

Respecting Human Rights in the On-Demand Economy: Closing the New Governance Gap

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I. INTRODUCTION

We are in the midst of a dramatic economic revolution, a revolution that is driven by rapidly evolving technology, the rise of big data, and changing attitudes towards both employment and services. This new economy has many labels: it is often referred to as the sharing economy for the platforms that enable users to earn money by sharing their homes, cars, or other property. It is often called the “gig” or on-demand economy, transitioning from a model based on permanent employees to one of independent contractors or “micro-entrepreneurs” using new platforms to bid for and complete multiple gigs.² This article seeks to apply a business and human rights lens to these new economic models. It explores potential human rights impacts associated with the shift to the on-demand economy, reviews recent efforts in business and public policy to begin to address these impacts, and points to the UN Guiding Principles on Business and Human Rights (UN GPs)³ as a useful framework to define responsibility and guide action by both business and government.

New business models, taking advantage of mobile technology to disrupt traditional markets such as hospitality, car rentals, taxi services, and lawn care, have been wildly successful. AirBnB, the short term lodging platform, was valued in 2015 at UD\$25.2 billion, surpassing the market cap of major hotel chains like Marriott (US\$20.6 billion), Starwood (UD\$14.1 billion).⁴ Fiverr, an online market for small services starting at

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² Arun Sundararajan, ‘The “gig economy” is coming. What will it mean for work?’, *The Guardian* (26 July 2015), <http://www.theguardian.com/commentisfree/2015/jul/26/will-we-get-by-gig-economy> (accessed 20 January 2016).

³ Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect Respect and Remedy Framework”’, A/HRC/17/31 (21 March 2011).

⁴ Alison Griswold, ‘Airbnb Is Thriving. Hotels Are Thriving’ *Slate.com* (6 July 2015), http://www.slate.com/articles/business/moneybox/2015/07/airbnb_disrupting_hotels_it_hasn_t_happened_yet_and_both_are_thriving_what.html (accessed 23 January 2016).

UD\$5, generates close to 1 million transactions a month.⁵ Along with technological innovation, we are seeing a generational shift in how the so-called millennial generation views employment. Millennials are far more likely than previous generations to view self-employment as a career ideal, according to the 2015 Allstate/National Journal Heartland Monitor poll.⁶

There is a striking parallel between the rise of the on-demand economy and the rapid globalization of the economy in the 1980s and 90s, with respect to human rights. Rapid globalization exposed governance gaps where global, national and local institutions and regulatory frameworks were ill-equipped (or unwilling) to address human rights impacts stemming from rapidly expanding economic activities globally.⁷ Many aspects of the globalization challenge, as described by UN Special Representative on Business and Human Rights (UN SRG) John Ruggie, could be used today to describe governance gaps in the on-demand economy:

The current debate on the business and human rights agenda originated in the 1990s, as liberalization, technology, and innovations in corporate structure combined to expand prior limits on where and how businesses could operate globally. Many countries, including in the developing world, have been able to take advantage of this new economic landscape to increase prosperity and reduce poverty. But as has happened throughout history, rapid market expansion has also created governance gaps in numerous policy domains: gaps between the scope of economic activities and actors, and the capacity of political institutions to manage their adverse consequences. The area of business and human rights is one such domain.⁸

II. HUMAN RIGHTS RISKS IN THE ON-DEMAND ECONOMY

In today's economy, similar governance gaps are emerging. Widely used and rapidly growing new business models are operating in a legal and regulatory environment that was designed for the traditional markets that these new models are disrupting. There are several risks to human rights resulting from these gaps.

Legal protections of employees' social security and insurance benefits are becoming less relevant as a growing percentage of the workforce, willingly or unwillingly, transitions to independent contractor status in the "gig" economy. While, for some, working as an independent contractor might be preferable, for others, this shift could impact the workers' rights to protection against unemployment⁹ and to the right to security in the event of unemployment, sickness, or disability.¹⁰ Workers shifting to

⁵ Connie Loizos, 'Fiverr CEO On Raising \$60 Million in Fresh Funding: It's a Land Grab Right Now', *TechCrunch.com* (12 November 2015), <http://techcrunch.com/2015/11/12/fiverr-ceo-on-raising-60-million-in-fresh-funding-its-a-land-grab-right-now/> (accessed 23 January 2016).

⁶ Gillian B White, 'Millennials in Search of a Different Kind of Career', *The Atlantic* (12 June 2015), <http://www.theatlantic.com/business/archive/2015/06/millennials-job-search-career-boomers/395663/> (accessed 23 January 2016).

⁷ Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', A/HRC/8/5 (7 April 2008), 3.

⁸ *Ibid.*, at 104.

⁹ *Universal Declaration of Human Rights*, U.N. Doc. A/810 (10 December 1948). (UDHR), art 23, available at <http://www.un.org/en/universal-declaration-human-rights/> (accessed 23 January 2016).

¹⁰ *Ibid.*, art 25.

independent contractor status also may lose the ability to organize and bargain collectively, impacting the right to join trade unions.¹¹

Contractors in the on-demand economy don't necessarily earn less than employees doing comparable work and they have the potential to earn more. For example, drivers on ridesharing network Uber reportedly earned wages as much as double those of traditional taxi drivers in the same market.¹² But the risk of *when* they earn their pay is shifted to the worker.¹³ This may impact the worker's right to 'just and favorable conditions of work'.¹⁴

With rapid growth of ride sharing services Uber and Lyft, customers with disabilities have reported problems with accommodations for guide dogs and wheelchairs,¹⁵ posing a risk to their right of non-discrimination.¹⁶ At the same time, policies that on the surface seem discriminatory, may be appropriate in some cases, such as female hosts on room rental platform AirBnB offering space in their home only to other women.

Advances in technology also bring risks to privacy. In January 2016, ride sharing service Uber settled an investigation by the New York Attorney General into allegations that the company was inappropriately tracking drivers and riders using the platform. Through a tool nicknamed "God View", Uber could track riders with an aerial-like view of all of the cars in New York City and the riders' personal information.¹⁷

III. POSITIVE IMPACTS OF THE NEW ECONOMY

The transition to the new on-demand economy brings significant positive impacts, as did economic globalization. Just as globalization has helped countries, as Ruggie explained, 'to take advantage of this new economic landscape to increase prosperity and reduce poverty',¹⁸ new models in the on-demand economy have the potential to create significant new economic opportunities. Ride sharing service Uber, for example, has revealed that while the total taxi market in the city of San Francisco was estimated at US \$140 million revenue a year, the ride sharing company's annual revenues were running at US\$500 million per year in that market, significantly increasing the economic opportunities for drivers.¹⁹ Similarly, sharing economy platforms AirBnB and Turo,

¹¹ Ibid, art 23.

¹² Robert Reich, 'The Upsurge in Uncertain Work', (23 August 2015), <http://robertreich.org/post/127426324745> (accessed 26 January 2016). The numbers are debated, however, as it is unclear how much drivers cover in expenses: Farhad Manjoo, 'Uber's Business Model Could Change Your Work', *New York Times*, (28 January 2015), http://www.nytimes.com/2015/01/29/technology/personaltech/uber-a-rising-business-model.html?_r=0 (accessed 26 January 2016).

¹³ Ibid.

¹⁴ UDHR, note 9, art 23.

¹⁵ Salvador Rodriguez, 'For Uber, Lyft Riders With Disabilities, Discrimination Often Comes Included', *International Business Times* (13 August 2015), <http://www.ibtimes.com/uber-lyft-riders-disabilities-discrimination-often-comes-included-2052675> (accessed 26 January 2016).

¹⁶ UDHR, note 9, art 2.

¹⁷ Biz Carson, 'Uber settles investigation into "God View" tool', *Business Insider* (6 January 2016), <http://www.businessinsider.com/uber-settles-investigation-into-god-view-tool-2016-1> (accessed 8 February 2016).

¹⁸ Protect Respect and Remedy Framework, note 7, 104.

¹⁹ Henry Blodget, 'Uber CEO Reveals Mind-Boggling New Statistic That Skeptics Will Hate', *Business Insider* (19 January 2015), <http://www.businessinsider.com/uber-revenue-san-francisco-2015-1> (accessed 23 January 2016).

which enables users to rent cars to other users, have generated opportunities for retirees and students to earn additional income to cover their rent, helping to secure their human right to an adequate standard of living.²⁰

Many of the new platforms can also be used to address humanitarian challenges, quickly facilitating assistance to people in need. AirBnB, for example, has teamed up with the U.S. Federal Emergency Management Agency to advance its disaster response program that lets victims of hurricanes, earthquakes and other disasters stay at host homes for free.²¹ Finally, ride sharing service Uber highlights the fact that its service helps people of color who had suffered from discrimination in the traditional taxi market. The company cites a study that four in ten rides on its platform in Chicago start or end in underserved neighbourhoods.²²

IV. CLOSING THE NEW GOVERNANCE GAP

These positive human rights impacts, and the opportunities for growth from the on-demand economy underscore the importance of addressing human rights risks. In the case of globalization, the recognition of global governance gaps led to an effort to review business and human rights responsibilities, led by UN SRSG John Ruggie. That process culminated in the endorsement by the Human Rights Council of the UN GPs.²³ For the on-demand economy, the UN GPs can provide a useful framework to delineate the responsibility of different actors to address human rights concerns, and to determine how companies can effectively manage human rights risks.

The UN GPs differentiate between the state duty to protect and the corporate responsibility to respect human rights.²⁴ When a new economic model leaves a large portion of the workforce without the protections of workers rights and benefits that were intended for the broad workforce under current regulations, the state should have an obligation to evolve public policy and regulation accordingly.

So far, in the U.S., it has been primarily municipal governments seeking to address human rights impacts in the on demand economy. For example, the Seattle City Council voted unanimously to approve a bill allowing drivers for ride sharing services such as Uber or Lyft to form unions, the first legislation of its kind in the country.²⁵ In New York, Council Members Corey Johnson and Brad Lander and the

²⁰ UDHR, note 9, art 25.

²¹ International Committee of the Red Cross, 'AirBnB teams up with FEMA's Ready Campaign as it seeks to boost disaster response program' (9 July 2015), <http://blogs.icrc.org/gphi2/2015/07/09/airbnb-teams-up-with-fema-s-ready-campaign-as-it-seeks-to-boost-disaster-response-program/> (accessed 20 January 2016).

²² 'Uber economic study: Uber serves underserved neighborhoods in Chicago as well as the Loop. Does taxi?', (3 March 2014), <https://newsroom.uber.com/chicago/uber-economic-study-uber-serves-underserved-neighborhoods-in-chicago-as-well-as-the-loop-does-taxi/> (accessed 20 January 2016).

²³ UN GPs, note 3.

²⁴ Ibid, Principles 1, 11.

²⁵ Nick Wingfield and Mike Isaac, 'Seattle Will Allow Uber and Lyft Drivers to Form Unions', *New York Times*, (14 December 2015), http://www.nytimes.com/2015/12/15/technology/seattle-clears-the-way-for-uber-drivers-to-form-a-union.html?_r=0 (accessed 8 February 2016).

New York City Taxi Workers Alliance are seeking to mandate a driver benefits fund to provide for-hire drivers with health care benefits.²⁶

In an article for Democracy Journal, venture capitalist Nick Hanauer and labour union leader David Rolf call for a Shared Security Account in which workers in the new economy accrue basic employment benefits.²⁷ These benefit accounts would be prorated based on hours worked, portable between “gigs” and universal across industries.²⁸ Similarly, Steven Hill calls for a portable safety net for workers in the on-demand economy that would build on existing multi-employer insurance plans in the U.S., which are used in industries such as construction where contractors work for multiple employers.²⁹

V. CORPORATE RESPECT IN THE ON-DEMAND ECONOMY

Companies have a responsibility to respect which exists independently of the state duty to protect human rights of its citizens.³⁰ For companies in the sharing and on-demand economies, meeting the responsibility to respect requires more than advancing specific human rights causes such as non-discrimination or humanitarian innovation. While noteworthy and laudable, such efforts should lead to, rather than substitute for a comprehensive and proactive human rights due diligence approach.

We have yet to see a company in the on-demand economy that has adopted a comprehensive human rights approach and no government has formally launched a broad public policy approach to address human rights in the on-demand economy. However, a growing number of new ideas and initiatives in the public policy sphere, as well as key steps taken by companies seek to address the most widely discussed risks to worker’s rights. Some of these efforts are described below.

Increasingly, start-up companies are beginning to evolve or shift their models to give access to benefits to their workers or contractors. Honor, a home healthcare company, announced that it has decided to shift from a model based on independent contractors, who were matched with patients via a smartphone app, to a model based on employees eligible for benefits, worker’s compensation and stock options.³¹

Before Honor, shipping company Shyp and grocery delivery service Instacart were among the companies in the on-demand economy that turned their independent contractors into employees.³² While many of these shifts came on the heels of a decision

²⁶ Brad Lander, ‘Protecting Workers in the On-Demand Economy’ (26 October 2015), <http://bradlander.nyc/news/updates/protecting-workers-in-the-on-demand-economy> (accessed 8 February 2016).

²⁷ Nick Hanauer and David Rolf, ‘Shared Security, Shared Growth’, *Democracy*, Summer 2015, No. 37, <http://democracyjournal.org/magazine/37/shared-security-shared-growth/?page=all>.

²⁸ *Ibid.*

²⁹ Steven Hill, ‘New Economy, New Social Contract’, *New America Foundation*, 2015, https://static.newamerica.org/attachments/4395-new-economy-new-social-contract/New%20Economy,%20Social%20Contract_UpdatedFinal.34c973248e6946d0af17116fbd6bb79e.pdf (accessed 26 January 2016).

³⁰ UN GP, note 3, Principles I,11.

³¹ Elizabeth Weise, ‘No more independent contractors for this gig economy startup’, *USA Today*, (21 January 2016), <http://www.usatoday.com/story/tech/news/2016/01/20/gig-economy-company-moves-employee-benefits-model-honor-sharing-economy/79043986/> (accessed 26 January 2016).

³² Claire Zillman, ‘As Uber faces regulatory heat, yet another startup turns its contract workers into employees’, *Fortune*, (1 July 2015), <http://fortune.com/2015/07/01/uber-shyp-contract-workers/> (accessed 26 January 2016).

by the California Labor Commission finding that a former Uber driver should have been classified as an employee, the companies cite quality and customer service as key factors in their decision.³³

Taking a different approach, TaskEasy, a lawn care services company, is offering hourly accrued insurance benefits to protect independent contractors using its platform,³⁴ similar to the prorated and portable benefit accounts proposed by Hanauer and Rolf.

Finally, a new initiative on the Future of Work at the Aspen Institute, co-led by U.S. Senator Mark Warner and former Governor of the state of Indiana Mitch Daniels, is aimed at re-envisioning the social contract.³⁵ Focusing on data collection to inform public policy, research of innovative new models to protect workers in the on-demand economy, and calling on companies to make greater investments in pay and skills training, the initiative's aim is to prepare workers, and the economy itself for this new reality. Warner and Daniels effectively summarize the challenge ahead:

Even in the midst of an economic revolution—perhaps especially in the midst of such a revolution—it is essential to recognize that some needs and rights of workers have not changed. People still require access to health care and retirement security, and workers need to be protected from exploitation. We should look for creative ways to increase the economic security of on-demand workers without undermining the flexibility of the on-demand economy.³⁶

Both policy makers and companies are working to understand and address the full scope of impacts the new on-demand economy may have on worker's rights and to tackle this difficult but not insurmountable challenge.

³³ Ibid.

³⁴ Ken Davis, 'A New Class Of Worker Could Fix The On-Demand Economy', *Tech Crunch*, (17 July 2015), <http://techcrunch.com/2015/07/17/a-new-class-of-worker-could-fix-the-on-demand-economy/#.jlwdy1g:FmSu> (accessed 26 January 2016).

³⁵ 'Aspen Institute Launches New Initiative on Future of Work and Capitalism', *Aspen Institute*, (30 November 2015) <http://www.aspeninstitute.org/news/2015/11/30/aspen-institute-launches-new-initiative-future-work-capitalism> (accessed 26 January 2016).

³⁶ Mark Warner and Mitch Daniels, 'The Future of Work', *Medium* (16 December 2015), <https://medium.com/@SenMarkWarner/the-future-of-work-51d72f296b78#.cwnlhla02> (accessed 26 January 2016).