

ESTUDIOS

Transnational judicial dialogue and worker protection in the gig economy

*Diálogo judicial transnacional y protección de los trabajadores en la economía
de las plataformas*

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ABSTRACT Can transnational judicial dialogue be an efficient mechanism to protect workers' labor rights in the gig economy? As long as digital platforms operate transnationally, the negative externalities generated by them —especially regarding compliance with labor regulatory standards— become common problems in the countries of a given region. The aim of the research is to answer this problem, and in order to do so a broad literature review and a study of the cases *Uber Technologies Inc. v. Heller*, *Dynamex Operations West, Inc. v. Superior Court* and case *Uber B.V. and others v Aslam and others*, judged by the Supreme Court of Canada, the Supreme Court of California, and the Supreme Court of the United Kingdom, were conducted respectively. A literature review and deductive method were used. It has been found that transnational judicial dialogue can enhance the persuasiveness, authority, and legitimacy of individual judicial decisions rendered in national courts, especially in Brazilian Labor Courts, as well as serve as an instance of collective deliberation to address common problems.

KEYWORDS Sharing economy, gig economy, globalization, Transnational Judicial Dialogue.

RESUMEN ¿Puede el diálogo judicial transnacional ser un mecanismo eficaz para proteger los derechos laborales de los trabajadores de la economía colaborativa? En la medida en que las plataformas digitales operen a nivel transnacional, las externalidades negativas que generan, especialmente en lo que respecta al cumplimiento de las normas de regulación laboral, se convierten en problemas comunes para los países de una determinada región. El objetivo de esta investigación es responder a este problema, y para esto se realizó una amplia revisión de la literatura y un estudio de los casos *Uber Technologies Inc. v. Heller*, *Dynamex Operations West, Inc. v. Tribunal Superior* y caso *Uber B.V. y otros v Aslam y otros*, juzgados por la Corte Suprema de Canadá, la Corte Suprema de California y la Corte Suprema del Reino Unido, respectivamente. Se utilizó una revisión

bibliográfica y un método deductivo. Se ha comprobado que el diálogo judicial transnacional puede aumentar la persuasión, la autoridad y la legitimidad de las decisiones judiciales individuales dictadas en los tribunales nacionales, especialmente en los tribunales laborales brasileños, así como servir de instancia de deliberación colectiva para abordar problemas comunes.

PALABRAS CLAVE Economía compartida, gig economy, globalización, Diálogo Judicial Transnacional.

Introduction

The technological progress, the globalization, and the emergence of the network society have enabled the development of business models based on the provision of services through digital platforms. The sharing economy, seen as a new stage in the development of capitalism, promises to generate positive externalities from decentralization, a reduction of transaction costs from the use of excess capacities of goods and services, and the promotion of more transparent economic relations based on mutual trust.

In the context of having an excess capacity for goods, services, and time, the sharing economy has facilitated the gig economy. Platforms like Uber allow individual drivers to provide themselves with passengers through the platform, observing terms and conditions of use unilaterally defined by the company, and subject to performance evaluation by the platform users as independent contractors.

This promise of a new economy, new interpersonal relationships, and new forms of work enabled by the sharing economy, combined with the transnational operation of digital platforms, has generated regulatory uncertainties at a global level, especially regarding the classification of service providers using digital platforms and whether they are employees or self-employed.

This research, based on the international context of legal disputes faced by Uber in several national courts regarding the appropriate definition of the legal nature of the relationship between the digital platform and the drivers that provide its services, intends to answer the following problem: considering that digital platforms, notably Uber, operate transnationally, can transnational judicial dialogue be an efficient mechanism to protect labor rights? This analysis stems from the hypothesis that the judicial decisions rendered in the cases *Uber Technologies Inc. v. Heller*, *Dynamex Operations West Inc. v. Superior Court*, and *Uber B.V. and others v. Aslam and others*, by the Supreme Court of Canada, the Supreme Court of California and the Supreme Court of the United Kingdom, respectively, can increase the persuasiveness, authority and legitimacy of individual judicial decisions rendered in national Courts, especially in Brazilian Labor Courts, notably when the local labor legislation coincides with the decisional parameters adopted by foreign Courts.

The objective of this research is to analyze whether transnational judicial dialogue can be an adequate instrument to enable the adequate protection of workers inserted in the gig economy dynamics. To achieve this goal, a broad literature survey was conducted, especially overseas, as well as a review and discussion of scientific articles and court decisions that have faced legal issues related to the nature of the relationship between service providers and digital platforms. The deductive method was used to analyze how the domestic courts of the United Kingdom, the United States, Canada, and Brazil define labor rights based on the work performed in the economic dynamics of the gig economy.

This article is divided into three chapters. The first is dedicated to contextualizing the sharing economy as a transnational economic model, which is why the proper legal treatment of the negative externalities generated by digital platforms depends on an equally transnational governance mechanism. The second chapter is dedicated to understanding the concept and typology of transjudicial communication. The third chapter analyzes how the courts have resolved and sought to protect the interests of workers inserted in the gig economy, especially from the study of the cases *Uber Technologies Inc. v. Heller* and *Dynamex Operations West Inc. v. Superior Court*.

Transnationality of the platform economy

This article aims to answer the following question: can transnational judicial dialogue be an efficient mechanism to protect labor rights in the gig economy? The answer to this question presupposes a proper understanding of the phenomenon of the sharing economy's transnational nature and to what extent transjudicialism can be a theoretical perspective able to offer an adequate response to labor rights' protection. However, even before analyzing the impact caused by the sharing economy and understanding how it enhances the gig economy, it is important to describe how the law has been responding to violations of labor rights as human rights by transnational corporations.

Dual transnational mobility: When capital and labor become mobile

The consequences of globalization, and especially offshoring,¹ on the labor market have been the subject of discussion and legislative proposals for decades. In the international economic literature, Moore and Ranjan (2005: 391-422) already show how

1. Offshoring is a concept that refers to the phenomenon observed when the source of supply is located in a country other than the outsourcing company's home country. Offshoring can be performed internally, transferring production from the parent company to its foreign affiliates, often called "captive offshoring" or externally outsourcing services to a third-party service provider abroad. The spread of international services outsourcing has been a major force in shaping the services trade and investment landscape over the past two decades (UNCTAD, 2014).

trade liberalization in a skill-rich country can reduce unemployment for skilled workers and increase unemployment for unskilled workers, and since each sector employs only one type of labor, there is no intersectoral reallocation of labor. In turn, Felbermayr and others (2011: 39-73) studied the impact of marketing cost reduction of final goods on unemployment in an industry model with firm heterogeneity. Lastly, Groizard and others (2013), and Ranjan (2016: 64-79) have examined the implications of offshoring on unemployment.

In legal literature, especially from the theoretical perspective of business and human rights (Assis and Pamplona, 2019: 1-29; Flues and Van Shaick, 2005; Ribeiro and Santos, 2016: 383-403; Ruggie, 2007: 819-840; Silva and Pamplona, 2016: 147-168; Weissbrodt, 2005: 55-73), the attempt to offer greater protection to workers employed by transnational companies has led to the development of inventive regulatory and legal proposals, such as the execution of collective bargaining agreements of a transnational nature with the possibility of enforcement in countries that have high standards of labor protection and a judiciary system with enforcement capacity (Albuquerque, 2009; Lima and Sousa, 2006; Cordeiro, 2013; Pamplona and Souza, 2018: 59-77; Racciatti and Rímolo, 2006: 91-124; Soares Filho, 2006; Soares Filho, 2007: 44-52).

The transnationalization of companies and globalization are related phenomena since the latter is characterized by “the uniqueness of the product market on a world scale and a transnational architecture —above national borders— of the conditions under which the product is manufactured and subsequently distributed” (Laurencin, 1998: 33). It is possible to understand the relationship between globalization, the progressive increase in the economic power of transnational companies, and the productive displacement model (offshoring) from Holger Görg’s definition of globalization as a phenomenon characterized, firstly, by the total trade (that is, the flow of goods across borders); and, secondly, by offshoring, (that is, the relocation of production processes abroad), which lead to the trade of intermediate goods across borders (Görg, 2011: 21). Therefore, “globalization is, in fact, only really possible when there is a great international mobility of production factors” (Laurencin, 1998: 33). As a consequence, the dynamics of production networks (Castells, 1999: 24; Castells, 2005: 17) have resulted in highly fragmented and geographically dispersed production processes across a wide range of industries (Altreiter and others, 2015: 67). Discussions of the relationship between transnational corporations and employment relations highlight the ways in which these corporations delocalize or outsource labor in order to take advantage of a “procurement regime” or “institutional arbitrage”. That is, transnational corporations aim to operate in national, regional, or local labor markets with lower levels of protection: lower wages, greater flexibility, and weaker security standards (Altreiter and others, 2015: 67). In certain cases, cross-border restructuring processes are not only justified by the desire for access to the local labor

market: these processes depend on the labor force itself being mobile and transnational. This is why we can speak of a double transnational mobility: capital and labor (Altreiter and others, 2015: 67).

Transnational capital mobility implies the ability and a real strategy to move assets across national borders, that is, the ability to make foreign direct investment or divestment, to reallocate business functions, or to implement certain offshore activities, which is why capital mobility cannot be seen as a mere locational/geographical issue (Altreiter and others, 2015: 68). As Laurencin (1998: 33) points out, capital mobility depends, however, on “certain conditions and especially a general condition of liberalization, that is, the absence of barriers to exchange flows and to the implantation of companies (standard, public market, customs formality, etcetera) between countries”. Capital moves in an international economic space, so that “the economic space where capital is produced, reproduced and circulates no longer coincides with the political territoriality” (Benakouche, 1980: 79-90).

The increased mobility of capital shapes employment relations and international labor migration. For this reason, it is possible to state that transnational corporations have the potential to weaken employment relations for three reasons (Altreiter and others, 2015: 69): firstly, for their enhanced position of power based on their greater mobility and the opportunities for “coercive comparisons” and “negotiating concessions”; secondly, because they can introduce foreign labor relations practices into the countries where they operate; and third, because local management often has only limited decision-making powers. These characteristics of capital mobility cause the bargaining power of unions to weaken and tend to pressure governments to relax levels of labor protection.

On the other hand, the spatial (and temporal) dispersion of work has been variously considered as distributed work, hybrid work, mobile or multilocal work, telework, and electronic work (Pyöriä and Ojala, 2018: 405). Mobile labor can take many forms that are linked to different mobility or migration regimes, and to specific legal frameworks and regulations (it can encompass from labor migration for undocumented foreign workers to temporary work in another country or the detachment of workers) (Altreiter and others, 2015: 69). This paper considers labor mobility as the spatial mobility of labor in the context of firms’ transnationalization. In general, the opportunity for migration arises when incomes are low in the origin country and high in the destination area, as well as when migration costs are low (Borjas, 2012: 387). Globalization and the transnationalization of firms, nevertheless, have significantly altered the dynamics of geographic labor mobility, and, above all, have changed the incentives for the emergence of increasingly mobile work arrangements. In addition, the diverse use of information and communication technologies is changing work and organizational processes in distributed environments (Pyöriä, 2009: 366-381).

Transnational and mobile capital may transfer management strategies from other contexts or obtain concessions from the workforce by threatening to relocate jobs. In these situations, the mobile workforce, for various reasons, may be less likely to offer resistance and defend local regulations, customs, and practices (Altreiter and others, 2015: 70-74). Altreiter and others (2015: 70-74) exemplify dual mobility from the cases of Foxconn Electronics in Europe, Amazon warehouses in Germany, the Chinese fashion industry cluster in Italy, and the Danish meat industry.

What are the consequences of dual mobility? Both capital mobility (in particular the threat of relocation and the subsequent negotiation of concessions) and labor mobility (especially through their disengagement and divisions by linguistic and ethnic lines) point to high levels of disembedded employment relations (Giddens, 1990: 21).² This disengagement demands protective solutions, especially from the union associative mobilization that protects these mobile workers mainly in the socioeconomic context of outsourcing relations, that is, where the workers are not employed by the main companies but by subcontracted companies (Altreiter and others, 2015: 84). It can be stated, therefore, that the globalization process, transnationalization, and the emergence of the network society, produce a new business development model based on the idea of productive decentralization, which has contributed to the arising of precarious labor relations, especially because “in many cases, the destination of decentralization is in countries with low labor legal protection, with low labor costs and little guarantee of enforcement” (Pamplona and Souza, 2018: 62).

The progressive process of economic liberalization and the growth of international trade and investments have not been accompanied, however, at the same speed by global governance mechanisms or even by national legal systems (Redmond, 2003: 70). And, especially given the inherent limitations of national mechanisms in the face of the mobility of transnational corporations, Redmond, as recently as 2003, argued for the need of a new or strengthened international coordination mechanism to ensure broad agreement on the desirable content of transnational corporate liability rules and to provide a modality for their implementation (2003: 70-71). Therefore, “the transnational dimension of economic activities requires that the protection of human rights of workers inserted in the productive process be carried out beyond the borders of States” (Pamplona and Souza, 2018: 75). This research suggests that transnational judicial dialogue can contribute to raising the standard of worker protection in the context of transnational double mobility.

2. For Giddens, disembedding means the process of detaching social relations from their inherent contexts of social interaction, so that they are restructured at undefined intervals of time and space.

The step beyond: Sharing economy and the empowerment of platform-mediated jobs

The gig economy is directly related to the sharing economy, which can be seen as a new stage in the process of economic development that emerges from the overcoming of the logic of mass consumption and accumulation of consumer goods, particularly in the late twentieth century, from the moment when the market, guided by the principle of sustainability and rational use of goods, begins to favor new forms of access to goods and services (Lemos and Souza, 2016: 1758-1759). The term, therefore, is used to “describe the phenomenon triggered by the diffusion of technological platforms for online service provision” (Tigre, 2019: 23) and ultimately consists of an economic model based “on the use of information technology in favor of optimizing the use of resources through their redistribution, sharing and exploitation of their surplus capacities” (Lemos and Souza, 2016: 1758-1759).

Hence, the sharing economy is understood from the emergence of digital or technological platforms, which are defined as “a set of standardized technologies and components that serve as a basis for the development of goods and services” (Tigre, 2019: 23). The combination of the sharing economy and digital platforms has led to the decentralization of activities, the reduction of transaction costs, and the emergence of an economy of attraction founded on trust among interpersonal relationships (Lemos and Souza, 2016: 1758-1759). This combination generated, above all, efficiency gains. If in the industrial society economic efficiency depended on the concentration of resources, in the sharing economy “resources would no longer be concentrated in the hands of a few, but could be generated and exploited by those at the ends, using technology to bring together demands” (Lemos and Souza, 2016: 1758-1759). Companies like Uber and Airbnb act as a middleman between individuals interested in using transportation or a room but don't own fleets of cars or rooms of their own (Lemos and Souza, 2016: 1759).

Decentralization as an effect of the sharing economy would promote consumer empowerment by removing consumers from “a state of passivity (from consumer to prosumer), granting them the means to produce items that would previously have been purchased in the market” (Lemos and Souza, 2016: 1757-1777 and 1758-1760). As a consequence of decentralization, transaction costs are reduced so that in the sharing economy “the cost of producing anything from an intellectual work to a physical piece of work is increasingly close to zero” (Lemos and Souza, 2016: 1760), especially as the platform economy creates an online labor supply that would provide consumption opportunities to the middle class that were previously only available to the wealthy (McGinnis, 2018: 329-370). In this sense, the cost of providing a service through a digital platform is also reduced (especially by reducing information asymmetries). Consumers gain from the sharing economy in that goods and services are

provided at lower prices, as well as greater choice and convenience (Arthurs, 2018: 55-72). This circumstance is important for this research to the extent that the business model of companies that operate digital platforms presupposes, in order to be efficient, that transaction costs are effectively reduced. By considering that drivers are classified as individual contractors who use the platforms to provide their services with reduced transaction costs, platforms like Uber make their business model effectively viable. Another consequence of this combination between the sharing economy and digital platforms is the consolidation of the economy of attraction, based on trust in personal relationships, which “understands personal desires and begins to treat the individual not as the one to whom a demand is pushed (push economy), but rather as the one who sees his demand met (pull economy)” (Lemos and Souza, 2016: 1760).

Access to goods and services in the context of the sharing economy creates conditions for the development of “collaborative consumption”, which privileges access over the acquisition of ownership of goods that will not be exploited to their full potential” (Lemos and Souza, 2016: 1760). Thus, in principle, the sharing economy allows cars, sofas, rooms, available time, talents, and food to be shared. Consequently, the mediation of access by technology could mitigate the impacts of the tragedy of the commons by enabling the emergence of collaborative peer production (Lemos and Souza, 2016: 1761). Technology, by creating this space of collaborative production and sharing of goods and services among individuals, would be an agent for the promotion of collective welfare while enabling access to goods and services individually (Lemos and Souza, 2016: 1761). By promoting the efficient use of the good (emphasizing its social function) and the transparency in contractual relations (promoting objective good faith), the sharing economy contributes to the protection of trust in social relations “based on the development of new mechanisms that allow parties to agree in a clear and informed manner”. The connection between passengers and drivers made by Uber leads to more rational and appropriate use of vehicles. This is because leaving a car parked is not efficient, while allowing professional drivers to transport passengers through the app increases the utility of the vehicles. This also helps to reduce the number of cars circulating with only the driver, as many customers of these services would stop using their own cars. There is a concern that increasing the fleet of cars for individual transport may harm the urban environment, but apparently, offering more shared transportation options can reduce the number of idle cars and improve the environmental impact. In addition, these services provide comfort, transparency, and trust, enhancing the quality of life for passengers. Finally, Lemos and Souza highlight the relationship between the social function of property and transport apps. While traditionally the social function aims to limit the abusive use of property, in this case, the apps enable vehicle owners to use their assets in a socially beneficial way (Lemos and Souza, 2016: 1768).

On the one hand, the sharing economy causes positive externalities, in principle, making exchanges in the dynamics of consumption more sustainable; however, on the other hand, especially in the dynamics of labor relations arising from and enabled by the sharing economy, it is possible to identify situations in which the externalities caused by sharing economy are not positive. For example, platforms are often used not only to share idle capacity but to bring new features to the market, as when suppliers buy secondary apartments to rent them out on Airbnb or buy new cars in order to drive for Uber (Makela and others, 2018: 4). In fact, Uber itself encourages this kind of investment by financing the purchase of cars, and Airbnb does little to discourage the purchase of new real estate (Makela and others, 2018: 4). Moreover, while physical assets such as apartments and cars are an important part of the business model of these platforms, human resources —labor— can be just as, if not more, important (Makela and others, 2018: 4).

Several scientific publications warn about the way in which the gig economy weakens the legal protection of workers, encouraging the proliferation of jobs without minimum labor guarantees, such as limitation of working hours, minimum wage, rest periods, and social protection³ (Abilio, 2020: 111-126; Abilio, 2020a: 41-51; De Stefano, 2016: 461-471; Moraes, 2020: 377-394; Rushkoff, 2016; Slee, 2019). In this context, the sharing economy limits the “application of existing legal frameworks, blurring the traditional distinction between consumer and supplier, employee and self-employed, professional and non-professional service provision” (Amado and Moreira, 2019: 63).

The term “gig economy” is directly related to the way in which work is provided and made possible by digital platforms. The companies that operate these platforms behave as intermediaries and make it possible for agents representing supply and demand to conduct transactions directly (in a model known as a two-tier market) (Tigre, 2019: 32). In other words, these companies allow, from their platforms, buyers to request a timed and monetized task from an available worker (Hunt and others, 2017: 7), usually by charging a flat fee, pay-per-use, or other forms of payment for the service or product. These workers, who are at one end of the market intermediated by the platform, have no guarantee of further employment and are classified by the gig economy companies as independent contractors.

Hunt and others (2017: 7) explain that the operating models of platforms in the gig economy can be classified into “crowdwork” and “on-demand work”. The crowdwork model refers to tasks that are commissioned and performed virtually through the internet (in this model the crowdsourcer and crowdworker rarely —if ever— experience face-to-face interaction with the other end). As Amado and Moreira (2019: 64) explain, “crowdwork, in fact, can be either online or offline crowdwork, inasmuch as

3. Schreiber, Mariana (2020). “*Adeus, iFood: Entregadores tentam criar cooperativa para trabalhar sem patrão*.” Brasília: BBC News Brasil.

there are activities that can be performed completely online and offered globally”. In this aspect, competition, in the case of the crowdwork model, is also global. The tasks inherent to this model may or may not demand qualification from the supplier, but what particularizes them is that they are equally poorly paid, regardless of professional qualification because of the globalization of competition, or because “no attention is paid to the time workers have to be available online, nor the time they have to be looking for a task” (Amado and Moreira, 2019: 64).

In turn, the on-demand work model refers to tasks that are performed locally, with the two ends (buyer and supplier) in close physical proximity (Hunt and others, 2017: 7). These tasks are usually organized by mobile platforms and companies that set the terms of service (including fees and minimum service quality standards) and have some role in selecting and managing workers (De Stefano, 2016). As Hunt and others (2017: 7) ponder, especially in poorer countries, workers also engage with work platforms using low-tech methods such as text messaging or phone calls rather than a smartphone app. The most emblematic example of an on-demand-work model is Uber.

As will be discussed in the third chapter, there is a fluctuating international jurisprudence as to whether or not an employment relationship exists that is capable of attracting legal rules of labor protection in the context of the gig economy. This uncertainty produces an effect similar to the one caused by transnational companies when they seek countries with low labor protection and employ workers from a logic of double mobility. As will be shown, adequate protection of workers’ labor rights on digital platforms depends on a common transnational judicial enterprise that is capable of providing similar and predictable responses at the regional or global level.

First, however, it is appropriate to understand transjudicialism and verify to what extent transnational judicial dialogue can contribute to the protection of individual and collective rights.

Transnational judicial dialogue

The idea that judges from different countries talk to each other —through meetings or cross-quotes— is not a new phenomenon. It is a fact that courts are talking to each other around the world (Slaughter, 1994: 103-114) and that globalization has infiltrated and is influencing the way judicial decisions are made (Bahdi, 2002). As Slaughter explains, the Zimbabwean Supreme Court cites decisions from the European Court of Human Rights to reform its decision that corporal punishment of an adult constitutes cruel and unusual punishment and that the same for an adolescent is unconstitutional. Moreover, in 1994, nearly 60% of the citations from the Quebec courts were from foreign sources, including French authors and decisions, common law decisions, and authors from other countries (Slaughter, 1994: 100). Bastos Junior

and Bunn (2017: 90), published a survey that revealed that in a universe of 123 judgments of the Federal Supreme Court of Brazil there was “the citation of 693 foreign elements, an average of 70 mentions of foreign law per year”. The analysis also showed that the courts most often cited by the Supreme Court in its decisions are Germany, the USA, Portugal, Spain, and Italy; and that legislation is cited more than precedents, although when the last ones are cited the Federal Supreme Court concentrates on North American and German precedents (Bastos Junior and Bunn, 2017: 90-91). Furthermore, when foreign elements are cited they are usually quoted directly or through foreign doctrine and appear with greater recurrence in winning votes. They are also used as reinforcing arguments for the purpose of interpreting national legislation in cases involving the protection of fundamental rights (Bastos Junior and Bunn, 2017: 90).

Dias and Mohallen (2016) identify four contemporary reasons that are related to the development and consolidation of the intense communication of the Federal Supreme Court of Brazil and other constitutional courts: i) the hyper-constitutionalization of life established by the 1988 Constitution of the Federative Republic of Brazil; ii) the institutional similarity between Brazil and the surrounding countries; iii) the regional integration process; and iv) “transformation of the Constitution and constitutional jurisprudence resulting from Constitutional Amendment 45” by introducing into the Brazilian system “the principle of *stare decisis* through the instrument of general repercussion and binding precedents”. These reasons even influence the dialogue between the Federal Supreme Court and the Inter-American Court of Human Rights (Schäfer, 2017: 219).

If this research suggests that transjudicial communication (or transnational judicial dialogue or transjudicialism) can be an effective governance tool for protecting labor rights in the sharing economy and its spin-off, the gig economy, it is reasonable to first understand what exactly transjudicialism is, what its characteristics are, its causes, and its consequences.

Transjudicialism can be defined as a judicial opening to foreign trends (Wood, 2005: 93-94), starting from a communication or repercussion of decisions of foreign courts by a national court and vice versa. As a result of globalization, interactions between national and international or supranational courts have expanded progressively “with the expansion of the powers of the judiciary throughout the world-system and the proliferation in the number of international and supranational courts” (Pereira, 2012: 169).

Slaughter established a typology of transjudicial communication, and, in summary, it can occur horizontally —between courts of the same status, whether national or supranational, across national or regional borders—, vertically —between the national court and supranational court—, or in a mixed way (vertical-horizontal) —between signatory states to the European Convention on Human Rights, for

example, national legal norms and principles are spreading through the Convention's decisions or it would be possible to identify the presence of common legal principles in national legal orders that can be distilled and disseminated by a supranational court— (Slaughter, 1994: 103-112).

This communication between Courts may be direct, such as the communication between the European Court of Justice and the national Courts of the European Union; it may be from a monologue (Pereira, 2012: 173)⁴ where the Court whose idea is disseminated is not aware that its opinions have a foreign audience; or it may be from a mediated dialogue where an international document such as the European Convention on Human Rights effectively mediates the communication between national Courts, so that British courts, for example, may begin to conclude that the human rights jurisprudence developed by the European Court of Justice is based more on the human rights guarantees in the German constitution than on the British one (Slaughter, 1994: 112-114).

When attempting to see the functions, it can be seen that transjudicial communication can be aimed at: i) increasing the effectiveness of supranational courts; ii) securing and promoting the acceptance of reciprocal international obligations; iii) promoting cross-fertilization; iv) increasing the persuasiveness, authority, or legitimacy of individual judicial decisions; and v) foster a process of collective judicial deliberation on a set of common problems (Slaughter, 1994: 114-122). Particularly when discussing the effective protection of labor rights of workers who provide services intermediated by digital platforms, cross-fertilization and the promotion of collective judicial deliberation on common problems are significantly important. As will be shown in the following chapters, the judicial decisions handed down by the Supreme Court of California, the Supreme Court of Canada, and the Supreme Court of the United Kingdom, are based on interpretative and argumentative premises that are particularly common to Brazilian labor law (which, curiously, have not been considered by the Superior Court of Justice and by the Superior Labor Court in cases involving the recognition of employment relationship between drivers and Uber).

For the author, common elements can be identified in these examples, and their identification offers a different and valuable perspective on transjudicial communication (Slaughter, 1994: 122). In brief, there are three elements: first, transjudicial communication presupposes the existence of a conception of judicial identity that emphasizes the autonomy of these institutions (the Courts), a self-understanding whereby the courts involved in transjudicial communication conceive of themselves and their foreign counterparts as independent courts from their counterpart govern-

4. For Pereira (2012: 173), transjudicial communication by monologue is a real contradiction in terms, “since even in the context of the so-called ‘transjudicial dialogues’ there is not, properly speaking, a conversation between courts, since an ‘exchange’ of ideas between one and the other is not detected”.

mental institutions, even within the framework of international relations. That is, the Courts must interact independently of the governments to which they are bound and often against the will of those governments (notably when it comes to the protection of human rights). Thus, the dialogue presupposes that the courts have a conception of themselves as actors capable of determining these interests on their own, even if they choose to consider the views of other government departments (Slaughter, 1994: 123-124).

Secondly, transjudicial communication depends on a reliance on persuasive rather than coercive authority (Slaughter, 122). Particularly, this reliance on persuasion means that courts in a cross-fertilization process are likely to accept a specific idea only if they are persuaded or if they conclude that the content of the idea and/or its source will better enable them to persuade their own audience (Slaughter, 1994: 125).

Finally, the Courts must share an implicit conception of a common judicial enterprise among courts in a particular region or even around the world, and a mutual recognition of other institutions as similarly situated institutions performing similar functions under broadly similar rules (Slaughter, 1994: 122-123). This is important because Slaughter's liberal approach to transjudicialism identifies the Rule of Law as the political element common to courts. It is, above all, the awareness of the similarity between diverse judicial institutions, and of the similarity of the judicial enterprise between various countries (from the recognition of institutions that are equally committed to the Rule of Law, the preservation of human rights, the use of trial methods, the respect for precedents—even in civil law countries—, etcetera), reinforced, in turn, by a mutual recognition of a common judicial identity and an openness to persuasive authority that promotes the willingness to look outward (Slaughter, 1994: 128-129).

What are the causes and consequences of judicial communication? Courts talking to each other is not a new phenomenon, although, as shown by Bastos Junior and Bunn (2017: 90), it is becoming commonplace at the Supreme Court, especially regarding the problem that drives this research which is determinant for the effective protection of workers inserted in the dynamics of the gig economy. The various examples of judicial communication are part of a phenomenon with underlying characteristics and preconditions (Slaughter, 1994: 128-129).

For Slaughter, the most obvious cause is the increasing internationalization of all domestic transactions due to historical and technological trends (Slaughter, 1994: 128-129). This frequent internationalization pushes the courts to become acquainted with other legal systems and, consequently, with what other courts are saying. While technology enables the transnationalization of companies through the platform economy, access to online databases of other foreign courts allows for greater familiarity with foreign law (Slaughter, 1994: 128-129).

The internationalization of human rights can be considered a second cause for the increase in transjudicial dialogue. Supranational courts can communicate with national courts and other supranational courts (Slaughter, 1994: 128-130), particularly concerning the international protection of human rights. Despite the existence of international legal instruments, the implementation of these protection systems depends on the performance of the Courts when interpreting the conventional provisions. In other words, national courts can seek guidance on specific questions in supranational courts that the international instrument itself cannot answer (Slaughter, 1994: 128-130).

The third cause: some structural factors may encourage transjudicial communication, such as the existence of international instruments that intentionally structure some types of transjudicial communication (as with article 177 of the Treaty of Rome), such as the referral of cases from a national court to a supranational court; the possibility of direct access by citizens to supranational courts contained in the Optional Protocols to the European Convention for the Protection of Human Rights, and the International Covenant on Civil and Political Rights which enables supranational courts to monitor the activities carried out by national courts; and the absence of national legislation concerning a certain right or claim of rights (Slaughter, 1994: 128-131).

The fourth cause may be related to the emergence of Liberal Rule of Law States from the third wave of democratization. As anticipated, unifying factors of autonomous judicial identity, persuasive authority, and mutual recognition as participants in a common enterprise are likely to be stronger among courts in liberal democracies and between national courts in liberal democracies and supranational courts charged with oversight in these democracies. In this manner, the spread of liberal democracy brings the promise of a growing community of liberal states, encouraging courts to act as autonomous foreign policy actors, and raising awareness of a common effort to build and preserve the Rule of Law (Slaughter, 1994: 128-131).

Once the causes are understood, it is worth reflecting on the consequences of transjudicial communication. Here, Slaughter indicates four possible consequences: the first would consist of a progressive improvement in the quality of judicial decisions around the world based on the idea that a collective deliberation produces a better solution than the one that can be found by any individual. Ongoing relations between national and supranational courts offer a form of collective deliberation over time, as both sides work toward a mutually satisfactory position on legal issues of common interest and impact. Moreover, courts that share insights with their counterparts in other nations are forced to examine their own legal systems from a comparative perspective, which often highlights features that we take for granted (Slaughter, 1994: 132).

The second consequence can be the recognition that the Courts involved in the transjudicial communication may come to perceive themselves as members of a

transnational community of law, different from the International Community of States. The creation or generation of a legal community through cross-court communication could itself help to define and strengthen common political and economic values in the states involved so that the court in a fledgling democracy, for example, might look to the opinions of courts in older, more established democracies as a way to bind its country into this existing community of states (Slaughter, 1994: 133-134).

The third effect can be the very blending of international law and national law, especially from the promotion of a common judicial undertaking among the various Courts. And, lastly, the fourth consequence would consist in the dissemination and elevation of human rights protection levels, since the protection of individual rights constitutes the core of the judicial identity of many Courts (Slaughter, 1995-1995: 135).

There are theoretical criticisms that can be leveled at transjudicial dialogue as proposed by Slaughter, especially for its liberal political charge. In this sense, Toufayan (2010: 314) argues that a transnational procedural legal informal approach⁵ has important distributional consequences that are ignored in the analyses of theorists who advocate for transjudicialism. That is because developing or underdeveloped countries, as well as non-European regional human rights systems, are reduced to sites of consumption and internalization of norms that have no impact on the production of norms, especially because of the countries' cultural context (Toufayan, 2010: 315). In a similar line, discussing the ethical issues can be raised by addressing transjudicialism (Pereira, 2012: 173), and despite the criticism of the mainstream approach, starting with Slaughter, it is important to note that even the liberal approach to transjudicialism can contribute to greater effectiveness in protecting labor rights.

What effects can transnational judicial dialogue have on the protection of labor rights in the sharing economy, especially in countries like Brazil? The next chapter is dedicated to analyzing how foreign courts have classified these workers and how the Brazilian Judiciary, notably the Superior Court of Justice and the Superior Labor Court, have understood labor relations in the context of gig economy.

5. For Toufayan (2010: 307-382), "transnationalism-legal-process-antiformalism" (TLPAF) is a mechanism of transnational governance through disaggregated processes of cooperation and dialogue and exchange as an instrument for the development and effectiveness of supranational institutions. In practice, more formal structures are discarded, and instead substantive human rights standards are applied through informal procedural mechanisms. This approach entails significant problems, especially when developing or underdeveloped countries are considered.

Solving common problems and the jurisprudential fluctuation on platform-mediated work

The regulation of technologies in the context of the Fourth Industrial Revolution represents a challenge for States around the world, for four reasons: firstly because the Internet and new technologies have led to the rapid emergence of new markets and entire industries; secondly, because regulatory frameworks, usually developed around previous business models, have taken time to adapt and change; thirdly, because they introduced new risks to consumers; and fourthly, because of the discomfort new technologies caused in governments.

This context requires States to rethink regulatory structures, processes, and strategies, and to also recognize that there are important structural challenges to this process, such as the focus on different objectives between the private innovation sector and the public sector (profit versus public good), resulting from a different mindset (raising ceilings from innovation, as opposed to ensuring floors). In addition, operating models move at different speeds with different levels of technological sophistication.

Brazilian jurisprudential and regulatory uncertainty as an incentive to the precarization of labor relations through platforms

The judicialization of labor through technological platforms in Brazil faces two types of discussion: one, exclusively procedural regarding the competence to prosecute and judge actions brought by drivers against platforms similar to Uber; and the other related to the existence of a legal employment relationship or an autonomous employment relationship between the driver and the application. A procedural discussion is a logical consequence of a substantive law discussion since, in Brazil, the Labor Court only has substantive jurisdiction to prosecute and judge actions arising from the employment relationship.

When there is a procedural discussion regarding the competence to process and judge a specific legal action, a procedural incident is created, always resolved by a Court hierarchically superior to the judges involved in the jurisdictional conflict. When the conflict involves a labor court and a court attached to the Justice of the States, it is up to the Superior Court of Justice to resolve it. In Jurisdiction Conflict number 164.544/MG, the Superior Court of Justice held that the State Common Justice has jurisdiction to judge a writ of mandamus, coupled with compensation for material and moral damages, filed by an app driver seeking the reactivation of his Uber account so he can again use the app and perform his services. The judicial motivation used by the Superior Court of Justice can be summarized as follows: the sharing economy allows a new type of economic interaction in which, by using the

platforms, drivers, as executors of a task, act as individual entrepreneurs without an employment relationship with the company that owns the platform.

The precedent set in Jurisdiction Conflict number 164.544/MG, however, should be explained from the factual circumstance that generated it. In the case judged by the Superior Court of Justice, the plaintiff neither claimed that there was an employment relationship between him and the platform nor did he request recognition of an employment relationship. The request made in the action consisted of ordering the platform to reactivate his account so that he could again use the application and provide his services. Although the jurisdiction of the Labor Court must consider the nature of the claim (the assertion of an employment relationship), it would not have real jurisdiction in this case. Although the main legal reason for ruling out the Labor Court's jurisdiction was strictly procedural (failure by the plaintiff to assert an employment relationship), the Superior Court of Justice inserted in the judgment its opinion regarding the nature of the contract between the driver and Uber: a civil contract.

Until December 14, 2020, the Superior Labor Court registered in its jurisprudence consultation system, a case⁶ in which the Court came to manifest itself on the existence of a legal employment relationship between a driver and Uber. The other cases did not have their merits examined, because, for the Superior Labor Court, the judgment of these appeals would depend on the reexamination of facts and evidence (which is prohibited by Enunciation number 126 of the precedent of the Superior Labor Court).

In Review Appeal number 1000123-89.2017.5.02.0038, the Superior Labor Court dismissed the recognition of an employment relationship between the driver and Uber because the plaintiff confessed that he could go offline indefinitely. For the Court Ministers, this indefinite absence from the platform means “ample flexibility for the author to determine his routine, his working hours, the places he wishes to work, and the number of clients he intends to serve each day”. This self-determination would be, for the Superior Labor Court, incompatible with the legal employment relationship. Furthermore, another reason that led the Court not to recognize the employment relationship was the amount received by the worker for the work performed by the platform (around 75% of the amount paid by the user), which was higher than what the Superior Labor Court admits as sufficient to characterize a partnership relationship “since the apportionment of the value of the service in a high percentage to one of the parties shows a remuneration advantage not consistent with the employment relationship”. Therefore, for the Court, the possibility of the driver

6. The case found from a procedural consultation on the Superior Labor Court website was the Review Appeal RR-1000123-89.2017.5.02.0038, 5TH Panel, reporting Justice Breno Medeiros, Available at the Electronic Journal of the Labor Court of February 7, 2020. Another 6 appeals intended to take to the Superior Labor Court the discussion regarding the existence of an employment bond. None of them was heard due to procedural issues, however.

disconnecting from the platform and the percentage received for the work performed on it would be incompatible with the employment relationship.

The limits of this article do not allow for a detailed analysis of the decisions handed down by the Regional Labor Courts in lawsuits in which drivers seek recognition of the employment relationship with digital platforms, especially Uber. Nonetheless, it is possible to state that, in these Courts, there is still a lot of uncertainty regarding the existence of an employment relationship between platform drivers and Uber.⁷

As will be shown below, the Courts of the United Kingdom, Canada, and California have faced the controversy by stipulating objective criteria based on principles and rules of law very familiar to Brazilian labor law: the existence of legal subordination between worker and technological platform, and the primacy of reality from an in-depth analysis of the real dynamics of the economic relationship between drivers and platforms. This transnational judicial dialogue proposed in this article might mean that sometimes courts need to look outward and dialogue with others to finally find their roots.

Uber Technologies Inc. v. Heller: Prospects for a Transnational Judicial Dialogue

This chapter will analyze the arguments and judgment patterns in two cases that gained international repercussions, all involving Uber: the case *Uber Technologies Inc. v. Heller*, tried by the Supreme Court of Canada, and the case *Uber B.V. and others v Aslam and others*, whose judgment was concluded by the Supreme Court of the United Kingdom in 2021.

In June 2020, the Supreme Court of Canada, in the case of *Uber Technologies Inc. v. Heller*, concluded a legal discussion on the validity of a mandatory arbitration clause in a contract between Uber and an Uber Eats driver. Said clause submitted any dispute arising under the contract to an arbitral forum located in Amsterdam, whose proceedings were to be conducted on the basis of the law applicable in the Netherlands. The arbitration clause also provided for the payment of US\$ 14,500 as initial administrative costs, not including costs for travel to Amsterdam, accommodation, hiring of lawyers, etcetera. When comparing the costs of initiating arbitration with the amount received by the driver in previous years without deduction of taxes (somewhere between US\$ 20,800 and US\$ 31,200), the cost of the arbitration procedure was a strong disincentive to any dispute initiated by the driver.

7. In this sense, check, for example, cases: number 1001246-85.2017.5.02.0018 (judged by the Regional Labor Court of the 2ND Region); number 10575-88.2019.5.03.0003 (judged by the Regional Labor Court of the 3RD Region); number 10575-49.2019. 5.03.0113 (tried by the Regional Labor Court of the 3RD Region); number 10771-28.2018.5.03.0186 (tried by the Regional Labor Court of the 3RD Region); and number 10802-79.2018.5.03.011 (tried by the Regional Labor Court of the 3RD Region).

As Bogg (2020a: 1) warns, the case of *Uber Technologies Inc. v. Heller* is an important reminder that we are in an era of legal mobility where companies seek to escape from national labor regulations without having the cost and inconvenience of special mobility. This is all enhanced by the economy of platforms. But why is the case of *Uber Technologies Inc. v. Heller* so important? The discussion throughout the court case involved the legal validity of the arbitration clause, which at first glance sounded like a strong limitation of access to justice. This impression was confirmed by the Ontario Court of Appeal, which held that the arbitration agreement was invalid because it precluded the possibility of filing complaints with the Ministry of Labour provided for in the Employment Standards Act of 2000. For the Ontario Court of Appeals, the arbitration clause was also unscrupulous due to Mr. Heller's lack of bargaining power and the significant costs of arbitrating a small individual claim in another jurisdiction.

The case was taken to the Supreme Court of Canada and much of the legal discussion by the Court focused on the doctrine of unconscionability. This doctrine allows a party to void a manifestly unfair contract when it is demonstrated that one of the contracting parties enjoyed unequal bargaining power and that this concentration of power resulted in a substantially unfair negotiation. The development of this doctrine is considered "one of the most important achievements of modern contract law, representing a renaissance in the doctrinal treatment of contractual justice" (Benson, 2019: 165). For the Supreme Court of Canada, the doctrine of unconscionability is identified by two elements: the existence of circumstances where the contractual term is itself unreasonable and the unreasonableness arising from unequal bargaining power.⁸

A majority of the Justices of the Supreme Court of Canada upheld the decision made by the Ontario Court of Appeals. However, the reasons for this were different and thus two approaches prevailed: the contractual approach and the constitutional approach. For the justices who argued based on the contractual approach, the arbitration clause was unfair and therefore invalid (Bogg, 2020: 29). And for the justices who argued from the constitutional approach, the clause was not unfair, and the contractual approach, in arguing for unfairness, would be expanding the doctrine beyond its proper limits, creating an unacceptable degree of uncertainty for the contracting parties. Instead of finding the clause unfair from a contractual standpoint, justices like Russell Brown decided on the issue from a narrower public policy angle. As the effect of the arbitration clause was to exclude Heller's access to an appropriate forum for a fair determination of his legal rights, preventing access to justice, the

8. *Uber Technologies Inc. v. Heller*, 2020, Supreme Court of Canada 16, paragraph 63 citing *Hunter Engineering Co. v. Syncrude Canada Ltd*, 1989, 1 S.C.R. 426, pages 512 and 462. See also, *Douez v. Facebook Inc.*

clause violated the Rule of Law itself. The argument invokes a principle of public policy that precludes the dismissal of courts in determining legal rights. This argument would be sufficient to dismiss the application of the arbitration clause, without further disruptive effects on the negotiation of contracts, which depend on a stable and predictable legal framework (Bogg, 2020a: 1).

The case of *Uber Technologies Inc. v. Heller* represents, in the words of Alan Bogg, a powerful countermovement against the use of arbitration clauses in employment contracts. The argument based on the doctrine of unconscionability can be understood as a private law response to the use of arbitration clauses, considering the unequal bargaining power of workers who sign standardized contracts drawn up by economically powerful companies like Uber (Bogg, 2020a: 1). Part of the judges involved in the case proposed an extended interpretation of the doctrine of unconscionability directed specifically to contracts of adhesion since unequal bargaining power would result in an unwise transaction. This interpretation, for example, does not require proof of guilt or intent on the part of the contracting party. This interpretation is similar to the current interpretation in Brazilian Law, in the sense of abusiveness of labor contract clauses that worsen the employee's situation (articles 444, 448, and 468 of the Consolidation of Brazilian Labor Laws) or that attempt, in any way, to distort, impede or defraud the application of the precepts contained in the Brazilian Consolidation of Labor Laws (article 9 of the Consolidation of Brazilian Labor Laws), in civil law (article 424 of the Brazilian Civil Code), and in consumer law (article 39 of the Brazilian Consumer Defense Code).

On the other hand, the argument made by Russell Brown from the constitutional approach is based on the idea of the Rule of Law and connected to arguments regarding a public interest against a system of private arbitration in disputes related to labor contracts (Bogg, 2020a: 1). On this point, the argument from the Rule of Law reaches broader concerns than those about the bargaining power of the parties involved in entering a contract. Matthew Finkin (2008: 149-168), for example, argues that there are strong political arguments for an exclusive state jurisdiction for labor relations due to guarantees such as natural judge, impartiality, transparency, and publicity of judgments, with wider legal and community impact and public accountability inherent to the Judiciary. As Bogg argues, when private arbitration clauses are used so extensively litigation in public courts disappears, and generally the system of public justice and the Rule of Law are undermined. For that reason, the public interest can justify the restriction of private arbitration clauses, even when there is no unfairness in the negotiation of the individual employment contract (Bogg, 2020a: 1).

The public interest in protecting labor rights is not foreign to the Brazilian legal system, for example. By intervening in labor-economic relations, Labor Law seeks, through the stipulation of social rights, to guarantee closer economic and social relations and, consequently, to promote well-being. In this regard, labor law is of public

interest (Bogg, 2020: 22) so the right to a decent wage can be understood as being justified in part by its contribution to the public good, namely the maintenance of a public culture of decent work. Labor law is also a public interest law in the sense that rights are generally implemented through statutes administered by special courts rather than ordinary courts, with those rights sometimes enforced at the initiative of public officials, especially since issues related to identifying an employment relationship are infused with public constitutional values (Bogg, 2020: 22). In Brazilian Labor Law, the public and cogent nature of labor laws is manifested through the principle of the imperative nature of those laws (Delgado, 2012: 196).

For Bogg (2020: 1), by focusing on the public interest in resolving labor disputes as a consequence of the Rule of Law and the broad guarantee of access to justice—in a forum that can allocate rights fairly—, Russell Brown’s constitutional approach allows the proportionality of arbitration clauses to be examined in a more personalized way, so that private arbitration in labor disputes would only be possible when it does not impede access to justice. For these reasons, the problem with the clause questioned by Heller derives from its very design: it makes arbitration inaccessible to the most vulnerable party, which is the very antithesis of the guarantee of access to justice (Bogg, 2020: 1). Even if in the negotiation process the weaker party was warned of the consequences of the arbitration clause, through transparent explanations, the limitation of access to justice would make such clauses unlawful from a constitutional perspective.

Nevertheless, there is an important issue to be noted in the approach given by Russell Brown in the case *Uber Technologies Inc. v. Heller*: the constitutional approach of subjecting the validity of arbitration clauses to the guarantee of effective access to justice, applies to disputes over labor rights, which evidently assumes, the legal situation of employment.

Nowadays, the existence of an employment legal relationship between app drivers—specifically, drivers who provide services from the Uber platform— and the platform itself has provoked judicial and legislative discussions. The Court of Justice of the European Union ruled on December 2017 that Uber is a transport company and found that “this intermediation service is part of an overall service whose main element is a transport service and, therefore, this does not meet the qualification of ‘information society service’ but that of ‘service in the field of transport’”. For this reason, the Court of Justice of the European Union has held that it is “for the [EU] Member States to regulate the conditions for the provision of such services, provided that the general rules of the Treaty on the Functioning of the European Union are respected”.⁹ In the United States, in the state of California, California Assembly Bill

9. Judgment of the Court (Grand Chamber) of December 20, 2017 (reference for a preliminary ruling from the Juzgado de lo Mercantil number 3 of Barcelona, Spain). *Asociación Profesional Elite Taxi v Uber Systems Spain, SL*. Available at <https://bit.ly/47Mo9xt>.

5 was approved on September 18, 2019, which began requiring companies like Uber and Lyft to treat contract workers as employees.¹⁰ However, it is certain that, as Darcy du Toit¹¹ notes, Uber's business model, like many digital platforms, depends on the legal characterization of its drivers as self-employed, who do not enjoy labor rights.

In any case, for the Superior Court of Canada, the legal-labor relationship is a relationship especially considered by the Rule of Law and, therefore, protected by laws of public interest. Conversely, the right to "access to a court", as Bogg explains (2020b: 1), can be understood as a fundamental legal value as well as a subjective right. As a legal value, it should serve as a guideline to reformulate institutions and interpretations that, in practice, limit workers' access to the judiciary. In this aspect, especially when it comes to the use of non-state means of dispute resolution, the legal status of employees is a determinant for the use of a state justice system, as already explained by Matthew Finkin.

Hence, the persistent uncertainties surrounding employment status mean that disputes over whether an individual is an employee remain a strategic pressure point for employers who resist legal claims, as well as a practical deterrent for workers to pursue legal claims against their employers (Bogg, 2020b: 1). For this reason, it is possible to argue that in situations where the employer has the upper hand in drafting the written contract and is thereby able to shape the legal characterization of these arrangements, legal doctrines should be attuned to this inequality of bargaining power (Bogg, 2020b: 1).

The case whose judgment was concluded by the UK Supreme Court in 2021 went down a path with favorable judgments for workers who provided services for Uber.¹² For the majority of the judges who make up the English Court of Appeal, the contractual provisions treating app drivers as self-employed "do not correspond to practical reality" and the idea that Uber in London is trying to make the existence of "a mosaic of 30,000 small businesses linked by a common 'platform' is, to our minds, somewhat ludicrous" (Darcy du Toit). For the Court of Appeals, a written contract may be considered relevant evidence in defining the legal status of employment, but it is not conclusive when standard terms are non-negotiable or even in cases where the parties are on unequal bargaining terms. Therefore, for the Court, the truth is a digital platform derives its revenues from the work performed by the drivers, who are balanced in the

10. California Assembly Bill 5 was intended to amend section 3351 and add section 2750.3 to the California Labor Code, as well as amend sections 606.5 and 621 of the Unemployment Insurance Code, relating to employment.

11. Darcy du Toit, "The Employment Rights of Uber Drivers: A Battle Won, the War Goes On", *Oxford Human Rights Hub*, January 14, 2019. Available at <https://bit.ly/46tjVN3>.

12. To access the full judgment: *Uber B.V. and others* (appellants) v. *Aslam and others* (respondents), available at <https://bit.ly/3MTuXEd>.

worst of both worlds: they are contractually prohibited from exercising rights that are basic to independent contractors —such as negotiating their own prices or maintaining contact with their own customers— and they are excluded from any labor legal protection (Darcy du Toit). From these findings, the Court of Appeals held that Uber drivers should be considered employees under the Employment Rights Act 1996, which entitled them to minimum wage, paid vacation, and other basic labor rights.

In turn, the Supreme Court of the United Kingdom considered that the transport service carried out by drivers through the Uber platform has aspects that are strictly controlled by the platform: Uber defines and controls the service offered to passengers. That is, the service provided by drivers is, according to the Supreme Court, designed and organized in order to provide a standardized service to passengers in which drivers are perceived as substantially interchangeable and from which Uber, more than individual drivers, obtains the benefit of customer loyalty and goodwill. However, from the drivers' perspective, the same factors —in particular, the inability to offer a differentiated service or to set their own prices, and Uber's control over all aspects of their interaction with passengers— mean they have little or no ability to improve their economic position through professional or entrepreneurial skill. The UK Supreme Court found that the only way for drivers to increase their earnings is by working longer hours while meeting Uber's performance metrics. The Supreme Court of the United Kingdom further confirmed the correctness of the decision taken by the Labor Court in determining that the time spent by applicants working for Uber was not limited —as argued by the platform— to the periods when they were actually taking passengers to their destinations, however, included any period the driver was logged into the Uber app within the territory in which the driver was licensed to operate and was ready and willing to accept trips.

The United Kingdom's Judiciary Branch, in short, considered that the relationship between drivers and Uber is characterized by economic dependence and control over the way in which services are provided and how they result. That is to say, the platform controls the provision of services performed by the drivers and this control makes drivers subordinate workers. Despite being recent, there is no way to depart from the international relevance of the decision taken by the Supreme Court of the United Kingdom, since Uber's business model is international. Or rather, supranational.

In the leading case of *Autoclenz v. Belcher*, Bogg recalls that the UK Supreme Court formulated an “intentional” approach to determining the existence of an employment relationship, reminding the courts that their task was to identify the “true agreement” (which may not be the same as the “agreement” portrayed in the documentation text) (Bogg, 2020b: 1). The test created by the UK Supreme Court assesses whether (Mcgaughey, 2018: 6): i) there is a “minimum irreducible obligation on each side to create a service contract” that has been defined as “compensation”; ii) the employer can exercise control “to a sufficient degree”; and iii) there is a personal

performance of the work, primarily “by one’s own hands”, although there may be limited power of delegation. The basis for these factors is a general guiding principle that “the relative bargaining power of the parties must be taken into account when deciding whether the terms of any written agreement actually represent what has been agreed upon”.

Ideally, for Bogg (2020b: 1), in *Uber v. Aslam*, the UK Supreme Court should adopt a strongly objective approach to the investigation of the existence of an employment relationship so as to extend the scope of employment protection to situations where the substantive agreements reveal that a worker is integrated into the employer’s business. In essence, a strongly intentional approach means that if it is reasonably feasible to identify a worker as an employee based on their work arrangements, then they should indeed be classified as an employee. This conclusion reinforces the idea of the rule of law by enabling systemic protection of fundamental social rights in labor laws, which has much in common, according to Bogg, with the principle of “favorability” in continental legal systems (Nikolka and Poutvaara, 2019: 44-49; Hijzen, Martins and Parlevliet, 2019: 1-26; Rodriguez, 2000),¹³ whereby legal principles are progressively developed to support the position of the weaker party (Bogg, 2020b: 1). This interpretation serves as a counterbalance to the employer’s power to format contracts from complex written documentation that is presented to workers on a “take-it-or-leave-it” basis. Therefore, Bogg (2020b: 1) believes that Russell Brown’s constitutional approach could provide the thread that connects Heller and Aslam’s claims for justice in the gig economy and it may be their most enduring intellectual legacy.

Dynamex Operations West Inc. v. Superior Court of Los Angeles County:

The need for an appropriate legal standard or test for differentiating between private individual contractor and employee status

Sharing economy platforms consider the workers who provide services through them to be independent contractors because they would be free to decide how many hours a day to work and on which days to do so, including working for other platforms. In this manner, they would assume the risk of economic activity. Nevertheless, as already demonstrated, the very autonomy and contractual freedom of these workers, in the context of the gig economy, has been legally questioned, especially since the driver is not really free to negotiate prices and is subject to various training requirements and

13. In Brazil, the principle of “favorability” is manifested from the principle of protection that, in turn, materializes in three ideas: a) *in dubio pro operario*, b) rule of application of the most favorable standard, and c) rule of the most beneficial condition.

vehicle specifications, including cleanliness, but the platform reserves the right to terminate the contractual relationship with drivers with bad evaluations.¹⁴

Platforms like Uber benefit from the network effects of two-tier markets, “in which a set of agents interact through a platform and the decisions of each set affect the outcomes of the other agents, usually through network effects or externalities” (Tigre, 2019: 32). Network effects can occur at the same end —when consumers’ behavior has an impact on other consumers or when providers’ behavior has an impact on other providers— or crosswise, namely when “network externalities are generated by the impact of users on one side of the market on participants at the other end, that is, the effects that consumers produce on providers and vice versa” (Tigre, 2019: 33). Evidently, these externalities can be positive and negative. In the case of Uber, the negative network effects are present when there is a unilateral increase in supply leading to more idleness and lower revenue for drivers. In theory, this effect would cause drivers to quit the business and would cause the platform, through an algorithmic decision, to balance the supply, attracting more users (Tigre, 2019: 33).

Even though Uber defines itself as a technological platform that connects drivers and riders in real-time, offering a fare, a cut, and insurance, the platform operates in a situation of considerable legal risk. Report filed by Uber to the United States Securities and Exchange Commission¹⁵ affirms that the platform’s business model would be adversely affected if drivers were classified as employees rather than independent contractors. The report further cites court decisions with considerable impact, as they discuss the legal status of platform drivers rendered by the California Supreme Court in *Dynamex Operations West Inc. v. Superior Court of Los Angeles County*, which established a new standard for determining employee or independent contractor status in the context of California wage orders, as well as the cases of *Aslam, Farrar, Hoy and Mithu v. Uber B.V. and others*, in which, as seen earlier in this research, the Employment Appeal Tribunal in the United Kingdom concluded that drivers are workers (rather than self-employed). In addition to these decisions, the French Supreme Court held that a driver of an outsourced meal delivery service was under a “relationship of subordination”, inferring the existence of an employment relationship between worker and platform. For Uber, by virtue of legislative changes in the various countries in which it operates or court decisions, the platform is required to classify drivers as employees (or as workers or quasi-employees where such statuses exist) and significant additional expenses would be created to compensate drivers, potentially including expenses associated with the enforcement of wage and

14. Jean Tirole, “Regulating the disrupters”, *Project Syndicate*, January 9, 2019. Available at <https://bit.ly/47FQMil>.

15. See Uber Technologies, Inc., Form S-1 Registration Statement under the Securities Act of 1933. Available at <https://bit.ly/3QOgGKg>.

hour laws (including minimum wage, overtime, meal and rest period requirements), employee benefits, social security contributions, taxes, and fines. More precisely, the reclassification would require the platform to fundamentally change its business model and, consequently, would have an adverse effect on our business and financial situation. In other words, Uber's business model depends on the drivers' classification as independent contractors.

As anticipated in the previous paragraph, the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*, set a test to determine whether the drivers of app-based companies are employees. The test known as the ABC test makes the point that, unless the hiring entity establishes i) that the worker is free from the control and direction of the hiring entity with respect to the performance of the work, both under the contract to perform the work and in fact, ii) that the worker performs work that is outside the normal course of business of the hiring entity, and iii) that the worker is customarily engaged in an independently established trade, occupation, or business; the worker is to be considered an employee and the hiring business an employer under the license or work pattern in the wage orders. For the California Supreme Court, the contractor's failure to prove any one of these three prerequisites will be sufficient by itself to establish that the worker is an included employee, rather than an excluded independent contractor, for purposes of the pay order.¹⁶

The test is an important precedent that may inspire a solution to the problem of defining the legal status of workers on digital platforms. Particularly for Brazil, the precedent reveals that, regardless of legislative change, if a worker renders services under the direction of a contractor, is inserted in the contractor's core activity, and is economically dependent on this work, he must be considered an employee.

The California Supreme Court's decision also brings important repercussions to the platforms' own business model. As explained by Lemos and Souza, the systems of evaluation, activity history, and identification of individuals who use digital platforms enable the sharing economy to increase transparency and trust in the relationships they intermediate. This transparency generated by the increased duty of information promotes adequate protection of trust, because "by building a system anchored on reputation (the better the evaluation, the higher your reputation on the platform), the system encourages a better provision of the activity since the evaluation granted by the user will be visible to future customers" (Lemos and Souza, 2016: 1772). The mutual evaluation system and the protection of trust can even justify the exclusion of poorly evaluated users at both ends (Riley, 2017: 1-15). The unilateral exclusion from the contract justified on the platform users' performance and evaluation may indicate, from the ABC test, a relationship of subordination that would attract the incidence of labor legal norms.

16. See *Dynamex Operations West, Inc. v. Superior Court*, 2008. Available at <https://bit.ly/3QSF65u>.

The approach taken by the California Supreme Court is in line with the approach suggested by Bogg in *Uber B.V. and others v. Aslam and others*. The identification of objective criteria analyzes, above all, the contractors' intent and the worker dynamics in the platform's business model. As we will see below, although the criteria established in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County* have resonance in Brazilian Labor Law, the Judiciary Branch has shown signs of decisional instability when faced with the judicialization of the gig economy.

Final considerations

The sharing economy is a model of economic development specific to globalization, transnationalism, and the emergence of the network society. The operation of the digital platforms of the sharing economy is therefore transnational, and mobile, both from the point of view of capital and labor.

The problems caused by digital platforms are, therefore, problems common to the communities of countries where these companies operate. The transnationality of the operation demands that the protection of human rights, eventually violated by these companies, be understood as a common undertaking for the institutions of these countries, including the Courts. For this reason, transjudicialism can be an efficient governance instrument to enable the adequate protection of rights, especially in countries with low enforcement capacity.

The cases of *Uber Technologies Inc. v. Heller* and *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County* may provide the Regional Labor Courts of Brazil with persuasive capacity and legitimate decision parameters based on Brazilian labor legislation to enable the protection of workers who are inserted, in the reality of the facts: i) in a relationship directed and controlled by the contractor; ii) performing an activity inserted in the very core activity of the contractor; and iii) inserted in a relationship where there is economic dependence. The ABC test, developed by the California Supreme Court, and the analysis of intent and bargaining power, signaled by the Supreme Court of Canada, reinforce that the analysis to be performed by Brazilian Courts must consider labor protection norms. These norms are of public interest and apply to the facts regardless of formal contractual provisions.

The hypothesis that motivated this research was confirmed: insofar as transnational judicial dialogue can increase the persuasiveness, authority, and legitimacy of individual judicial decisions made in national courts, especially in Brazilian Labor Courts, as well as serve as an instance of collective deliberation to face common problems. The transnational judicial dialogue proposed in this article can mean that Brazilian Labor Courts need to look outside and dialogue with others to finally find their roots. Notably, the assessments made by foreign courts to decide for the existence of an employment relationship between app drivers and digital platforms are based

on theoretical and normative premises present in the Consolidation of Labor Laws and in the legal labor literature. Not only are the problems faced by the Courts of the countries, whose decisions were analyzed in this research, common to those faced by Brazilian labor courts, but also the legal bases that motivated the conclusions adopted in the United Kingdom, Canada, and the United States are common to Brazilian labor law.

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