3) the bonus payment system.<sup>106</sup>



The IBM Hakozaiki Facility building in Tokyo, Japan. Credit: iStock.com/ Marvin Samuel Tolentino Pineda

The first of these—annual wage increases—became a contested issue at IBM Japan after the company decided to deploy a tech system, *IBM Compensation Advisor Watson*,<sup>107</sup> to assist managers with salary adjustment decisions. Workers learned about this decision on 14 August 2019 through the company's intranet site. According to the announcement, the software would assist in the determination of annual wage adjustments, drawing on 40 categories of workers' data, without specifying what the categories were.<sup>108</sup> Prior to this, the practice at the company was that a manager would make a recommendation on annual wage adjustments on the basis of five factors: job description, work attitude, performance, skills,

<sup>106</sup> ARNE L. KALLEBERG, KEVIN HEWISON & KWANG-YEONG SHIN, KOREA PRECARIOUS ASIA GLOBAL CAPITALISM AND WORK IN JAPAN, SOUTH KOREA, AND INDONESIA 109-10 (2021).

<sup>107</sup> Ruiiko Kokubun, 「AIによる賃金提案」に上司は支配されるのか 新たなIBM労使紛争で見たこと (*Will bosses be controlled by “AI wage proposals”? What we learned from the new IBM labor dispute*), BENG04.COM (2021), [https://www.bengo4.com/c\\_5/n\\_13965/](https://www.bengo4.com/c_5/n_13965/) (in Japanese).

<sup>108</sup> ILAW Network, Interview with representatives of JMITU (Apr. 15, 2023).

and main salary.<sup>109</sup>

In response to this announcement, the Japan Metal Manufacturing, Information and Telecommunication Workers Union (JMITU), which represented IBM workers, started a process of collective bargaining and requested the disclosure of all categories of data used by the software. JMITU also requested an explanation of how the data would be used to evaluate workers, and how the supervisors would use the software's recommendations. Their concern was whether the supervisors would merely apply the machine's decisions, or use them to inform their own decision as part of a meaningful review. Initially, the company responded by disclosing 10 categories of data,<sup>110</sup> but declined a request to disclose them all.

In April 2020, the union filed a complaint with the Tokyo Labour Relations Commission on the grounds that the company's response constituted an unfair labour practice.<sup>111</sup> The complaint drew upon labour law and personal data protection law,<sup>112</sup> arguing that the company is not only obligated to disclose to its employees what data it collects on them, but also to ensure (a) that use of machine-based systems does not lead to unfair or discriminatory treatment of trade union members,<sup>113</sup> and (b) that decisions made by

<sup>109</sup> Hozumi Masashi (ほづみ まさし), AIによる賃金査定にどう向き合うか: 日本IBM事件(不当労働行為救済申立)の報告[HowtoFaceAI-BasedWageAssessments:Report on the IBM Japan Case (Unfair Labor Practice Relief Petition)], 338 季刊労働者の権利[Worker Rights Quarterly], no. 10, 2020, at 101, 102.

<sup>110</sup> By the time of writing, IBM Japan disclosed another 17 categories of data, leaving 23 categories still unknown to the workers. The known categories include "specialization in the main job", "need for skills at IBM," or "past salary increases". See, Kokubun, *supra* note 106.

<sup>111</sup> Bad faith collective bargaining and control intervention, prohibited by the Trade Union Law [Article 7(2), (3)]. For details about the complaint, see the union's webpage (in Japanese): <http://www.jmitu-ibm.org/>.

<sup>112</sup> JMITU is concerned that Watson might be collecting sensitive data, such as medical history or race (Article 2.3. of the Act on the Protection of Personal Information).

<sup>113</sup> In a period between 2012 and 2015, IBM Japan dismissed 34 workers who were trade union members. JMITU and the workers filed complaints over unfair dismissals, which they won by 2019, when the courts declared them illegal and invalid. See, Hozumi, *supra* note 108.

technology are subject to human review.<sup>114</sup>

In an interview for this issue brief, the representatives of JMITU explained that the absence of information about how *IBM Compensation Advisor Watson* would be used presented a multiple concerns, not only over wages and/or bonuses, but also regarding workers' right to bargain collectively. As the representatives explained, "the main issue for us is that in wage negotiations, IBM avoids substantive discussion about wages. We lack the basic facts, which hinders bargaining." The representative went on to identify the core problem: 'Workers don't know how the systems, such as Watson, use their data to manage them.'<sup>115</sup>

IBM Japan claimed that the technology is a supplementary tool, and asserted that it explained to its employees how it is used on the company's intranet. In response to a request for clarification from the Business and Human Rights Resource Centre, the company stated that 'the information provided by AI does not lead straight to salary adjustments'.<sup>116</sup>

A lawyer representing JMITU at the Labour Relations Commission clarified the concerns over the link between the lack of information about the machine learning system fed by workers' data, and the risk of discrimination. 'If the system's algorithm contains any form of bias, for example anti-union, gender or racial bias,' the lawyer stated, "there is a risk it will produce discriminatory impact".<sup>117</sup>

Japan has adopted the Act on the Protection of Personal Information, which includes several provisions similar to EU's GDPR, including the rights of the data subject—such as notification of purpose, consent for processing sensitive personal data, and the right to

<sup>114</sup> JMITU, AIの不透明な賃金提案 (AI's opaque wage proposal. Accountability required), (18 April 2023), <https://www.jmitu-ibm.org/2021/04/8073.html> (in Japanese).

<sup>115</sup> ILAW Network, Interview with representatives of JMITU (Apr. 15, 2023).

<sup>116</sup> IBM Japan, *Response to Business and Human Rights Resource Centre*, BUS. & HUM RTS. RES. CTR. (Feb. 15, 2022), <https://www.business-humanrights.org/en/latest-news/ibm-japans-response/>.

<sup>117</sup> ILAW Network, Interview with representatives of JMITU (Apr. 15, 2023).

request information business is collecting on them.<sup>118</sup> Breaches of the Act can result in civil liability or even criminal sanctions.<sup>119</sup> While the trade union continues its litigation and bargaining efforts, another litigation opportunity may emerge regarding the data rights of IBM workers. This case illustrates the intrinsic link between labour rights and workers' data rights in the context of the expanding use of workplace analytics technology offering 'data-driven solutions'.

### 3.1.3 Take-Away on Workers' Data Strategies

The expanding capabilities and practice of employers to surveil workers, including during their private time, require labour lawyers to rethink the harms experienced by workers and the most effective tools available to expose and remedy those harms. This section presented examples in which workers relied on labour laws that oblige employers to inform workers and negotiate with them on the use of technology at the workplace, as well as data protection laws that require that workplace monitoring must meet the criteria of transparency, necessity, and proportionality.

New data protection regulation across jurisdictions gives power to workers to demand to know what information their companies are collecting on them, and to challenge the ways this information is used. Data protection laws also provide strong enforcement mechanisms—through complaints filed in courts with and data protection authorities—than can strengthen the litigating and bargaining position of workers. It is particularly important that legislation provide judicial and regulatory authorities with investigative powers for establishing evidence of harms, which often remains hidden behind the veil of algorithmic systems.<sup>120</sup>

<sup>118</sup> Act on the Protection of Personal Information (Partly unenforced) Law No. 57 of 2003, art. 27 (Japan), English translation available at [https://www.japaneselawtranslation.go.jp/en/laws/view/4241/en#je\\_ch4sc2at5](https://www.japaneselawtranslation.go.jp/en/laws/view/4241/en#je_ch4sc2at5).

<sup>119</sup> *Id.* §§ 171-75.

<sup>120</sup> 'Member States shall ensure that national courts have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the claim.

Even in absence of data protection laws, workers already use the existing provisions—including prohibitions of unfair dismissals or retaliation—to set the boundaries on electronic monitoring in the workplace.<sup>121</sup> Litigation and bargaining over the use of technology that may violate workers' rights also requires technical expertise to present analysis and evidence of the working of the system and its harms. Within the proceedings, the costs of obtaining such expertise should be, by law, borne by the companies rather than the workers, as is the case in Germany.

## 3.2. Algorithmic Management

The case studies in the previous section illustrate that the use of data-driven technology has expanded beyond digital platforms. Companies rely on algorithms to assign shifts to workers, to perform human resource management tasks, including pay calculations and performance reviews, and to track and discipline workers.<sup>122</sup> As illustrated by these examples, ILAW members across regions observed that labour law often does not provide an adequate framework to safeguard workers' rights in this new context:

- Argentina: "In Argentina we have a regulatory gap. Labour-employer relationships are regulated also by local laws. Existing bargaining regulation is not adapted under this [app-based] business model. Even when the na-

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They shall ensure that, when ordering the disclosure of such information, national courts have at their disposal effective measures to protect such information.' *Commission Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work*, at art. 16.2, COM (2021) 762 final (Dec. 9, 2021).

<sup>121</sup> For example, in August 2023, the Colombian Supreme Court held that by firing a security guard who complained to his colleagues on a private WhatsApp group about managers, the company breached his right to the freedom of expression, that this dismissal was unjust, and he should be reinstated. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Lab. marzo 7, 2023, M.P. D.A.C. Villota, SL464-2023, Rad. no. 90021, Act. 7 (Colom.), <https://cortesuprema.gov.co/corte/wp-content/uploads/2023/05/SL464-2023.pdf>.

<sup>122</sup> ROGERS, *supra* note 3, at 74-78.

tional laws recognize the employment status, there are still gaps caused by the algorithmic management of labour."<sup>123</sup>

- South Korea: "[Although there are] trade unions in South Korea representing food delivery platform workers, recognized by the Ministry of Labour, they cannot access information about algorithms used by the platforms. They are demanding this information, but there is no legal basis for this. Information about algorithms is key for understanding how workers' pay is determined. The lack of regulation is major obstacle for the work of these trade unions."<sup>124</sup>

### 3.2.1 Arbitrary Deactivation of Accounts

Ride-hailing digital platforms have been reported to respond to drivers who participate in strikes by deactivating or blocking their accounts.<sup>125</sup> ILAW members observed retaliatory deactivation of app-based workers in South Asia. They complained that, due to a lack of regulation, they have no effective procedure to challenge these practices.<sup>126</sup> A research participant from Pakistan said, "[When] we asked workers [in 2023] whether they would like to have a trade union, their response was: 'but the company would deactivate us'. For platforms it's easy to see who was on [a trade union] protest because the videos are [publicly available]. The ILO Committee of Experts has been telling the government for decades that it should implement the ILO Conventions on freedom of association."<sup>127</sup>

<sup>123</sup> ILAW Network, Regional Interview: Latin America (May 24, 2023) (in Spanish with translation).

<sup>124</sup> ILAW Network, Regional Interview: Asia-Pacific (May 31, 2023).

<sup>125</sup> This has been reported in interviews and came up also through literature review South Africa, Tanzania, and Kenya. FRIEDRICH EBERT STIFTUNG TRADE UNION COMPETENCE CENTRE FOR SUB-SAHARAN AFRICA, WORKERS OR PARTNERS?: THE POLITICAL ECONOMY OF UBER IN DAR ES SALAAM, NAIROBI, AND JOHANNESBURG 26 (2022), <https://library.fes.de/pdf-files/bue/ros/festucc/19096-20220607.pdf>.

<sup>126</sup> ILAW Network, Regional Interview: Asia-Pacific (May 19, 2023).

<sup>127</sup> ILAW Network, Country Interview: Pakistan (June 2, 2023); Ejike Kanife, *Nigerian e-hailing drivers union gets govt certificate, becomes AUATON*, TECHNEX (Aug. 21, 2021), <https://>

Workers in delivery, transport, or domestic work reported arbitrary and non-transparent deactivation of their accounts by the digital platforms in several countries, including South Africa,<sup>128</sup> Nigeria,<sup>129</sup> Kenya,<sup>130</sup> Argentina,<sup>131</sup> Uruguay,<sup>132</sup> and the UK.<sup>133</sup>

Additionally, algorithmic decisions, including deactivations of workers' accounts, appear to have a gendered dimension in the field of digital domestic work. An ILO report on [Argentina](#) recorded cases of deactivations due to absences related to caring for children and ill relatives. Workers reported a sense of arbitrariness of these forms of dismissals, as well as observing the intense asymmetry of the relationship in other aspects as well; notably, that they were not able to evaluate or rank clients.<sup>134</sup>

[technext24.com/2023/08/21/app-drivers-union-auaton-certificate/](https://technext24.com/2023/08/21/app-drivers-union-auaton-certificate/).

<sup>128</sup> Kim Harrisberg, Bukola Adebayo, & Meena Farouk, *Concerns over abuse and exploitation as house-cleaning service apps take off*, TIMES (Feb. 16, 2023), <https://www.timeslive.co.za/news/africa/2023-02-16-concerns-over-abuse-and-exploitation-as-house-cleaning-service-apps-take-off/>.

<sup>129</sup> Daniel Arubayi, *Ride-hailing Platforms, Algorithmic Management, and Everyday Resistances: A Case Study of Drivers in Lagos, Nigeria 217-24 (2022)* (unpublished Ph.D. dissertation, University of Manchester, UK), [https://pure.manchester.ac.uk/ws/portalfiles/portal/248989537/FULL\\_TEXT.PDF](https://pure.manchester.ac.uk/ws/portalfiles/portal/248989537/FULL_TEXT.PDF).

<sup>130</sup> TOM KWANYA & KATOMA J. WAKUNUMA, ALEXANDER VON HUMBOLDT INST. FOR INTERNET & SOC., REGULATION OF DIGITAL PLATFORMS FOR A SOCIALLY-JUST GIG ECONOMY IN KENYA 30 (2023) <https://www.bmz-digital.global/wp-content/uploads/2023/05/Kwanya-T.-Wakunuma-K.-2023.-Regulation-of-Digital-Platforms-for-a-Socially-Just-Gig-Economy-in-Kenya.pdf>.

<sup>131</sup> Uma Rani, Rishab Kumar Dhir, & Nora Gobel, *Delivery workers, trapped in an algorithmic system*, SOCIOLOGIA: REVISTA DA FACULDADE DE LETRAS DA UNIVERSIDADE DO PORTO 23 (2022) <https://doi.org/10.21747/08723419/soctem2022a2>; IOULIA BESSA, SIMON JOYCE, DENIS NEUMANN, MARK STUART, VERA TRAPPMANN, & CHARLES UMNEY, INT'L LAB. ORG, A GLOBAL ANALYSIS OF WORKER PROTEST IN DIGITAL LABOUR PLATFORMS 25 (2022), <https://www.econstor.eu/bitstream/10419/263131/1/ilo-wp70.pdf>.

<sup>132</sup> ILAW Network, Country Interview: Uruguay (June 13, 2023).

<sup>133</sup> GHAMS 4 April 2023, ECLI:NL:GHAMS:2023:796, JAR 2023/137 m.nt. Jakimowicz (Drivers/Uber B.V.) (Neth.).

<sup>134</sup> Sonia Filipetto et al., *Platform labour in contexts of high informality: Any improvement for workers? A critical assessment based on the case of Argentina*, NEW TECHNOLOGY, WORK

In 2019–22, YouTube content creators,<sup>135</sup> with support of German trade union IG Metall, ran a campaign called **FairTube**,<sup>136</sup> demanding transparency over the platform's decisions to “demonetize”—i.e. remove ads from certain videos<sup>137</sup>—and delete the accounts of creators in response to algorithmic “brand safety controls”.<sup>138</sup> The “demonetization system” negatively affected creators with unpredictable and non-transparent income in particular, and they were not told which specific guidelines they violated. Some content creators for whom YouTube was their primary source of income reported stress, anxiety, and other mental health issues.<sup>139</sup>

FairTube was the first collective initiative to address these labour rights issue at YouTube through the personal data protection regulation. It called on YouTube to:

- disclose all categories and criteria affecting content creators' income, such as those affecting monetization decisions and promotion of content by the recommender system;
- provide precise explanations about decisions regarding content and channels made by the

algorithmic systems;

- provide access to qualified human review, as well as contact persons with whom content creators could communicate regarding the results of reviews of their content;
- give content creators the option to contest negative decisions, and to establish a special dispute resolution board;
- create a formal body, comprised of content creators, for resolving and discussing decisions related to and affecting them.<sup>140</sup>

Its demand of algorithmic transparency relied on GDPR, as well as the *Nowak* ruling of the CJEU, which clarified that individuals should have the right to access personal data related to them, and that the processing of their data should be correct and lawful.<sup>141</sup> In 2021, FairTube announced some progress in the bargaining, but content creators continued to report problems with demonetization.<sup>142</sup>

### 3.2.2 Access to Information about Algorithmic Decision-Making

Workers in **Italy** successfully challenged the refusal of a digital platform to disclose the details of their algorithmic management systems. Drawing on Italian Workers Statute, Legislative Decree 58/2023, which includes disclosure obligations,<sup>143</sup> and GDPR, the unions demanded details about algorithmic management based on workers' behavioural data. The company rejected the request.

In June 2023, a **court in Palermo** issued a ruling in a case on this topic, which was brought by trade unions

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AND EMPLOYMENT (2023) at 60, <https://onlinelibrary.wiley.com/doi/10.1111/ntwe.12283>.

<sup>135</sup> *The Spark*, YOUTUBERSUNION.ORG, <https://youtubersunion.org/content/spark>.

<sup>136</sup> FAIRTUBE, <https://fairtube.info/en/>.

<sup>137</sup> They also advocated for income for content creators. See M. Six Silberman, Sangh Rakshita, Halefom H. Abraha & Jeremias Adams-Prassl, *Content Marketplaces As Digital Labour Platforms: Towards Accountable Algorithmic Management and Decent Work for Content Creators*, PROCEEDINGS OF THE 8TH CONFERENCE ON REGULATING FOR DECENT WORK, INTERNATIONAL LABOUR OFFICE, GENEVA, 10–12 JULY 2023, at 4 (2023), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4501081](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4501081).

<sup>138</sup> Edward Ongweso Jr., *The YouTubers Union Is Not Messing Around*, VICE (July 26, 2019), [https://www.vice.com/en\\_us/article/j5wy8d/the-youtubers-union-is-not-messing-around](https://www.vice.com/en_us/article/j5wy8d/the-youtubers-union-is-not-messing-around).

<sup>139</sup> Silberman et al., *supra* note 136, at 5; Iuliia Miroshnichenko, *Fairtube Revisited: The GDPR Violations of Content Creators' Personal Data Rights by Algorithmic Decision-Making on Youtube 27–28* (2021) (unpublished master's thesis, Talinn University of Technology), <https://digikogu.taltech.ee/en/Download/35114d9b-4c8b-4290-8d3d-82b077268fed>.

<sup>140</sup> Miroshnichenko, *supra* note 138, at pp. 28–29.

<sup>141</sup> Case C-434/16, *Peter Nowak v. Data Prot. Comm'r*, ECLI:EU:C:2017:994 ¶¶ 49, 57 (Dec. 20, 2017).

<sup>142</sup> Silberman et al., *supra* note 136.

<sup>143</sup> Int'l Org. of Employers, *Italy: law converting Decree No. 48/2023 [Employment Decree] published in the Official Gazette*, INDUST. REL. & LAB. L. NEWSLETTER (July 2023), (<https://industrialrelationsnews.ioe-emp.org/industrial-relations-and-labour-law-july-2023/news/article/italy-law-converting-decree-no-48-2023-employment-decree-published-in-the-official-gazette>).

against the digital platform Foodinho, owned by Glovo.<sup>144</sup> In the ruling, the court held that the company's rejection of this request amounts to anti-union conduct, as the obligation to provide information about automated decision-making and monitoring systems is not just limited to workers, but also extends to trade unions.<sup>145</sup> The court used the interpretation of the Italian data protection authority Garante, according to which companies are obligated to disclose information about the main parameters used to train automated systems. The court ordered Foodinho to provide the trade union with details about automated termination of workers' accounts, the "logic and operation" of workers' scoring and scheduling systems, the categories of data used to train the automated systems, and the measures in place to ensure that these systems are accurate and fair.<sup>146</sup>

### 3.2.3 Take-away on Strategies Against Algorithmic Deactivation

Relying on data protection laws, which bind companies that process workers' data, labour lawyers can challenge arbitrary or punitive terminations of contracts with drivers, through both transport licensing authorities and courts. In several countries, such laws prohibit the full automation of these decisions, and they also require companies—in their data processing activities—to protect workers' data from breaches.<sup>147</sup>

### 3.2.4 Algorithmic Discrimination

Workers under algorithmic management report various forms of the manipulation of their working arrangements and conditions, from pay<sup>148</sup> to schedul-

<sup>144</sup> Trib. de Palermo Sezione Lavoro, 26 giugno 2023, CGIL v Foodinho (It.), available at <https://www.bollettinoadapt.it/wp-content/uploads/2023/06/art-28-statuto-Riders-1687786624-1.pdf>.

<sup>145</sup> *Id.* at 19.

<sup>146</sup> *Id.* at 28.

<sup>147</sup> See *infra* section 4.2.1.

<sup>148</sup> Dubal, *supra* note 2; See also Brave New Europe, *Gig Economy Project – Gorillas in Berlin: chronic problems and mounting divisions* (2022), [ing.<sup>149</sup> This could be a result of biased data used to train algorithmic decision-making,<sup>150</sup> or a deliberate corporate strategy to target workers on the basis of protected characteristics, such as gender, race or ethnicity, trade union membership, or political views.<sup>151</sup>](https://braveneweuropa.com/gig-economy-project-gorillas-in-berlin-chronic-problems-and-mount-</a></p>
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Algorithmic decision-making can take place at all stages of the work or employment relationship: from recruitment, through the establishment of working conditions and pay, to termination. For example, as of 2020, Austria's Public Employment Service was reported to use predictive profiling algorithms to assess labour market chances of jobseekers.<sup>152</sup> The level of support jobseekers get depends on how the algorithm classifies them into one of three categories—those with high, moderate, or low employment prospects. Researchers have been conducting technical and policy analysis of this system, examining possible biases and discrimination that impacted access to employment support, particularly regarding women, people with disabilities, and people with care obligations.<sup>153</sup>

Another example of algorithmic bias that has been observed in this space is the use of scheduling software that draws on data from which a digital platform company inferred workers' participation in union

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[ing-divisions.](#)

<sup>149</sup> ILAW Network, Regional Interview: Latin America (May 24, 2023) (in Spanish with translation); see also Dmitriy Mazorenko, *Kazakhstani couriers are pushing back against the gig economy*, OPENDEMOCRACY (June 30, 2021), <https://www.opendemocracy.net/en/odr/kazakhstani-couriers-are-pushing-back-against-gig-economy/>; Ilaria Purificato, *Behind the Scenes of Deliveroo's Algorithm: in the Blindness of "Frank" its Discriminatory Potential*, 14 ITAL. LAB. L. E-J. 169 (2021), <https://doi.org/10.6092/issn.1561-8048/12990>.

<sup>150</sup> Marvin van Bekkum & Frederik Zuiderveen Borgesius, *Using sensitive data to prevent discrimination by artificial intelligence: Does the GDPR need a new exception?*, 48 COMP. L. & SEC. REV., art. no. 105770 (2023), <https://doi.org/10.1016/j.clsr.2022.105770>.

<sup>151</sup> Dubal, *supra* note 2; Maoj Dias-Abey, *Mobilizing for Recognition: Indie Unions, Migrant Workers, and Strategic Equality Act Litigation*, 38 INT'L J. COMPAR. LAB. L. & INDUS. REL. 137 (2022).

<sup>152</sup> Doris Allhutter, Florian Cech, Fabian Fischer, Gabriel Grill, & Astrid Mager, *Algorithmic Profiling of Job Seekers in Austria: How Austerity Politics Are Made Effective*, 3 FRONTIERS IN BIG DATA (2020), <https://doi.org/10.3389/fdata.2020.00005>, at 17.

<sup>153</sup> *Id.*



activities, resulting in the exclusion of such workers from availability when there is higher customer demand.<sup>154</sup>

When challenging these corporate practices, workers can rely on anti-discrimination law, labour law, and the data protection law. This happened in the U.K. in 2021, when two unions, **The Independent Workers' Union of Great Britain (IWGB)** and **The App Drivers and Couriers Union (ADCU)**, took Uber to court over facial recognition technology, claiming that its use results in disproportionate "deactivation" of racialized workers.<sup>155</sup> The software used by the company requires drivers to photograph themselves and verify the picture against the app. The unions claimed that, in cases when the system failed to match the photo with the one stored, workers were not only dismissed, but also faced automatic revocation of their private hire driver and vehicle licenses.<sup>156</sup> The unions further objected to the fact that in these cases, the drivers had no opportunity to challenge their "deactivation".<sup>157</sup> These cases illustrate the power of technology to not only deprive workers of their rights, but also to compound their disposability.

In 2021, **Italian DPA Garante**, after examining the practice at Deliveroo, issued a decision that set the parameters for the use of automated systems in workplaces. Relying on the prohibition of automated processing of personal data under Article 22 GDPR,<sup>158</sup> Garante examined the consequences of the use of

these types of systems on workers. It concluded that profiling workers by the algorithmic systems used by a company produced "a significant effect on the person concerned consisting in the possibility of allowing (or denying) access to job opportunities, in certain pre-established time slots, and therefore offering (or denying) an opportunity of employment."<sup>159</sup> Due to these serious consequences for workers, Garante held that companies must ensure a human review of the software's decisions, which Deliveroo had failed to do.



Credit: iStock.com/AdrianHancu

Garante's decision regarding Deliveroo's practices was not the first time this company had faced legal consequences related to its use of algorithmic systems. In 2020, the **Court in Bologna**, Italy issued a declaratory order to Deliveroo to stop using a reservation system powered by an algorithm, 'Frank', which scored riders on the basis of 'reliability' and 'participation'. It held that the effect of using Frank was indirectly discriminatory against those riders who participated in protests.<sup>160</sup>

<sup>154</sup> Purificato, *supra* note 148.

<sup>155</sup> *IWGB takes Uber to court over racist facial recognition as Black Lives Matter UK backs the drivers' strike and boycott on Wednesday 6 October*, IWGB (Oct. 5, 2021), <https://iwgb.org.uk/en/post/racist-facial-recognition/>; *ADCU initiates legal action against Uber's workplace use of racially discriminatory facial recognition systems*, APP DRIVERS & COURIERS UNION (ADCU), <https://www.adcu.org.uk/news-posts/adcu-initiates-legal-action-against-ubers-workplace-use-of-racially-discriminatory-facial-recognition-systems>.

<sup>156</sup> ADCU, *supra* note 154.

<sup>157</sup> Dias-Abey, *supra* note 150.

<sup>158</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) art. 22, 2016 O.J. (L 119), 1, 21

<sup>159</sup> Garante per la protezione dei dati personali (GPDP), *Ordinanza ingiunzione nei confronti di Deliveroo Italy s.r.l. – 22 luglio 2021 [9685994]*, at § 3.3.5, available at <https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9685994>.

<sup>160</sup> Trib. Ord. di Bologna Sezione Lavoro, 27 novembre 2020, case no. 2949/2019, *CGIL Bologna v Deliveroo Italia (It.)*, available at <https://www.bollettinoadapt.it/wp-content/uploads/2021/01/Ordinanza-Bologna.pdf>. [hereinafter *2020 CGIL Bologna decision*]

### 3.2.5 Take-away on Strategies Against Algorithmic Discrimination

Anti-discrimination law presents another opportunity for workers to challenge labour rights violations linked to the use of technology. Among the issues that deserve the attention of labour law lawyers are a) the personal scope of anti-discrimination law; and b) evidence of algorithmic discrimination.

- a) Through anti-discrimination law, workers may bypass the classificatory struggle that has emerged as one of the major problems for labour law in relation to technology.<sup>161</sup> In cases brought by self-employed workers, the courts in the European Union have clarified that anti-discrimination law applies to workers regardless of their status.<sup>162</sup> Although some countries limit this protection to employees, in several jurisdictions in low to middle income countries, the right to equal treatment applies to all workers, including independent contractors.<sup>163</sup>
- b) Although on its own, anti-discrimination law may not provide an adequate response to algorithmic discrimination,<sup>164</sup>

workers might be able to bring cases relying on evidence that they get by exercising their data rights. Evidence of direct or indirect differential treatment often remains hidden behind the technology. Companies are now capable to obtain granular data about workers, and use technology to individualize and obscure differential treatment in scheduling, pay practices, disciplining, promotions, or dismissals.<sup>165</sup> To challenge such practices, workers may obtain evidence by relying on the types of data subject request rights that were discussed in the previous section on data governance), as well as by submitting grievances to both the data protection authorities and equality bodies, each of which may have greater investigatory powers than workers or trade unions.

Workers can also shift the burden of proof to companies—either through presenting statistical evidence on their employers' differential treatment,<sup>166</sup> or by presenting facts that point to a lack of compliance with equal treatment rules.<sup>167</sup>

### 3.3 Fair Wages and Social Security

Workers engaged in digital labour report violations of their right to a fair wage.<sup>168</sup> This is particularly preva-

<sup>161</sup> TAKEN FOR A RIDE: LITIGATING THE DIGITAL PLATFORM MODEL, ILAW ISSUE BRIEF (Mar. 2021), <https://www.ilawnetwork.com/issue-briefs-reports/taken-for-a-ride-litigating-the-digital-platform-model/>, TAKEN FOR A RIDE 2: ACCELERATING TOWARDS JUSTICE, ILAW ISSUE BRIEF (Dec. 2022), <https://www.ilawnetwork.com/wp-content/uploads/2022/12/ISSUE-BRIEF-Taken-for-a-Ride-2.pdf>.

<sup>162</sup> Case C-356/21, TP (Monteur television pour la television publique), ECLI:EU:C:2023:9 ¶ 33 (Jan. 12, 2023); *2020 CGIL Bologna decision*.

<sup>163</sup> See, e.g., *Argentina*, AGEDISCRIMINATION.INFO (Aug. 15, 2023), <http://www.agediscrimination.info/international-age-discrimination/argentina>; *Colombia*, AGEDISCRIMINATION.INFO (Oct. 4, 2023), <http://www.agediscrimination.info/international-age-discrimination/colombia>; *Brazil*, AGEDISCRIMINATION.INFO (Sept. 29, 2023), <http://www.agediscrimination.info/international-age-discrimination/brazil>.

<sup>164</sup> Philipp Hacker, *Teaching fairness to artificial intelligence: Existing and novel strategies against algorithmic discrimination under EU law*, 55 COMMON MARKET L. REV. 1143 (2018).

<sup>165</sup> Dubal, *supra* note 2; Antonio Aloisi, *Regulating Algorithmic Management at Work in the European Union: Data Protection, Non-discrimination and Collective Rights*, 40 INT'L J. COMP. LAB. L. & INDUST. REL. 37 (2024).

<sup>166</sup> Case C-109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, ECLI:EU:C:1989:383 ¶ 13 (Oct. 17, 1989).

<sup>167</sup> Case C-127/92, *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health*, ECLI:EU:C:1993:859 ¶ 16 (Oct. 27, 1993).

<sup>168</sup> MICHELE GILMAN, DATA & SOC., POVERTY LAWGORITHMS: A POVERTY LAWYER'S GUIDE TO FIGHTING AUTOMATED DECISION-MAKING HARMS ON LOW-INCOME COMMUNITIES (2020), [\[26\] \*\*Labour Rights and Technology: Mapping Strategic Opportunities for Workers and Trade Unions\*\*](https://datasociety.net/wp-content/uploads/2020/09/Pover-</a></p>
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lent for those who are employed through digital platforms that can, and do, arbitrarily and non-transparently change the algorithm that determines the pay rate. Tools such as ‘surge pricing’, which enable platforms to vary the pay rate according to demand,<sup>169</sup> bypass fair wage protections codified in the labour law.

Drawing on a long-term ethnographic research among on-demand ride-hail drivers in California, labour law scholar Veena Dubal demonstrated that algorithmic management removes the predictability, clarity, and fairness of wages.<sup>170</sup> The result of dynamic pricing, in which the base fee of drivers is not calculated as mileage and time, but is instead determined algorithmically,<sup>171</sup> drawing on granular data that these platforms collect on workers and consumers, is unequal pay for substantially similar work. In other words, this is ‘algorithmic wage discrimination’ that draws on behavioural data collected by these platform companies.<sup>172</sup>

In California, this practice was legalized by the adoption of Proposition 22,<sup>173</sup> which cements the power of firms to provide digitalized variable pay with no hourly floor guarantee, while failing to balance that power by providing for workers’ data rights.<sup>174</sup> Algorithmic manipulation of pay, embedded in the platform economy, has significant negative consequences for workers’ lives, particularly when it results in those workers’ income being below the required minimum.

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[ty-Lawgorithms-20200915.pdf](#). For a definition of ‘fair wage’, see Comm. on Econ., Soc., & Cultural Rts., General comment No. 23 (2016) on the right to just and favourable conditions of work, ¶ 10, U.N. Doc. No. E/C.12/GC/23 (Apr. 27, 2016); Int’l Lab. Org., Convention (No. 31) concerning Minimum Wage Fixing, with Special Reference to Developing Countries, art. 3, Apr. 29, 1972, 825 U.N.T.S. 77.

<sup>169</sup> SCHOLZ, *supra* note 2, at 45.

<sup>170</sup> Dubal, *supra* note 2.

<sup>171</sup> In addition to the base fare, Uber drivers can be raised by offers, bonuses, surges, quests, and other “wage manipulators”, which differ from driver to driver and across time. *Id.* at 16.

<sup>172</sup> Dubal, *supra* note 2, at 11–18.

<sup>173</sup> *California: Prop 22 Strips Gig Workers of Minimum Wage*, HUM. RTS. WATCH (Nov. 9, 2020), <https://www.hrw.org/news/2020/11/09/california-prop-22-strips-gig-workers-minimum-wage>.

<sup>174</sup> Dubal, *supra* note 2, at 18.

Since 2017, workers across the world have been mobilizing over the issues of unpredictable and unfair pay.<sup>175</sup> According to Leeds Index project, which analysed protests of workers on 36 platforms in 15 countries,<sup>176</sup> over 60% of protests between 2017 and 2020 involved pay.<sup>177</sup> This trend continued as platforms consistently manipulate pay through the mechanism of ‘dynamic pricing’.<sup>178</sup> For example, between January and April 2023, Wolt drivers across eight countries in Europe—Czech Republic, Greece, Denmark, Finland, Georgia, Croatia, Germany, and Serbia—organized protests over the pay rates. As of 24 January 2023, the riders have been on new contracts under which their pay rate is to be determined by an algorithm that considers a varied list of data points that ‘includes, for example, distance, weather conditions, the size of delivery, the location of the merchant and the time of day’.<sup>179</sup> This implies that the list in the contract is non-exhaustive, and may include historical data on the driver’s accepted rate or availability—both of which are categories that have raised concerns of trade unions related to discriminatory impact.<sup>180</sup>

Low pay in the digital economy is also related to the corporate practices that directly or indirectly force workers into unpaid time. For example, according to research from South Africa, domestic workers under-report the hours they work out of concerns over deactivation.<sup>181</sup>

<sup>175</sup> ILAW Network, Regional Interview: Europe and Central Asia (May 29, 2023). See also Mazorenko, *supra* note 148.

<sup>176</sup> BESSA ET AL., *supra* note 130, at 13.

<sup>177</sup> *Id.* at 19.

<sup>178</sup> ‘Dynamic pricing, also called real-time pricing, is an approach to setting the cost for a product or service that is highly flexible. The goal of dynamic pricing is to allow a company that sells goods or services over the Internet to adjust prices on the fly in response to market demands.’ *Definition of ‘dynamic pricing’*, TECHTARGET: WHATIS?, <https://www.techtarget.com/whatis/definition/dynamic-pricing>; see also *Gig Economy Project – Is ‘dynamic pricing’ ripping-off gig workers?*, BRAVE NEW EUR. (Feb. 7, 2023), <https://braveneweuropa.com/gig-economy-project-is-dynamic-pricing-ripping-off-gig-workers>.

<sup>179</sup> *#ReWolt: Why are Wolt strikes spreading across Europe?*, BRAVE NEW EUR. (Apr. 7, 2023), <https://braveneweuropa.com/revolt-why-are-wolt-strikes-spreading-across-europe>.

<sup>180</sup> See *supra* section 3.2.4.

<sup>181</sup> Shaera Kalla, *Hacking platform capitalism: the case of domestic workers on South Africa’s SweepSouth platform*, 30

Finally, having algorithms make the decisions about pay also undermines workers' ability to demand fair wages through collective bargaining. Dubal warns that while the practice of algorithmic wage discrimination most visibly affects work in 'on-demand' sectors, there is a significant risk that digitalized variable pay might be already affecting workers in 'standard employment'.<sup>182</sup> This is the case for workers at IBM Japan,<sup>183</sup> for example, as well as outsourced digital workers in the low to middle income countries, as is the case of Meta's operation in Kenya.<sup>184</sup>

### 3.3.1 Regulation

In 2020, **India** has adopted Motor Vehicle Aggregator Guidelines,<sup>185</sup> which regulate the fares<sup>186</sup> and the working conditions in digital platforms. These Guidelines introduce mandatory breaks, obligate the platforms ('the aggregator') to pay the drivers' health insurance,<sup>187</sup> and ensure safety of women employees

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GENDER & DEV. 655 (2022).

<sup>182</sup> Dubal, *supra* note 2, at 11

<sup>183</sup> See *supra* section 3.1.2.

<sup>184</sup> The cases in Kenya are discussed extensively in sections 3.5 and 4.1, *infra*.

<sup>185</sup> Ministry of Road Transport and Highways, *Motor Vehicle Aggregators Guidelines-2020*, GAZETTE OF INDIA no. 3746, at 5785 (Nov. 27, 2020) (India), available at [https://morth.nic.in/sites/default/files/notifications\\_document/Motor%20Vehicle%20Aggregators27112020150046.pdf](https://morth.nic.in/sites/default/files/notifications_document/Motor%20Vehicle%20Aggregators27112020150046.pdf). [hereinafter *2020 India Motor Vehicle Aggregators Guidelines*]. See also Manish Singh, *India sets rules for commissions, surge pricing for Uber and Ola*, TECHCRUNCH (Nov. 27, 2020), <https://techcrunch.com/2020/11/27/india-sets-rules-for-commissions-surge-pricing-for-uber-and-ola>.

<sup>186</sup> According to section 13(4),

*The Driver of a vehicle integrated with the Aggregator shall receive at least 80% of the fare applicable on each ride and the remaining charges for each ride shall be received by the Aggregator. The State Government may by way of a notification direct 2% over and above the fare towards the state exchequer for amenities and programmes related for Aggregator operated vehicles, which have been helpful in reducing traffic congestion to a great extent and subsequently reducing pollution.*

*2020 India Motor Vehicle Aggregators Guidelines*, § 13(4).

<sup>187</sup> *Id.* § 7(2).

and drivers.<sup>188</sup> However, trade unions remain concerned that the government has so far failed to ensure enforcement of these Guidelines, which means that their impact remains limited.<sup>189</sup>

In 2022, the Ministry of Transport in **Kenya** adopted the regulation, 'Transportation Network Companies, Owners, Drivers and Passengers', which sets the maximum commission that platforms can charge the drivers at 18%.<sup>190</sup> In November 2021, during the consultation over the regulation, Uber and Bolt claimed the proposed cap—15% at the time—was 'discriminatory for the digital hailing sub-sector [because] no other sector has price controls', and that it presented a risk of 'disincentivizing investment in the ICT sector as a whole leading to tens of thousands of economic opportunities lost'.<sup>191</sup> Uber initially filed a petition in court, arguing the regulation is unconstitutional, but withdrew it less than two months later when it announced it would comply with the 18% cap.<sup>192</sup> This regulation is now in force. In addition to the cap on the companies' commission, it also protects drivers

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<sup>188</sup> *Id.* § 10(3).

<sup>189</sup> FAIRWORK INDIA, LABOUR STANDARDS IN THE PLATFORM ECONOMY: FAIRWORK INDIA RATINGS 2022, at 16, [https://fair.work/wp-content/uploads/sites/17/2022/12/221223\\_fairwork\\_india-report-2022\\_RZ\\_red\\_edits\\_10.pdf](https://fair.work/wp-content/uploads/sites/17/2022/12/221223_fairwork_india-report-2022_RZ_red_edits_10.pdf). See also Press Release, Telangana Gig and Platform Workers Union, Government must urgently implement Motor Vehicle Aggregator Guidelines 2020 (Oct. 9, 2022), <https://tgpwu.org/2022/10/09/press-release-telangana-government-must-urgently-implement-motor-vehicle-aggregator-guidelines-2020/>.

<sup>190</sup> National Transport and Safety Authority (Transport Network Companies, Owners, Drivers and Passengers) Regulations, 2022, at § 9(2)(g), *Legal Notices No. 120*, KENYA GAZETTE SUPPL. NO. 100 (June 20, 2022) (Kenya), available at <http://www.parliament.go.ke/node/17704> ('The commission which shall be paid by a transport network driver or a transport network driver or a transport network owner to the transport network company, which shall not exceed eighteen per cent of the total earnings of the trip'.) [hereinafter *Kenya NTSA 2022 Regulations*].

<sup>191</sup> See the letter of Uber and Bolt addressed the Cabinet Secretary of the Ministry of Transport, 29 November 2021

<sup>192</sup> *Kenya Pricing Structure*, UBER (Nov. 18, 2022), <https://www.uber.com/en-KE/blog/kenya-pricing-structure/>. See also Annie Njanja, *Uber withdraws petition to annul new ride-hailing regulations in Kenya*, TECHCRUNCH (Nov. 4, 2022), <https://techcrunch.com/2022/11/04/uber-withdraws-petition-to-annul-new-ride-hailing-regulations-in-kenya/>.

from arbitrary deactivation,<sup>193</sup> and it obligates companies to ensure that all vehicles have insurance, and to comply with data protection laws when processing drivers' and customers data.

The National Assembly of **Ecuador** has been debating two bills that would regulate work on digital platforms since 2021. These bills, which recognize the labour relationship, were supposed to be debated in the plenary for the second parliamentary hearing.<sup>194</sup> However, due to the president's dissolution of the National Assembly in May 2023, there was no further progress at the time of this writing.<sup>195</sup>

In November 2021, five members of Congress in **Peru** presented the Bill on Dependent and Independent Workers in Digital Platforms, aiming to grant labour rights to drivers and delivery workers.<sup>196</sup> In June 2023, the Labour Committee of the Congress presented its report to proceed.

In 2022, the Government of **Uruguay** presented a draft law to the Tripartite Superior Council that was aimed at regulating work through digital platforms for

<sup>193</sup> Transport network companies must provide drivers with adequate notice ahead of deactivation, and they must also provide them with a meaningful opportunity to challenge it. See *Kenya NTSA 2022 Regulations*, at § 15(1)(b-d).

<sup>194</sup> Fairwork Ecuador Ratings 2023, p. 15, [https://fair.work/wp-content/uploads/sites/17/2023/11/Fairwork\\_Ecuador\\_Report\\_2023-1.pdf](https://fair.work/wp-content/uploads/sites/17/2023/11/Fairwork_Ecuador_Report_2023-1.pdf).

<sup>195</sup> *Ecuador's president just invoked 'mutual death' to avoid impeachment. Here's why it matters*, ATLANTIC COUNCIL (May 17, 2024), <https://www.atlanticcouncil.org/blogs/new-atlanticist/ecuadors-president-just-invoked-mutual-death-to-avoid-impeachment-heres-why-it-matters/>.

<sup>196</sup> Proyecto de Ley No. 00842/2021-CR, LEY QUE RECONOCE BENEFICIOS LABORALES A LOS TRABAJADORES QUE REALIZAN EL SERVICIO DE REPARTO, MENSAJERÍA Y MOVILIDAD POR MEDIO DE PLATAFORMAS DIGITAL (Nov. 25, 2021), <https://wb2server.congreso.gob.pe/spley-portal/#/expediente/2021/18> (Peru); Proyecto de Ley No. 00667/2021-CR, LEY QUE REGULA ENTRE LAS PLATAFORMAS DIGITALES Y LAS PERSONAS QUE PRESTAN SERVICIO DE REPARTO O MOVILIDAD (Nov. 9, 2021), <https://wb2server.congreso.gob.pe/spley-portal/#/expediente/2021/667> (Peru); Proyecto de Ley No. 01536/2021-CR, LEY QUE ESTABLECE BENEFICIOS A LAS PERSONAS QUE PRESTAN SERVICIOS A TRAVÉS DE PLATAFORMAS DIGITALES (Mar. 28, 2022), <https://wb2server.congreso.gob.pe/spley-portal/#/expediente/2021/1536> (Peru).

the delivery of goods and passenger transport.<sup>197</sup> Although this law was tabled by the General Assembly in September 2022, there was no progress on it as of date of this writing.

In August 2023, the government of **Colombia** presented the second version of a comprehensive labour law reform to the Congress.<sup>198</sup> The initial proposal, from March 2023, included the regulation of work on digital platforms; however, it was archived following strong opposition from business interests. The new proposal follows a model similar to the law of **Chile**, allowing for the option of either a subordinate labour contract or an independent and autonomous one, while requiring the platform to inform the worker about type of relationship.<sup>199</sup> To improve the situation of workers, the draft also envisages setting up a Comprehensive Social Security System, which would guarantee social protection as a decent work standard. Under the proposed law, platforms would have to register with the Ministry of Labour, and report their number of active workers on a quarterly basis.<sup>200</sup> It also requires platforms to inform workers about automated monitoring and decision-making systems in a concise, transparent, and easily accessible manner, and limits the purposes of processing of personal data of workers.<sup>201</sup> Finally, the draft law also gives app-based workers a right to request a human review of any decisions made by automated systems.<sup>202</sup>

Also in August 2023, two deputies in **Paraguay** tabled

<sup>197</sup> Ministerio de Trabajo y Seguiridad Social, Proyecto que refiere a la tutela del trabajo desarrollado mediante plataformas digitales (Sept. 29, 2022), [https://medios.presidencia.gub.uy/legal/2022/proyectos/09/mtss\\_314.pdf](https://medios.presidencia.gub.uy/legal/2022/proyectos/09/mtss_314.pdf) (Uru).

<sup>198</sup> MERY LAURA PODERMO-OSPINA, INT'L LAWYERS ASSISTING WORKER NETWORK (ILAW), EN COLOMBIA ES NUEVAMENTE RADICADA LA REFORMA LABORAL "TRABAJO POR EL CAMBIO" ANTE EL CONGRESO DE LA REPÚBLICA (2023), <https://www.ilawnetwork.com/resource/en-colombia-es-nuevamente-radicada-la-reforma-laboral-trabajo-por-el-cambio-ante-el-congreso-de-la-republica/>.

<sup>199</sup> Proyecto de Ley No. 166/2023C, Por medio del cual se adopta una reforma laboral para el trabajo digno y decente en colombia, Gaceta No. 1152 de 2023 (Aug. 24, 2023), <https://www.camara.gov.co/reforma-laboral-1>.

<sup>200</sup> *Id.* art. 27.

<sup>201</sup> *Id.* art. 28.

<sup>202</sup> *Id.* art. 29.

a new bill that promises to protect the labour rights of app-based transport and delivery workers and to strengthen compliance with safety standards. The bill envisages that the Ministry of Labour would be responsible for a Register of Platform Workers, and that platforms would be required to have a physical presence in the country that serves as a contact point for workers and customers.<sup>203</sup>

In March 2024, **Brazil's** President Lula submitted to the Brazilian Congress a new law regulating the labour rights of digital platform workers. The law aims to strengthen the rights of ride-hailing app drivers, including rights to a minimum wage, social security contributions by the companies and maternity benefits. It does not recognize an employment relationship between drivers and reduces the right to collective bargaining to sectoral agreements. This draft bill was the result of a multi-year tripartite negotiation. The law is still being debated in the Brazilian Congress.<sup>204</sup>

In **South Asia**, workers and labour rights organizers turned to the state to provide for basic labour rights in the digital economy. A major breakthrough in this struggle came in July 2023, when the assembly of Indian state Rajasthan adopted **The Platform-Based Gig Workers (Registration and Welfare) Act, 2023**. Under the Act, platforms must register workers with the state's welfare board, as well as transfer between 1% and 2% of every transaction to this board, which manages the workers' social security fund.<sup>205</sup> The Act

<sup>203</sup> Press Release, Congreso Nacional del Paraguay Honorable Camara de Diputados, Iniciativa plantea regular funcionamiento de plataformas digitales de movilidad (Aug. 11, 2023), <https://www.diputados.gov.py/index.php/noticias/iniciativa-plant-ea-regular-funcionamiento-de-plataformas-digitales-de-mov-ilidad>.

<sup>204</sup> Brazil Ministry of Labor and Employment, *Bill proposal creates package of rights for app drivers* (March 11 2024), <https://www.gov.br/trabalho-e-emprego/pt-br/noticias-e-conteudo/2024/Marco/proposta-de-projeto-de-lei-cria-pacote-de-direitos-para-motoristas-de-aplicativos>; International Employment Lawyer, *Brazil's Lula proposes new rights for Uber and 99 drivers*, (March 5, 2024), <https://www.internationalemploymentlawyer.com/news/brazils-lula-proposes-new-rights-uber-and-99-drivers>.

<sup>205</sup> Rajasthan Platform Based Gig Workers (Registration and Welfare) Bill, 2023. art. 12 (India), <https://www.medianama.com/wp-content/uploads/2023/07/20-06-2023FinalDraftofP-BGWBill2023byLawDepartment.pdf>.

also requires the welfare board to engage with 'registered unions working with platform-based gig workers',<sup>206</sup> and sets up a grievance mechanism for workers who were wronged over payments and benefits.<sup>207</sup>

While the Act was celebrated as a victory of workers employed through digital platforms,<sup>208</sup> observers raised concerns over the risk that the platforms may attempt to avoid registration in Rajasthan, and continue operating from elsewhere without contributing to the fund.<sup>209</sup> Still, with its reliance on the state for the enforcement of the workers' right to social security, the Act appears as an alternative strategy in the efforts to gain labour rights protections for platform workers through their classification as employees.<sup>210</sup>

Finally, the Centre for Labour Research and Fairwork Foundation in **Pakistan** prepared draft legislation, the Islamabad Capital Delivery Platform Workers Bill. If adopted, it would provide digital platform workers with several new rights, including the right to employment contract in Urdu; the right to a minimum wage; bonuses for overtime, nightwork and work during inclement weather and holidays; the right to paid annual leave; the right to occupational health and safety protections; the right to protection from discrimination and harassment; and the right to freedom of association and collective bargaining.<sup>211</sup>

### 3.3.2 Litigation

Digital platform companies have been consistently resistant to comply with the requirements of transparency, and in particular data protection regulations concerning the use of algorithms to calculate the

<sup>206</sup> *Id.* art. 5(d).

<sup>207</sup> *Id.* art. 15.

<sup>208</sup> *A Social Security Board for Gig Workers: Rajasthan's Pioneering Step*, CIVILSDAILY (May 17, 2023), <https://www.civildaily.com/news/a-social-security-board-for-gig-workers/>.

<sup>209</sup> Sabrina Deway, *Big Problem, Small Wins: Social Security for Social Security for Rajasthan's Gig Workers*, INDIA FORUM (Aug. 22, 2023), <https://www.theindiaforum.in/public-policy/big-problems-small-wins>.

<sup>210</sup> See TAKEN FOR A RIDE (2021) & TAKEN FOR A RIDE 2 (2022), *supra* note 160.

<sup>211</sup> REGULATING THE PLATFORM ECONOMY IN PAKISTAN, CTR. LAB. RSCH (2022), <https://clr.org.pk/Islamabad-Capital-Territory-Platform-Workers-Protection-Bill-2022.pdf>.

price for service and, subsequently, workers' pay. With the support of trade unions, these workers have started a long struggle—relying on both organizing and litigation—to end these practices.

A group of **UK drivers** and a driver from **Portugal**, with the support of the App Drivers and Couriers Union (ADCU), petitioned a court in the Netherlands in their battle over transparency of algorithmic management practices of Uber and Ola.<sup>212</sup> In a landmark decision in April 2023, the Amsterdam Court of Appeal ordered both companies to provide information to workers on automated decision-making as it impacts work allocation and fares, including dynamic pay and pricing.<sup>213</sup> The court also held that driver profiles, which the companies compile by collecting workers' data, amount to personal data and must, therefore, be provided to the workers in accordance with the requirements of GDPR.<sup>214</sup>

Litigation has a long history in certain African jurisdictions. For example, in 2016, 34 drivers sued **Uber Kenya Ltd.**, arguing that the company breached their contracts with regard to payments.<sup>215</sup> The claimants' contracts provided for a base fare at a minimum of an equivalent of \$0.54 per kilometre, and specified a minimum total fare of \$2.71. However, in July 2016, Uber Kenya, without consulting its drivers, lowered the rate to \$0.35 per kilometre and \$1.98 per trip.<sup>216</sup> In their suit, the drivers argued that Uber violated their rights under Article 41 of the Constitution, according to which “[e]very person has the right to fair labour

<sup>212</sup> *Gig economy workers score historic digital rights victory against Uber and Ola Cab*, APP DRIVERS & COURIERS UNION (ADCU), <https://www.adcu.org.uk/news-posts/gig-economy-workers-score-historic-digital-rights-victory-against-uber-and-ola-cabs>.

<sup>213</sup> GHAMS 4 April 2023, ECLI:NL:GHAMS:2023:796, JAR 2023/137, m.nt. Jakimowicz (Drivers/Uber B.V.), at ¶ 3.21 (Neth.).

<sup>214</sup> *Id.* ¶ 3.15.

<sup>215</sup> *Kanuri Limited & 34 others v Uber Kenya Limited*, Civil Suit No. 356 of 2016, [2017] eKLR (H.K.C.) (Kenya). As of 2022, Uber Kenya was asking the court to require arbitration of this issue. See *The Citizen, Uber Pushes for Arbitration in Fares Row with drivers in Kenya*, (May 10, 2022), <https://www.thecitizen.co.tz/tanzania/news/business/uber-pushes-for-arbitration-in-fares-row-with-drivers-in-kenya-3810426>.

<sup>216</sup> *Id.* ¶ 12. Rates established through a historical currency calculator.

practices... and every worker has the right to fair remuneration.”<sup>217</sup>

Six years later, following the Kenyan government's adoption of the 2022 Regulation on Transport Network Companies, Uber announced it would cut its commission to 18%.<sup>218</sup> In May 2023, a group of 21 drivers appealed to the Transport Licensing Appeals Board (the Board) challenging the Board's decision to provide Uber BV with a license to operate in Nairobi. The workers claimed, among other things, that Uber charged a commission of 29%. On 19 May 2023, the Board granted the appeal.<sup>219</sup>

Another legal strategy for fighting for fair wages draws on antitrust laws. In 2022, three **California** rideshare drivers, supported by the non-profit advocacy organization Towards Justice, filed a class action lawsuit in state court seeking to stop Uber and Lyft from using price-fixing to set fares, which harms both the customers and the drivers.<sup>220</sup> In the complaint, the drivers alleged that the customers pay more and the drivers earn less than they would have if Uber and Lyft had not engaged in this price-fixing scheme.<sup>221</sup> In March 2024, the drivers requested a dismissal of the case,<sup>222</sup> after San Francisco Superior Court judge struck down the class action in 2023.<sup>223</sup>

<sup>217</sup> CONSTITUTION art. 41 (2010) (Kenya).

<sup>218</sup> Elizabeth Kivuva, *Uber cuts commissions to 18pc*, BUSINESS DAILY (Oct. 31, 2022), <https://www.businessdailyafrica.com/bd/corporate/companies/uber-cuts-commissions-to-18pc-4003712>.

<sup>219</sup> Transport Licensing Appeals Board, Appeal No. TLAB-E-008/2023 & TLAB-E-009/2023 (May 19, 2023) (Kenya).

<sup>220</sup> *Drivers Sue to Block Uber, Lyft's Illegal Price Fixing*, TOWARDS JUSTICE (June 21, 2022), <https://towardsjustice.org/litigation/drivers-sue-to-block-uber-lyfts-illegal-price-fixing/>.

<sup>221</sup> Class Action Complaint, at ¶¶ 40, 157, *Gill v. Uber Tech., Inc.*, No. 4:23-cv-00518 (Cal. Super. Ct. June 20, 2022), available at <https://towardsjustice.org/wp-content/uploads/2022/06/Uber-Lyft-Complaint.6.20.2022-3.pdf>.

<sup>222</sup> Notice of Dismissal, *Gill v. Uber Tech., Inc.*, (Cal. Super. Ct. March 13, 2024) available at <https://fingfx.thomsonreuters.com/gfx/legaldocs/klpydjyqvg/3-13-notice-dismissal.pdf>.

<sup>223</sup> Mike Scarcella, *Uber, Lyft drivers drop price-fixing lawsuit in California*, REUTERS (March 15, 2024), <https://www.reuters.com/legal/litigation/uber-lyft-drivers-drop-price-fixing-lawsuit-california-2024-03-15/>.

### 3.3.3 Organizing

In the Republic of **Georgia**, for example, concerns of low wages for app-based workers stem from that country's low legal minimum wage.<sup>224</sup> Furthermore, several ILAW members noted that mobilisation efforts by worker and trade unions to demand fair pay are hindered by worker misclassification. For example, in **Thailand**, “[p]latform workers can form an association, but they cannot bargain. What they can do is protest. The protests are about working conditions.”<sup>225</sup>

However, as of April 2024, the Thailand National Human Rights Commission found delivery riders are not ‘business partners’ but are actually employees of platform companies and are entitled to all the protections and rights under labour law. The Thai National Human Rights Commission has found an employee-employer relationship between platform companies and the delivery riders because of the control the platform company exerts on these riders.<sup>226</sup>

In 2021, workers in **Bangladesh**, who had organized to form the App-based Drivers Union of Bangladesh, protested against the fee of up to 25% of every fare taken by Uber.<sup>227</sup> Also in Bangladesh, the Dhaka Ride-Sharing Drivers Union presented multiple demands to the government, including (1) an end to all kinds of police harassment; (2) recognition of app-based riders and drivers as workers; (3) setting a company's commission at 10% instead of 25% for all types of rides; and (4) establishing parking space for ride-sharing vehicles in Dhaka, Chittagong and Sylhet.<sup>228</sup>

<sup>224</sup> ILAW Network, Regional Interview: Europe and Central Asia (May 29, 2023).

<sup>225</sup> ILAW Network, Regional Interview: Asia-Pacific (May 31, 2023).

<sup>226</sup> *Deliver Riders Work Rights*, BANGKOK POST (April 4, 2024), <https://www.bangkokpost.com/opinion/opinion/2771138/deliver-riders-work-rights>. (The Thai National Human Rights Commission is not able to directly enforce its decision and will require the Ministry of Digital Economy and Society and the Ministry of Labour to ensure the ruling is enforced and ensure the fair treatment of platform riders going forward.)

<sup>227</sup> *Thousands of Drivers Unionizing Uber in Bangladesh*, TWC NEWSLETTER (Apr. 12, 2022), <https://news.techworkerscoalition.org/2022/04/12/issue-6/>.

<sup>228</sup> *Riders go on 24-hour strike with 6-point demand*, DHAKA

Returning to **India**, app-based delivery workers organized over the non-transparent pricing system that renders their wages below the legal minimum. As a participant of the ILAW regional interview explained:

*We started this work by comparing the actual situation with the requirements of the Minimum Wages Act and realized that the platform practices are discriminatory. In surge pricing [the companies] would charge 400 rupees to the customer and give 100 rupees to the driver. That leaves 200 rupees in the [company's] account. For what? They are not contributing to petrol, providing any health or medical insurance. We look at the contradictions of these new forms of work with the labour law for which the working class fought very hard in India.*<sup>229</sup>

Finally, in **South Africa**<sup>230</sup> and **Nigeria**<sup>231</sup> trade unions continue to organize online strikes and protests against high commission rates, and concerns over occupational health and safety.

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TRIBUNE (Sept. 28, 2021), <https://www.dhakatribune.com/bangladesh/dhaka/259857/riders-go-on-24-hour-strike-with-6-point-demand>.

<sup>229</sup> ILAW Network, Regional Interview: South Asia (May 19, 2023).

<sup>230</sup> *Warning for Uber and Bolt users in South Africa this week*, BUSINESSTECH (July 17, 2023), <https://businesstech.co.za/news/lifestyle/704565/warning-for-uber-and-bolt-users-in-south-africa-this-week/>.

<sup>231</sup> See Ejike Kanife, *‘If we are not workers are we slaves?’ e-hailing drivers union knock Uber and Bolt*, TECHNEX24 (June 22, 2023), <https://technext24.com/2023/06/22/slaves-hailing-drivers-uber-and-bolt/>; Gbemileke Babatunde, *‘Uber and Bolt will Feel it’: e-Hailing Drivers Say as they Begin Week-long Strike*, TECHNEX24 (Apr. 19, 2021), <https://technext24.com/2021/04/19/uber-and-bolt-will-feel-it-e-hailing-drivers-say-as-they-begin-week-long-strike/>; Olumuyiwa Olowogboye, *Nigeria: Uber & Bolt drivers stage strike action over low pay, allegedly caused by companies ‘competing’ over low pricing*, BUS. & HUM. RTS. RES. CTR. (Apr. 19, 2021), <https://www.business-humanrights.org/en/latest-news/nigeria-uber-bolt-drivers-stage-strike-action-alleging-competition-over-low-pricing-is-reducing-workers-income/>.



### 3.3.4 Take-Away on Strategies Centred Around Fair Wages

Companies' abilities to bypass existing laws through algorithmic manipulation of pay requires multi-national, coordinated regulatory and enforcement responses.

The regulation should be aimed towards:

- a) a ban the arbitrariness of pay through methods such as surge pricing or nudges;
- b) a ban of transferring the work-related costs to the workers;
- c) severe restriction of companies' commission charges (in the case of digital platforms);
- d) regulation ensuring that waiting time is calculated as 'work' and thus included in the remuneration given to the rider/driver;
- e) requiring companies to implement predictive scheduling that includes adequate notice, as well as guarantees a number of minimum shifts and rests periods;<sup>232</sup> and
- f) requiring transparency if companies use algorithms or automated decision-making to determine wages and work allocation.<sup>233</sup>

While some of these principles have already been integrated into national laws through new and amended legislation, in addition to case law, the labour movement needs to pursue them more consistently, both through collective bargaining and by bringing cases to labour law inspectorates, licensing authorities, equal treatment bodies and courts.

<sup>232</sup> Predictive scheduling laws or fair work laws were adopted by some U.S. states. See GILMAN, *supra* note 167, at 50.

<sup>233</sup> See GHAMS 4 April 2023, ECLI:NL:GHAMS:2023:796, JAR 2023/137 m.nt. Jakimowicz (Drivers/Uber B.V.) (Neth.).

### 3.4. Working Conditions & Occupational Safety & Health in Digital Work

Workers on digital platforms also report concerns over occupation health and safety (OSH). Trade unions in Bangladesh,<sup>234</sup> India, Argentina,<sup>235</sup> and elsewhere have organized protests over the harassment and deaths of ride-hailing drivers and delivery riders. In many of these cases, the digital platform companies failed to provide adequate support, if they provided any at all, for the affected workers. The ability of workers to access justice in these cases was also hindered by the companies' lack of physical presence in the countries in question.<sup>236</sup>

ILAW members from Africa raised the issue of workers' mental health, particularly content moderators, which will be discussed in more detail below.<sup>237</sup> According to Leeds Index, in 2020 Latin America had the highest number of protests over health and safety issues.<sup>238</sup> Although this was partially a consequence of the COVID-19 pandemic, workers also raised concerns of inadequate OSH protection, as well as the lack of health insurance and paid sick leave.<sup>239</sup> Following the mobilization of digital platform workers across several countries in Latin America, the governments started working on legislation that promised to address some of the gaps.<sup>240</sup>

<sup>234</sup> TWC NEWSLETTER, *supra* note 222.

<sup>235</sup> Mariano Fernandez, *Repartidores de Pedidos Ya cortaron Panamericana pidiendo justicia por un asesinato*, QUEPASAWEB (Mar. 4, 2023), <https://www.quepasaweb.com.ar/repartidores-de-pedidos-ya-cortaron-panamericana-pidiendo-justicia-por-un-asesinato/>. See also ILAW Network, Regional Interview: Latin America (May 24, 2023) (in Spanish with translation)

<sup>236</sup> ILAW Network, Regional Interview: South Asia (June 23, 2023).

<sup>237</sup> ILAW Network, Regional Interview: Sub-Saharan Africa (May 8, 2023); see also *infra* notes ##-## and accompanying text.

<sup>238</sup> This region had more than 66% of all protests. BESSA ET AL., *supra* note 130, at 38.

<sup>239</sup> Mariana Fernández Massi, *Contested delivery platforms in Argentina: what do platform workers want?*, DIGIT-RESEARCH.ORG (July 20, 2022), [https://digit-research.org/blog\\_article/contested-delivery-platforms-in-argentina-what-do-platform-workers-want/](https://digit-research.org/blog_article/contested-delivery-platforms-in-argentina-what-do-platform-workers-want/).

<sup>240</sup> For more information on fair wage legislative initiatives in

### 3.4.1. Regulatory Responses

Governments in several countries have introduced legislation to better regulate platform companies. One of the first countries to regulate delivery work performed through digital platforms was **Uruguay**. Under Decree No. 119/017, adopted in 2017, delivery workers must hold a professional training certificate issued by the competent authority or authorized entity.<sup>241</sup>

In 2021 the **European Commission** presented its draft Platform Work Directive, which provides for protection of workers who are subjected to algorithmic management.<sup>242</sup> This Directive had three main components: (1) correct determination of employment status of platform workers;<sup>243</sup> (2) improved enforcement of personal data rights vis-a-vis automated monitoring and decision-making systems;<sup>244</sup> and (3) transparency of platform work.<sup>245</sup> Acknowledging the impact of automated systems on workers, the Directive also requires platforms to monitor their impact on working conditions, to track OSH risks these systems present, and to ensure that they do not put undue pressure on workers in any manner, which includes putting workers' physical and mental health at risk.<sup>246</sup>

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Latin America, see *supra* section 3.3.

<sup>241</sup> Decreto de establecese la obligación al los trabajadores que cumplan tareas utilizando motocicleta o vehículo bi-rodado con motor la aprobación de un curso de capacitación y el certificado de formación profesional expedido por la autoridad competente, Decreto N° 119/017, May 5, 2017, (Uru.).

<sup>242</sup> European Labour Authority, *EU proposes directive to protect the rights of platform workers*, EURES (Mar. 17, 2022), [https://eures.europa.eu/eu-proposes-directive-protect-rights-platform-workers-2022-03-17\\_en](https://eures.europa.eu/eu-proposes-directive-protect-rights-platform-workers-2022-03-17_en) (citing *Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work*, COM (2021) 762 final (Dec. 9, 2021)). Regarding the status of this directive as of this writing, while the European Council adopted this proposal on 12 June 2023, it had not, as of yet, become EU law, as it "still needed to be negotiated with the European Parliament." *EU Rules on Platform Work*, EUR. COUNCIL OF THE EU (Jan. 24, 2024), <https://www.consilium.europa.eu/en/policies/platform-work-eu/>.

<sup>243</sup> See *Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work*, COM (2021) 762 final (Dec. 9, 2021), at ch. II.

<sup>244</sup> *Id.* ch. III.

<sup>245</sup> *Id.* ch. IV.

<sup>246</sup> *Id.* art. 7.

In April 2024, the EU Parliament adopted the Platform Work Directive. The text of the Directive came after two years of negotiation and is a result of compromise language, where the language on employment status and algorithmic management could have been stronger. It is the first EU-wide regulation on platform work. At the time of this brief being published, the agreed text of the Directive is still to be formally adopted by the Council. Once that has been done, EU Member states will have two years to incorporate the provisions of the Directive into their national legislation.<sup>247</sup>

The focus on states' and companies' obligations to ensure worker OSH presents a potentially powerful strategy for the labour movement, complementing the legal battles over classification. Before Brexit, the Independent Workers' Union of Great Britain (IWGB) filed a lawsuit over inadequate transposition of EU's OSH Framework Directive<sup>248</sup> and PPE Directive.<sup>249</sup> In November 2020, the High Court of England and Wales agreed with the IWGB's argument: by excluding workers in the "gig economy" from the protections guaranteed by UK's Health and Safety at Work Act, the government failed to properly implement the EU OSH Directives.<sup>250</sup> The court ruled that UK's legislation that distinguishes between 'employees' and 'limb (b) workers,' the latter of whom work under a contract other than an employment contract, creates a gap in protection.<sup>251</sup>

Regulation integrating OSH, wage & hour laws and data protection in digitally-managed warehouses

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<sup>247</sup> European Parliament News, *Parliament adopts Platform Work Directive* (April 24, 2024), <https://www.europarl.europa.eu/news/en/press-room/20240419IPR20584/parliament-adopts-platform-work-directive>.

<sup>248</sup> Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, 1989 O.J. 183 (L 183), 1.

<sup>249</sup> Council Directive 89/656/EEC of 30 November 1989 on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace (third individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC), 1989 O.J. (L. 393), 18.

<sup>250</sup> *IWUGB v. SSWP and Others* [2020] EWHC 3050 (Admin), Case No. CO/1887/2020 (Nov. 13, 2020) (Eng.).

<sup>251</sup> *Id.* ¶ 137.

were proposed in **California** in 2021 and 2022. Assembly Bill 701 introduced a requirement of transparency over performance quotas<sup>252</sup> and mandatory compliance with health and safety regulations.<sup>253</sup> It was signed into law on 22 September 2021.<sup>254</sup> Meanwhile, in January 2022, a member of the California State Assembly proposed the Workplace Technology Accountability Act (AB 1651), which, among other things, would require employers to inform workers about data collected to assist employment-related decision-making, including any associated benchmarks.<sup>255</sup> As of the time of this writing, there has been no further action on this second proposal.<sup>256</sup>

### 3.4.2 Litigation

One of the new forms of digital labour that engages tens of thousands of workers, especially in low to middle income countries, is content moderation. To reduce costs and evade liability, companies routinely outsource digital labour to intermediaries (outsourcing agencies)<sup>257</sup> that hire workers under precarious contracts and offer them low wages.<sup>258</sup> Content moderation is no exception. What makes it stand out among the other forms of outsourced digital labour, however, is the impact on workers' mental health.

*The Cleaners*, a 2018 documentary, exposed the working conditions of content moderators in **Philippines**. It showed how prolonged exposure to images of violence, predatory behaviour, and pornography

<sup>252</sup> AB-701 §§ 2100-2108, 2021-2022 Reg. Sess. (Cal. 2021).

<sup>253</sup> *Id.*

<sup>254</sup> See the events leading to the passage of this legislation at [https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill\\_id=202120220AB701](https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=202120220AB701).

<sup>255</sup> AB-1651 § 1530(a)(2), 2021-2022 Reg. Sess. (Cal. 2022).

<sup>256</sup> See the current status of this bill at [https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill\\_id=202120220AB1651](https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=202120220AB1651).

<sup>257</sup> Use of outsourcing agencies is standard when employing a "business process outsourcing" (BPO) model.

<sup>258</sup> Mark Graham & Mohammad Amir-Anwar, *Digital Labor, in DIGITAL GEOGRAPHIES* (Ash, Ktichin & Leszczynski eds., 2018), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2991099](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2991099); Clément Le Ludec, Maxime Cornet, & Antonio A Casilli, *The problem with annotation. Human labour and outsourcing between France and Madagascar*, 10 *BIG DATA & SOC.* (2023), <https://doi.org/10.1177/20539517231188723>.

leaves the outsourced workers with untreated trauma.<sup>259</sup> Allegations over severe mental injury and trauma suffered by content moderators in the **US** and **Ireland**, as well as other European countries, led to legal complaints brought by workers against "Big Tech" companies.<sup>260</sup> At the time of writing, these cases had either resulted in settlements or were still pending.<sup>261</sup>

In 2019, UK-based non-profit Foxglove started to support content moderators of Facebook, WhatsApp, Instagram and TikTok, helping them bring legal cases against big tech companies and their intermediaries in several jurisdictions, including those in low to middle income countries.<sup>262</sup>

In **Kenya**, Nzili and Sumbi Advocates, together with Foxglove, brought cases where content moderators argued labour law and constitutional law violations. In one case, they represented Daniel Motaung, a former content moderator of Facebook (Meta). On May 9, 2022, Motaung filed a case against Samasource Ken-

<sup>259</sup> Bryan Bishop, *The Cleaners is a riveting documentary about how social media might be ruining the world*, *THE VERGE* (Jan. 21, 2018), <https://www.theverge.com/2018/1/21/16916380/sundance-2018-the-cleaners-movie-review-facebook-google-twitter>.

<sup>260</sup> Laura Llach, *'It scars you for life': Workers sue Meta claiming viewing brutal videos caused psychological trauma*, *EURONEWS* (Oct. 19, 2023), <https://www.euronews.com/2023/10/19/it-scars-you-for-life-workers-sue-meta-claiming-viewing-brutal-videos-caused-psychological>.

<sup>261</sup> See Anna Drootin, *"Community Guidelines": The Legal Implications of Workplace Conditions for Internet Content Moderators*, 90 *FORDHAM L. REV.* 1197 (2022). In *Soto v Microsoft*, two members of Microsoft Online Safety Team brought a case against their employer over a failure to inform them about the harmful effect of the work through which they developed post-traumatic stress disorder (PTSD). See *id.* According to available records, the case was settled in 2019. *Id.* at 1208 (citing Order for Dismissal with Prejudice, *Soto v. Microsoft Corp.*, No. 16-2-31049-4 (Wash. Super. Ct. Feb. 15, 2019)). A class action case brought by a Silicon Valley-based Facebook content moderator in 2018 also ended in settlement in 2021. *Id.* at 1209-09. In her summary of the settlement, Anna Drootin noted that "Facebook agreed that it will require its U.S. vendors to retain licensed and certified clinicians who are experienced in mental health counselling, are familiar with symptoms of PTSD, and will be available during every shift to speak with workers." *Id.* at 1209.

<sup>262</sup> *Content moderators: we want to speak to you!*, *FOXGLOVE*, <https://www.foxglove.org.uk/content-moderators/>.

ya, Meta Inc., and Meta Ireland Ltd in the Employment and Labour Relations Court (ELRC) in Nairobi.<sup>263</sup> The allegations against the companies include misleading recruitment<sup>264</sup> that amounted to human trafficking and forced labour, unfair labour relations, union busting and a failure to provide adequate psychological support.<sup>265</sup>



Mercy Mutemi in a virtual pre-trial consultation with a judge and Meta's legal counsel. Credit: Foxglove

Motaung argued that the working environment created by Meta and Sama was extraordinarily harmful. It involved intense surveillance, together with the enforcement of stringent performance metrics to meet volume and accuracy goals, which created extreme time pressure and high psychological stress.<sup>266</sup> Fur-

<sup>263</sup> See Daniel Motaung launches world-first case to force Facebook to finally put content moderators' health and well-being ahead of cash, FOXGLOVE (May 10, 2022), <https://www.foxglove.org.uk/2022/05/10/motaung-facebook-world-first/>. This lawsuit followed an expose published in February 2022 by the American newsmagazine *Time* that featured accounts, by Motaung and others, of the conditions at Sama. See Billy Perrigo, *Facebook Faces New Lawsuit Alleging Human Trafficking and Union-Busting in Kenya*, TIME (May 11, 2022), <https://time.com/6175026/facebook-sama-kenya-lawsuit/> [hereinafter Perrigo, *New Lawsuit*]; Billy Perrigo, *Inside Facebook's African Sweatshop*, TIME (Feb. 17, 2022), <https://time.com/6147458/facebook-africa-content-moderation-employee-treatment/> [hereinafter Perrigo, *African Sweatshop*].

<sup>264</sup> This is due to a failure of the recruiters to specify that the involves moderating content on Facebook. Constitutional Petition ¶ 49, Daniel Motaung v. Sama & Meta, petition no. E071 of 2022 (Emp. & Lab. Relations Ct., May 9, 2022) (Kenya) [hereinafter Motaung 2022 Constitutional Petition].

<sup>265</sup> *Id.* ¶ 60.a.-d.

<sup>266</sup> *Id.* ¶ 56.

thermore, Motaung argued, the combination of these factors posed a risk to workers' mental health,<sup>267</sup> of which Meta and Sama were aware. Despite this, they failed to take 'adequate steps to guarantee the mental health and well-being of Facebook content moderators and to invest in programs to prevent, mitigate and treat the harm of content moderation work on these moderators.'<sup>268</sup> Motaung also challenged the necessity of constant surveillance and performance pressure, which added to the stress content moderators are under. Furthermore, he claimed that the sole or real purpose of the 'extreme granularity' of the content these workers had to label was not to keep the platform clean of harmful material, but to train the algorithms.<sup>269</sup>

Another critical detail of Motaung's complaint against Meta and Sama involved their practice of targeting workers from disadvantaged backgrounds, who were often migrant workers from outside Kenya.<sup>270</sup> Despite Sama's promise that its business model was 'designed to minimize inequities',<sup>271</sup> Motaung's petition alleges that workers find themselves trapped in harmful jobs, the nature of which only becomes clear once they sign the employment contract and begin the work.<sup>272</sup> According to Motaung, he and his colleagues were coerced by a threat of penalty to accept the unlawful circumstances they found themselves in.<sup>273</sup> Moreover, not only were the wages they received not adequate to meet the requirements of the cost of living in Nairobi, but the basic pay varied from month to month.<sup>274</sup> Instead of delivering the social justice they promised, the companies exploited the vulnerabilities of migrant workers.<sup>275</sup> Meta attempted to persuade the court to strike out the case against it for

<sup>267</sup> *Id.* ¶ 50.

<sup>268</sup> *Id.* ¶ 57.

<sup>269</sup> *Id.* ¶¶ 199-200.

<sup>270</sup> Perrigo, *New Lawsuit*, *supra* note 256.

<sup>271</sup> *Sama by the Numbers*, SAMA BLOG (Feb. 11, 2022), <https://www.sama.com/blog/building-an-ethical-supply-chain/>.

<sup>272</sup> Motaung 2022 Constitutional Petition, *supra* note 257, ¶ 114.

<sup>273</sup> *Id.* ¶ 123.

<sup>274</sup> *Id.* ¶¶ 141-53.

<sup>275</sup> *Id.* ¶¶ 115-6.

a lack of jurisdiction, which the court rejected.<sup>276</sup> The case was still pending at the time of this writing.

In June 2023, Kenya's Employment and Labour Relations Court (ELRC) found Meta to be the primary employer of 43 content moderators and, therefore, liable in those workers' claims of unfair dismissals.<sup>277</sup> In this complex case, *Arendse and Others v. Meta and Others (Arendse)*, the applicants asked the court to, among other things, order the employer to provide proper medical, psychiatric, and psychological care for the workers.<sup>278</sup> The *Arendse* court clarified that Meta, together with their agents, Sama and Majorel,<sup>279</sup> 'are strictly bound by the ... statutory provisions for the occupational safety and health of the content moderators'.<sup>280</sup>

Upon examining the evidence presented, the *Arendse* court concluded that the work of content moderators is 'inherently hazardous with likely serious and adverse mental health impact'.<sup>281</sup> The court ordered Meta and Sama 'to provide for proper medical, psychiatric and psychological care for ... Facebook Content Moderators in place of 'wellness counselling''.<sup>282</sup> The court also ruled that the Facebook content moderators should not be left without remedy for the violation of their rights under the 2007 Occupational Safety and Health Act.<sup>283</sup>

Furthermore, the *Arendse* court ordered several

<sup>276</sup> For details of Meta's strategy to avoid liability and accountability, see *infra* section 4.1.

<sup>277</sup> The court also ruled that Meta was the principal employer of the outsourced digital labour. For details, see *infra* section 3.5.

<sup>278</sup> *Arendse & 42 others v. Meta Platforms, Inc. & 3 others*, [2023] KEELRC 1398, at ¶ 1.p. (KLR) (Kenya).

<sup>279</sup> Meta engaged Majorel, an outsourcing company in Kenya, to recruit and manage content moderators after Sama stopped providing these services in February 2023. Abraham Augustine, *Court stops Meta, Sama from firing 260 Kenyan content moderators*, TECHCABAL (Mar. 23, 2023), <https://techcabal.com/2023/03/23/court-stops-meta-sama/>.

<sup>280</sup> The court was referring specifically to the 2007 Occupational Safety and Health Act. *Arendse*, [2023] KEELRC 1398, at ¶ 37 (Kenya).

<sup>281</sup> *Id.* ¶ 38.

<sup>282</sup> *Id.* ¶ 50.g.

<sup>283</sup> This holding applies specifically to those content moderators who were the applicants in the case. *Id.* ¶ 41.

stakeholders, including the Ministry of Labour, Social Security and Services, the Ministry of Health, and trade unions to review the status of the law and policy for the protection of employees' occupational health and safety in the digital work sector and report to the court.<sup>284</sup>

Although the case originated in March 2023 when a small group of 43 filed this petition, by April 2023, a large group of additional content moderators joined the lawsuit, bringing the total to 184.<sup>285</sup> They informed the court that Meta and Sama 'have embarked on an unlawful and unfair termination of their employment' and that the sole reason for this was the companies' retaliation for Dainel Motaung's May 2022 constitutional petition.<sup>286</sup>

In response to the petition, the ELRC issued restraining orders against Meta over the redundancy notices, pending hearing and determination of the application.<sup>287</sup> Meta attempted to challenge the petition and the ruling of the ELRC on the ground that courts in Kenya lack jurisdiction to hear the case.<sup>288</sup> Several months later, on August 23, 2023, the ELRC gave Meta and the content moderators 21 days to resolve their dispute out of court, which was unsuccessful.<sup>289</sup>

As this section has discussed, digital platform companies arrange for workers in developing countries to generate, annotate, and enrich data, often without offering key protections for these workers' labour

<sup>284</sup> *Id.* ¶¶ 37, 42.

<sup>285</sup> The court granted the order for joinder of petitions on 13 April. *Id.* ¶ 1.

<sup>286</sup> *Id.* ¶¶ 3-4.

<sup>287</sup> After issuing a ruling on certain preliminary relief in this case in March 2023, preliminary objection was dismissed by Judge Nderi on April 20, 2023. See *Meta Platforms, Inc. & another v. Samasource Kenya EPZ Limited t/a Sama & 185 others*, [2023] KECA 999, at ¶¶ 5-7 (KLR) (Kenya).

<sup>288</sup> For more details on the corporate strategy to evade liability, see *infra* section 4.1.

<sup>289</sup> Reuters, *Kenyan Court Gives Meta and Sacked Moderators 21 Days to Pursue Settlement*, VOICE OF AMERICA (Aug. 23, 2023), <https://www.voanews.com/a/kenyan-court-gives-meta-and-sacked-moderators-21-days-to-pursue-settlement-/7237632.html>.

rights.<sup>290</sup> The cases of Facebook content moderators expose an employment model in which hazardous digital work is outsourced to companies that rely on exploiting workers who are in precarious situations.<sup>291</sup> At the same time, these cases provide an opportunity for workers to reveal the harm caused by the digital infrastructure on which this type of employment depends, thereby allowing them to hold the transnational companies—as principal employers hiding behind outsourcing—to account.<sup>292</sup>

### 3.4.3 Take-away on litigation to ensure adequate working conditions

Occupational safety and health is inherently linked to labour practices, which—as illustrated by the cases of Facebook content moderators—are likely to deteriorate in the process of technology-enabled outsourcing. The cases show that workers not only have the power to expose the hazards that are exacerbated by digitalization and algorithmic management, but also to seek redress.

Labour lawyers, unions, and workers should consider the following when advocating for and litigating occupational health and safety for workers:

- a) Employment status;
- b) Constitutional prohibition of forced labour, in addition to national, state-level, and local occupational health and safety laws that—despite the need to be improved to specifically ensure the protection of those undertaking digital work—protect the rights of content moderators (the case of Kenya, in particular, could be used as a model);<sup>293</sup>
- c) Independent technical experts who can

provide supporting affidavits to petitions, not only regarding a particular company's algorithms, but also on psychosocial risks of the work causing harm to the claimants;

- d) Unionization of claimants;
- e) Advocacy and legislative reform to include content moderation in the list of hazardous jobs in OSH regulations; and
- f) Advocacy for legislative reform that includes expert-level advising on creating provisions and resources that offer stronger protections for workers' psychosocial health and well-being.

## 3.5 Challenging Outsourcing and Subcontracting

Outsourcing some or all operations to entities in low and middle-income countries is a corporate strategy that results in violations of labour rights. Although this practice is not new and has been documented in call centre work,<sup>294</sup> digitalisation has significantly simplified management of labour supply chain across industries.<sup>295</sup> In particular, it has allowed millions of workers in low to middle income countries to be employed in the outsourced service sector, and countries such as India and the Philippines are two of the world's top outsourcing destinations.<sup>296</sup> Geographers Mohammad Amir Anwar and Mark Graham note that the business practice outsourcing (BPO) industry has started to grow in various parts of Africa, offering customer service, customer retention, sales, data management, consultancy, and other similar opera-

<sup>290</sup> Le Ludec et al., *supra* note 252.

<sup>291</sup> *Arendse & 42 others v. Meta Platforms, Inc. & 3 others*, [2023] KEELRC 1398, at ¶ 1.j. (KLR) (Kenya).

<sup>292</sup> The owners of the digital workspace necessary for content moderation were the two Meta entities. *Id.* ¶ 31.

<sup>293</sup> *Id.* ¶ 37.

<sup>294</sup> ILAW Network, Regional Interview: Sub-Saharan Africa (May 8, 2023); Beatrice Appay, *Economic Concentration and the Externalization of Labour*, 19 *ECON. & INDUS. DEMOCRACY* 161 (1998).

<sup>295</sup> For the impact on the supply chain in the garment industry, see López et al., *supra* note 12.

<sup>296</sup> Kyle Edriel Tomagan, *Outsourcing in Asia: Philippines vs. India*, *WORKSPACE IN ASIA* (Feb. 25, 2019), <https://workspacein-asia.kmc.solutions/outsourcing-in-asia-philippines-vs-india>.

tions.<sup>297</sup> Many of these services are mediated through digital platforms.<sup>298</sup>

Researchers Clément Le Ludec, Maxime Corner, and Antonio Casilli examined the supply chain of French-based companies that outsource their data annotation work to Madagascar; one company provided catering services with automated payment terminals, and the other developed an image recognition software for shoplifting.<sup>299</sup> These researchers observed similar elements of the outsourced data production to those identified by the petitioners in the content moderator cases against Meta in Kenya. The French companies had a direct relationship with their suppliers of data work in Madagascar, through whom they were able to control the workers, through both direct communication and direct supervision. In both case studies, the data workers were deeply embedded in the operation of the French companies. Despite performing skilled work of developing AI-based solutions, they were paid very low wages, estimated at \$0.41 to \$1.70 per hour.<sup>300</sup>

### 3.5.1 Litigation and liability of companies using technology in outsourced operation

As discussed in the prior section, in June 2023, Kenya's Employment and Labour Relations Court (ELRC) issued a landmark ruling in the *Arendse* case. This was in response to a petition of 43 Facebook content moderators who faced redundancy notices. The court was asked to determine whether Meta Platforms should be considered an employer of content moderators who were working under contract for Samasource Kenya.

In *Arendse*, the court held that because the work of the content moderators 'actually belongs to the 1st and 2nd respondents [Meta Inc. and Meta Ireland Ltd.]' and that it was 'undertaken through the 1st and 2nd respondents' digital resources and digital work-

<sup>297</sup> MOHAMMAD AMIR ANWAR & MARK GRAHAM, *THE DIGITAL CONTINENT: PLACING AFRICA IN PLANETARY NETWORKS OF WORK* 25 (2022).

<sup>298</sup> Mohammad Amir Anwar & Mark Graham, *Digital labour at economic margins: African workers and the global information economy*, 47 REV. AFR. POL. ECON., no. 163 (2020): 95.

<sup>299</sup> Le Ludec et al., *supra* note 252.

<sup>300</sup> *Id.*, at 10.

space as per the 1st and 2nd respondents' digitally provided operational and policy requirements.<sup>301</sup> The court recognized that the content moderators carried out the work through the SRT platform, which was 'a proprietary system designed' by Meta.<sup>302</sup> The performance of the content moderators was also monitored by the SRT platform, and—as the ELRC noted—it was reflected on their pay slips.<sup>303</sup> In other words, the court found that content moderation work was carried out for Meta, which had control over both the operation and the performance management.<sup>304</sup> Meta announced it planned to appeal the decision.<sup>305</sup> The ELRC's 2023 *Arendse* decision sets the parameters for establishing the liability of companies relying on the use of technology when outsourcing their operation. In it, the ELRC clarified the relationship between the intermediary, which in this case was Sama, and the principal, Meta. Sama was responsible for recruitment, induction, and training of the workers, and provided a physical workspace and human resource management.<sup>306</sup> But the relationship between Meta and Sama was different from a 'typical outsourcing contract', in which the latter was engaged to provide a workforce. Instead, the work was done digitally and was integrated into the operation of Meta. The court therefore concluded that Meta Inc. and Meta Ireland Ltd. were the principal employers of the content moderators, and that Sama and Majorel Kenya (Meta's eventual replacement for Sama) were Meta's agents.<sup>307</sup>

### 3.5.2 Takeaway on challenging digital outsourcing

Two important components for the future liti-

<sup>301</sup> *Arendse & 42 others v. Meta Platforms, Inc. & 3 others*, [2023] KEELRC 1398, at ¶ 29. (KLR) (Kenya)

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> Annie Njanja, *Meta to appeal court ruling declaring content moderators as its employees*, TECHCRUNCH (June 9, 2023), <https://techcrunch.com/2023/06/09/meta-to-appeal-court-ruling-declaring-content-moderatos-as-its-employees/>.

<sup>306</sup> *Arendse*, [2023] KEELRC 1398, at ¶ 31 (Kenya).

<sup>307</sup> *Id.*

gation of workers' rights when big transnational companies rely on intermediaries are:

- a) Establishing that the ownership of the digital space where the work is carried out is with the principal company rather than the intermediary by showing (1) that the principal is in control of the systems used, the data and information created, and the performance metrics of the workers, whereas (2) the intermediary is only charged with finding workers and having a physical space for that work; and
- b) Presenting evidence on principal's data-driven performance management systems showing that the principal has control over the operation.

Furthermore, when organizing workers employed through digital outsourcing, it is important for trade unions to understand their socio-economic situation, migration status, and vulnerabilities and have adequate resources to support them, including financially.

### 3.6 Digital/Tacit Collusion

In the struggles over "dynamic pricing" used by platforms and its negative impact on workers' right to fair wages, the labour movement could further explore the use of competition law to challenge algorithmically determined wages. In the *Eturas* case, decided in 2016, the Court of Justice of the European Union ruled that businesses that use third party algorithms to set prices must ensure that online communication channels are monitored to avoid collusion.<sup>308</sup> In other

<sup>308</sup> Case C-74/14, *Eturas et al. v. Lietuvos Respublikos konkurencijos taryba* (the Competition Council of the Republic of Lithuania, 'the Competition Council') (Jan. 21, 2016), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=173680&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=523288>. See also FRESHFIELDS BRUCKHOUSE DERINGER, *PRICING ALGORITHMS: THE DIGITAL COLLUSION SCENARIOS* (2017), <https://www.freshfields.com/globalassets/our-thinking/campaigns/digital/mediainternet/pdf/freshfields-digital---pricing-algorithms---the-digital-collusion-scenarios.pdf>; OECD, *ALGORITHMS AND COLLUSION: COMPETITION*

jurisdictions, price fixing, bid-rigging, and market allocation are prohibited under antitrust law also, which presents a significant opportunity for labour movement challenges to algorithmic pay practices.<sup>309</sup>

A 2022 Harvard Business School paper called for dynamic pricing systems to be closely regulated due to the risk of exploitation and tacit collusion.<sup>310</sup> The authors, Alexander MacKay and Samuel Weinstein, noted that the challenge of this strategy is to argue breaches of anti-trust laws in cases when companies do not explicitly collude, because tacit collusion is likely to be out of the reach of anti-trust law. They propose that the solution might be price regulation.<sup>311</sup> When it comes to labour law, price of labour is already regulated by minimum wage laws, wage and hour, and fair wages standards. However, as discussed in section 2.3. of this brief, companies are capable of bypassing these laws by frequent and non-transparent changes in the algorithmic determination of pay. In the world of work, MacKay and Weinstein's proposal that regulation should eliminate the frequency when pay or prices can change and ban companies from incorporating rivals' prices in their algorithms, would amount to a modest reform, but one that may prove capable to restrict the most unhinged arbitrariness of pay.

A UK-based non-profit, Worker Info Exchange (WIE), successfully used MacKay and Weinstein's collusion theory to argue against the use of automated decision-making by Uber and Ola Cabs in a case before the Amsterdam Court of Appeal in 2023.<sup>312</sup> The court ordered Uber to disclose how it uses automated deci-

POLICY IN THE DIGITAL AGE (2017), <https://web.archive.oecd.org/2019-02-17/449397-Algorithms-and-collusion-competition-policy-in-the-digital-age.pdf>.

<sup>309</sup> See Alexander J. MacKay & Samuel N. Weinstein, *Dynamic Pricing Algorithms, Consumer Harm, and Regulatory Response* (Harv. Bus. Sch. Working Paper 22-050, 2021), [https://www.hbs.edu/ris/Publication%20Files/22-050\\_ec28aaca-2b94-477f-84e6-e8b58428ba43.pdf](https://www.hbs.edu/ris/Publication%20Files/22-050_ec28aaca-2b94-477f-84e6-e8b58428ba43.pdf).

<sup>310</sup> See *id.*

<sup>311</sup> *Id.* at 33-34.

<sup>312</sup> *Historic digital rights win for WIE and the ADCU over Uber and Ola at Amsterdam Court of Appeal*, WORKER INFO. EXCH. (WIE) (Apr. 4, 2023), <https://www.workerinfoexchange.org/post/historic-digital-rights-win-for-wie-and-the-adcu-over-uber-and-ola-at-amsterdam-court-of-appeal>.



sion-making and worker profiling to allocate work.<sup>313</sup>

In some countries, competition authorities have already raised concerns that the use of algorithmic pricing may be to the detriment of competition.<sup>314</sup> One of the first examples of a judicial decision in this area is a 2022 landmark ruling of Tokyo District Court, which sided with a restaurant chain against an operator of Tabelog, **Japan's** largest restaurant review platform. The court held that algorithm altered the scores of chain restaurants in such way that it damaged their sales. It also ordered the review platform to disclose information used by the algorithm to determine the restaurants' scoring.<sup>315</sup> Ahead of this ruling, several restaurants had voiced concerns over opaque rating methods of the review platform, which held a dominant position on the market.<sup>316</sup> Although it does not directly involve workers' rights, this case may provide guidance for labour lawyers litigating cases of algorithmic discrimination, particularly when it comes to requesting disclosure of scoring or profiling during the proceedings.

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<sup>313</sup> *Id.*

<sup>314</sup> Michele Giannino, *Webtaxi: The Luxembourg Competition Authority exempts an algorithmic price-fixing arrangement on efficiency grounds*, LEXXION (July 10, 2018), <https://www.lexxion.eu/en/coreblogpost/webtaxi-the-luxembourg-competition-authority-exempts-an-algorithmic-price-fixing-arrangement-on-efficiency-grounds/>.

<sup>315</sup> *Japan May Rule On Making Big Tech Open Up On Algorithms*, COMPETITION POL'Y INT'L (CPI) (July 4, 2022), [https://pymnts.com/cpi\\_posts/japan-may-rule-on-making-big-tech-open-up-on-algorithms/](https://pymnts.com/cpi_posts/japan-may-rule-on-making-big-tech-open-up-on-algorithms/).

<sup>316</sup> *Operator of major Japan restaurant review site ordered to pay damages*, KYODO NEWS (June 16, 2022), <https://english.kyodonews.net/news/2022/06/bd976fd11539-operator-of-major-japan-restaurant-review-site-ordered-to-pay-damages.html>.

# 4. Barriers to Organising and Litigation

Big tech companies and digital platforms continue to evade accountability for labour rights violations by claiming to be outside of the territorial jurisdiction of national courts.<sup>317</sup> This strategy is reaching its limits, however, as the courts in several countries establish intrinsic links and direct involvement of these companies in operations in Italy, Kenya, Spain, South Korea, United Kingdom, or Uruguay.

## 4.1 Contesting Jurisdiction

Plaintiffs' attorneys must carefully consider both territorial jurisdiction and subject matter jurisdiction. The examples in this section illustrate strategies for responding to jurisdictional challenges.

### 4.1.1 Establishing territorial jurisdiction

Landmark rulings in [Kenya](#) featured jurisdictional challenges by the defendants. In a 2021 opinion, the High Court in Nairobi rejected an application of Uber to quash a petition on the grounds of lack of territorial jurisdiction, and held that both Uber Kenya and Uber B.V. could be sued in Kenya.<sup>318</sup> Then, in 2023, the Kenyan Employment and Labour Relations Court (ELRC) reached a similar decision in the case of Facebook moderators.

As discussed in the prior section, former Facebook content moderator Daniel Motaung sued Meta and Sama in the ELRC in 2022.<sup>319</sup> Meta and Sama filed a response to Motaung's petition on May 30, 2022, which was ruled on by the ELRC on February 6,

<sup>317</sup> Kanuri Limited & 34 others v Uber Kenya Limited, Civil Suit No. 356 of 2016, [2017] eKLR, at ¶ 26 (H.K.C.) (Kenya).

<sup>318</sup> Kanuri Limited & 34 others v Uber Kenya Limited, [2021] KEHC 138 (KLR) (Commercial and Tax) (7 October 2021) (Ruling) (H.K.C.) (Kenya).

<sup>319</sup> For a detailed account of the plaintiff's complaint in the *Motaung* case, see *supra* notes 256-269 and accompanying text.

2023.<sup>320</sup> Meta and Sama used two main arguments to attempt to have the claim dismissed. First, they submitted that Meta had no contractual relationship with Motaung.<sup>321</sup> Second, they claimed that the court in Kenya had no jurisdiction over Meta, as they were 'foreign corporations neither resident, domiciled nor trading in Kenya'.<sup>322</sup>

In its February 2023 decision, the ELRC rejected the company's arguments, and ruled that it would be "inopportune" to strike out the case.<sup>323</sup> The court held that the Meta entities were, in fact Daniel Motaung's employers, as they 'supervised and assigned tasks and carried on business in Kenya'.<sup>324</sup> The case will therefore proceed to a hearing.

Meanwhile, the ELRC issued orders in March and April 2023 in the *Arendse* case as well.<sup>325</sup> There, in response to the petition of 184 content moderators, in which the court rejected Meta's argument over the lack of territorial jurisdiction, Meta Inc. and Meta Ireland Ltd. appealed the ELRC *Arendse* decision to the Court of Appeal in Nairobi in May 2023,<sup>326</sup> arguing that the ELRC should have "consider[ed] the nature and extent of liability with regard to the alleged breaches and violations of the Constitution arising and or related to employment and Labour relations in Kenya".<sup>327</sup> In its

<sup>320</sup> *Motaung v. Samasource and 2 others*, [2023] KEELRC 320 (KLR) (Kenya).

<sup>321</sup> *Id.* ¶ 16 (citing the May 30, 2022 motion by Meta Platforms, Inc. and Meta Platforms Ireland, Ltd.).

<sup>322</sup> *Id.* ¶ 2(i).

<sup>323</sup> *Id.* ¶ 121.

<sup>324</sup> *Id.* ¶ 89.

<sup>325</sup> For background information on the *Arendse* case, see *supra* notes 271-282 and 295-300 and accompanying text.

<sup>326</sup> *Meta Platforms, Inc. & another v. Samasource Kenya EPZ Limited t/a Sama & 185 others*, [2023] KECA 999, at ¶¶ 5-7 (KLR) (Kenya).

<sup>327</sup> *Id.* at ¶ 7 (citing the April 20, 2023 ruling by Judge Nderi dis-

decision, dated July 28, 2023, the Court of Appeal dismissed the jurisdictional appeal, stating that whether or not Meta was operating in Kenya is a matter of evidence that will be assessed in the main appeal.<sup>328</sup>

#### 4.1.2 Establishing subject matter jurisdiction

Another corporate strategy to bypass regulation is to challenge the court's authority to hear the case. For example, in response to a complaint of a Bolt driver in Kenya over a breach of his data rights, the company attempted to challenge the jurisdiction of the Transport Licensing Appeals Board Tribunal (TLAB).<sup>329</sup> TLAB, however, ruled that if the driver was aggrieved by a decision of the Licensing Authority, under which Bolt operates in Kenya, TLAB has the jurisdiction to hear and determine the matter.<sup>330</sup> It then held in favour of the driver, who had been deactivated from the platform after complaining about a data breach that exposed him to fraudsters,<sup>331</sup> stating that "[i]t is an inherent duty upon any Transport Network Operator to put in place systems and mechanisms to ensure the security, protection and privacy of both drivers and passengers."<sup>332</sup> TLAB ordered Bolt to restore the driver's account, and awarded the driver back pay of KES 1,008,000 (US\$6,670) for the 168 days he was out of work after the deactivation.<sup>333</sup>

ILAW members also reported cases that had been brought by workers alleging unfair treatment, and that the digital platforms had challenged the jurisdiction of industrial courts, arguing instead that these cases should be heard by commercial courts, as the contested relationship was based on a contract of a commercial nature, rather than an employment contract.<sup>334</sup>

missing the preliminary objection).

<sup>328</sup> *Id.* at ¶ 33.

<sup>329</sup> Transport Licensing Appeals Board, Appeal No. TLAB/E010/2023 at ¶ 27 (May 19, 2023) (Kenya), [https://www.ilawnetwork.com/wp-content/uploads/2023/11/TLAB-E010-Of-2023-Judgment-31102023\\_231031\\_121638.pdf](https://www.ilawnetwork.com/wp-content/uploads/2023/11/TLAB-E010-Of-2023-Judgment-31102023_231031_121638.pdf).

<sup>330</sup> *Id.* At ¶ 31.

<sup>331</sup> Ejike Kanife, Bolt Kenya ordered to pay driver \$662,743 for deactivating account for 168 days, Technext24 (Nov. 1, 2023), <https://technext24.com/2023/11/01/bolt-kenya-deactivating-driver-168-days/>.

<sup>332</sup> Transport Licensing Appeals Board, *supra* note 323 at ¶ 47.

<sup>333</sup> *Id.* at Orders, ¶ 1.

<sup>334</sup> ILAW Network, Regional Interview: Sub-Saharan Africa (May 8, 2023).

## 4.2 Platforms Undermining the Right to Freedom of Association

Companies are increasingly able to weaponize technology to detect and suppress organizing efforts among workers.<sup>335</sup> This has been extensively reported by digital platform workers. Not only do these companies distort and evade labour law protections by misclassifying workers as independent contractors, but they also fundamentally undermine labour power by denying workers the right to collective bargaining<sup>336</sup> and the right to freedom of association.<sup>337</sup>

For several years now, on-demand ride hailing and delivery workers have sought to use collective initiatives to pursue their interests and rights.<sup>338</sup> This generally involves attempts to set up new unions, which often struggle get formalized or registered. For example, the App-based Drivers Union of Bangladesh (ADUB) reported that their informal status complicates their advocacy. They filed a complaint over human rights violations by app-based companies to the Bangladesh Road Transport Authority, which dismissed it on the grounds that ADUB is not a registered entity.<sup>339</sup> In the absence of registration and formal bargaining, unions opted for alternative strategies such as pro-

<sup>335</sup> See ROGERS, *supra* note 3.

<sup>336</sup> This right is protected under the ILO's Right to Organise and Collective Bargaining Convention: Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements. Int'l Lab. Org., Right to Organise and Collective Bargaining Convention, 1949 (No. 98), art. 4, July 1, 1949.

<sup>337</sup> '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.' Int'l Lab. Org., Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), art. 2, July 9, 1948.

<sup>338</sup> Felix Hadwiger, *Realizing the opportunities of the platform economy through freedom of association and collective bargaining* (ILO Working Paper No. 80, Sept. 2022), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_857284.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_857284.pdf).

<sup>339</sup> TWC NEWSLETTER, *supra* note 222.

tests and strikes.<sup>340</sup>

In some countries, these workers can form unions— notwithstanding employment classification—but their collective bargaining rights remain restricted due to a lack of legal recognition of their status as employees. In **Argentina**, workers from Glovo, Rappi, Pedidos Ya, Uber, and others formed *Asociación de Personal de Plataformas* (APP).<sup>341</sup> The formation of APP was preceded by digital strike<sup>342</sup> over Rappi's decision to change the algorithm for order allocation, which included a system of bonuses and sanctions based on the acceptance rate of orders.<sup>343</sup>

Workers submitted the application to register APP as a union on 3 October 2018 to the Ministry of Labour, Employment and Social Security; the process, however, became protracted. A report of the Office of Trade Union Affairs, which was added to the registration file in October 2018, noted the absence of any proof of employer social security contributions by the platform companies to which workers offered their services. According to research by the Friedrich Ebert Stiftung, the report served as the basis for an objection to the registration.<sup>344</sup>

In November 2018, there were accounts of members of the APP's Executive Committee being permanent-

ly deactivated by Rappi.<sup>345</sup> APP responded by filing a complaint with the labour court and the Ministry of Labour, Employment and Social Security. They sought an order against Rappi over anti-union and discriminatory practices. In March 2019 the labour court issued an order to immediately cease the anti-union conduct and unblock the accounts of union leaders;<sup>346</sup> however, the National Court of Labour Appeals revoked it in July 2019. It justified this decision by saying that issuing an order would amount to qualifying a link between the company and the workers, which a court cannot do based on an interim order.<sup>347</sup> As a result, the union ceased to exist. In the meantime, workers started another union, *Sindicato de Base de Trabajadores de Reparto por Aplicación*, which had not been formally registered by the time of this writing.<sup>348</sup>

Misclassification of workers exposes them to anti-union discrimination without access to an effective remedy.<sup>349</sup> This is illustrated by a case of app-based riders who filed a class action complaint over anti-union dismissals and discrimination in **Chile**, which had taken place when, amid protests over pay, the company Pedidos Ya deactivated the accounts of 7 workers. The First Labour Court of Santiago dismissed the claim, concluding there was no employment relationship between the company and the riders.<sup>350</sup> The workers applied for a declaration of nullity

<sup>340</sup> Shyamali Ranaraja, *Trade union responses to organizing workers on digital labour platforms: A six-country study*, 11 INT'L J. LAB. RSCH. 60 (2022).

<sup>341</sup> Pablo Míguez & Nicolas Diana Menendez, *Platform workers in Latin America: Transnational logics and regional resistances?*, 33 TEMPO SOC.: REVISTA DE SOCIOLOGIA DA USP, 231, 241 (2021); Camille Audibert, *An Argentinian Platform Workers' Union, the First of Its Kind in the Region, Is Fighting for the Rights of Delivery Workers and Revitalising the Union Struggle*, FRIEDRICH EBERT STIFTUNG (2020), <https://www.fes.de/index.php?eID=dumpFile&t=f&f=59265&token=f3927991187f-13be25eeaf34e5a8b49d43b6e3ab#>.

<sup>342</sup> The formation of APP was preceded by digital strike The workers would take the orders but then we told support staff on the platform that they had a problem with their bike or an accident. In response, Rappi increased the rates to ensure the supply of workers. Although the rates slightly decreased after the strike, they remained above the original level. PERELMAN *et al.*, *supra* note 4, at 7.

<sup>343</sup> *Id.* at 6

<sup>344</sup> *Id.* at 9-10.

<sup>345</sup> *Id.* at 7

<sup>346</sup> The court held that deactivating accounts of trade union representatives would amount to a violation of the right freedom of association and the ILO Convention 87, as well as other rights. National Labour Tribunal of First Instance N° 37, case no. 46618/2018, Rojas Luis Roger Miguel y otros c Rappi ARG SAS s/ medida cautelar, decision N° 1141, Buenos Aires, 19 March 2019, para. IV (Arg.).

<sup>347</sup> National Court of Labor Appeals, case no. 46618/2018, Rojas Luis Roger Miguel y otros c Rappi ARG SAS s/medida cautelar, 19 July 2019, para. 3 (Arg.).

<sup>348</sup> La Nueva Manana, *Trabajadores de apps de delivery: "No tenemos amparo ni derechos,"* (July 20 2022), <https://lmdiaro.com.ar/contenido/357390/repartidores-de-apps-piden-reconocimiento-sindical-no-tenemos-amparo-ni-derechos>.

<sup>349</sup> Int'l Lab. Org., *Right to Organise and Collective Bargaining Convention, 1949* (No. 98), art. 1, July 1, 1949 ('Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.').

<sup>350</sup> First Labour Court of Santiago, 17 May 2021, "Eduardo José

of the ruling for incorrect application of the Labour Code; however, the Appeals Court of Santiago rejected this in December 2021 for lack of evidence of an employment relationship.<sup>351</sup>



A Pedidos Ya driver in Argentina. Credit: iStock.com/Diego Coppola

The process of union registration also presents opportunities for companies to raise objections.<sup>352</sup> In January 2023, the federal government of **Nigeria** approved the registration of a new trade union, Amalgamated Union of App-Based Transport Workers of Nigeria (AUATWON).<sup>353</sup> Pursuant to the 2004 Trade Disputes Act and the 2004 Trade Unions Act,<sup>354</sup> a union is registered within three months if there are no proper objections raised against it.<sup>355</sup> Despite the government's initial approval, the registration of AUATWON did not happen due to objections raised by Uber and Bolt.<sup>356</sup> The companies relied on the fact

Estrada, et al. c. Pedidos Ya Chile Spa," RIT: T-980-2020 (Chile).

<sup>351</sup> Court of Appeals of Santiago, 13 December 2021, "Eduardo José Estrada, et al. c. Pedidos Ya Chile Spa," RIT: T-980-2020 (Chile).

<sup>352</sup> Int'l Lab. Org., Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), art. 2, July 9, 1948.

<sup>353</sup> Wade Odunsi, *Nigerian govt approves new trade union, Online Transport Workers*, DAILY POST (Jan. 24, 2023), <https://dailypost.ng/2023/01/24/nigerian-govt-approves-new-trade-union-online-transport-workers/>.

<sup>354</sup> Trade Unions Act (2005) Cap. (T14) § 5.3 (Nigeria) (Amended in 2005)

<sup>355</sup> Trade Unions Act (2005) Cap. (T14) § 5.3 (Nigeria); Trade Disputes Act (2004) § 1 (Nigeria).

<sup>356</sup> ILAW Network, Regional Interview: Sub-Saharan Africa, at 0:17 (May 8, 2023).

that there was a pending dispute over the classification of drivers.

The dispute began in December 2018 when the National Industrial Court of Nigeria in Lagos issued a ruling that drivers were employees, which Uber and Bolt appealed.<sup>357</sup> Both companies then claimed the registration of the union should not happen before the decision on their appeal.<sup>358</sup> This had direct implications on workers' right to bargain collectively, and in June 2023, AUATWON announced that the digital platforms continued to refuse to negotiate with them over workers' collective demands, particularly pay increases in response to rising petrol costs.<sup>359</sup>

App-based transport workers in Nigeria had decided to unionize for reasons that included (a) low pay due to high commissions taken by the app-based companies, (b) non-optimal working conditions, and (c) lack of labour rights protections as issues for collective bargaining.<sup>360</sup> The trade union, therefore, felt compelled to persist in their drive to unionize. In the end, it succeeded in its registration efforts in August 2023, when it announced that it was changing its name to Amalgamated Union of App-Based Transporters

<sup>357</sup> Olatunji v. Uber Tech. Sys. Nigeria Ltd. [2017] Suit No. NICN/LA.546/2017 (Nigeria).

<sup>358</sup> ILAW Network, Regional Interview: Sub-Saharan Africa, at 0:25-0:28 (May 24, 2023) (clarifying the difference between registering an "association" (available to anyone) and "trade union": available to individuals engaging in trade); see also Ejike Kanife, *"Uber and Bolt are trying to hijack and impose a yellow union over the e-hailing industry" -Drivers' union*, TECHNEXT 24 (May 15, 2023), <https://technext24.com/2023/05/15/nigerian-drivers-accuses-uber-and-bolt/>. Once registered as a trade union, the workers can engage with, for example, the Nigerian Labour Congress.

<sup>359</sup> *Drivers of Uber, Bolt and others threaten indefinite strike*, BUS. DAY (June 19, 2023), <https://businessday.ng/news/article/uber-bolt-other-app-based-transport-workers-threaten-indefinite-strike/>; Joseph Olaoluwa, *Despite pushback from Bolt and Uber, Nigeria's ride-hailing union unites against unfavourable working terms*, TECHCABAL (July 1, 2023), <https://techcabal.com/2023/07/01/despite-pushback-from-bolt-and-uber-nigerias-ride-hailing-union-unites-against-unfavourable-working-terms/>.

<sup>360</sup> Chiemeka Ohajionu & Kolajo Onasoga, *The impact of unionisation of app-based transport workers in Nigeria*, STREN & BLAN PARTNERS (Aug. 9, 2023), <https://strenandblan.com/2023/08/09/the-impact-of-unionisation-of-app-based-transport-workers-in-nigeria/>.

of Nigeria (AUATON) and dropping the references to 'workers'.<sup>361</sup> The Ministry of Labour responded to this change by registering AUTON as a trade union on 17 August 2023.<sup>362</sup>

App-based riders in **Serbia**, the majority of whom have contracts with intermediary agencies rather than the platforms themselves, have also started the process of organizing.<sup>363</sup> Their main concerns include pay, excessive working hours,<sup>364</sup> lack of protection of occupational safety and health, and lack of health and social security insurance.<sup>365</sup> Workers' ability to bargain over these issues collectively with the platforms was hindered by the fact that under the existing law, they were prohibited from forming a bargaining unit.

Amid 2023 protests of app-based workers in **Georgia** over low pay and working conditions, a coalition of independent trade unions and civil society organizations, The Georgia Fair Labour Platform, published information about striking workers receiving 'life time app bans'.<sup>366</sup> In July 2023, the Ombudsman of Georgia issued a statement, saying that blocking riders for life over their participation in strikes, as well as text messages sent by the company to workers asking them not to participate in protests, amounts to anti-union discrimination.<sup>367</sup>

<sup>361</sup> Joseph Olaoluwa, *After pushback, Nigeria's ride-hailing union drops 'workers' from its new name*, TECHCABAL (Aug. 21, 2023), <https://techcabal.com/2023/08/21/after-pushback-nigerias-ride-hailing-union-drops-workers-from-its-new-name/>.

<sup>362</sup> Ejike Kanife, *Nigerian e-hailing drivers union gets govt certificate, becomes AUATON*, TECHNEX 24 (Aug. 21, 2023), <https://technext24.com/2023/08/21/app-drivers-union-auaton-certificate/>.

<sup>363</sup> ILAW Network, Country Interview: Serbia (April 7, 2023).

<sup>364</sup> *Id.* (explaining that they were required to work 12 to 15 hours per day).

<sup>365</sup> L. LUJINOVIĆ, SOLIDARITY CENTER, RESEARCH ON LABOR RIGHTS, POSITION AND NEEDS OF DELIVERY WORKERS IN SERBIA 16 (2022).

<sup>366</sup> *Lifetime app ban for striking Wolt couriers constitutes illegal discrimination*, GEORGIA FAIR LAB. PLATFORM (Mar. 31, 2023), <https://shroma.ge/en/news-en/wolt-illegal-discrimination/>.

<sup>367</sup> *Public Defender Finds Discrimination against Wolt Couriers Based on Dissenting Opinion in Labour Relations*, PUB. DEFENDER (OMBUDSMAN) OF GEORGIA (July 6, 2023), <https://www.ombudsman.ge/eng/akhali-ambebi/sakhalkho-damtsvelma-voltis-kurierebi-mimart-shromit-urtiertobashi-ganskhvave->

## 4.2.1 Non-disclosure agreements

A particularly perfidious barrier used by businesses to undermine workers' ability to exercise and claim their rights are non-disclosure agreements (NDAs). They are imposed on workers by a multitude of tech companies and often take an extreme and overbroad form.<sup>368</sup>

For example, Facebook content moderators in Kenya reported that the NDAs they had to sign, both with Sama and Meta, banned them from discussing their 'work with family, friends or their social circle'.<sup>369</sup> Such restrictions interfere with workers' rights to speech, assembly and association.<sup>370</sup> For several years, Kenyan workers have been calling on companies, including Facebook, to end the practice of a 'culture of fear and excessive secrecy'.<sup>371</sup> They alleged that the NDAs went beyond protection of users data and appear to be aimed at preventing them from organizing and raising concerns about their working conditions.<sup>372</sup>

Workers have legal routes to challenge their silencing through NDAs by relying on whistleblowing legislation, which not only contains protections for those who speak out, but also requires companies to have ef-

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<sup>368</sup> Schweller, G. 2023. "Big Tech Illegally Uses NDAs to Silence Would-Be-Whistleblowers, SEC Tips Allege." *Whistleblower Network News*. <https://whistleblowersblog.org/corporate-whistleblowers/sec-whistleblowers/big-tech-illegally-uses-ndas-to-silence-would-be-whistleblowers-sec-tips-allege/>

<sup>369</sup> Motaung 2022 Constitutional Petition, *supra* note 257, ¶ 362.

<sup>370</sup> *Id.* ¶ 234.

<sup>371</sup> Zoë Schiffer, *Facebook content moderators call for company to put an end to overly restrictive NDAs*, THE VERGE (July 22, 2021), <https://www.theverge.com/2021/7/22/22587757/facebook-content-moderators-ireland-end-restrictive-ndas>.

<sup>372</sup> *Breaking the code of silence: what we learned from content moderators at the landmark Berlin summit*, FOXGLOVE (Mar. 15, 2023), <https://www.foxglove.org.uk/2023/03/15/building-worker-power-in-social-media-content-moderation-our-thoughts-on-the-landmark-moderators-unite-summit-berlin/>; Alex Hern, *Facebook moderators 'told not to discuss working conditions'*, THE GUARDIAN (Feb. 11, 2021), <https://www.theguardian.com/technology/2021/feb/11/facebook-moderators-say-they-were-told-not-to-discuss-covid-working-conditions>.

fective reporting channels.<sup>373</sup> Beyond whistleblowing, in some jurisdictions, labour disputes over violence, harassment, and discrimination are exempted from NDAs to ensure that they are not abused to silence the survivors.<sup>374</sup> As a result, employers in those countries can no longer rely on NDAs relating to discrimination, harassment, and retaliation claims against current or former employees.<sup>375</sup>

### 4.3 Takeaway on Responses to Barriers to Organizing & Litigation

1. Drawing on the experience of suing content moderators for labour rights violations in Kenya, labour law lawyers in other countries can challenge corporate arguments that the absence of their 'physical presence' in the country amounts to a lack of territorial jurisdiction. However, such strategies require proof of a sufficient nexus between the country and company's operation there.
2. Labour movements need to advocate for a simplified process of union registration and limits on the ability of companies to undermine the rights to freedom of association and collective bargaining by raising objections—including objections over the workers' classification.
3. Workers can challenge restrictive NDAs by relying on legislation protecting them from violence, harassment, and discrimination, as well as on statutes dedicated to whistleblowers' rights.

<sup>373</sup> PRINCIPLES FOR RESP. INV. ASSOC. (PRI ASSOC.), WHISBLOWING: WHY AND HOW TO ENGAGE WITH YOUR INVESTEE COMPANIES 24-26 (2020), <https://www.unpri.org/download?ac=12194>.

<sup>374</sup> INT'L LAB. ORG., VIOLENCE AND HARASSMENT IN THE WORLD OF WORK: A GUIDE ON CONVENTION NO. 190 AND RECOMMENDATION NO. 206, at 70 (2021), [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms\\_814507.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_814507.pdf).

<sup>375</sup> *Id.*, see also Vincent N. Avallone & Meghan T. Meade, *New Jersey's Latest #METOO Law Goes Beyond Sexual Harassment*, XIV NAT. L. REV., No. 26, Mar. 25, 2019, <https://www.natlawreview.com/article/new-jersey-s-latest-metoo-law-goes-beyond-sexual-harassment>.

# 5. Future Interventions

There are several substantive issues related to labour and technology that were outside the scope of this publication and will require future research, including internet shutdowns and under-regulation of fin-tech services used by workers. Those areas are discussed briefly in this section.

## 5.1 Internet Shutdowns & Labour Rights

In 2023 alone, internet shutdowns affected workers in India,<sup>376</sup> Pakistan,<sup>377</sup> Burkina Faso, Eritrea, Sudan, Mauritania and other jurisdictions.<sup>378</sup> According to Human Rights Watch and the Internet Freedom Foundation, the 2019–2021 internet shutdown in India led to huge economic and job losses.<sup>379</sup> Moreover, in the context of digitalization of the Indian work attendance system, lack of stable internet meant that workers were not able to record their attendance, which also led to job losses.<sup>380</sup>

In an effort to challenge the negative impact of internet shutdowns on workers, the labour movement can

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<sup>376</sup> Durga M. Sengupta, *The irony that's "Digital India"*, REST OF WORLD (June 28, 2023), <https://restofworld.org/2023/newsletter-south-asia-digital-india-irony/>.

<sup>377</sup> Hafsa Adil, *'Ruined my livelihood': Pakistan internet shutdown hits millions*, AL JAZEERA (May 11, 2023), <https://www.aljazeera.com/news/2023/5/11/pakistan-internet-shutdown>.

<sup>378</sup> Johnstone Kpilaakaa, *6 African countries imposed internet restrictions in the first half of 2023*, BENJAMINDADA.COM (July 28, 2023), <https://www.benjamindada.com/african-countries-internet-restrictions/>.

<sup>379</sup> *India: Internet Shutdowns Hurt Vulnerable Communities*, HUM. RTS. WATCH (June 13, 2023), <https://www.hrw.org/news/2023/06/13/india-internet-shutdowns-hurt-vulnerable-communities>.

<sup>380</sup> Human Rights Watch, *No Internet Means No Work, No Pay, No Food: Internet Shutdowns Deny Access to Basic Rights in "Digital India"* (June 14 2023), at 53–55, <https://www.hrw.org/report/2023/06/14/no-internet-means-no-work-no-pay-no-food/internet-shutdowns-deny-access-basic>.

draw on successful litigation of civil society groups in Indonesia and Zimbabwe.<sup>381</sup> In 2019, civil society groups in **Indonesia** filed a case against a government-ordered decision to enforce an internet blackout during weeks of protests in Papua and West Papua.<sup>382</sup> In June 2020, the Jakarta State Administrative Court held that the internet shutdown violated the constitutional right to freedom of expression and access to information because it had not been carried out according to the law by failing to meet the proportionality requirement.<sup>383</sup>

In January 2019, **Zimbabwe's** Congress of Trade Unions called for a national stay-away, during which there were arrests. The following day, the Minister of State, issued orders under the Interception of Communications Act (the Act) to shut down the internet in the country. In response to the shutdown, the Zimbabwean chapter of the Media Institute of Southern Africa and Zimbabwe Lawyers for Human Rights filed an urgent application at the High Court in Harare, arguing that the Minister's order amounted to infringement of the right to freedom of expression and privacy. The court agreed, holding that the Minister had no

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<sup>381</sup> A case against the government-ordered decision to enforce an internet blackout during weeks of protests in Papua and West Papua in August 2019. See DUNIA MEKONNEN TEGEGN, *ADVANCING STRATEGIC LITIGATION ON INTERNET SHUTDOWNS CASES IN AFRICA: PROMISES AND PITFALLS* (2021), <https://cipesa.org/wp-content/files/Advancing-Strategic-Litigation-on-Internet-Shutdowns-cases-in-Africa-Promises-and-Pitfalls.pdf>.

<sup>382</sup> The groups included the Alliance of Independent Journalists, the Southeast Asia Freedom of Expression Network, and the Indonesian Legal Aid Foundation, and others.

<sup>383</sup> M. Tanzil Aziezi, *The Implementation of Human Rights Principles in Jakarta Administrative Court Judgment on Internet Access in Papua and West Papua*, LEMBAGA KAJIAN & ADVOKASI INDEPENDENSI PERADILAN (June 19, 2020), <https://leip.or.id/the-implementation-of-human-rights-principles-in-jakarta-administrative-court-judgment-on-internet-access-in-papua-and-west-papua/>.



authority to issue the order and set it aside.<sup>384</sup>

## 5.2 Wages & Regulation of Fin-Tech Services

Digital platforms often rely on mobile payment solutions that include 'mobile money', as well as mobile lending, which has already raised concerns over predatory practices.<sup>385</sup> Workers, such as boda boda riders in Kenya, use these fin-tech products, which are often under-regulated, to buy or rent vehicles and to cover other work-related expenses. It has been reported that these lenders extensively track and collect data on the borrowers, which exposes them to breaches of their privacy and predatory practices.<sup>386</sup> Also in Kenya, concerns over personal data breaches led the government to suspend a blockchain project in August 2023.<sup>387</sup>

There is strong pressure to digitalize wage payments across industries,<sup>388</sup> which may present risks for workers in countries in which such services are not

adequately regulated or regulators do not have the power or capacity to protect workers' data rights. In the end, further research is needed to understand the relationship between under-regulation fin-tech industry services and the risks they pose to workers' pay.

<sup>384</sup> *Zimbabwe Lawyers for Human Rights v. Minister of State, National Security*, COLUMBIA GLOBAL FREEDOM OF EXPRESSION, <https://globalfreedomofexpression.columbia.edu/cases/zimbabwe-lawyers-for-human-rights-v-minister-of-state-national-security/>.

<sup>385</sup> Elija Kimani, *Fin-tech in Kenya should not cause poverty in pursuit of financial inclusion*, AFRICA AT LSE BLOG (Jan. 20, 2020), <https://blogs.lse.ac.uk/africaatlse/2020/01/20/fin-tech-kenya-poverty-financial-inclusion-gambling-mpesa/>; Faustine Ngila, *Why Safaricom, east Africa's biggest telecom, is getting sued by its customers*, QUARTZ (Mar. 7, 2023), <https://qz.com/why-safaricom-is-being-sued-by-its-customers-1850194457>.

<sup>386</sup> JACK ODEO, AFR. CTR. FOR CITIES MOTORCYCLES, DIGITAL PLATFORMS AND FINTECH INTEGRATION IN NAIROBI, KENYA, ii-iv (2023), <https://www.africancentreforcities.net/wp-content/uploads/2023/06/3-PPSS-Nairobi.pdf>.

<sup>387</sup> Martin K.N Siele, *Scammers are cashing in on Worldcoin's chaotic Kenya launch*, REST OF WORLD (Aug. 11, 2023), <https://restofworld.org/2023/worldcoin-kenya-suspended-scammers-cash-in/>.

<sup>388</sup> Leora Klapper, Maria Soledad Requejo & Christine Svarer, *Big potential for digitizing wage payments in Cambodia's garment factories*, WORLD BANK BLOGS: EAST ASIA & PACIFIC ON THE RISE (Dec. 13, 2021), <https://blogs.worldbank.org/eastasiapacific/big-potential-digitizing-wage-payments-cambodia-garment-factories>.

# 6. Conclusion and Recommendations

This issue brief summarizes examples of successful interventions in the field of labour and technology, and outlines possibilities for the labour movement to build legal strategies that rely on data protection, anti-discrimination, occupational safety and health, and labour law. Additionally, by drawing on a global mapping of key concerns, workers' responses, and regulatory initiatives in the field of labour and technology, it shows that there already is a rich body of work that opens up opportunities for more effective coordination across jurisdictions and industries.

A systemic and sustainable response by the labour movement to breaches of workers' labour rights, data rights, and algorithmic discrimination requires a strategy that would challenge these practices simultaneously across several countries. To do so, the labour movement could take the inspiration from climate change litigation, which brings strategic cases as part of a broader campaign with clear targets.<sup>389</sup> Such a strategy would involve identification of jurisdictions with strong labour laws and strong data rights regimes, which also have high penalties for breaches and powerful enforcement mechanisms. This issue brief identified some such strategic opportunities in section 2 (Labour and Technology: Interventions).

Drawing on the experiences from climate justice litigation, it is also important to note that legal action that aims to change to system targets not only big players, but also actors that are less visible, such as entities to which the big tech companies outsource labour management. Strategic work on the axis of labour and

<sup>389</sup> In the case of climate litigation, the main targets remain the governments. JOANA SETZER & CATHERINE HIGHAM, GRANTHAM RESEARCH INSTITUTE ON CLIMATE CHANGE AND THE ENVIRONMENT AND CENTRE FOR CLIMATE CHANGE ECONOMICS AND POLICY, LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2022 SNAPSHOT 11 (2022), <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf>.

technology also requires new partnerships for trade unions that could involve digital rights groups, privacy campaigning groups, racial justice groups, gender equality campaigners, consumer groups, and others.<sup>390</sup>

## 6.1 Recommendations

### 6.1.1 Workers and Data Protection

1. Relying on workers' 'subject access rights', workers can demand the information that companies collect on workers, and use it as evidence in proceedings and/or collective bargaining to challenge the ways this information is used by the companies and/or employers.
2. Workers and unions can demand that employers inform them and bargain over the types of technologies that will be used in their workplace, what data will be collected, how it will be stored, how it will be used, and when it will be removed from the employers' system. Furthermore, there should be a ban on employers' ability to sell this data to third parties.
3. Relying on existing data protection laws or advocate for reform of data protection laws that ensure transparency, proportionality and necessity of any data collection and surveillance in the workplace. If advocating for a new law (or reform of a law), ensure that complaints and requests for investigations can be made on behalf of an individual (allowing unions to file complaints on behalf of their members) and ensure that the data protection authority (and relevant judicial authority) has investigative and enforcement powers.
4. Make use of the data protection enforcement

<sup>390</sup> See *id.* at 15.

mechanisms to file complaints with courts and data protection authorities over identified breaches of workers' data rights by the employers and/or the companies.

5. Submit requests to data protection authorities to use their investigative powers and carry out inspections into data processing in companies suspected of causing harms to workers. These investigations and complaints can support on-going advocacy or negotiations/bargaining between workers and their employers as it adds another layer of pressure.
6. Reach out and build cooperation with technologists, and privacy organizations and experts to gather and present evidence in the proceedings.
7. Unions and workers should demand that when discussing, bargaining, or negotiating over the use of technology within the workplace (surveillance, automated decision-making, etc.) that a technology expert is provided who can help explain the complexities of such technology use in the workplace. The cost of this expert must be borne by the employer who is choosing to introduce new technologies to the workplace.

### 6.1.2 Algorithmic Management

1. Make use of the legal restrictions on automated or semi-automated decision-making, including profiling of workers to demand a human review of such decisions; and systemic change at the company level to ensure that decisions at workplaces that produce legal effects are subject to due process and human review.
2. Challenge punitive decisions "hidden" behind algorithms by demanding the details from companies (drawing on data subject access rights) and, if applicable, by bringing claims over algorithmic discrimination (for example, against trade union members).
3. Where applicable, utilize anti-discrimination laws to challenge unfair and discriminatory algorithmic decision-making, and seek

very specific and clear remedies involving transparency, human review, and safeguards against such discrimination if automated decision-making is used to determine wages, work allocation, etc. This litigation strategy will require gaining access to the algorithm's data for evidentiary purposes, which can be difficult if companies claim proprietary rights over the algorithm. This could be overcome through the use of data governance and data protection laws (discussed above).

4. Workers can also shift the burden of proof to companies—either through presenting statistical evidence on differential treatment linked to occupational requirements, or by presenting facts that point to a lack of compliance with equal treatment rules.

### 6.1.3 Fair Wages

1. Where applicable, make use of the existing case law in which the courts addressed corporate practices that bypassed wage and hour and minimum wage laws by misrepresenting the working time (such as by excluding the waiting periods from the working hours).
2. Bring cases to courts, or, where applicable, to licencing authorities, over platform companies' non-compliance with the caps on commission charges extracted from workers' pay.
3. Explore opportunities to bring discrimination claims over pay in the context of 'dynamic (or surge) pricing', and, where relevant, make simultaneous submissions related to such cases to labour inspectorates and equal treatment bodies. Additionally, explore opportunities to challenge the automated decision-making process for wages and fares, and to demand transparency in wages and prices.
4. Advocate for regulation of algorithms and automated decision-making technology that:
  - a. Bans the arbitrariness of pay through methods of surge pricing or nudges;
  - b. Bans transferring of work-related costs to

workers;

- c. Strictly regulates and enforces commission rates charged to the workers by these companies;
- d. Ensures that waiting time is calculated as working time for wages;
- e. Requires companies to implement predictive scheduling; and
- f. Ensures transparency to workers and unions of what factors are used to calculate wages and work allocation by algorithms.

While some of these principles have already been integrated in the national laws through reforms or through case law, the labour movement needs to pursue them more consistently, not only through collective bargaining, but also through and litigation by bringing cases before labour law inspectorates, licensing authorities, equal treatment bodies, and courts.

#### 6.1.4 Adequate Working Conditions

1. Bring cases over non-compliance with OSH regulations and employment laws by principals and—where applicable—their intermediaries, in the context of ‘digital labour’, such as content moderation, content labelling, content creation, platform workers, and others.
2. Advocate for additions or changes to OSH laws to include content moderation as an inherently dangerous job requiring specific and adequate psychosocial protections for workers.
3. Identify and work with experts to develop appropriate health and safety plans and policies for these workers.
4. Advocate for legislative reforms to clearly prevent and remedy psychosocial harms caused by technology and technology-driven sectors.
5. 6.1.5 Outsourcing

6. Challenge outsourcing models that shield big tech companies from liability by using evidence of the ownership of the digital space by the principal to establish that they are in control over the operation and therefore liable. Where possible, show that the platform being used by workers is owned, operated, and under the control of the tech company and not the outsourcing agency, and the ‘product’ is directly sent and used by the tech company. The outsourcing agency’s only role should be to find workers and set up a physical space in country for them to work.
7. In a situation when such work is outsourced by the principal across several countries, consider coordinated, simultaneous transnational litigation. Provide the necessary socio-economic and mental health support for workers and their families involved in the litigation. Where possible, consider challenging the use of outsourcing agencies altogether as a violation of workers’ fundamental rights because it subverts liability from the primary employer.
8. Where possible, advocate for reform or bring litigation challenging the lack of a physical presence in country where the work is being done (i.e. the primary employer must have a physical presence in the country it is doing business in) to circumvent the argument by these companies regarding territorial jurisdiction.

#### 6.1.5 Right to Freedom of Association and Collective Bargaining

1. Use national and international mechanisms to expose and challenge companies’ strategies to undermine the right to freedom of association and collective bargaining by illegitimate objections to trade union registration.
2. Make use of whistleblowing laws and legislation that provides for protection from violence, harassment, and discrimination to challenge overbroad non-disclosure agreements that undermine workers’ right to speak out and organize collectively. Continue to challenge the misclassification of workers as independent

contractors or outsourced workers in court and through legislative reform to ensure they are recognised as workers who are covered under national labour law with all the protections and rights afforded to them.

3. Workers and unions across countries should build regional and global campaigns against these companies to organize, litigate and advocate for legislative reforms.



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