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CYBERMIGRANTS, A LEGAL CONCEPT 4.0

RÉSUMÉ

La révolution industrielle 4.0 redéfinit la façon dont les entreprises créent de la valeur par-delà les frontières. À la délocalisation de la production de biens matériels, considérée comme une stratégie commerciale courante des entreprises, s'ajoute aujourd'hui l'internationalisation croissante de la création de valeur dans le secteur des services. Cette nouvelle percée, rendue possible par le développement, l'amélioration et l'utilisation des technologies de l'information caractéristiques de la révolution industrielle 4.0, a engendré un nouveau type de travailleurs : les « cybermigrants ». Cet article expose un nouveau concept juridique pour identifier les travailleurs qui, par-delà les frontières de leur pays et en dehors de l'entreprise, fournissent des services en temps réel à des clients. Cet article propose également une stratégie permettant de protéger ces travailleurs en leur appliquant le statut international de travailleurs migrants.

MOTS CLÉS: *Cybermigrants, migrants, révolution industrielle 4.0, technologies de l'information, services transnationaux.*

ABSTRACT

The Industrial Revolution 4.0 places us before a resizing of the way in which companies create value beyond borders. To the delocalisation of the production of material goods as a frequent behavior in the business strategy, now, it is possible to add a growing internationalization in the creation of value in the service sector of the economy. This new irruption, made possible by the development, improvement and use of information technologies, typical of the Industrial Revolution 4.0, confronts us with a new type of workers: «cybermigrants». The present work proposes to expose a novel legal concept that allows to identify those workers who provide services from outside the company, abroad, providing direct response to the final clients demands. In short, providing instant consumption services, at the customer's seat, but from outside the borders. It also proposes a strategy to cover these subjects through the application of the international statute that has been built for migrant workers.

KEYWORDS: *Cybermigrants, Migrants, Industrial Revolution 4.0, Information Technologies, Transnational Services.*

The so-called fourth industrial revolution follows on directly from the steam engine, electricity and the computer. It rests on the spread of information technologies, the latter being characterised by the massive interconnection of digital systems and devices, but also and above all by artificial intelligence which combines huge quantities of data (big data) and the use of algorithms to process them.

Each of the previous industrial revolutions had major repercussions on production methods, and beyond that, on the establishment of work relationships and the governance of the system. The impact was such that the emergence of employment law at the time of the first industrial revolution was historically linked to the factory as its cornerstone. Naturally, the appearance of electricity and the automation of production helped to draw the contours of the world of work as we know it today. However industrial revolution 4.0 could lead to far-reaching changes, likely to shake the very foundations of our concept of work, workers and employment law.

The digitisation and interconnection of processes, combined with the infinite possibilities of using communication and data processing systems, have erased the national borders of production for ever. This is why we propose a reflection on this new concept of «cybermigrants»¹, born out of industrial revolution 4.0: workers who make the choice to provide services in real time and across borders.

For decades, national production activities have been transferred towards countries where production costs are (substantially) lower, in order to maximise returns on capital. It can only be concluded that labour costs are of crucial importance, which is why most companies look for places where labour is cheaper than in the country of origin, to relocate the production of their goods, either partly or completely.

Industrial revolution 4.0 gives another dimension to this approach. What is new now resides in the fact that this process, which in the past was linked to the production of material goods, now applies to services too.

Not so long ago, the provision of services necessarily took place in the place where the service was needed, generally virtually instantaneously. Times have changed. Today, real-time services can be provided remotely. For example, if I cannot find my credit card and I need to declare it lost, I call a telephone number, and now the person I speak to probably lives in a different country to me and certainly speaks a different mother tongue to mine. I nevertheless

1 This concept was presented at the XXII ISLSSL World Congress which took place from 4 to 7 September 2018 in Turin (Italy) on the occasion of the presentation of A. de la Riva's book, *Cybermigrants, franchir les frontières de la réalité virtuelle*: <http://www.islssl torino2018.org/congress/>. This study attempts to explore further the reflection initiated by S. Strange, «Presidential Address ISA as a Microcosm», *International Studies Quarterly*, 1995, vol. 39, no. 3, p. 289: «To make any kind of marks, I have to develop ideas for my own, and take a chance that no one would listen (...) Have the courage to do your own thing, and say what you really think. Why else should anyone want to be an academic?».

benefit from the service instantly, in spite of the fact that the worker is thousands of miles away, even on another continent. The service is provided in real time and «really» provided within the borders of my country².

This offshoring of services, made possible by new technologies³, characterises industrial revolution 4.0 to a large extent. This is the reason why this way of working remotely, whilst offering a service under similar conditions and producing the same value as if it were provided *in situ*, deserves its own specific concept: the cybermigrant, explored here starting from the notion of cybermigration (I), which affects a human being working behind a screen (II) and which, for that reason, must be addressed on a legal level (III).

I - CYBERMIGRATION

This new concept involves the coming together of three notions: teleworking, «eWorking» and migrant work.

The notion of teleworking⁴ generally involves two essential elements: on the one hand, a worker who is off the company's premises and, on the other hand, the intensive use of communication and information technologies as essential means of carrying out the task to be done.

«eWorking» is presented as a more advanced form of teleworking, from the subjective point of view - as it can be carried out under contractual conditions that do not necessarily fit in with the framework of work protected by employment law - as well as from an objective point of view, as it is not intended to be performed in the principal's offices, or at the service provider's home, or any other physical space. In short, this form of work would include all the types of tasks performed by an intensive use of technological means⁵.

As mentioned previously, the two notions of teleworking and «eWorking» also converge with a third notion, that of the migrant worker. Work has always been linked to migration. Throughout history, migration has been driven by the search for new horizons, for different sociological, political, economic or ethnic reasons or due to conflicts. These tangible, visible migratory movements have never ceased since Biblical times; on the contrary, they have developed to form a characteristic trait of our era. They complicate the economic, social and

2 See footnotes p. 8 and 9.

3 According to the ILO report, *Changing Business and Opportunities for Employer and Business Organizations*, Bureau for Employers' Activities (ACT/EMP), 26/03/2019, «56 per cent of respondents named technological innovation as the global trend having the greatest overall impact on business». Today, technological innovation is opening the door to new markets, creating opportunities for new digital business models, accelerating the development of new products and services, allowing the deployment of new working methods (such as international virtual teams and teleworking) extending the digital networks of suppliers and commercial partners.

4 Idea developed based on the concept of home working. By way of an example, we can mention the ILO Home Work Convention (C177) of 1996 (which came into force on 22 April 2000) and the Home Work Recommendation (R184), from which it appears that teleworking would find itself trapped if the provision of services is included as a possible type of home working. See R. Gallardo Molla, *Le travail à domicile ancien et nouveau: de la machine à coudre à l'ordinateur*, Móstoles, Madrid, 1998, which insists on the need for overall protection of home working, based on the protection of fundamental elements including both old and modern types of remote working.

5 W. Sanguinetti Raymond, «Télétravail»: <https://wilfredosanguinetti.files.wordpress.com/2008/11/teletrabajo-voz-dic-montoya-wsanguinetti.pdf>

cultural landscapes of the host countries and the countries left behind, probably awakening the best and the worst in our ways of thinking and acting as human beings.

This new concept, situated at the interface between the three notions just mentioned, implies conceiving of the cybermigrant as a physical person who has no foothold inside the company, is based outside the national borders and provides, thanks to an indispensable and crucial technological medium, a service for another physical person who manages, controls and pays them.

As everyone knows, the concept of the cybermigrant is intrinsically inseparable from the practice of offshoring. It refers to a physical person living outside the borders of the country where the service is provided and working outside the company that pays them⁶. In other words, the cybermigrant is not physically in a commercial space, or in the country where the service is provided to its recipient. The physical separation between the employer and the worker is therefore total, as it is between the beneficiary of the service and the worker performing that service. But this dual physical separation is made up for by a virtual and also dual hyperconnection. Which is why, as we have already said, the technological medium is indispensable and crucial.

It is the technological component that enables the task assigned to be performed⁷ insofar as without it, the work could not be performed via cybermigration⁸ even though it could obviously be performed in the form of traditional work in a company, as was the case until now⁹. Technology thus frees the worker from the obligation to be physically anchored within a given company, in a given country, with a view to providing a service locally to a beneficiary. That being the case, cybermigrants work directly for the company, off its premises and sometimes from a different continent. They perform their tasks in a two-way line, *via* interactive exchanges in line with the new forms of globalised, transnational organisation of work. It is therefore not different work, but a different way of performing the service, characterised today by the lack of a physical community.

As already mentioned, it is precisely for this reason that the physical separation is counterbalanced by the virtual hyperconnection, which is also present on two levels. First of all, at the employer's level, insofar as the elements necessary for the protection of the worker

6 It should be pointed out that a cybermigrant does not offer their services to a *call center* or to a branch of the company that hires them, for it this were the case, they would be a typical worker in a conventional company, subject to local regulations.

7 This is essential, paramount. Otherwise, there would be no means of carrying out the task requested, unless the worker were physically present in the company.

8 Imagine a hospital carrying out medical studies the clinical aspect of which takes place in the hospital itself, while the report is written up remotely, but in real time. Imagine a financial organisation, which receives in its offices an application for a loan that will be analysed by an agent who is thousands of miles away. Imagine a cinema production company that hires a sound engineer based on the other side of the ocean to produce the sound track of all its films. Imagine an Asian car manufacturer that entrusts all the translation of all its vehicle manuals to a Latin American expert.

9 All the tasks mentioned in the previous note were at the time, and certainly still are in many cases, carried out in the company itself. The doctor writing up the report was not only in the hospital, but also perhaps in the room where the images to be studied were taken, the credit analyst almost certainly had his office a few metres from where the loan application had been sent, the sound engineer no doubt worked in the film studios and the translator in the administrative offices of the car plant. With the use of technology of course, these tasks could also be done on site by - often foreign - workers. In this case, they were not cybermigrants, but workers providing a service locally, whether or not they were nationals of the country in question, whether or not they were migrant-type workers.

by employment law are present, namely the power of management, control, remuneration and the fact of working on behalf of someone else. These elements obviously depend on the particular relationship with the employer and are adapted to the specific nature of the performance of the tasks and the particular way of exercising authority. This is why certain concepts, such as that of subordination require a more open approach¹⁰. Nevertheless, this does not mean that with cybermigrants we do not find certain aspects of these traditional concepts, in the manner of the classical subordination of the worker associated with the first industrial revolution. Cybermigrants are often subject to even stricter control by the employer than most workers of the time, a control that is, furthermore, facilitated by technology.

In addition, the virtual hyperconnection, is also present in the relationship with the consumer. The worker and the consumer are bound by the service provided, not «face to face» but *via* bytes of data. A hyperconnection that is characterised by a possibility of unlimited interaction, with no barriers of time, space, working hours or place.

The situation can therefore be summed up in a few words: offshoring and physical separation, virtual hyperconnection, information technology in the service of the job to be done.

II - A HUMAN BEING BEHIND THE SCREEN

These workers based beyond our borders are performing the same task as if they were physically present at the time of providing the service, as was traditionally the case.

This situation is made possible by the technology, which eliminates the physical boundaries and places us in a single space, which is at once global and virtual, and inside which the service provider remains invisible, anonymous behind their screen. Now, it is important to note that a service provider based in one country whose talent is immediately exploited in another country is creating wealth in the country where the service is rendered and not in the country where it is produced. We are therefore confronted with a sort of migration not that is bodily or physical, but one of skills: a «cybermigration».

Cybermigrants, with the value added they bring to the product of their labour and by the relationship of subordination to the employer, are identical to the migrants who physically move to another place. Finally, the employer draws the same benefits from their labour, but without having the same responsibilities.

Thus, the cybermigrant must only be available to the extent imposed by the employer. No-one will check how long their working day or week is, or whether rest times are respected or the salary fixed paid. Nor will anyone check that the legal provisions are adhered to, since the worker is invisible both to the States where they reside and to the State in which the service is provided. It is true that depending on the type of service, the number of individual providers available and the characteristics of the country of residence, levels of pay and

10 Not necessarily more vague or more lenient.

benefits offered by employers in the country of origin vary. The situation is obviously not the same for a skilled worker providing a highly specialised service and an ordinary worker. The skilled worker may perhaps be paid an attractive salary compared to the pay of their compatriots when the latter are performing the same tasks locally. But one thing is certain, this worker will not benefit from any official status or any social cover. In addition, they will be probably be working unsocial hours due to time zone differences and with no limit on the hours worked.

If the real situation regarding individual rights is difficult to measure, that of collective rights is even more so, insofar as cybermigrants belong to a «collectivity» that is totally nebulous, no more than a mist of data bytes¹¹. What collective conscience is it possible to have when working from one's own home, cut off from the thousands, perhaps hundreds of thousands of other people performing the same tasks from their own homes, which may be scattered around the four corners of the globe?

If there is nothing to encourage these workers to join the formal sector they belong to, what kind of social cover can they expect to have? When social protection is organised essentially around formal work everywhere in the world, these workers are at a total disadvantage. At best they can aspire to non-contributions based coverage, which is generally rare and provides low levels of support, in particular in less advanced countries.

Due to their status as cybermigrants, these workers and their families are only able to benefit from limited access to health services, education and the most basic rights which they cannot even claim in their own country. It is clear that they and their families have no prospects, given that they cannot take advantage of the benefits offered to the citizens of the rich countries to whose development they are nevertheless contributing.

How then is it possible to respond to the need for legal protection of the worker 4.0?

III - TOWARDS A LEGAL APPROACH TO CYBERMIGRATION

As we have already emphasised, the only difference between a worker who provides services directly to their employer's customer and a foreign worker who does the same in the country is their place of residence. This possibility of action and mobilisation across national borders is made possible by the new technologies of industrial revolution 4.0, technologies that today reign supreme in the service sector of the global economy. The phenomenon we have observed here, referred to as cybermigration, deserves to be subject to regulation that takes account of its specific nature.

This is why the application to cybermigrants of the vast regulatory framework of migration could be envisaged; in short they could be offered the same protection as local workers, avoiding all employment discrimination based on nationality. This approach would allow a

11 If the problem of defining the subjective scope of collective labour agreements is already perceptible in the case of conventional workers who temporarily cross borders, imagine the extra complexity in the case of cybermigrants. See A.M. Molina Martín, «Mobilité géographique internationale des travailleurs et champ d'application subjectif des conventions collectives», XXVIIth Andalusian University Days on Employment Law and Labour relations, Andalusian Council for Labour Relations, 2009, p. 111, which analyses this hypothesis from the perspective of cybermigration, approaching the work of cybermigrants as if it were akin to that of temporary expatriates, but in an unlimited time framework.

movement towards the globalisation¹² of services that is socially sustainable¹³, whilst reducing the social *dumping* that negatively impacts both the countries that benefit from the services and the countries of origin, but also physical persons and companies, even though they are affected in different ways and to differing degrees.

Although most international treaties do not oblige States to regulate the extra-territorial activities of their companies, the application of the rules relating to migrants' work to these providers of services from abroad would enable some international control, whilst respecting geographical borders. Just as bytes of data blur the lines of sovereignty between countries, the application of rules to migrants' work reduces barriers in the rights domain.

This is therefore not a question of proposing new measures with extra-territorial implications for national companies, but of giving value to services provided by a labour force situated outside the country. It is also not about establishing national laws whose scope would extend beyond national borders, far from it. However, it is about removing the blinkers that skew our vision of traditional concepts and prevent us from seeing that the concept of cybermigrants is not so far from that of traditional migrants¹⁴. A more open approach to international regulations would enable them to be applied to migrants' work generally, whether, in actual fact, the migration is physical or cyber-migration.

The entire universal human rights system¹⁵ offers acceptable solutions that are perfectly transferable to this new mode of providing services. In that sense, and over and above its weaknesses, the international regulation system set up by the International Labour Organisation, as a common ethical framework, is entirely relevant to the protection of basic rights at a time when globalisation is affecting all aspects of human work¹⁶.

12 According to the recent report *Changing Business and Opportunities for Employer and Business Organizations*, Bureau for Employers' Activities (ACT/EMP 26/03/2019): «Despite recent setbacks, the world economy has become truly global with a rapidly changing profile. Emerging economies - once on the periphery of global value chains, mainly as suppliers of low-cost goods, unprocessed natural resources or simple services - are becoming hubs for capital, innovation and talent».

13 Without confining the subject to declarations of basic principles, corporate social responsibility actions or advances in what is known as *soft law*, but without minimising their relevance in this area, where they have played a leading role in containing professional activity and the enjoyment of certain basic rights. These subjects have been analysed in depth by I. Daugareilh, «La responsabilité sociale des entreprises transnationales: analyse critique et prospective juridique», *Cuadernos de Relaciones Laborales*, 2009, 27, no. 1, p. 77.

14 The recommendation for «innovative action to address the growing diversity of situations in which work is performed, in particular the emerging phenomenon of digitally mediated work» is therefore particularly relevant, and the concepts developed here, even though they were invented before the report, are a humble credit to it. *Work for a brighter future* Global Commission on the Future of Work, International Labour Organisation, Geneva, ILO, 2019, p. 15.

15 As well as the main international universal and regional pacts and treaties on human rights, two documents deserve to be better known in the author's opinion: The UN Guiding Principles on Business and Human Rights of 2011 and the OECD Guidelines for Multinational Enterprises, 2013: <http://dx.doi.org/10.1787/9789264202436-es> "révision 2011"

16 J-M. Servais, «Labour Law. Its role, trends and potential», *Labour education*, 2006/2-3, no. 143.

Conclusion

The new category of migrant workers born of the advent of industrial revolution 4.0, which has made it possible to provide services across borders, poses serious challenges and demands new approaches. This truly new, and yet already common way of working in the tertiary sector of the global economy has affected States, workers, companies and trade unions to varying extents. It has also had an impact on various domains, such as basic rights, social coverage, the gender gap and the generation gap.

The cybermigration in question here, as well as the legal nature of the concept of cybermigration and the possibility of regulating it via different international legal systems traditionally designed for migrant workers, are intended to provide an appropriate response to the challenges that this new situation has raised, in particular with regard to the «mandate of universality» of the International Labour Organisation.

There is no better time to act than now. There is no better time than now, if we do things properly. We simply have to have the courage to look afresh and draw on existing traditional norms to find new ways to act.

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