

What if the purpose of social law was to ensure that workers' needs are met? Some lessons from the regulation of zero-hour contracts in three European countries

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journals.sagepub.com/home/ell**Auriane Lamine**

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Abstract

This article concludes the recent special issue of the ELLJ devoted to zero-hours contracts (ZHC), edited by E. Dermine and A. Mechelynck. It draws some cross-cutting conclusions based on the analysis of the four national contributions. Two major issues are examined in turn. First, the author looks back at the contrasting attitude that different national authorities have taken towards the use of ZHCs. She describes how these practices have been differently defined and legally framed and identifies the main debated issues. After acknowledging that no legal system has completely banned ZHCs, the article asks whether specific mechanisms adopted to mitigate the negative consequences of ZHCs are effective. This second inquiry is framed within a normative framework inspired by the work of Maslow. It invites us to refocus the legal debate on the fundamental objective of meeting the most basic needs of ZHC workers.

Keywords

zero-hour contract, labour law, atypical work, pyramid of needs.

I. Introduction

‘Is labour law antithetical to the development of zero-hour contracts (ZHCs)’? That is the ambitious question that has guided the coordinators and contributors of this special issue. More precisely, they wanted to explore this question on the basis of national studies describing how laws have received,

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regulated and reshaped these particular practices, according to their respective histories and cultures and in dialogue with international norms. In this final piece, I draw some lessons from these different articles and I come back to the initial question.

To fulfil their aim, Amaury and Elise have opted for a social (as distinct from a purely legal) definition of ZHCs: work relationships where an employer can decide whether or not he will call on a given worker¹ - leaving the latter in a situation of immense uncertainty as she has no guarantee of being asked for any performance at all (zero-hours). This conceptual choice makes sense given none of the three legal orders analysed in this issue has regulated work practices using this particular terminology. ZHCs, elsewhere qualified as 'on-call' or 'on-demand' work, have been attracting the attention of scholars from different disciplines in recent years. They are adding an extra feature to their definition: the 'entrapping' nature of the arrangement, as workers are often put in a situation where they remain at a disposal of a given employer, for diverse (not only legal) reasons. Faced with uncertainty and intermittence, these workers find themselves in a situation of increased heteronomy.

A first interesting feature of these practices is that they can (but do not have to) share the features of all the other more 'traditional' (the word says it all) non-standard relationships that have been, for their part, explicitly regulated in almost all legal orders. ZHC arrangements tend to be of a finite duration. Also, the duration of each performance is highly variable and often each single task would last less than the hours a full-time worker would perform on a daily or weekly basis. ZHC could hence be likened to 'part-time' forms of work. ZHCs often involve flexible patterns or schedules. Finally, ZHC work can be done through forms of intermediation; in this regard, platform work can be presented as extreme example of ZHC work everywhere it develops. The ZHC is the flexible work relationship *par excellence*. It is worthy of attention because it epitomises all the challenges faced by modern social law.² Because these features all disconnect workers from the organisations they work for in their respective ways,³ ZHCs also result in the fissuring of the workplace at its apex, as Joe Atkinson puts it rightly in his article.

The challenges faced by ZHC workers are thus similar to the ones of other non-standards workers, but they are added to each other and exacerbated, as pointed out by all authors. There is a lack of legal certainty in the absence of clear regulation but the most pressing issues are stemming from the unpredictable and intermittent character of work, which makes many existing legal provisions intended to protect the standard employee ineffective. Indeed, all of the authors mention the harmful consequences for workers of an irregular workload and thus income: the inability to benefit from social security schemes in the absence of adequate seniority, the absence of work-life balance and the workers' inability to make use, as atomised working individuals, of their collective rights.

If I take the definition chosen by the editors seriously (the ZHC as an employment practice independent of its legal underpinnings), then I am tempted to answer a cynical 'no' to the primary question. ZHCs are flourishing in many places. Even if social practices are indeed informed and constrained by the law in place, social sciences teach us that there is always a distance between legal norms and the realm of practices. This forces us legal scholars to approach our analyses

1. It is something like 'recruitment at will', mirroring 'dismissal at will' - a legal principle well established in common law traditions. Interestingly, our authors show that ZHC workers have often proved to be LIFO ('last in first out') in organisations, notably during the Covid pandemic.

2. In this concluding article, I will use the term 'social law' to refer to the bodies of labour, employment and social security law together.

3. The disconnection is of a temporal, spatial and/or contractual nature.

with humility. However, by the same token, it offers some scope for optimism, as we acknowledge that the evolution of practices also has the power to impact and shape the future content of norms when the latter are proven ineffective in fulfilling the goals for which they were adopted or when these very goals are questioned by a majority. The construction of social law offers us the best example of such a fruitful dialectic. Hence, a corpus of law could not be antithetical to any kind of development of practices. There is no logical or necessary relation between law and practices, rather, it is game of interpenetration.

That being said, the primary question is of the highest relevance if we, as scholars and citizens, acknowledge fully the normative character and purpose of the underlying endeavour. All contributors to this issue have started by describing the awful situation in which ZHC workers are placed. The literature unanimously denounces the fact most workers who are forced into these arrangements are not able to meet their most basic needs. It would thus be legitimate to ask if labour law, as it stands today, as a corpus of positive law that is increasingly informed by the human rights tradition, encompasses resources that could hinder the development of these damaging practices which are in many ways reminiscent of the exploitation of day labourers in the 19th century, IT developments omitted. As I unambiguously share these premises, I will try to answer the question in two steps, on the basis of what I have learned from the four contributions. First, I will examine the question of the lawfulness of ZHC practices. Having noticed that there is no critical impediment, in the different legal orders, to their development, I conduct an empirically-inspired analysis of the different legal tools that could be used to ensure that ZHC workers' most important needs are covered.

II. The reception⁴ of ZHC practices in national legal orders

A first finding is the contrasted attitude that national authorities - judges, legislators and in the Dutch cases even legal commentators - have adopted towards the development of ZHC practices which emerged a couple of decades ago, even if their number seems to be increasing everywhere (with the exception of during the Covid-19 years). These positions probably reflect, to an extent, the dominant economic or political ideologies in the countries concerned. The three national regimes could be located on a spectrum of intensity. The Belgian authorities have been reluctant to recognise the lawfulness of non-standard forms of work, and initially adopted mechanisms to deter parties from using ZHCs. However, in 2015, they developed 'flexijobs', an allegedly exceptional form of ZHC, the use of which some want today to expand to the whole economy (see, in this special issue, the contribution of Elise Dermine and Amaury Mechelynck on the Belgian case). By contrast, we note the favourable but cautious reception of ZHCs in the Dutch legal order, where the legislator has developed more and more layers of legal mechanisms over time in order to mitigate the adverse effects of the practices they had first recognised as legal (see the contribution of Anja Eleveld on the Dutch case). The English case is characterised by the highly liberal attitude of authorities who have not, to date, questioned the appropriateness of ZHCs (see the contribution of Joe Atkinson on the situation in the UK) and have, on the contrary, played a supporting role, notably through the Universal Credit system that makes access to social benefits conditional

4. L. François, *Introduction au droit social* (2^{ème} éd.), Liège, Presses Universitaires de Liège, 2022, pp. 84–90. The 'reception' of a norm and/or normative practices, according to François, who is one of the most important representatives of the legal pluralist tradition in the French-speaking world, is its institutional integration into a legal order from which it does not originate. This reception can take various forms and be more or less intense.

upon the search for and acceptance of any type of job, including ZHC work. In this special issue, Virginia has described this as ‘state-mediated exploitation’.

What is interesting is that, with the exception of a simple prohibition of the practice (whose efficiency is always relative, as mentioned above), any kind of legal intervention targeting ZHCs or non-standard work - even the most limiting or constraining regimes - has had a streamlining effect on the use of these practices, notably (but not only) by increasing legal certainty around them, and even more so if they were previously forbidden. For example, the *limits to the use* of successive fixed-term contracts have had the indirect effect of legitimising *the mere use* of the arrangement. This seems to be confirmed by the growing use of non-standard contracts in all three legal orders. Any kind of intervention that takes a practice for granted carries the risk of a form of legitimisation because it is in the nature of law to crystallise social realities and allow for their reproduction. Several decades ago, some French researchers described labour law as intrinsically capitalistic.⁵ Indeed, the institution of the employment contract has by the same token protected the oppressed and normalised their subordination. In this regard, the fact that the attention of authorities and scholars alike has mainly been focused on ‘abusive’ uses of ZHCs (as opposed to the use), and the evidence, documented in the Belgian case in particular, of the replacement of the traditional employment contract with flexible forms (through one or several jobbers), tend to reinforce this idea that ZHCs have lost their exceptional or marginal character in discourse and practice. This tension should never be overlooked when commenting on existing or projected legal arrangements because once the very use of an arrangement is taken for granted, this will likely produce path dependency in future legal design.

Speaking of the discourse of exception, it is interesting to note the important space taken by the invocation of ‘Economic Reason’⁶ as an authoritative argument intended to justify either the mere recourse to ZHCs or the derogation from specific protections for atypical workers. But what do market norms demand precisely? In many cases, starting with EU Directives on atypical work, the content of Economic Reason is left for the employer to define - he who knows better what ‘the business needs’ are, what is required for his company to thrive. What is fascinating is, in my opinion, the progressive *institutionalisation* of the exception discourse when it comes to flexibility in work.⁷ At first, atypical work is presented as a solution in very specific, challenging economic situations faced by companies. Then it becomes accepted that some fluctuations are structural, for example, in some sectors or because of the nature of an activity. The exception (or more precisely, the legal intervention it serves) is purely institutionalised when public authorities are not simply advocating the use of ZHCs or other flexible work forms as an answer to a critical episode, but promoting them as a useful regulatory tool to achieve general macroeconomic goals such as the fight against unemployment or undeclared work. This, of course, is linked to the normalisation effect described above. If the content of Economic Reason is never fully and coherently disclosed, its authoritative nature is nonetheless rarely questioned.⁸ It is particularly striking to see that collective bargaining is recurrently used - the Dutch case is here paradigmatic - to found the exception and legitimise derogations. This is of course counterintuitive to most labour

5. F. Collin, R. Dhoquois, P.-H. Goutierre, A. Jeammaud, G. Lyon-Caen, A. Goudil, *Le droit capitaliste du travail*, Grenoble, Presses Universitaires de Grenoble, 1980, 274 p.

6. As brilliantly defined by A. GORZ, *Métamorphoses du travail. Critique de la raison économique*, Paris, Gallimard, 1988, pp 205–215.

7. G. Agamben, *État d’exception. Homo sacer 2*, trad. fr. J. Gayraud, Seuil, Paris, 2003.

8. A. Supiot, *La gouvernance par les nombres. Cours au collège de France 2021-2014*, Paris, Fayard, 2015, 512 p.

law scholars but one might find the beginning of an explanation in the fragmentation of collective ties that atypical work inevitably produces and in the loss of trade union power. One could also argue that the main focus of unions, at least since WWII, has not been to question the definition of Economic Reason but more to ensure that the wealth produced has been more fairly distributed in the economy.⁹

In all three legal orders, the question of the legality of ZHC practices has been tackled and it has been intertwined with the distinct issue of the accurate legal qualification to be given to this particular transaction over labour performance. In the UK and in Belgium, principles of mutuality of obligations (and consideration) and of the '*caractère certain de l'objet*'¹⁰ and the employer's 'obligation to provide work' for his worker, respectively, are casting serious doubts on the lawfulness of contracts where the amount of work is undefined and uncertain. Even if the contract's main object was not the provision of labour, its legality would be debatable. Hence ZHCs can only be framed legally as a succession of fixed-term contracts, with the many consequences that this qualification has in terms of protection. In the Belgian flexi-job model, a certain continuity is acknowledged by the signature of a parallel framework contract between parties, on the basis of which future ZHCs (in the sociological sense adopted in this special issue) will be concluded. In the UK, the recent case law on platform work will likely benefit ZHC workers, allowing them to benefit from an umbrella contract linking separate work performances, if there are enough of them. Interestingly, the legality of a series of ZHCs concluded over time, coupled with an obligation of the employee to accept upcoming tasks, has been construed in Dutch law through the design, by academics, of an 'exception to the *payment principle*' - that is, the rule according to which the contractual party who is responsible for a lack of economic activity still has to remunerate the other despite the correlative absence of work performance.

Many discussions have been devoted to the nature of work arrangements in the context of the platform economy. Some national courts have recognised the qualification of an employment contract (or at least a relationship involving a 'worker' in the UK) not only in situations of pure subordination but also on the basis of more generous criteria like economic dependence or integration in a business. The 2019 Cinderella Directive also seems to have paved the way for a somewhat enlarged (or at least realist¹¹) definition of the labour contract. These developments can easily be transposed to the reality of ZHCs and will not be elaborated further here. Of interest is the different treatment reserved to the freedom to refuse a call in the legal orders. In the UK and in the Netherlands, this prerogative is allegedly revealing of the autonomy of a worker and thus leads judges to refute the existence of an employment contract. A similar fate is reserved for the freedom to work for a competitor in the UK. The Belgian *Cour de Cassation* has, on the contrary, described the right to refuse a gig as not more than a manifestation of the freedom to contract; the presence of subordination will only be evaluated later, if and once the contract is signed. That being

9. X. Vigna, *L'insubordination ouvrière dans les années 68. Essai d'histoire politique des usines*, Presses universitaires de Rennes, Rennes, 2007, 384 p.

10. The principle found in civil law according to which parties should be able to identify with some certainty the main components of their transaction.

11. By realist, we refer to the '*principe réalité*' that dominates in many labour law national traditions (see e.g. S. Gamonal C. and C. F. Rosado Marzan, *Principled Labor Law. U.S. Labor law through a Latin American Method*, Oxford, OUP, 2019, chapter 2 ('primacy of reality')). It consists in the judge giving the reality of practices an important weight in the process of legal qualification. This sometimes leads the judge to depart from what is expressed in the written contract or from company law-established classifications. This principle should not be mistaken (even if both can go hand in hand) with the tendency of labour judges to adopt a broader definition of the employment contract, mentioned in the text.

said, the difference between self-employment and employment loses some relevance in situations of extreme intermittency as many rights held by ZHC employees are simply not effective, as discussed above. In some instances, a contract of service where parties recognise the relational nature¹² of their commitments might even provide more security than a ZHC employment contract. Across jurisdictions, a lose-lose situation seems to emerge in which the ZHC worker has a choice between a kind of precariousness (resulting from self-employment) and another kind (as the consequence of being trapped in legally or economically captive forms of intermittency, inside employment).

I have already noted the similarities between ZHCs and other forms of non-standard work relationships. Some contributors have built a convincing case in favour of the application of labour law protections specific to non-standard work to ZHC workers (more on this below). Further, they have pointed out that employers might have recourse more easily to already regulated arrangements such as those attached to agency work either because they seem even more flexible than those applicable to ZHCs (the Dutch or the Belgian case) or because they would prefer legal certainty, even with some constraints involved, to the uncertainties attached to ZHCs.

In her piece, Virginia has questioned in-depth the compatibility of the UK Universal Credit - a social security system which makes the right to benefits for the unemployed or for people with low income, conditional on the acceptance by the worker of any working arrangement, including very precarious ones - with international standards. The pressure exerted by public authorities casts some serious doubts on the freely undertaken nature of workers' commitment. However, the analysis also sheds light on how international human rights law (including the prohibition of forced labour and inhuman treatment, right to respect for private life, and the prohibition of discrimination) might serve as a tool to force nations to adopt a stricter approach towards the use of ZHCs, at least each time workers end up being *coerced* into such employment relationships. What emerges is that international courts and supervisory bodies show a relatively high tolerance towards the use of ZHCs and the fact of making access to benefits conditional on the acceptance of ZHCs. Again, their attention has mainly been focused on abusive forms of workfare arrangements. The most promising avenue seems to lie in the use of the right to a subsistence minimum or in the integration of the substantial criterion of poverty into discrimination law. In both cases an analysis founded purely in the holding of (merely political) rights is substituted by one where the existence of rights is grounded in the identification of needs. This idea will guide us in the following section.

III. Which legal arrangements to respond to ZHC workers' most basic needs?

Once we realise the practice of ZHCs exists and no legal order has the intention of simply prohibiting it, or to forbid it in all its forms, it is legitimate to ask if law might play a role in mitigating the adverse impacts these intermittent arrangements have on the workers involved. We can recognise the conservative nature of legal tools without denying law a correlative power of transformation. Some consider the corpus of labour law to be historically grounded in a number of values, ends, functions and purposes, such as decommodification (which has the advantage of being rooted in international law). Others affirm on more economic grounds that it has served a goal of shifting risks from the worker to the employer. One can recognise some volatility in the relation between ends and legal norms and still advocate, as the UK Courts have apparently been more eager to

12. I.R. Macneil, 'Relational Contract: What We Do and Do Not Know', *Wisconsin Law Review*, 4, 1985, pp. 483–526.

in recent years, a teleological interpretation of legal arrangements, because one considers these are the ends worth pursuing today.

In the following paragraphs, I make this perspective my own and advocate for a reading of the social law corpus as one that should intend to guarantee that the most basic needs of workers are met.¹³ I build the reflection in what has been long recognised as a reference in psychology, Maslow's pyramid of needs.¹⁴ The pyramid is composed of three main levels: at the bottom, are the most basic physiological and safety needs; the second level comprises relational needs like belongingness and recognition; the upper level is dedicated to needs of self-realisation. I take seriously the idea, materialised in the pyramid, that there will be some hierarchy between needs - at least that someone will, first and foremost, try to secure means of survival for her and her family, before striving for kinds of self-realisation of her life's ends and purposes. Applying labour law jargon, one could say that a certain level of economic stability (independence?) is necessary to be in a position to exert individual autonomy (insubordination?).¹⁵ It is not that one category of needs is more important in a purely rational sense, but very pragmatically that access to autonomy, inside and outside work, depends on the most basic needs being fulfilled, at least at a minimum level. Arendt has described wonderfully how the effective exercise of political liberties is dependent on the freedom not to worry about how to make ends meet.¹⁶ Developments about the non-take up of rights, found in all four contributions, tend to confirm this affirmation.

An analysis of positive law through this matrix of needs is interesting for several reasons. It departs from a conception of labour law where economic safety (through social rights) is *the counterpart* of the surrender by workers of their autonomy in work. This conception shows drastic limits when authority comes from the market or from an invisible algorithm and when it appears that employees and self-employed alike are suffering from intermittency. Instead, the analysis treats the response to needs as *the condition for* individual autonomy. Moreover, it opens a door to the expansion of the personal scope of social law. It offers an interesting counterpoint to the current use of Economic Reason, often identified as undebatable business needs: what is at stake are workers' needs, and the latter could and should be debated. The legal field has moved further and further away from its naturalist underpinnings and yet it has proven so permeable to the authority of Economic Reason. Psychology might offer useful tools to rebalance the power of the Total Market. Finally, this vision, though first independent from it, could be backed up by the existing

13. It is not rare that employment law is presented as a corpus of rules aimed at providing 'security to the dependent worker, regardless of the name the contracting parties have given to the employment relationship' (see e.g. Anja's contribution, quoting works by Dutch labour law scholars from the end of the 19th century; similar discussions have taken place in Belgium and France). This claim could also be founded more cynically in a Marxist sense of the needed 'reproduction of the labour force', which is also necessary for the capital to flourish.

14. A. H. Maslow, 'A Theory of Human Motivation', *Psychological Review*, 50, 1943, pp. 370–396. <https://doi.org/10.1037/h0054346>. The model, and particularly the definition of needs, their order and interrelations are highly debated in academia (and should surely be subject to democratic debate), but my purpose is not to enter these discussions. I use the model as a tool of analysis of the legislation in force. See also A. SUPIOT, *Critique du droit du travail* (2^{ème} ed.), Paris, PUF, coll. Quadrige, pp. 67–68. The order is not exactly the same in Supiot ('une gradation (...), à partir de l'idée de sécurité physique de la personne (la sécurité dans le travail), s'étend à sa sécurité économique (la sécurité par le travail), puis au respect de son identité, d'abord son identité par le travail, puis son identité dans le travail'). Of course, Maslow's account is purely descriptive while Supiot identifies the coverage of these layers of needs as the main historical purpose of social law.

15. S. Ribotta, 'Condiciones materiales para el ejercicio de la autonomía. El jaque de la desigualdad a la libertad', *Revista Derecho del Estado*, n° 48, Enero-Abril 2021, <https://ssrn.com/abstract=3771600>.

16. H. Arendt, *The freedom to be free*, Penguin classics, 2020, 128p.

corpus of human rights (subsistence minimum and social assistance; poverty as a criterion of discrimination). The vision of social and economic rights becomes even more empowering once the recipient is not a passive, assisted, individual but a worker, who strives for her autonomy.¹⁷

The question I ask is thus: are all the legal arrangements discussed in the four pieces, whether in force or only projected, whether targeting ZHCs or other types of non-standard contracts, effective in helping ZHC workers to meet their most basic needs? The analysis is purely based on arrangements as they are described on paper. It would have to be supplemented by empirical findings. In each legal order, the institutional responses offered are based on different legal techniques including: civil presumptions and the reversal of the burden of proof; general principles found in civil or common law, such as fairness in the execution of a contract or the prohibition of unilaterally modifying contractual conditions agreed upon; types of economic incentives for workers or employers alike; human-rights inspired types of justification; principles like non-regression or the *principe réalité*; sanctions of a civil or criminal nature; forms of licensing/authorisation by public authorities to use/not use/derogate; non-discrimination and equality law, etc.¹⁸

Depending on the legal order concerned, the responsibility for ensuring the fulfilment of needs (or legally speaking, the benefit of social rights), which involves important costs, is distributed differently between employers, workers and the State. This is particularly sensitive in situations of intermediation, or in situations where the worker benefits from extended freedom in employment (sometimes only on paper) because in these cases, the classical definition of roles is blurred and thus the social justifications for allocating responsibilities to one or another ('he controls work so he must protect/pay'; 'he gets the economic benefit so he must protect/pay', etc.) lose their teeth and relevance. This is likely to have an important impact on the economic choices of actors, and should be at the heart of public debate, but this issue goes way beyond the scope of this contribution.

IV. Evaluation

While reading the four pieces, I first spotted all legal mechanisms developed (or whose development was envisioned) to counter the deterring effects of ZHCs or other atypical arrangements which share some of their features. I will present them very quickly as classified in five categories. I will then turn to evaluate their efficiency in responding to ZHC workers' most essential needs¹⁹

17. A. Chowdhury, "'The Giver or the Recipient?': The Peculiar Ownership of Human Rights", *International Political Sociology*, 5 (1), 2011, pp. 35–51.

18. Note, however, that the non-discrimination rationale applied to atypical work requires identification of who is 'the comparable standard worker'. In situations of complete intermittence this might prove particularly difficult if not impossible. It might be less challenging for rights that do not require spatial or temporal association with an organisation (e.g. wage entitlements *vs.* concrete health-related rights). Besides, the granting of pro rata entitlements might very well be insufficient to reach the thresholds that the fulfilment of needs requires.

19. Of course, there is some artificiality in isolating legal mechanisms from the general national systems, more or less conducive or receptive to the development of ZHCs, from which they stem. That is why I have dedicated the first part of these conclusions to their reception in the different legal orders, taken as wholes. This second part questions the ability of each singular mechanism to respond to workers' needs. The fact that I first identify them in the various legal orders pursues two aims. It is a guarantee that I will only discuss arrangements that exist or are envisioned. It is also intended to show that even in very different systems, similar recipes are advocated for. But this should be usefully complemented by an empirical analysis questioning how the different laws in each legal order offer higher or lower protections, when taken in combination or in a systemic way. Such an inquiry would necessarily require the support of other scientific disciplines.

A. Categories of legal arrangements²⁰

1. *Mechanisms safeguarding workers' income* (either salary or social benefits): Guaranteed salary or equivalent sum, even if work is not performed, or for periods between gigs,²¹ sometimes over a defined period, or in cases of cancellation (Belgium (BE), Netherlands (NL), EU); responsiveness of social security regimes (either sick pay, unemployment benefits, pension, or forms of universal replacement revenues) to insufficient revenue (UK); minimum revenue per hour or per month to be divided by hour or by day (BE); obligation of main employment or equivalent social status besides ZHCs (BE, and all countries where ZHC are presented as a complement to social security benefits); reduced (or no) thresholds/conditions to access social security benefits (UK, NL).
2. *Mechanisms safeguarding workers' working time* (both workload and schedules): Amount of guaranteed hours in general or over a reference period, based - or not - on previous employment (NL, BE, UK); predetermined schedules/working patterns whether partially variable or not, or predetermined hours and days of work (NL, BE, UK, EU); mandatory period for calling or for cancelling a call (NL, EU); maximum period between calls (NL); minimal duration for one task (BE, NL), maximum period for the use of ZHC (NL); upper limits to working time (EU, BE, NL, UK); right to disconnect (EU).
3. *Mechanisms imposing transparency or disclosure of information* (before or during the contract): various types of mandatory information, sometimes in a given timeframe, on patterns/schedules/working conditions/rest periods/notice periods/deadlines for cancellation (UK, NL, BE, EU).
4. *Mechanisms adjusting the contractual design*: umbrella contract in parallel to fixed-term contracts or 'joining' them (BE, UK); limits in renewability and use and/or transformation of successive fixed-term contracts into indefinite term contract in some circumstances (BE, NL, UK, EU); assimilation of non-renewal to dismissal (EU, UK, NL); priority in work attribution if there is work (EU, NL); respect of specific notice period (NL); (enhanced) freedom to refuse calls (for a reason or for no reason, including other work) (BE, NL); obligation to call in case there is work (NL); prohibition of non-competition or exclusivity clauses (UK, EU); transferable rights, especially when it comes to social security, or other mechanisms creating continuity despite multiple separate tasks (UK).
5. *Additional rights*: Access to training (EU).

B. Are these mechanisms efficient to respond to ZHC workers' needs?

I will now question these various mechanisms in their capacity to respond to workers' needs. I start with the bottom of the pyramid, go through relational needs and finish with the need

20. I will not detail each arrangement but only mention with the relevant acronym (BE-NL-UK-EU) where each type of mechanisms is in force or envisioned. For further detail, I encourage the reader to turn to the relevant article. Please note that the effectiveness of some of these arrangements is highly reduced by the derogations that are attached to them. I will not analyse these as I am attempting to draw some general observations from the material.

21. Of course, interesting parallels could be made here with the case law of the ECJ on working time, which has increasingly applied the legal qualification of working time to periods when the worker is available, though inactive. That being said, the Court has always affirmed that this only applies to issues inside the material scope of the Directive and thus not directly to issues of remuneration – those mainly at stake here.

for self-realisation. As the reader will notice, the main developments relate to the first layer as most legal mechanisms are meant to increase the financial security of workers and, as I mentioned above, the effective meeting of the most essential needs is a condition for the fulfilment of those found higher in the pyramid.

1. *Physiological and Safety Needs*: The needs concerned are those related to food, housing, safety and health, at work and outside of work. In a market society, some of these needs will be met in kind but most of them will be met through the use of financial resources which will serve to buy essential goods and services on the market.

It is interesting to note that many mechanisms are aiming, or at least have the potential, to offer some financial security to ZHC workers. However, a distinction should be made depending on the level of security they are able to provide: securing a given amount of money; guaranteeing a living wage; offering financial stability over time.

One thinks first of the mechanisms which only *guarantee a determined revenue* to the worker,²² in exchange or in the absence of work, over a reference period, or not. Those guaranteeing the workers a given amount of work - for a task, an absolute minimum, over a reference period or not, work as functional equivalents to the first kind as they guarantee a certain income. When the minimum is set over a given reference period, the shorter this period is, the greater the guarantee will be for ZHC workers.²³ Mechanisms giving priority to some workers in the allocation of extra work offer them the prospect of earning a higher income. Unfortunately, these mechanisms are quite weak as they only allow workers to secure a specific amount of income. There is no guarantee that the perceived income will be a living one. Chances are high that it will not be enough to cover basic needs. When the enforcement of these mechanisms is itself conditional on the fulfilment of some conditions (often some continuity in past working time), the prospect of covering basic needs becomes even more remote. What is more, the given amount or working time will rarely be enough to fulfil the conditions (length of service or accumulated revenue) to access replacement revenues in most social security regimes, whether unemployment, sickness or pension benefits.

It is only when combined with other measures that the first kind of mechanisms will *ensure ZHC workers a living wage*, despite their situation of intermittency. Several hypotheses are possible. First, one might impose the requirement that the guaranteed working time and/or wage, or a combination of both, must reach a defined minimal threshold, enough for the workers' needs to be covered. This might involve strengthening or generalising limits to the use of part-time work. But a living revenue can also be fully granted through social security schemes. For intermittent workers to benefit from these schemes some adaptations in the conditions to access them (e.g., switching from a seniority requirement to an 'accumulated income' one) should take place. A living wage could also be reached by a combination of salary and replacement/alternative income. This is notably achieved through systems where ZHCs are only available to workers who also benefit from a sufficient replacement income - but with guarantees that the choice to keep working will positively affect their revenue.

If the worker stays on-call for the same employer, the law could require him to remunerate the worker between tasks. This could be achieved through any mechanisms decoupling the amount of

22. They are of utmost importance when the arrangement concerns a task and not some defined working time.

23. It is interesting to note that the average weekly hours on a reference period type of rule plays a very different role depending on whether the worker works full-time, or part-time. For the former, it is a protection against potential overwork (it is thus strongly linked to health and safety). For part-time workers or ZHC workers, it offers, first and foremost, a guarantee of revenue.

work from the amount of pay and imposing a living threshold. Finally, one could reach a living wage through the addition of multiple service contracts (employment or not). This is the path taken by systems which prohibit non-competition or exclusivity clauses, and by those which enshrine a general right to refuse calls or expand the legitimate causes for refusal: they make it possible for workers to work for several contractors during the same period. Obligations of transparency (or in some cases of an express agreement of the worker) on schedules, notice before calls, etc. are also likely to help a worker who would want or need to add to her working commitments. However, this will never offer a guarantee of reaching a living income *per se*. The only system that could provide for it is a system where ZHCs are only available if the worker is involved, in the first place, in a working arrangement that guarantees her a living revenue.

But the ultimate goal would be to ensure that a worker would benefit *from a living wage in the long run*, not for a single period of reference - in other terms, from financial stability. A number of mechanisms intended to create some contractual continuity for the worker - by abandoning the mutuality of obligations requirement, through the use of a framework contract or via forms of intermediation - carry the advantage of guaranteeing the benefit of a number of labour rights, even when no work is performed. It is particularly useful when the activation of some benefits relies on seniority. The chances are higher, then, that the worker will access replacement income if needed. However, contractual continuity falls short of ensuring financial stability if it does not come hand in hand with a guaranteed salary or an equivalent working time. The same is true for measures like the transformation of successive fixed-term contracts into an open-ended one, or to a lesser extent priority given in the attribution of open-end contracts: they only might prove efficient in providing financial stability if they are coupled with minimum thresholds. Of course, stability will always be dependent on the employer's willingness not to terminate the contract. Mechanisms which allow a ZHC worker to benefit from severance pay (e.g., by assimilation of non-renewal to dismissal) and those establishing explicit mechanisms for the transition from a work arrangement to another (outplacement, forms of training, etc.) are clearly oriented towards the reconstruction of stability in a context of discontinuity. Without a strong system guaranteeing the perception of a living wage between working arrangements, however, financial stability is likely to remain an empty promise.

In the four articles, one finds very few instances of legal arrangements targeting specifically the health and safety at work of ZHC workers which might suggest these needs have been considered as less essential than financial security. Of course, the more extensive the knowledge that the worker has in advance of her working conditions and working time (even better if she needs to agree on them) the better she can arrange to avoid burnout, stress or other psychosocial risks. However, this still relies heavily on her own autonomy. When acknowledged as the legal employer, the principal has the obligation to abide by health and safety standards during work performance. However, the unpredictable and intermittent nature of ZHCs, often coupled with their part-time and fixed-term components, reduce drastically the effectiveness of classical, EU-inspired risk management systems which rely on a holistic conception of the workplace and on the evaluation of risks to be updated over time. Mechanisms establishing contractual continuity with one employer may, unfortunately, not impact the situation of ZHC workers if they are not coupled with an imposed sufficient amount of work. In between tasks or gigs, the employer might not be in a position to control the health of his workers, even if he is obliged to do so. This continuity might allow ZHC workers to qualify more easily for social benefits outside work, however, including types of health coverage.

In the absence of exclusivity, it is not rare that a ZHC worker will be performing tasks for more than one employer. When the need for financial security is unfulfilled, workers might be tempted to

compensate for it by adding to commitments, at the cost of their own health. Of course, each employer has to abide by working time limitations. But one might wonder why legislators have not given more attention to the respect of these maximum limitations starting from the worker's perspective. When the worker is working intermittently, such type of transversal time constraints should be established, including defined rest times and limits in the variation of schedules. This, of course, would also require stricter mechanisms of time reporting, as it is usually the case for part-time work.

2. *Belonginess and social ties related needs*: These needs rank just above those just discussed. They can 'be fulfilled within general relationships, such as belonging to an ingroup, or within specific relationships, such as friendships, parent-child relationships, or romantic relationships'.²⁴ If left unfulfilled they can lead to various forms of psychosocial pathologies.

It is interesting to note that these needs are mainly approached, when it comes to ZHC workers, through the prism of work-life balance. Many protections adopted in the legal orders analysed in this issue are at least partly justified by the predictability they provide to ZHC workers and the correlated increased autonomy they get to organise their private life. This is true for all the transparency rules regarding working time, schedules, notice periods and rest time. When the consent of the worker is required on these different work components (even better in written form), and when the employer is prohibited from unilaterally modifying them, the degree of protection is even higher. The imposition of predetermined days or hours of work, the increased freedom to refuse calls for a reason or without reason and the right to disconnection are additional tools the ZHC worker might use to draw some clearer lines between professional and private life.

However, these findings call for several remarks. Here again, the effectiveness of protections might be questioned. First, if one takes the idea of the pyramid seriously, there is a risk of non-take-up of rights by ZHC workers: if the most basic financial needs are not met, this might impact negatively on work-life balance despite ambitious protections. Again, protections are applicable to each single employer, but intermittency often implies job contracts with several principals. The protection of these particular needs is also undermined by a pervasive discourse around 'chosen flexibility', often attributed to women workers in search of a satisfying work-life balance, and more lately to Generation Y, which even if often rooted in real aspirations, helps to legitimise precarious work arrangements. With regard to the central role that women play in providing care inside and outside work, responding to the very needs we are focusing on, the issue of ZHCs should probably be approached from a more gender-sensitive perspective by researchers and legislators alike. It is striking that all four contributions mention the care sector (and more generally the service sector) as one where the use of ZHCs is the most widespread.

To finish up, it is also interesting to read between the lines of legislation that puts respect for work-life balance at its centre. Even not explicitly, it reveals that the fulfilment of belonginess and social needs is, first and foremost, envisioned as something that pertains to the private sphere of life for which some reasonable time should be allocated. The question of how ZHC workers might want to fulfil these needs by integration into a working community is completely neglected. Others have already brilliantly described how non-standard work arrangements, coupled with digitalisation, are threatening the very existence of the workplace and its particular

24. R. T. Pinkus, 'Love and belongingness needs', in Zeigler-Hill V., Shackelford T.K. (eds), *Encyclopedia of Personality and Individual Differences*, Springer, 2020, https://doi.org/10.1007/978-3-319-24612-3_1487 and A. H. MASLOW, *op. cit.*, 50, pp. 381–382.

social ties.²⁵ Some partial responses can be found in laws imposing contractual continuity when they also involve minimum 'shared' or 'common' working time for workers of a given organisation. This fissuring is not without consequence: it impacts drastically the capacity for workers to voice their concerns, which requires them to first identify as a collective with shared interests and to pinpoint who is the right and legitimate addressee (maybe addressees) of their claims.

3. *The need for self-realization*:²⁶ That is to say, the fulfilment of one's potential and aspirations, whether in private (autonomy in the determination of personal preferences and goals) or in public (participation in meaningful collective projects, including work), individually or collectively.

As I just pointed out, autonomy is implicitly envisioned, in the legislation analysed, as a prerogative to be exerted in the personal and/or the public sphere (there as a citizen, outside the workplace) so that the main way to indirectly promote it is to ensure that workers enjoy sufficient *free* time to make use of this autonomy. This last upper layer of needs has often been left outside the scope of the social law legislator's concerns and historically of trade unions' attention, which has mostly been concentrated on issues of health and safety and wealth redistribution. Self-realisation in work has been at best envisioned through the protection against psychosocial risks, which is often a privilege of the standard employee. The definition of the content and of the ends of work is left to the management of firms. It is also an advantage that the successful self-employed enjoy. If one takes the hierarchy of needs seriously it might indeed make sense to ensure more basic needs are fulfilled if one wants to ensure that potential political rights in the workplace do not remain dead letter. This also concerns, in the legal orders examined, the possibility to go to court to have rights (and thus needs), at all levels, recognised and enforced.²⁷

Finally, it is interesting to note that collective bargaining, the main expression of workers' autonomy enshrined as right in social law, seems to be used in various legal orders as an instrument to implement and legitimise more precarious arrangements. This is particularly the case in the Netherlands, where it offers an opportunity to derogate from the already very partial protections conferred on ZHC workers when some conditions are met. It might - but the hypothesis should be tested - confirm the idea that the power imbalance in atypical work relationships is so strong (notably, given the impossibility of ever belonging to various communities of workers, as already mentioned) that even collective autonomy, at least in its current forms, proves inefficient as a tool of emancipation.

V. Final observations

From this cross-sectional reading of the four contributions forming the special issue, it stems that only a combination of different types of legal mechanisms can enable all needs of ZHC workers to be met. More than that, this goal would probably require generating some *stability in their working time* through legal intervention; in that case one could legitimately ask if we are still discussing ZHCs, as defined in the introduction of the issue, or if we have entered new legal territory. This is true for all legal orders, independently of the more or less favorable approach that the State

25. See, e.g., J. Prassl, 'Collective voice in the platform economy: challenges, opportunities, solutions', Report to the ETUC, Sept. 2018, 32p., <https://www.etuc.org/sites/default/files/publication/file/2018-09/Prassl%20report%20maquette.pdf>

26. It definitely connects with the literature mentioned by Joe in his contribution, that identifies freedom, in the republican sense, as 'one of the underpinnings for employment law'.

27. And thus get free from the vicious circle where the situation of precariousness of workers impedes them from using the legal tools intended to get them out of this same precariousness.

has adopted towards ZHCs. This observation forces one to look with caution at mechanisms intended at mitigating the effects of the use of ZHCs - they might end up fostering the expansion of these practices while missing their main target.

It is my opinion that avoiding this risk should involve putting workers' needs at the heart of any further legislative move in labour and social security law. In this article I have argued in favour of the adoption of a notion of needs that is completely decoupled from the idea of assistance. Needs are mostly considered in social law to justify that one will benefit from basic advantages she would not be entitled to would her human dignity not be at risk. Indeed in most systems, needs only become central once the worker has been disconnected from the systems (enterprise, social security) in which he is bound to participate, financially or in some cases politically. I presented the fulfilment of needs as the main condition without which an emancipation from any situation of heteronomy and thus, advanced forms of participation, would be impossible. I would go even further and add that to guarantee that a legal regime, even intended to protect a particular type of workers, does not end up legitimising power imbalances and forms of exploitation, one needs to enshrine in the law making, forms of voice that give these workers the power to dissent and reshape each regime for the future.²⁸ This power will only be effective if these regimes guarantee that their basic needs are covered in parallel. It might also very well be that a renewed focus on workers' needs, on human needs, in the law, would also lead to a questioning of the direction of economy itself, in bringing it back from an age in which emancipation is envisioned as a meeting of desires - through profit and the consumption of endless commodities offered by companies competing on markets - to an age where emancipation materialises in genuine autonomy, inside and outside work, because the needs of all are met.²⁹

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