DISSERTATION

Master of Laws (LLM)

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Atypical workers: the quest for an inclusive worker's protection Regime

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RESEARCH DISSERTATION PRESENTED FOR THE APPROVAL OF SENATE IN FULFILMENT OF PART OF THE REQUIREMENTS FOR THE MASTER OF LAWS IN APPROVED COURSES AND A MINOR DISSERTATION.THE OTHER PART OF THE REQUIREMENT FOR THIS DEGREE WAS THE COMPLETION OF A PROGRAMME OF COURSES.

I HEREBY DECLARE THAT I HAVE READ AND UNDERSTOOD THE REGULATIONS GOVERNING THE SUBMISSION OF MASTER OF LAWS DISSERTATIONS, INCLUDING THOSE RELATING TO LENGTH AND PLAGIARISM, AS CONTAINED IN THE RULES OF THIS UNIVERSITY, AND THAT THIS DISSERTATION CONFORMS TO THOSE REGULATIONS.

Signed by candidate

B. R. MKWANAZI.

CAPE TOWN, 2004.

DISSERTATION
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TITLE: ATYPICAL WORKERS: THE QUEST FOR AN INCLUSIVE WORKERS' PROTECTION REGIME.

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PROGRAM: MASTER OF LAWS (LLM)

ON LAWS

VERILY, THE OCEAN LAUGHS WITH THE INNOCENT

BUT WHAT OF THOSE TO WHOM LIFE IS NOT AN OCEAN,

AND MAN MADE LAWS ARE NOT SAND-TOWERS,

BUT TO WHOM LIFE IS A ROCK

AND THE LAW A CHISEL WITH WHICH THEY WOULD

CARVE IT IN THEIR OWN LIKENESS?

PEOPLE OF [THE WORLD], YOU CAN MUFFLE THE DRUM,

AND YOU CAN LOOSEN THE STRINGS OF THE LYRE,

BUT WHO SHALL COMMAND THE SKYLARK NOT TO SING?

Gibran Kahlil
The Prophet
1883-1931.

DEDICATION

I LONG FOR THE DAY I WOULD WRITE ALL THE NAMES SIMULTANEOUSLY, BUT SINCE THE TECHNOLOGY HAS NOT BEEN INVENTED YET, I SHALL RECORD THEM IN THE ORDER GOD MADE THEM KNOWN TO ME:

1. My late mother, Mrs. Anne Caroline Thokozile Mabuza nee Khuzwayo, whose calm spirit I feel with me and around me all the time.

2. My late husband, Mr. Mandlakayise Winston Mkwanazi, who loved and stood by me until he accepted his promotion to serve up yonder.

3. My youngest son, Siyabonga Mhlengi (4yrs), may the flame continue to burn brightly Somkhele.

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My family, members of the Mabuza and Mkwanazi families, who celebrate my successes however minute and share in my grief as necessary;
My employer, The Central Bank of Swaziland (CBS), who graciously released me from work to go on full time study in pursuit of a shared vision for growth and development;
Members of my Spiritual Fountain, The Methodist Church of Southern Africa (MCSA), for their sterling and unwavering spiritual and moral support.

Last but by no means the least, I wish to register my profound appreciation to all who encouraged, supported and prayed for my success in this endevour, some of whom have tirelessly been there to deal with the rigours of the student that I have been.

LIST OF ABBREVIATIONS.

BCEA	Basic Conditions of Employment Act 3/1983.
CCMA	Commission for Conciliation, Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act130/1993.
EU	European Union.
ILO	International Labour Organisation
LRA	Labour Relations Act 66/1995.
NEDLAC	National Economic Development and Labour Council.
OECD	Overseas Economic Council for Development
RDP	Reconstruction and Development Program
SADC	Southern African Development Community
UIA	Unemployment Insurance Act 30/1966.
UIF	Unemployment Insurance Fund.
EEA	The Employment Equity Act
IRA	The Industrial Relations Act 1980 (Swaziland)
SALJ	The South African Law Journal
SAJLR	The South African Journal of Labour Relations
CICLASS Security	Center for International and Comparative Labour and Social Law (Rand Afrikaans University)

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ATYPICAL EMPLOYMENT: THE QUEST FOR AN INCLUSIVE WORKER PROTECTION REGIME

ABSTRACT

It is trite knowledge that the labour market has experienced a continuous evolution. The growth of atypical or non-standard forms of employment is one such phenomenon. Regrettably, the juridical discipline does not always follow the dynamics of the development of socio-economic phenomena. Very often, new social phenomena are governed by old rules, which in their scope, contents and cultural inspiration cannot correspond to the new realities. This situation is compounded by the attitude of collective agreements, which do not address issues of non-standard employment, thereby hampering the full development of and legal protection to be accorded to these.

In recent times, changes in what had been accepted as standard working patterns have been signalling a new era in terms of labour law requirements. Nowadays, employers prefer to use non-standard work arrangements to create a labour force that is flexible and more suited to meeting market demands, whereas employees may be attempting to create a more effective work-life balance on the one hand or to make ends meet due to limited employment opportunities on the other. The crux of the issue is, however, that most legislation gives a narrow definition of employee, thereby excluding many classes of workers who are in fact dependent on their employers. This leaves them vulnerable to exploitation and subject to contractual regimes that do not fall within the formal private law concepts of employment.

Given the constraints of diverse forms of atypical work and its growing significance in the Post-Fordist era, the challenge is to craft a regime that will provide a win-win solution for both business and workers regardless of whether one is typically or atypically employed. It is the right time in history to re-conceptualise labour law and embrace atypical employment as a form of employment needing protection as much as any other.

CHAPTER 1 – INTRODUCTION

1 General

The post-war model of the permanent full-time contract of employment has been eclipsed by a plethora of work arrangements. Nonetheless, even though non-standard or atypical employment is a growing phenomenon in the world of work, it is apparent that particular categories thereof are not sufficiently protected in terms of labour and social security legislation. Existing labour law tends to be narrowly focused on regulating labour relations and extending protection to workers in the formal sector, resulting in its obvious inability to deal effectively with the phenomena of a high and steadily increasing unemployment. The neo-liberalists are thus calling for a de-regulation of the labour market to afford it the requisite flexibility. In developing countries, it may be detrimental to adopt less interventionist measures because local conditions of high unemployment, skewed patterns of wealth, and poverty might constrain governments to protect certain population groups. Meanwhile, the nature and extent of the role of the State lies at the centre of the need to balance the often-competing challenges of prosperity and social justice.

Despite the virtues of labour flexibility and a lack of outside regulation of employment, in the case of the atypically employed, it appears that this lack of proper legal regulation and protection has contributed to the potential for discrimination in hiring, disparity in treatment and the non-committal approach adopted by unions. Atypical employees, who do not fall within the ambit of the definition of employees, such as independent contractors and some types of consultants, thus cannot rely on the protection offered by the country's labour laws. The general absence of appropriate and an all-inclusive statutory protection in developing countries lies at the heart of the potential for discrimination in hiring and termination of service, as well as in the general disparity in treatment suffered by the vast categories of non-standard workers. In Swaziland and in South Africa this is the case despite the noble intentions of the legislation that are meant to capture or encompass all workers and promote the constitutional right (in the case of the latter), to equality and the exercise of true

democracy as stated in the preamble of the South African Employment Equity Act 55/1998.[1]

Regardless of the social and economic benefits of atypical employment, the workers engaged therein have thus far tended to be disadvantaged either by a lack of or inadequate legal protection. Realistically, though, given the diverse nature of most non-standard types of work, it is indeed difficult to fit all within the definition of employee. Clearly, this situation is challenging current labour legislation to be responsive to the issues of the 21st century. Labour law ought to be enhanced to be inclusive of all workers, and it is contended herein that part of the solution lies in extending the definition of employee, re-conceptualising labour law and empowering the individual worker through securing rights to continuous skills development and training. It is argued further that such rights secure the worker's career as property, which might afford part of the solution to the current situation.

1.1 Why a Legal Solution?

Atypical workers are particularly vulnerable to exploitation, as they usually have less favourable terms of employment than those engaged in the typical or standard form. They depend upon statutory employment standards for basic working conditions. The subject matter of labour law is work and those who perform it, which are workers. Although employers and trade unions have increasingly become part of the equation, they are not necessary components of the definition: in other words, one could conceive of a labour law without employers or trade unions, but not without either work or workers, which are essential components of the definition of labour law.[2] This is in fact inherent in the double meaning of labour.[3] Consequently, labour law can be defined as the law of work. Furthermore, there is a need to set appropriate labour standards as an essential means of ensuring that attempts to free a country or region

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[1] Employment Equity Act no 55 of 1998 has the following overview:
to promote the constitutional right of equality and the exercise of true democracy,
to eliminate unfair discrimination in employment,
to achieve a diverse workforce broadly representative of our people,
to promote economic development and efficiency in the workforce; and,
to give effect to the obligations of South Africa as a member of the International Labour Organization,...

[2] Jordan B., *A New Organizing Theme for Labour Law*, 1999.

[3] Drake and Bercusson, *The Employment Acts 1974-1980*, Sweet and Maxwell, 1981.

of economic paralysis and poverty should benefit everyone and that economic development will be accompanied by both social and human development.

1.2 Research Aims

Having identified the problematic issue pertaining to non- or insufficient coverage of atypical workers under existing legislation, it is the aim of this research to examine the legal position of those whose working arrangements fall outside of the traditional mould:

This research will question the effectiveness of the current laws of certain developing countries (for the purposes of this dissertation, specifically Swaziland and South Africa) in meeting the challenges posed by the unavoidable global trends of, *inter alia*, flexible work models, affecting employment relationships. It will capture significant links between developing economies and atypical employment as a viable alternative to pertinent issues such as resolving high rates of unemployment, promoting economic diversity, reducing dependence on social welfare and raising the general standards of efficiency among workers.

It is also the aim of this paper to outline some of the strategies being bandied about to enhance the protection of the atypical worker whilst simultaneously accommodating the business interests of the employer – thus working towards an inclusive protectionist regime, which guarantees decent work programs as advocated by the International Labour Organization (ILO).

We will also question the rationale of relying on the common law, its concepts and institutions to providing solutions relevant to worker protection issues confronting our time. The desire is to carve an inclusive worker protection regime.

A conclusion will be drawn, pleading for a dispensation that is inclusive of protection for atypical workers within the meaning of employee to the effect that career and flexible qualifications guarantees them security of a job, whether as part of a firm or as an individual. In the alternative, the conclusion appeals for a reconceptualisation of labour law, which replaces emphasis on concepts and institutions in favour of public policy that is designed to regulate work and protect those who render it. Consequently, collective bargaining strategies now more than ever ought to accommodate individual bargaining

1. 3 SUMMARY OF THE CHAPTERS.

1.3.1 The first chapter carves the landscape for present day labour law by recognizing that the current philosophy was shaped by a set of socio-economic factors following the end of the Second World War. It lays the background for a call to review labour legislation in tandem with the changing forms of employment, which are regrettably, not adequately covered by the Post-War legislative framework.

1.3.2 Although defining atypical forms of work is saddled with difficulty due to its varied nature, the second chapter gives an understanding of how they come about to an extent that prepares us to accept their growing phenomenon and in a way, inevitability. The section also questions the role of labour law from the standpoint of the relationship between workers protection and international cooperation. Vital questions on the possible role of education and training are interrogated as probable answers to increase one's employability- hence availing a measure of protection.

1.3.3 Chapter three introduces the various forms of atypical work and gives a global comparison thereof. It is revealed herein that whereas in industrialised countries atypical forms of employment might be out of choice, in developing countries it is not so. Hence the need for developing nations to urgently seek measures to redress the perceived inadequacy in the protection of atypical workers.

1.3.4 Given the difficulty of classifying typical and atypical work not only between countries, but even within industries in the same country, chapter four gives a rather liberal understanding of flexibility. It is contended that in order to afford protection to atypical workers, flexibility must be understood to include multi-skilling.

1.3.5 The following chapter addresses the definition of who is an employee. It further observes that the definition is fraught with complications given the varied nature of work arrangements. In the result that the courts have developed various tests to use as benchmarks. Regrettably, these are not conclusive even though they serve as guidelines. What then is the fate of workers that do not satisfy the test of employee? The chapter further considers the plight of independent contractors.

1.3.6 In chapter 6 we examine amendments to existing legislation in South Africa meant to address the already identified problem of insufficient labour law protection given to atypical workers. We further, go beyond the borders of South Africa and look at what guidance one can get from SADC as a viable economic group and the ILO as the epitome of worker protection body worldwide The chapter further justifies the need for reform in light of a Constitutional mandate that aspires to assure/ guarantees everyone rights to fundamental freedoms including the right to FAIR LABOUR PRACTICES. In an extreme situation, atypical workers most of whom are black and predominantly women could (at least in theory) sue for discrimination.

1.3.7 It is observed in the last chapter that, although the goodwill to redress the situation of atypical employees is abundant (judging from recent amendments discussed in chapter 5&6), the foundation of the house we are renovating is not solid, so long as we endeavour to do so around concepts and institutions that will not accommodate present day realities. The contention pleads for a reconceptualisation of labour law that seeks to place work and workers on centre stage- thereby introducing a shift in the underlying philosophy of labour law rights and privileges. Again, the argument herein- that runs throughout this dissertation is that, the reality of being faced with a difficult challenge does not absolve labour lawyers from **'biting the nail'**. It is time.

1.4 Methodology.

1.4.1.Available literature on the subject matter was extensively researched and analysed in a comparative attempt to highlight similarities and divergences with the aim of isolating areas of improvement in the quest to argue for more appropriate labour law protection for the atypically employed.

1.4.2. Official Law Reports and Law Journals as published by authorised law publishers were studied with the aim of scrutinizing important legal decisions that establish trends in the shaping of South African law. The Constitution of the Republic of South Africa and the Proposed Constitution of the Kingdom of Swaziland were closely studied in terms of guaranteed rights. The objective was to find basis for reform in the event labour legislation did not fully interpret the guaranteed Constitutional rights (as it is argued in this instance). Further, the underlying philosophy of labour law was questioned with a view to updating it in order to afford all workers protection as could be legitimately expected.

1.5 Limitations

Given the extent of the research required, the time constraints and the non availabity of materials from other SADC member states, the study concentrates on relevant

South African jurisprudence concerned with the protection, or lack thereof, of atypically employed workers as a challenge to be met by each developing country. The South African scenario is representative of a Constitutional Democracy that most Regional and International bodies are promoting in their desire to instil a culture of democracy and human rights to mankind.

1.6 Conclusion.

It being accepted that the changing forms of work arrangements will not abate, and taking responsibility to redress the inadequate labour law protection afforded to the atypically employed, society needs to meet the challenge with congruent measures that will allow the juridical discipline to follow developments of the socio-economic trends.

The Quest is for;

(a) Atypical Employees to enjoy adequate legal protection under labour legislation,

(b) Atypically employed should have equal access like workers in standard employment, to social security benefits,

(c) Workers in atypical employment should be afforded training to improve versatility of skills, hence increasing own chances of employability,

(d) Regional and International Organisations ought to be sensitised on the urgency of finding a solution to alleviate the plight of atypical workers,

(e) The need to reconceptualise labour law is real and need not be considered in an abstract sense,

(f) The Constitutional guarantees need to be practised to afford the marginalized people decency and human rights in the new South Africa.

CHAPTER 2

THE EVOLUTION FROM TYPICAL TO ATYPICAL FORMS OF EMPLOYMENT

2.1 Typical Employment

The maturity of capitalism as a mode of production in highly developed countries disrupted traditional modes of production. It ushered in the emergence of, on the one hand, employers of labour and, on the other, the employed, the self-employed and the unemployed. In other words, it separated the act of production from that of appropriating the fruits of one's labour.[4] Free labour, compelled by circumstances, offered to sell its labour power temporarily to the capitalist for a given period in return for a wage. This is the basis of Marxist theory. During this given period, the prerogative over the use of labour power and the product lay with the capitalist. In terms of conventional economics, this relationship is a contractual arrangement between two equally strong parties, at which the two have voluntarily arrived. The individual employee's position of subordination, which (save in exceptional cases) involves submission to the command of the employer, is camouflaged by '...that indispensable figment of the legal mind, the contract of employment. This individual contract is a command under the guise of an agreement'.[5]

Before the current wave of debate about the definition of typical employment, the general conception of employment was informed by the notion of the 'permanent job'. By definition, then, typical employment was employment in a permanent job.[6] The concept of a permanent job was influenced by the Japanese culture with its guarantee of lifetime employment with a single company. A comparison can thus be made between the family and a job: both are expected to consist of ongoing relationships, and in both, there are reasonable prospects of growth. Other features of employment

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[4] Mhone, G.,Atypical forms of work and employment and their policy implications, ILJ,1998 at 196.

[5] Freund, K., *Selected Works: Law and Opinion in England in the 20th Century*, (ed. M. Ginsberg), London, 1959.

[6] Theron, J. and Godfrey, S., *Protecting Workers on the Periphery*, Development & Lab Monographs 1/2000, University of Cape Town at p2.

are the following: permanent employment is typified by a wage or salary, with conditions and privileges attached thereto. It furthermore includes a contract, which stipulates the hours of work, pay levels, career path, management prerogatives and so forth. For many years, employment has been controlled by some form of regulation or law covering industrial relations and labour relations, as well as basic conditions of employment. In other words, employed persons enjoy certain minimum forms of protection as a result of state intervention, for example, minimum wages for certain categories of staff, and provisions governing retrenchment, termination/dismissal, transfers of business, pension and workmen's compensation. The totality of these regulations gives workers a sense of job security and confidence in exercising their rights in terms of the law. Furthermore, as the permanent job has a regular set of hours, it becomes convenient for worker organisations to canvass and collectively bargain.

Critics of this classification of permanent employment[7] are swift to remind us that it is not the job as such that has ever been permanent, but that the only permanent aspect of capitalism has been the need to accumulate profits by finding the cheapest way to produce commodities. Added to this is the ingenuity of capitalism to devise ways of bringing the cost of labour down, usually by exploiting labour.

Ultimately, it can be concluded that there is nothing inherently permanent about the relative attractiveness of normal or typical forms of employment.

It is interesting to note, however, that the so-called permanent job has always coexisted with other less conventional forms of labour utilisation, such as, for instance, peasant modes of production, slavery, communal modes of production at the periphery (through imperialism) and discriminatory forms of labour market segmentation based on gender, race, ethnicity or nationality.[8] Some of these 'unconventional' forms of using labour have survived and have become precursors to modern day atypical forms of employment. The 'putting out' system, for instance, accommodated experimentation with regard to emerging new forms of work, such as outsourcing, subcontracting, home-work and piece work. These were, of course,

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[7] Mhone, G., op cit note (4) at p200.

[8] Ibid at p200.

overshadowed by and less popular than the permanent job due to its perceived efficiency, reliability and predictability.

At the microeconomic level, typical or regular forms of employment have accommodated management prerogative to its maximum, coupled with flexibility in the deployment of labour in the interest of efficiency. Furthermore, as skills are becoming more standard, it is also becoming easier to replicate them through training and on-the-job education, which ultimately tends to lower the cost of labour in the long term. Production processes can be rationalised and unnecessary points in the production process eliminated, thus increasing chances of making more profits. At the macroeconomic level, typical employment lends stability to the economic system by being predictable. It allows for the legitimisation of social relations for purposes of production and the internalisation of externalities such as social security benefits for the workforce.

The main disadvantages of typical or regular work include the following: its potential of increasing labour costs because a regular labour force naturally expects to be paid a living wage[9], its tendency to alienate workers, thus leading to negative work traits such as monotony, alcoholism and absenteeism[10], and the opportunity for workers to organize themselves into a bargaining or pressure group to assert common interests.

2.2 Atypical Employment

Given the above, it was almost inevitable that so-called atypical employment would have grown out of a business need. Such business needs can be categorised into several components[11] which have converged with each other in both intensity and incidence during this era of globalisation.

The first category of factors has to do with controlling or curbing the rising costs of typical/standard employment and/or declining marginal productivity. This is borne out of the fact that in developed countries continuous economic expansion and increasing per capita incomes, supported by increased productivity and declining rates of

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[9] Op cit n. 6 at p 2

[10] Op cit n. 4 p 200

[11] Rodgers, G. et al; *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe*, International Institute for Labour Studies, Geneva, 1998.

population growth, have led to tight labour markets. Furthermore, the increased standardisation of work was accompanied by increased unionisation and an increase in the non-wage costs of employing labour, such as pension and medical aid. The economy's proneness to so-called 'welfarism' (to borrow a term from Mhone)[12] and regulatory labour market policy regimes have further escalated the costs of maintaining labour in standard forms of employment.

In order to increase profits, businesses have increasingly been under pressure either to increase productivity or to lower the costs of labour. Options available for reducing labour costs included deregulating labour markets, decreasing the power of the welfare state, increasing the participation of hitherto unemployed and under-employed individuals, such as women, youths, retirees and the disabled, and increasing capital intensity. Others included relocating the industry to a lesser-developed country, i.e. with less strict labour regulations, fewer expectations and cheaper labour. The overriding concern of businesses was (and has always been) to find creative ways of diminishing the costs of standard/typical employment. Atypical forms of employment are thus an attractive alternative, because they afford businesses the possibility of introducing new participants into the labour force,[13] thereby increasing the supply pool of labour. Another advantage is that this would facilitate the redefinition of the status of existing, regular workers.[14] It would also call for innovations to raise the productivity of existing labour by conducting job redefinition/restructuring and reorganizing work processes, product design, marketing and distribution and management processes[15]. Atypical employment forms furthermore tend to be utilised in small-scale firms, which in most cases were not regulated in any event, as they fell below the high thresholds set to restrict or constrain the activities of larger companies. Possibilities also existed for large enterprises to exploit the lacunae in the labour regulations by, for example, subcontracting work out to small operators or by breaking up production into smaller segments.

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[12] Mhone, G. op cit note (4) at p201.

[13] Anker and Melkas, Economic Incentives for Children and Families to Eliminate or Reduce Child Labour, International Labour Office, Geneva, 1996.

[14] ILO, Homework 1996, Report IV (2A), International Labour Conference, 83rd Session, ILO office, Geneva, 1996.

[15] Porter, 1994 quoted in note 6 supra.

In addition to the cost and regulatory factors, there are also certain autonomous considerations, such as changes in lifestyle and philosophical attitudes towards work that have given rise to the ingenuity of atypical employment styles. The growth in the importance of efficient management practices,[16] brought about by the need to maintain a competitive edge in business, has seen the adoption of strategic policies to achieve leaner and more flexible practices, which have ushered in home-work, part-time work, casual labour and outsourcing. Increasingly sophisticated technologies have also precipitated the rise of atypical work.[17] An influx of immigrants who may not always find fulltime employment, but who nonetheless do need to earn money to survive in their country of destination, also gives rise to atypical forms of employment.

The factors discussed above should not be seen in isolation. In fact, they mutually reinforce each other to result in the phenomenon called atypical work. In developing countries and in less developed countries atypical forms of work abound in the informal sector (e.g. temporary and casual workers) as well as in various service sectors (e.g. domestic work).

There is a temptation to view atypical forms of work in a negative light, viz. as vulnerable or precarious, paying low wages and being abnormal. This view is unfounded, as we shall examine below. In certain circumstances, it might even be the preferred form of work. Furthermore, many managers now consider alternatives to standard or typical employment as strategic choices[18]. Indeed, in the European Union (EU), the Framework Agreement on part-time employees, which regulates non-standard forms of employment and the working directive in agency staff, reflects a growing preference to such forms of employment. The mere existence of such legislation is a further acknowledgement that these types of employment are common enough to warrant regulation.

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[16] Hirschson P; Global Competitiveness Through Cooperative Strategies, SAJLR winter 2003. op cit note (10).

[17] Freedman, S, 'Labour Law In Flux: The Changing Composition of the Workforce', *ILJ*, 1997, Vol. 26, No. 4,

[18] Delsen L; Atypical Employment: An international Perspective; Walters-Noordhoff, 1995

2.3 The Effects of Globalisation

Even though typical forms of employment have several advantages when compared to the atypical forms of employment, specifically relating to the greater degree of efficiency of the former, this opinion / view has been reviewed in recent times in response to the pressures of globalisation and its concomitant demand for competitiveness. The term 'globalisation' denotes the variety of recent changes in the international political economy and their impact on the integration of economic policy, culture, technology and methods of governance. In this regard, Klug asserts that:

> "...the discourse of globalisation rests on two essential ideas. The first is the qualitative transformation of global economic and cultural interactions that have occurred in recent years, so that today we may speak of a global economy involving the transnational co-ordination of production markets and global norms reflected most clearly in the emergence of transnational social movements in the arenas of human rights and the environment".

Second is the recognition that, because of the intensification of worldwide social relations' distinct localities are linked in such a way that local happenings are shaped by events occurring many miles away and vice versa.'[19]

The emergence of a global economy has resulted in an increasing economic interdependence, homogenisation of markets, internationalisation of trade and interstate flows of capital.[20] It has also spurred global competition in a number of tradables between, on the one hand, the newly industrialising countries of South East Asia and Latin America and, on the other, Western European countries and America. The newly industrialising countries have cited the usage of new technology, their current production strategies and the availability of cheap labour (atypical employees in most respects) as factors critical to their success. Further, the development of new

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[19] Klug, H., 'Constituting democracy: Law, Globalism and South Africa's Political Reconstruction', 2000, pp45-50.

[20] Pieterse, M., 'Equality in the Global Village', XXXVI, CILSA, 2003.

technologies has converged methods of production in such a way, that specific geographic advantages are no longer determining comparative efficiency in international trade. As Potter asserts, the shift has been towards the exploitation of value chains and value channels through competitive advantage.[21] In addition, production in this globalised world requires and even demands efficiency in all forms of production, so that firms can unbundle their production processes and distribute different parts thereof to different international locations, guided primarily by opportunities to maximize returns. Investment has become more footloose than ever, as data can be easily communicated, finances quickly transferred between countries and goods transported with relative ease between nations.

Labour, although immobile (unlike the movement of capital and commodities) has only indirectly been influenced by the integrative effects of globalisation. Nonetheless, it is not immune to these processes, given that the importation of goods and services has a negative impact on local labour demand in competing domestic industries, and that the export of goods and services does the opposite. Moreover, labour is affected by the injection of Foreign Direct Investment (FDI). Such FDI has a tendency to depress demand for labour at its point of origin, while simultaneously raising demand at its point of destination.

Globalisation and the drive for international competitiveness are defining changes in the economy.[22] In the interests of economic freedom and competitive rationality, governments are compelled to find ways of protecting national markets against forces demanding trade liberalisation. Globalisation therefore defines who competes with whom and how consumer products are produced. Learning how to compete in the global economy requires a range of long-term investments in developing the multiple facets of human resources. It further calls for closer co-operation between the business sector and government, while not forgetting the representative bodies of employees.

Globalisation also imposes high-level competitive standards, compelling industries to raise productivity, impose cost competitiveness and increase efficiency to ensure their own survival. In the manufacturing sector, for instance, Hirschson says that the

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[21] Potter, 1994

[22] Hirschson, P., 'Global Competitiveness Through Cooperative Strategies', *SAJLR*, Winter 2003.

greatest challenge facing South Africa is to 'keep up with the Kim's of Korea and the Woos of Taiwan, as well as the Joneses and the Schmidt's.'[23]In fact, globalisation with its pressures of 'world class' and 'best practice' requirements dictate the cutting of costs of production, which negatively impacts labour and social service issues.[24]

It is the duty of top management to reposition the firm strategically in a global supply chain to optimise added value and the competitive and comparative advantages of different national locations. This dictates a shift away from traditional approaches of defining work towards more flexible accommodative multi-pronged approaches. Global trends have shown a move towards increasing flexibility in the work place[25] at the expense of permanent employment. In other words, investors aim to maximize profits by locating businesses in less regulated environments with an abundant labour resource. The prevalence of – as well as the need for – flexible and atypical work patterns in this globalised set-up can hardly be debated.

The familiar categorisation of Atkinson[26] rationalises the definition of flexibility by describing these new ways of organising labour. He holds that there are at least three categories of workers: The core group of workers in an organisation possess qualifications of special value to activities within the enterprise. Tasks within this category may change, as the employer may require employees to adjust skills to match demands for changes in workload, production methods and technology. This strategy, called functional flexibility, refers to the reallocation of labour through adequate and flexible organisational competence structures. It is in management's interest to retain a versatile workforce and, therefore, in most instances, secure work conditions are offered in these organisations. Typically, workers fitting this description are usually offered permanent employment.[27]

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[23] Ibid at p100.

[24] Vavi Z;Congress of South African Trade Unions(COSATU) General Secretary www.labour.tunion/za/docs/sp/2003 march.

[25] Appiah-Mfodwa, A. et al, 'Flexible work practices, productivity improvement and employment', *Society in Transition*, 2000, Vol. 31, No. 2.

[26] Atkinson, J., Manpower Strategies for Flexible Organisations in Personnel Management, London, 1984.

[27] Op cit note (25) at p105.

The second category of workers, the so-called non-core group, usually referred to as the peripheral group,[28] consists of workers with qualifications that are more easily available and who could be recruited on demand. The relevant manpower strategy is referred to as numerical flexibility, referring to the adjustment of labour inputs to meet fluctuations in the employer's needs, e.g. offering part-time, temporary, casual work or altering the working time patterns of shift or full-time workers.

The third category comprises external or distanced workers, including outsourced functions that are met by consultants and freelancers. These workers are not integrated into the employers' organisation in the sense of being employed there – they merely provide a service to it.

The second (numerical) and third (distancing) categories have in practice been referred to as external flexibility[29] because adjustment and flexibility are achieved mainly by means outside the employer's organisation upon demand whereas, the first category is referred to as internal flexibility.

The dictates of this new order as characterised by changes in the social organisation of production tends to destabilize the whole edifice of employment-based rights. The assumed widespread availability of relatively long term, well paying jobs is definitely negatively affected, as well as the notion of full-time employment and the dynamic of the relationship between management and the other industrial relations actors. The worker is compelled to consider 'survival' strategies such as multi-skills to remain an asset to the enterprise.

2.4 Employability

Although the actual mode of employment might be crucial, especially in developing economies with a high degree of unemployment and a huge social security bill, it is contended that the real issue threatening worker security is inadequate qualification, because it is the latter which affects the employees' employability. Highly educated workers tend to be amenable to changes and some may even be fond of incessant innovations, because multi-skilled workers are more flexible in learning new skills.

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[28] Op cit n (6) p7.

[29] Numhauser-Henning A, Flexible Qualification-a key to labour law;IJCLL&IR Vol.17, 2001

Single-skilled workers, in contrast, usually find it very hard to adapt to changes in jobs caused by innovation. It is common cause that in a modern society with highly developed industries, one of the most effective methods of obtaining better jobs and attaining better living standards is to develop one's own human capital. Education gives one the background for further learning. It enables one to adjust already acquired abilities and skills to new methods of working.

Legal attempts to protect skills and skill development always face difficulties related to a conventional concept of the right of ownership. Promoters of the continued education campaign, however, maintain that whatever the difficulties, it is necessary to elevate the values of skills in terms of their acquisition and maintenance; hence, the challenge is not to ignore the fact of importance of education , but to develop adequate programs in employment policies and in the legal framework to promote and protect human skills.

The promotion of continuous learning and skill formation is a positive way of attaining the goal of securing the job as property. It is a sure way of upward mobility, from lower-level jobs to higher-level ones, even though talent, aptitude and fortune would also contribute to elevate the grade of their jobs.[30] Even more so, the right to work is better secured in the changing industrial situations by skill formation through education and training.[31]

The role of the state in the **'proposed'** dispensation would be to encourage and assist flexible arrangements between employer and employee, through which employees would be given opportunities to reform and update or improve their skills, whether through off-the-job or on-the-job training.[32] Despite the time-consuming nature of such training, it is imperative, as little can be expected in this high-tech world of work without higher educational backgrounds. There is a need to be farsighted when discussing issues associated with education and training – they are long-term investments. Further, the state should provide a fundamental framework for the

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[30] Sugeno and Suwa, '"Career is Property"' As a Concept of Labour Market Policies', ILJLL&IR 1998 at p99.

[31] Genda Y, '"Shishitu' Ka 'Kuren' Ka (Trainability or Training?)", *The Monthly Journal of the Japan Institute of Labour*, 1996, Vol. 38

[32] ILO (1995 (a)), ILO (1995 (b)) and OECD (1995) Employment Outlook, OECD, Paris.

labour market, such as an employment service, unemployment benefits, vocational training etc.

However, the burden should not be placed on the state alone. Non-profit state enterprises can come into the fold too, as they can be farsighted in their thinking and promote equality for everyone, but on the downside, they do tend to be too rigid and costly. The market mechanism (market forces), on the other hand, can be flexible and less costly, but unfortunately tend to fluctuate excessively in accordance with shortsighted speculation. Private institutions are indifferent to collaboration between the state and the private sector. The degree of such collaboration would be determined by local factors within each society, such as the quality of bureaucracy, the extent of industrialisation, the level of national education, etc.

Employers will generally endeavour to invest in human capital by engaging strategic human resource management policies like job rotation, multi-skilling autonomous work control and quality circles, to systematically promote the formation and development of employee skills. Forms of study leave or long service leave are particularly useful to induce workers to concentrate on education in order to improve existing skills or to acquire new skills for future career development. The onerous responsibility on employers will be off-set by gains due to improved productivity on the part of the employee.

The contention herein is that even though there may be wide employee protection in the labour regulations, there are almost always loopholes that affect non-core workers, where the qualifications of an employee do not meet the needs of the business. The trick could be ensuring that workers remain employable, the solution of which might be located in rights to education and training.

2.5 Rights to Education

Education is not only intended, as traditionally expected, to provide some formal protection to workers (i.e. continued employment with their original employer). Even more importantly, education enhances the chances of external employment, which is a complement to such protection, substituting employment protection, redundancy payment and unemployment insurance. The right to education and training seems to

be a right that is especially appropriate for negotiated solutions, since financing is such an important component thereof.

Labour unions are pushing government to intervene and provide more support for workers, to negotiate and consult with employers' associations and with each individual employer to assure job security and skill formation, and to instruct union members to be more aware of career development. The individual worker would in the circumstances be responsible for the strategy of their own career development within and for the benefit of the enterprise.

More developed rights to education and training as part of employment protection schemes, seem to imply or necessitate the strengthening of employer prerogatives as regards the functional flexibility dimension. A right to education and training as part of the more general conditions of employment can also help to 'empower' individual employees. Thus the call for rights to education to be included in collective agreements and individual contracts of employment so as to counter adverse effects of a non protective legislative coverage of the atypically employed.

Knowledge as a production resource has implications for the style of management in enterprises as well as for industrial relations and collective bargaining. Management does not itself possess the knowledge that its various employees have, and it must therefore formulate targets and organise knowledge as productively as possible. An over-mobile work force constitutes a threat to the employer. Essentially, when an employee leaves, so does his/her knowledge. Therefore, good human resource management skills and the development of competencies are essential. Functional flexibility solutions are closely related to co-determination, industrial democracy and procedural flexibility.

All of the above place pressure on the legal concept of employee, which has traditionally been characterised by subordination of the employee to the employer.

As we have seen from the above discussion, the argument with regard to the need for adequate qualification and skills on the part of the employee is fraught with more questions than answers. These include ownership of the intellectual property as regards the employee's acquired skill, knowledge and expertise, as well as the legitimacy of non-competition clauses and slavery contracts and their relation to the

fundamental freedom of occupation.[33] Hence, neo-liberals, *inter alia*, advocate for a society with non- or limited regulation, which will be corrected by market forces. An opposing view holds that such reform would pave the way for a society with a wide gap between the rich and the poor. However risky, it appears that it would be irresponsible not to reform the conventional legal framework, which is now outdated to include the suggested continuous learning continuum. Further, the value of the 'learned' skill as 'title' or security not only to employment but to guaranteed good terms of employment needs to be protected by law.

[33] Op cit note (26) at p113.

CHAPTER 3

ATYPICAL WORKERS: A GLOBAL PERSPECTIVE

3.1 Introduction to Atypical Employment

Unlike the typical form of work relationship, non-standard forms of work encompass a variety of economic and legal relationships.[34] As discussed above, international trends have shown a move towards increasingly flexible practices in the work place. To a certain extent, this move is as much a choice of lifestyle on the part of workers, as it is due to global competitiveness and the need to maximize profits in conjunction with the use of efficient new technologies on the part of employers. It is clear that economic change has been accompanied by a decline in continuous full-time working and a corresponding surge in part-time and temporary working (both of which will be discussed in this chapter), self-employment and other forms of marginal working.[35]

The following are some of the various forms of atypical work, a number of which will be discussed below:

- Part-time work
- Casual work
- Home-work
- Subcontract work
- Unstable and irregular employment
- Unregistered self-employment
- Disguised wage work
- Family labour
- Moonlighting
- Illegal work or work in illegal activities
- Short-term contractual or fixed-term employment work that entails combining pre-capitalist and/or traditional non-market social relations with market related ones, and so on.[36]

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[34] Theron and Godfreys, op cit note (6) p1.

[35] Fredman S, op cit n 17

[36] Mhone, G. op cit note (4), Theron and Godfrey, op cit n 6 at pp1-2.

An additional indicator as to whether a particular work situation can be defined as atypical would be guided by a significant variance in certain characteristics that are considered necessary in a typical or standard work relationship, some of which include:

- Presence or absence of contractual agreement
- Nature of contract in terms of salary, hours of work, benefits
- Term of employment, i.e. whether casual, permanent, part-time or temporary
- Place of work
- Mode of payment
- Mode of work
- Mode of training
- Degree to which working conditions are governed by law or regulation.

Thus, non-standard employment can be defined as employment that deviates in some way from the conventional mode of continuous, full-time waged work.[37] It also deviates from the Western office-centred practice of the mid-twentieth century, which assumes a working week running from Monday to Friday, 8 hours a day, during daylight hours.[38] A closer look at this definition reveals that it ignores other forms of work performed by women, ethnic minorities and people employed in industries, where the criteria of weekday time of 8 hours per day and daylight do not apply, such as in factory shift work, manufacturing, agriculture and domestic work.

It has been argued that globalisation is one of the underlying causes of flexible work patterns.[39] A study analysing the European and OECD countries with regard to changes in working trends over the past decade[40] records that, of the occupations that employed the highest number of men in 1901, none had a high number of men working at home. Although some definitional differences may have developed in the

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[37] Hepple B, A race to the Top? International Investment Guidelines and Corporate Codes of Conduct: A revised version of a paper presented at the WG Hart workshop on labour regulation, Institute of Advanced Legal Studies, London, July 1999.Published in the Comparative Labour Law Journal.

[38] Allan, Brosnan and Walsh, ;Non standard Working Time Arrangements in Australia & New Zealand, Current research in Industrial Relations AIRAANZ, Wellington (1998).

[39] Hirschnson P, op cit note (22).

[40] McOrmond T,; National Statistics Feature, Labour Market Division, ONS, 2004. p 25

past century, it is clear that, by 2003, the composition of home-workers had changed significantly, as men were now more likely to work from home than women (14% and 18% respectively).[41] A significant factor contributing to the high prevalence of men working from home is the general predominance of self-employment among men as compared to women.[42]The issue is the extent to which these non-standard arrangements are becoming predominant, indicating a profound shift in the labour market

3.2 Categories of Atypical Employment

To call the changing forms of employment atypical may be a misnomer because there is no universally accepted definition of the term. Indeed it may be an inaccurate description in the light of the growth of the variety of forms they take.

3.2.1Part-Time Work

Although it is acknowledged that people's working patterns might shift over time and in response to changing circumstances, part-timers may be categorised as being either voluntary or involuntary. Voluntary part-timers comprise people who would have chosen such a situation for a variety of usually personal reasons, ranging from childcare to being financially able. In contrast, involuntary part-timers find themselves in such a position for other reasons, such as that the work would not accommodate their needs. In the OECD countries, a threshold of 30 hours per week separates part-time from full-time work, even though national jurisdictions may have differing provisions.

A number of reasons, cultural or personal, may inform an individual's decision to engage in part-time work. In Japan, for instance, non-regular workers are predominantly female,43 which can be traced back to the culture of Japan. Traditionally, the Japanese also worked much longer hours than their peers in the

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[41] Ibid at p27.

[42] Hotopp U, Teleworking in the UK: Labour Market Trends, june2002. p311.

[43] Houseman S and Osawa M; Part-time and Temporary Employment in Japan, Monthly Law Review October 1995. U.S. Department of Labour/ Breau of Labour Statistics, 10.

already developed world. Their hard work was rewarded through a mobility clause with most forms of full-time, regular employment. It is these issues, in addition to the greater household and childcare responsibilities faced by women in general, that are exerting a strong influence on their choices, as Japanese women entered the world of employment in great numbers.

In the United Kingdom, as in most of the Western World, women tend to take up part-time employment in an effort to balance home and work responsibilities.44 Both the presence of children or dependent adults and the simultaneous need to earn an income, have a big influence on women's decision to find paid work, which often includes part-time work. Other factors may also influence women's choices and these could be demand issues, e.g. a greater availability of part-time jobs in the economy or better childcare provisions. Part-time work, moreover, is such that it can be employer-driven.

In the United Kingdom, part-time workers have not enjoyed the same statutory protection in terms of employment rights as their fulltime counterparts. It had previously been the view of the UK government that extending employment rights to part-time workers would place a substantial burden on employers, which would lead to a significant reduction in the availability of part-time work.[45] In the case of *R v Secretary of State for Employment ex parte Equal Opportunities Commission,*[46] the Secretary of State argued that the whole purpose of the thresholds excluding part-timers was to bring about an increase in the availability of part-time work, and that it was 'objectively justified'. Of course, the House of Lords rejected this argument – as no evidence had been adduced in support of that assertion. The Secretary of State had argued that removing these thresholds would 'make employers more reluctant to create new part-time jobs and [might] indeed threaten some existing jobs.'[47]

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[44] Bardasi E and Gornick J.C; Women and Part-time Employment: Workers choices and Wage Penalties in Five Industrialized Countries; Working Papers of the Institute for Socio-Economic Research, paper2000-11 University of Essex, 2000

[45] http://webjcli.ncl.ac.uk/articles1/maxwell1.html accessed 1 08 2004 at 11.15hrs.

[46] (1994) 2 WLR 409.

[47] Ibid HC Deb 20/12/1994, 1101 w.

A Canadian study suggests that the increase in part-time employment as a proportion of total employment is strongly linked to the economic cycle.[48] Even though it is contended that Canada's economic growth has surpassed that of the G7 countries, Canada's relentless efforts to increase productivity and cut costs have led to job expansion in part-time work. This situation is similar to that existing in the 1990's, when there was a jobless recovery from the recession in both the USA and Canada, and part-time jobs accounted for the major part of employment growth.[49] This relationship highlights the connection between labour demands and economic cycles. Houseman and Osawa,[50] discussing recent changes to the Japanese labour market, suggest that in order to cope with an ageing labour force and to increase flexibility, it will be necessary for Japanese firms to expand part-time employment. Similarly, a jobless recovery similar to that experienced in the early 1990's is currently evident in the USA; although the recession is effectively over in terms of productivity, the USA has experienced negative job growth. [51]

Evidently, there are differences between nations in terms of the proportion of people working part-time. More to the point, these differences cannot be easily compared, because of variations in how each country defines part-time work. The Australians, for example, view part-time employment as based in part on self-definition, which has two main weaknesses: On the one hand, some post-interview re-classification was necessary in respect of those who stated that they were working part-time, but who were in fact working more than 35 hours in the reference week, i.e. the same as full-time employees.[52] On the other hand, there may also have been people who define themselves as full-time workers but who were actually working less than 35 hours in any reference week. These might have been recorded as part-time, which might account for an undercount of part-time employees. However, growth in the Australian labour market between 1982 and 1997 could be primarily attributed to the growth in

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[48] Poloz, S., 'Is Canada's Labour Market Losing Steam?', 2000. http:/ / www. edc.ca/docs/reports/commentary/w11.13.2002 e.htm

[49] Poloz S; Ibid

[50] Houseman and Osawa, op cit n 43.

[51] Leonhardt, D., 'Slowing Stream of New Jobs Helps to Explain Slump, The New York Times, October 1 2003. http://www.nytimes.com

[52] ABS, 2003; OECD, 1997.

non-standard employment. According to Markey et al,[53] the majority of growth in non-standard employment has been in predominantly female occupations, irrespective of the increasing number of men undertaking part-time employment.

If part-time work is examined in terms of the length of time spent with the same employer, then just over a quarter of women in the United Kingdom currently employed part-time have been with their employer for over ten years. It seems absurd that since they would be classified as non-standard, benefits accruing to permanent employees would be denied them.

Although recent discussions about part-time employment have centred on its non-standard aspects, the fact that there are employees who have spent in excess of ten years with the same employer and who are presently part-time workers indicates that part-time employment is actually an accepted alternative to standard work and, even more importantly, a method used to achieve an improved work-life balance.

In addition to increases in part-time employment, temporary employment has also increased over the past decade. In this regard, Markey et al found that, as in Australia, in the EU growth had also occurred in non-standard employment in predominantly female occupations, where 48% of employees subject to a fixed or temporary contract were female, although women accounted for only 42% of the paid work force.[54] This might indicate women's tendency to prefer balancing social responsibilities. The European Council has consequently attempted to develop a directive on temporary employment; to date, however, there has been no agreement among the necessary parties. The primary purpose of the proposal is to bring the treatment of temporary agency workers in line with that which they would receive if the company employed them directly . Income insecurity is a peculiar trait of this kind of non-standard employment: part-timers usually obtain fewer benefits compared to regular workers.

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[53] Markey, R. et al, Gender Part-time Employment and Employee Participation in the Workplace: Comparing Australia and the EU, Department of Economics, University of Wollongong, Working Paper Series, 2001.

[54] Markey et al, op cit n 53.

3.2.2Temporary Work

Temporary work is a concept that is difficult to measure: Does it refer to seasonal, agricultural workers or to consultants who take on a series of contracts rather than working for a single employer? Measuring temporary work is even more challenging if a person is employed full-time by an agency that farms out its workers: are they classified as full-time workers (with regard to the agency), or are they temporary workers (in relation to the company to which they are being farmed out)?

The definition of temporary workers moreover varies from country to country; thus, as with involuntary part-time workers, direct comparisons are difficult.[55]

- **Japan:** Temporary work refers only to contracts that last for less than one year.
- **Australia:** People are regarded as permanent employees if they are entitled to paid holiday and/or sick leave.
- **Canada:** Workers are regarded as temporary workers if the contract is for a fixed period, regardless of length and hours of work.

According to a study referred to by Olivier[56] supra, this category of employees represents the largest percentage of atypical employees in South Africa (although this comprises only 5% of all employees in the country). It is in particular found in the retail sector, where employees normally work long hours and are mostly women. Even though exact data is scarce, it is believed that numbers of temporary workers are on the increase.[57] They are rarely granted fringe benefits, though, and generally receive lower wages than their permanent counterparts.[58]

3.2.3Shift Work

In respect of employees who work shifts, in addition to perhaps being employed on a part-time basis or for a limited duration, there is the added complexity of working either fixed hours at non-standard times of the day (evenings, nights or weekends), or

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[55] European industrial relations observatory on-line http://www.eiro.eurofound,eu.int/1997/06/feature/eu9706/3/f,html accessed04 08 2004 at 9.00hrs.

[56] Olivier M; Extending Labour Law and Social Security Protection: The Predicament of The Atypically Employed ILJ, 1998,673

[57] Bronsman, et al, op cit n 38 , at p25.

working a variety of times over a set period, such as rotating or split shifts. Some of the growth in shift work among the younger age groups may be linked to their growing need to finance part of their post-secondary education, as is already common in North America, and therefore the need to fit work around their studies.

3.2.4Hired-out Workers

This arrangement provides one of the primary sources of atypical work – procuring the services of labourers through the labour broking system, i.e. via temporary employment services or hiring-out agencies. In South Africa, it is extensively used in the manufacturing, mining, forestry and agricultural sectors. In recent times, however, these have grown to include cleaning services, secretarial services and most support services classified in the non-core category. By 1995, more than 3,000 labour broking services were already supplying over 100,000 workers at a time.[59] The question arises as to whether these sourced workers are employees of the agency hiring their services or employees of the labour broker? In terms of the LRA,[60] workers are deemed to be employees of the labour broker. The nature of this form of employment is uncertain. Unionisation is low amongst this class but s 198 of the LRA read with s 82 of the Basic Conditions of Employment Act 75/1997 (BCEA)[61] protects them, albeit insufficiently. It covers liability against both the agency and the client against contravention of a binding bargaining council agreement, a binding arbitration award, provisions of the BCEA itself and a sectoral determination made in terms of the BCEA.

3.2.5Casual Employees

A survey in connection with the incidence of atypical employment in South Africa,[62] reveals that a low percentage of workers (about 2%), the majority of whom are

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[58] Standing G, et al, Restructuring the Labour Market: The South African Challenge (An ILO Country Review) 1996. 340 1996, at p341.

[59] Standing et al, Ibid at p159

[60] See s 198(1) of the Labour Relations Act 66 of 1995 (LRA), 1995.

[61]See s 82 Basic Conditions of Employment Act (BCEA) at 75 of 1997.

[62] Op cit note (56) at p671.

women, are employed on a casual basis.[63] In practice, these employees do not always enjoy the same protection as that afforded to typical employees – largely because of the absence of collective agreements. Thus, it is argued in this dissertation that concerted efforts aimed at providing protection to atypical workers needs to be devised.[64] No recent changes in treatment have been reported, although an increase is expected both in terms of numbers of people falling into this category and in terms of levels of abuse.[65]

3.2.6 Fixed-term Employees

Because of the changed pattern of work preferences, employers *inter alia,* expect an increase in the total percentage of workers engaged by fixed-term contracts.[66] Employment insecurity is perhaps the most important consequence of being appointed on a fixed-term contract.[67]

3.2.7 Home-Workers

This area is poorly researched and therefore no accurate data is available – perhaps because it is not a common mode of employment in South Africa. According to available information, only 10% of employers make use of home-workers, most of which appear to be female. They usually receive lower wages than regular workers.[68]

3.2.8 Self-Employed Workers

Although the mining industry and the public service have experienced retrenchments on a large scale in the last 10-15 years,[69] the significant increase in the number of self-employed people may have been a positive development. Since the period 1980

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[63] Op cit note (57), at p25; Horwitz and Erskine, 1995, at p40.

[64] Horwitz and Franklin, Labour Market Flexibility in South Africa: Researching Recent Developments, SAJLR, 1996.

[65] Ibid, at pp21, 24.

[66] Op cit note (69) at p21.

[67] Op cit note (59) at p341

[68] Op cit note (59) at p344

[69] Op cit note (56).

to 1991, the numbers of self-employed people have steadily risen by 8.3% per year, which is well above the increase in the labour force of 2.8% per year. The result, according to the Central Statistical Service Population Census 1991 (1993), is that their share of the total labour force has increased from 3.9% to 7% over the same period.[70]

Results of the 1994 October Household survey revealed that more than one million people were in self-employment in South Africa. These numbers are expected to soar. The primary forms of enterprises in this regard include street trading and the retail trade.[71] The main concern with this group is the lack of social security coverage. In August 1997, the White Paper on Welfare suggested that a separate retirement scheme be created for the self-employed in order to alleviate pressure on the government welfare service.

3.2.9Contract Work and Subcontracting

Certain sectors, especially the mining sector, are increasingly using this category. Contractors and consultants and in particular management consultants appear to be on the increase due to the demand for focused strategic advices.[72] The larger the enterprise, the more use is made of contractors and consultants.[73] Part of the explanation may be that larger enterprises now tend to outsource non-core activities, especially to former employees. The South African Breweries provides a useful case study.

From the employer's perspective, subcontracting is popular for several reasons: Usually, no fringe benefits are payable to subcontractors. Secondly, workers are not unionised, and thus tend to be paid lower wages than other workers. , The mines, for instance, generally refuse to grant same conditions of service to contract workers and regular workers.[74] In the iron and steel industry, the position is different in that

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[70] Central Statistical Service Population Census 1991 (1993).

[71] Op cit note (59) at 85.

[72] Horwitz and Erskine, Labour Market Flexibility in South Africa: A Preliminary investigation,1995, SAJLRat p42, 43.

[73] Op cit note (64) at p24, 25.

[74] Op cit note (56).

bargaining council agreements bind all employees, irrespective of who employs them and on what basis.[75]

3.2.10 Job Pools / Manpower Pools

In the mines in South Africa where job or manpower pools exist, there is the practice of in-service employment, which implies that mine workers are kept on the books of a mining company, without being necessarily physically employed. Under this system, workers are granted extended periods of unpaid leave. In 1995, only 86% of the workers in service were actually physically at work, whilst the remaining 14% were not physically employed, but were merely on the books of the company. The main advantage is that jobs are protected, and with unemployment in general not abating, this practice does present a tolerable option.

3.3 Conclusion

From the available evidence it appears that the great majority of workers in South Africa are still permanent full-time employees, in particular as far as core activities are concerned.[76] Nonetheless, declining formal sector employment may enhance the use of atypical forms of employment. The expansion of informal activities has been considerable, although this sector has until now been characterised by a lack of skills and low-income levels.

In summary, the current labour market incorporates or alternatively provides many forms of employment relationships that differ from full-time employment. They are usually described as 'non-standard' or 'atypical' forms of employment. The issue is that these workers are particularly vulnerable to exploitation, because they are unskilled or working in sectors with little or no trade union organisations, or little or no coverage by collective bargaining. A high proportion of these, especially in developing countries, are women. Frequently, they have less favourable terms of employment than other employees performing the same work and have much less security of employment.

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[75] Op cit note (58) at p303-4, 343.

[76] Op cit note (58) at p25,

Often, they also do not receive 'social wage' benefits, such as medical aid or pension funds. Isn't this practice discriminatory and dehumanising?

CHAPTER 4.

LABOUR CONTRACTS IN CONTEXT.

4 1 THE BASIC POSITION

There is much less freedom of contract in employment contracts than in commercial contracts, because of necessity to provide extensive statutory prescriptions of the terms thereof, in order to countervail the power imbalance between the 'contracting parties'. Individual freedom is further limited by collective agreements. However, the concept of standard working arrangements does not only vary within national labour markets – in other words, what is common practice in one industry may be non-standard in another – but also between sovereign states, with standards in the UK differing substantially from those in France, for instance.[77]. Similarly, with regard to part-time and temporary employment across the G7 countries, variations may be related to numerous factors, ranging from how part-time work is calculated and defined to the impact of employment legislation and the willingness of employers to engage employees on a full-time or indeterminate basis. In fact, part-time employment is more common and popular when there are less stringent employment legislations, such as in the United States of America..[78] Furthermore, countries with stricter legislations for temporary workers also have a lower incidence of temporary work than countries whose legislations are primarily focused on permanent employees.[79]

Changes in working patterns over time may signal the attempts of both individuals and employers to develop a more productive approach to work. Employers may be using non-standard working arrangements to create a labour force that is more flexible and thus more suited to meet market demands, whereas employees may be attempting to create a more effective work-life balance. Whatever the reason, shift, temporary and

[77] Harvey M,: Economies of Time: A Framework for Analysing the Restructuring of Employment Relations;, 1999.

[78] Slinger, T., 'Some Labour Market Implications of Employment Legislation', *Labour Market Trends*, 2001, at p445-454.

part-time work have become more common among a large majority of the population **throughout the world** during the last decade. This supports the conclusion that these work patterns have for some time already been an option, though little recognised, for marginalised workers who could not find, or perhaps did not want, standard employment. Positioning these types of work arrangements as entirely new, or as a reaction to the current changes in the nature of the labour market, obfuscates the dynamics that have created a standard/non-standard distinction in the first place, and renders it more difficult to understand the complexity of the labour market in both its current and past guises.

In the case of the atypically employed worker, it appears that such a lack of proper legal regulation and protection has contributed to a potential for discrimination in hiring, general disparity in treatment and an often non-committal approach adopted by unions. This is primarily because unions see themselves as protectors of the typically rather than the atypically employed. They tend to resist flexible labour force structures, as the likely impact might be that an increase in atypical workers may erode their support base.[80] There are exceptions, however, where a union decides to include categories of peripheral workers within bargaining arrangements with employers by, for example, extending maternity leave provisions to part-timers as well.[81] In certain instances, employment security guarantees have been traded for work flexibility arrangements.[82] Nonetheless, these instances are limited in scope and number. The absence of the necessary underpinning of atypical employment by collective agreements hampers the full development of these types of employment and the legal protection that may be accorded to them – even more so in developing countries like South Africa, where there are no statutory provisions to protect certain categories of atypical employees.[83] Although all workers enjoy constitutional protection in South Africa (see s 9 of RSA Constitution 108/1996),[84] atypical employees who do

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[79] Slinger T, Ibid p 453

[80] Horwitz and Franklin, op cit n (64) at p7.

[81] Finnemore, M. and Van der Merwe, R., Introduction to Labour Relations in South Africa, Fourth Edition, 1996, at p77.

[82] Horwitz and Franklin, op cit n (64)

[83] Op cit n (72) at p45.

[84] The Republic of South Africa Constitution Act 108 of 1996

not fall within the ambit of the definition of employee, such as independent contractors and some types of consultants, cannot rely on the protection offered by the country's labour laws. This is despite the intention of the legislation to capture/encompass all workers and to promote the constitutional right to equality and the exercise of true democracy, as stated in the Preamble of the South African Employment Equity Act 55/1998 (EEA).[85]

Furthermore, the Labour Relations Act 66/1995 (LRA)[86] extends its protection to job applicants, and an employer may thus be challenged if he does not consistently and fairly apply appointment criteria. The wide ambit of collective bargaining under the LRA has had an impact on the procurement of workers, apprentices, home-workers, self-employed, contract workers, sub-contractors, etc. In a 1997 case[87] in the Western Cape, the Labour Court held that an employer was bound to the provisions of an agreement between the employer and the unions, which set out specific procedures in advertising, short listing and interviews, and included the formal involvement of the unions in the selection process, before an appointment could be made.

The extension of the constitutional and statutory protection against discrimination to work-seekers could, in particular, affect certain categories of atypical employees such as part-timers, in circumstances where it is not an inherent requirement of the position that the appointment should be on a full-time basis. Considering the fact that most part-time workers in South Africa are women, it could be interpreted as indirect discrimination based on gender if an employer were to refuse to appoint a part-time employee, unless they could produce sufficient justification for not appointing that part-timer.[88]

The balance drawn between employers and workers might yield a decidedly weak set of workers' rights – the key issue is 'to strike the right balance between flexibility and security so that both employers and workers can benefit from greater flexibility'.[89] Our

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[85] The Employment Equity Act 55 of 1998.

[86] The Labour Relations Act 66 of 1995.

[87] In *Adonis v Western Cape Education Dept*, Case no. C11S/97.

[88] Olivier, M., 'Part-time Employment in the S.A. Public Service: An International Perspective', 1995 TSAR 704, at 707-713, *Griggs v Duke Power Co.* 401 05 424 (1978).

[89] Fredman S: Labour Law in Flux: The Changing Composition of the Workforce, ILJ Vol 26 No. 4 Dec 1997 at 352.

predecessors have constructed systems of modern labour law and social security to strike such a balance in the new economic situation produced by the Industrial Revolution. The foundations and activities of the ILO are representative of such efforts. Before the creation of the ILO, the market mechanism had been so merciless towards those with economic disadvantages as to require governments to protect them to preserve stability and equality in society. This idea has been widely accepted in most countries, which have gone through industrial development.[90] The state establishes the very basic national standards of employment relationships, such as minimum wages, maximum working hours, standards of safety and health, compensation for industrial accidents and so on. Trade unions, on the other hand are institutionalised as one of the essential institutions in labour law that assist individual workers in gaining better working conditions and more stable employment through, *inter alia,* collective bargaining. In this way government and unions divide and co-ordinate their respective roles of protecting workers.

At a global level, the changing attitude of unions to the flexibility debate and the role of social dialogue can be illustrated by quoting Bill Jordan, the Secretary General of the International Confederation of Free Trade Unions (ICFTU), which represents 141 countries:

> It is imperative to balance workers' desire for security in employment with the constant pressure from the market on employers to adapt quickly and efficiently to changes in technology and trade... Just as companies need to understand workers' fears and look for ways to meet their aspiration for predictability in their employment contract, so workers and their unions have to come to terms with the fact that companies that do not change, get left behind and die... The most difficult challenge for management is not in fact generating new ideas but translating them into the organisation of work. In this context, social dialogue and collective bargaining are the most appropriate instruments to help labour and management to adapt to the new rules

[90] Sengenberger and Campbell (1994): Creating Economic Opportunities: The Role of Labour Standards in Industrial Restructring, Geneva (International Institution for Labour Studies).

> of the game. Tripartite institutions are vital to dealing with the national dimensions of change, including training and education. Company and plant level bargaining is the key to the smooth adaptation of employment within the enterprise. Local and regional co-operation initiatives are essential to avoiding widening gaps between job opportunities in different parts of the country.[91]

The acknowledgement for flexibility by trade unions (as per above quote) does not only refer to conditions of employment but it is submitted that it may as well be in reference to security provided by possession of multi skills.

The correct policy thrust should be to search for modes of labour utilisation that will enhance both flexibility and security.[92] The question is how? Considering the circumstances of the Post-Fordist knowledge society, the high standards imposed by globalisation demand higher learning, greater specialisation and even increased literacy levels to enable workers to operate computers at factory levels etc. Central to the knowledge society is the acknowledgement that knowledge as a productive resource takes centre-stage, and further, that flexible qualification has the potential to upstage atypical forms of work.[93] If it is accepted that knowledge is an adequate production resource, it also has to be noted that, because knowledge is not static, it must be constantly updated and be flexible, so that it will remain relevant in changing circumstances. The challenge then becomes one of 'learning to learn'[94] in conjunction with continuous life-long education: 'the central component of general qualifications can be defined as flexibility, the ability to adapt to changing conditions and to transform one's qualifications as needed.'[95]

For the worker, flexible qualifications mean increased security in employment, whether in terms of continuous employment or increased chances of achieving high-quality

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[91] Jordan B; Union Markets and Democracy, a public lecture at the ILO Institute for Labour Studies, 14 Nov 1997.

[92] Mhone G: Atypical Forms of Work and Employment and their Policy Implications; ILJ Vol. 19 Part 2 at 212.

[93] Numhauser-Henning A: op cit n 29

[94] Ibid at Page 104.

[95] Ibid at Page 104.

working conditions and a fulfilling working life. For the employer, flexible qualifications mean enhanced intellectual capital for the organisation as well as more allocative flexibility. Increased qualifications thus equal employability, viz. increased chances of labour market participation, economic growth or competitiveness on a global scale.

Employability is crucial, regardless of the mode of employment, particularly when an individual faces the risk of being subjected to unfavourable labour conditions, transfers and unemployment. In fact, Gudmundsson contends that 'the basic cleavage in the labour market is between the core of the qualified and flexible and the margin of the unqualified and inflexible.'[96]

However plausible the argument of increasing allocative flexibility through qualifications may be, though, it has negative repercussions for workers on the periphery and the distanced workforce. It is even more of a problem perhaps for developing countries where resources would be an issue even if governments did undertake to finance the training. The training benefits would obviously be targeted at the core staff to the detriment of non-core workers just as the definition of employees is discriminatory of work arrangements other than the typical or standard form.

[96] Gudmundsson G: Old Wine in New Bottles: The Concepts of Competence and Qualification, in Global Redefining of Working Life Nord 1998/12, Nordic Council of Min., Copenhagen at Page 205.

CHAPTER 5

TOWARDS A REDEFINITION OF 'EMPLOYEE'

5.1 General

Regardless of the social and economic benefits of atypical employment, the workers engaged therein have thus far been disadvantaged either by a lack of or inadequate legal protection. Only 'proper' (i.e. fulltime and permanent) employees have been entitled to social security benefits and have access to the statutory mechanisms if they wish to seek remedies for violations of their employment rights; only 'proper' employers in terms of the definition in the LRA are bound by the labour statutes and are vicariously liable for the delicts of their employees.[97] Realistically speaking, however, given the range of most non-standard types of work, which includes, for instance, apprentices, home-workers, self-employed individuals, contract workers, sub-contractors and part-time, hired-out, casual, temporary, or fixed-term workers etc., it is indeed difficult to fit all of these within the definition of employee. These difficulties, however, do not absolve governments from addressing the issue.

From a legislative point of view, conventional definitions of 'employee' have two shortcomings. The one is that these definitions often rely on private law concepts of employment. These concepts are notoriously difficult to apply, particularly as modern employment practices no longer conform to the standard employment model described earlier in this paper. The other is that the definitions tend to be too narrow. They exclude many classes of workers who are in fact dependent on their employers and, as a result, are vulnerable to exploitation and subject to contractual regimes that do not fall within the formal private law concepts of employment.[98]

All over the world, countries have had to confront this difficulty, although they have ironically had to do so by legislative means despite the inherent constraints of the law. Some jurisdictions have consequently broadened the statutory definition of employment. In the United Kingdom, for instance, anti-discrimination legislation

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[97] Grogan J: Workplace Law, 2003 at p15.

[98] Prof.Cheadle et al, Report on the Labour Law Reform, Government of Tanzania, 2003.

applies to all workers; these are defined as 'all persons who work for another, excluding those who do so as part of their own business or professional practice'.[99] Other countries have created a new definition to cover dependant workers, who are not employees. In New Zealand, for instance, employment protection may be extended to dependent contractors 'who are either subject to supervision by an employer or form part of the employers' organisation'.[100]

Another strategy by some countries has been to incorporate presumptions that assist workers in establishing whether they are covered by legislation, as is the case with South Africa and France. From the perspective of a developing country, however, the South African situation is representative and will hereinafter be looked at more closely.

5.2 DEFINITION OF EMPLOYEE.

5.2.1 The Republic of South Africa

In the case of South Africa, the LRA does not cover certain atypical workers such as independent contractors and home-workers.[101] It does, however, cover a wide range of occupations, as its primary purpose is to give effect to s 27 of the Constitution of the Republic of South Africa.[102] Exceptions include members of the National Defence Force, the National Intelligence Agency, the South African Secret Service and the South African National Academy of Intelligence. The all-encompassing nature of the LRA is underpinned by the constitutionally protected right of South African citizens to 'fair labour practices',[103] as well as by s 185 of the LRA, which guarantees the right not to be unfairly dismissed.

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[99] Cheadle, 2003 Ibid

[100] Olivier M, et al; Limited Protection Afforded To Atypical Employees in South Africa and New Zealand: The Quest for an alternative Framework-CICLASS.

[101] Section 213 of the LRA, 1995 defines employee as

(a) any person, excluding an independent contractor, who works for another, etc

[102] The RSA Constitution No 1087, 1996 at s 27 provides the following rights

1. Every person shall have the right to fair labour practices
2. Workers shall have the right to form and join trade unions, and employers shall...etc.

[103] Ibid at s27

It is therefore safe to conclude that all other forms of atypical employment are covered by the LRA as well as by its dismissal provisions. Section 198 covers temporary workers, as they might fall under the temporary employment service. Special protection can be said to exist with respect to fixed-term contract employees. If the latter expected their contract to be renewed on the same or similar terms, but the employer either does not renew the contract at all or renews it on less favourable terms, then the court might construe this as a dismissal. The employer is not without recourse, however, as his actions might be justified because of misconduct or incapacity on the part of the employee, as long as the employer has followed the correct procedures.[104] In respect of fixed-term contract arrangements, then, an employee can be dismissed if there is sufficient reason for this dismissal. This is exemplified by the case of *Mkhiwa v BCS Joint Venture*.[105] Further, Part 8 of Schedule 8 to the LRA provides for more flexible guidelines relating to the dismissal of probationary employees based on incapacity than with any other category.

Statutory protection as a rule is limited to the traditional employer-employee relationship, since only persons who satisfy the definition of employee are generally covered in terms of the various employment laws.[106] This protection is consequently not available to certain categories of atypical employees.[107]

Social security legislation in South Africa as in most developing countries still excludes most non-standard workers from its sphere of application.[108] The exclusion of non-standard workers is multi-facetted and has consequences that go beyond those directly affected such as that;

(a) Protection is only extended to those who qualify as 'employees'.

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[104] M. Olivier ' Legal Constraints on the Termination of Fixed-term Contracts of Employment: An enquiry into Recent Developments' (1996) 17 ILJ 1001.

[105] *Mkhiwa v BCJ Joint Venture* 1997 BLLR 1014 (LC).

[106] LRA 66/1965, BCEA 75/1997 and the EEA 55/1998.

[107] Olivier, M; Extending labour and Social Security Protection: The predicament of the atypically employed 1998 ILJ 669,

Olivier, M: Critical issues in South African Social Security: The need for creating a social security paradigm for the excluded and the marginalised, 1999 ILJ 2199.

Horwitz F and Erskine, V: Labour Market Flexibility in South Africa: a preliminary investigation. 1995 South African Journal of Labour Relations 45.

[108] The Compensation for Occupational Injuries and Diseases Act 130/193 (COIDA), Unemployment Insurance Act of 2001 provide most telling examples.

(b) Exclusion of categories of persons from the ambit of the definition of 'employee' (or similar term) are contained in the relevant laws even though these persons would otherwise perfectly fit the notion of being employees, e.g. dependent contractors. Improvements have been made to the legislation, but have not yet been formally adopted.[109]

(c) A dependant of a deceased employee can qualify for a benefit in terms of South African Laws. However, the definition of 'dependant' in the various social security laws is normally linked to the employee/contract of service concept, in that coverage is extended only to dependants of deceased employees or persons who rendered services on the basis of a contract of employment.

(d) Sometimes the exclusion and marginalisation of atypical employees in terms of the South African social security system may be the result of the lack of a legal obligation to participate in a particular scheme or programme aimed at insuring workers against certain social risks. Membership of occupational retirement funds (i.e. provident and pension funds) serves as an example. There is no statutory compulsion to belong to a pension fund or provident fund, resulting in about 40% of the economically active population in South Africa not being covered. This has a detrimental effect on the state social assistance system.

The discussion above has not defined the term 'employee'. This definition is crucial, as the work-related arrangements do not extend beyond employer-employee relationships. Section 213[110] of the LRA goes beyond the common law understanding of employee, as it not only includes individuals who work for another or for the state, for remuneration, but also covers those who in any manner assist in carrying on or conducting the business of an employer. The same section furthermore distinguishes between an employee and an independent contractor.

There is no clear delineation between an employee and an independent contractor. Identity is largely a matter of degree. While there are clear cases where a party could

[109] CF Standing, G. et al 'Restructuring the Labour Market, The South African challenge (an ILO county Review) 1996 446 and the South African Labour Market Commission Report.

[110] Op cit n. (101)

be either an employee or an independent contractor, these occupy opposite extremes on a scale with a penumbra of grey areas occupying the space in between. For this reason, the courts have developed tests to differentiate between employee and an independent contractor.[111]

5.2.2Tests

A number of tests have been evolved by the civil courts in England as well as in South Africa, which set out to distinguish between the employment contract proper and other forms of contract vis-à-vis the provision of work.

(a) The Control Test

This test focuses on the element of control exercised by the employer over the employee. The power to control has traditionally been the preserve of the employment contract. The employee is thus subject to the supervision and control of the employer, who retains the right to prescribe not only 'what is to be done, but also the manner in which that work has to be done'.[112] The independent contractor, however, can be directed only as to what work needs be done, and not as to how it is to be done. Relatively speaking, though, highly skilled employees may enjoy a certain amount of freedom with regard to job performance – hence the courts will not decide on a strict *de facto* control requirement; but will recognize a right to control as sufficient to satisfy the test.[113]

The actual degree of control necessary is a matter for debate. Schreiner JA expressed it in strict terms when he held that 'a right to control, not only the end to be achieved by the other's labour and the general lines to be followed, but the detailed manner in which the work is to be performed.'[114] The judge was referring to a right in principle, and thus the fact that an employer may decide not to exercise this right, but rather to allow the employee some free reign, will not necessarily disqualify an employment relationship.

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[111] Grogan John: Workplace Law, 2003 at pg. 15.

[112] *Colonial Mutual v McDonald* 1931 AD 412 at 436.

[113] *Rodriguez v Alves and Others* 1978 (A) at 842 A.

[114] R v AMCA services & Another, 1959 (4) S.A. 207 (A).

Highly skilled employees with a wide discretion as to how to perform their functions are still employees, as the ultimate difference between an employee and an independent contractor is that the principal has no legal right to prescribe the manner in which the independent contractor brings about the desired result.[115]
The control test cannot be used in isolation, as it is not conclusive.

(b) <u>The Organisation Test</u>

This has its origin in French law, but it has been adopted in the cited case supra of *R v AMCA Services and Another*.[116] In this case, the Appellate Division of the Supreme Court of South Africa was to determine whether premium collectors were 'employed or working for any person'. The court held that the picture emerging from the facts was that of work done 'inside the company's organisation'.[117] In addition, it was decided further that 'in the nature of things a fair amount of latitude was left to them, but what they were doing was primarily the company's work not merely their own. They were members of its organisation and therefore employees within the definition'.[118]
This decision was overturned in a later case of *R v AMCA Services (Pty) Ltd*[119] where the court, in interpreting the expression of 'employee', held that it 'should be construed as implying the rendering of personal services. A person who is not bound to render his personal services to another cannot therefore be said to be "working for" that other person within the meaning of the definition'.[120]

(c) <u>The Multiple or Dominant Impression Test</u>

The inconclusive nature of the 'control' and 'organisation' tests stimulated even further judicial considerations of the issues. It resulted in a position or approach, which advocated viewing the relationship as a whole, thus formulating a conclusion that was informed by the whole picture. The approach was followed in the South African case

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[115] Op cit note (111).

[116] Op cit note (114) at 213.

[117] Op cit note (114) at 213.

[118] Op cit note (114) at 214.

[119] *R v AMCA Services (Pty) Ltd* 1962 (4) S.A.L.R. 537.

[120] Ibid at page 543 per judgement delivered by Botha J.A.

of *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB.*[121] In deciding this case, guidance was sought from the English case of *Ready Mixed Concrete*[122], where the three following conditions were isolated as a definitive test for a contract of service:

- '[T] He servant agrees that in consideration for a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
- [H] e agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.
- [T] he other provisions of the contract are consistent with it being a contract of service.'

In determining the 'other provisions of the contract', the court examines the particular aspects of the relationship, which includes the form of the contract, the method of payment, the supply of capital assets. the employer's right of suspension and dismissal, the object of the contract etc. In the case of the objective for forming the contract, the labour appeal court in *Borcheds v C W Pearce and J Sheward t/a Lubrite Distributors*[123] found that the main determinant of whether a person is to be classified as an employee or an independent contractor was the object of the contract.[124]
There is no exhaustive list of all relevant factors that are likely to be considered by the court. Each case must be dealt with by considering its particular set of circumstances. However, significant pointers are the employer's right to select who will do the work, the power to terminate the employment relationship, the employee's obligation to work for a given time and for certain hours, the provision of office space, equipment and tools to the employee, the right to deploy the employee as it deems fit. The case

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[121] 1976 (4) S.A 446 (A).

[122] *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* (1968) 2 QB 497.

[123] (1993) 14 ILJ 1262 (LAC).

[124] Ibid at page 1279 where it was held that 'Where the object of the contract was the production of a result rather than the rendering of personal services, the person concerned was an independent contractor, irrespective of whether in producing the result he performed the work personally.'

of *FPS Ltd v Trident Construction (Pty) Ltd*[125] illustrates that the court will consider the factual situation wholistically. It was accepted in this case that a consultant to a company was its employee even though he received no set salary but was remunerated only by way of commission earned, even though his working hours were left to his individual discretion, and even though he provided his own car to perform his duties. The terms of his contract proved more significant.[126]

In recent times, the labour appeal court has attempted to demystify the situation further, by offering a list of differences between *locatio conductio operis* (contract of work) and a *locatio conductio operarum* (contract of employment). The court took the opportunity in the case of *SA Broadcasting Corporation v McKenzie*[127] to outline the following:[128]

Locatio Conductio Operum	**Locatio Conductio Operis**
Object is the rendering of personal services between employer and employee.	Object is the production of a certain specified service or the production of a result.
Employee renders service on the behalf of employer.	Independent contractor is not obliged to perform work personally unless agreed.
Employer may decide whether it wishes to have employee render service.	Independent contractor is bound to perform specified results within specified or reasonable time.
Employee is obliged to obey lawful, reasonable instructions regarding work to be done and manner in which it is to be	Independent contractor is not obliged to obey instructions regarding manner in which task is to be performed.

[125] 1889 (3) S. A. 537 (A).

[126] The contract required, *inter alia*, that he 'shall devote the whole of his working time to his work, shall carry out such functions and duties as are from time to time assigned by the company laid down by the company' etc.

[127] (1999) 20 ILJ 585 (LAC).

[128] Ibid at pages 590-591.

done.	
Terminated by death of employee.	Not terminated by the death of the contractor.
Terminates on completion of the agreed period.	Terminates on completion of the specified work or production of the specified result.

The guidance provided by the decision in the *SABC v McKenzie*[129] case might have been formulated in accordance with a standard conception of the employment relationship, which in turn may vary as employers make more use of part-time and temporary workers, who are engaged on a results basis rather than a time basis. In a later case of *Midway Two Engineering and Construction Services v Transnet Bpk*,[130] the decision of the Supreme Court of Appeal centred on whether a person who works for another places his or her productive capacity at the disposal of the other, rather than merely producing a particular result. The court acknowledged the need for a 'multifaceted' test in order to consider all relevant issues 'as a matter of policy and fairness'.[131]

T he dominant impression test presents a problem for those employers seeking to exclude their labour force from the definition of an employee by labelling them independent contractors. Those employers cannot merely do this in a formal sense, by labelling the contract. They would usually make the employee a contract that labels them independent contractor; yet the employer wants to maintain a certain degree of control over the way this 'independent contractor' works, or even where they perform the job. Typically, these clauses are stipulated in the contract to enable the employer to maintain control or in reality exercise control over the 'independent contractor'. However, if this is the case, then the 'independent contractor' may in reality be an employee. Formal attempts to dress up an employee in the gowns of an independent contractor may not pass the muster with the court.

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[129] Op cit n 127.

[130] (1998) 19 ILJ 738 (SCA).

[131] Ibid at 740.

(d) The Economic Test

Another useful device is to establish who profits from the work done or from the services rendered. In the case of *Montreal v Montreal Locomotive Works*[132], the court posed the question 'whose business is it'? This was aimed at establishing if the worker had been doing business for himself and on his own behalf, and not merely for another.[133]

5.3 Who is a Worker?

None of the standard tests **listed above** cater for what Hugh Collins termed, the 'vertical disintegration' of the employment relationship.[134] These tests may further fall short when considering whether labour legislation applies to a particular situation or not.[135]

Determining who is to be regarded as a 'worker' in terms of the law may be a question of public policy,[136] and it may not be possible to design a watertight or comprehensive definition that will hold true for all factual situations. In this regard, Brassey has observed:

> The truth is that no test exists for determining who is an employee, if by that is meant some touchstone by which the relationship can quickly and certainly be identified. It would be surprising if it were. Employment is a complex and multi-faceted social relationship; its forms are protean, and its existence must be defined by a process

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[132] (1947) I DLR 161.

[133] Davies and FrIedland: Labour Law, Text and Materials (2 ed.) 88-9.

[134] Collins H: Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws 1990, Oxford Journal of Legal Studies 365. He was referring to aspects of production, which are no longer arranged through bureaucratic controls but through sub-contracting, franchising and concessions. The end result of this process is that many persons may be placed beyond the scope of labour legislation.

[135] Roycraft and Jordan: A Guide to South African Labour Law (2 ed. 1992) at Pages 43-44.

[136] Op cit note (134) at 365 and 377.

> whose application goes unremarked in most other branches of the law, the process of assessing all the relevant facts.[137]

The most that can be done is perhaps to suggest a foundation for a unified definition of the term, which will be in keeping with the broad purposes of labour legislation, i.e. to protect all forms of 'dependent labour'. This will always be a question of fact.[138] Currently, though, the definition is too narrow.

The courts in South Africa have accepted the Dominant Impression Test (Test (c) above) as appropriate for distinguishing an employee (or non-employee) from any other arrangement. In the case of *Liberty Life Association of Africa Ltd v Niselow*,[139] the court per Nugent J decided that:

> The concept of employment has been grappled with in numerous cases. What at least seems clear is that it requires one person to have placed his productive capacity at the disposal of another. The independent contractor, by contrast, commits himself only to deliver a product or the end result, of that capacity... [I]n my view it is the placing of one person's productive capacity at the disposal of another which is the essence of the relationship.[140]

In another ruling, *Medical Association of SA and Others v Minister of Health and Another*,[141] the judge followed the Dominant Impression Test as set out in a precedent case, *Smit v Workmen's Compensation Commissioner*,[142] in which, considering the characteristics of a contract of service, it was held as follows:

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[137] Brassey M: The Nature of Employment 11 ILJ (1990) 889 at 920.

[138] Brassey M: 'The Nature of Employment' 11 ILJ 1990 889 AT 920 and Mureinik, E.: "The Contract of Employment: an easy test for hard case 1997 SALJ 1980 246 at 253-7.

[139] *Liberty Life Association of Africa Ltd v Niselow* (1996) 17ILJ 673.

[140] Ibid at pg. 681

[141] *Medical Association of S.A. and Another v Minister of Health and Another* (1997) ILJ Vol. 18.

[142] 1979 (1) S.A. 61. ...

> Upon a consideration of all the provisions of the contract, I am driven to the conclusion that, overall, the dominant impression one gets is that the relationship between the individual applicants and the Free State Provincial Administration is more that of a contract of service than that of work. It seems to me that, applying the dominant impression test, the individual applicants are employees as defined in s 213 of the Act.[143]

In view of the above, it is important to ascertain who would qualify as an employee, because it seems that many more working arrangements actually fall outside the ambit of the definition. These include subcontractors, self-employed workers and some home-workers. How can the law protect such individuals?

5.4 The Dependent / Independent Contractor?

Why is it necessary to provide legislative protection for dependent contractors in the first place. An independent contractor is excluded from the definition of an employee as defined in the Act which means they do not have any rights that accrue to employees (including the right not to be unfairly dismissed). Some dependent contractors would undoubtedly need legislative 'help' against the economic domination of the party on which they are dependent, a good number of such contractors are in a privileged position and may even see themselves as being 'better off'.[144] Moreover, if they did not feel like this, they would not have left their permanent employment positions. A more cogent and appealing argument in favour of the protection of the dependent contractor may be to reason that it may rather be society that needs to be protected against them. Their eagerness to maximise profits might tempt some dependent contractors to over-exert themselves, thereby working longer hours than usual and thus endangering the lives of the public.

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[143] Ibid at p 543

[144] Theron and Godfrey: Op cit n.6 at pg 48.

The real reason why the legislature is trying to encompass both the dependent and the independent contractor in the legislation is in order to compel them to contribute to some form of social security, such as an unemployment insurance fund, a medical aid and a retirement scheme.

Another motivation for state intervention in having legislative measures to cover dependant contractors is that they themselves could be employers in the sense of having either assistants or people working for them.. Perhaps the deeming provision of the BCEA discussed above is not the solution in this regard because it may not adequately cover satellite enterprises. It appears that even collective bargaining and worker protection has hitherto not taken care of the plight of workers in satellite enterprises.[145] It was hoped that the recent amendments to the LRA and BCEA would have alleviated the problems of atypical worker protection. In essence, the amendments to s 200A of the LRA and s 83A of the BCEA have sought to extend the definition of employee to cover, *inter alia*, 'economic dependence on the person for whom he or she works or provides services'.[146]

These amendments are commendable, but it is doubtful whether they are meant to cover other categories of atypically employed workers, such as satellite workers. It is submitted that not all satellite enterprises (although dependent economically on the core business) should qualify in terms of the employee classification. As observed by other scholars, legislative quick fixes[147] may not be the answer at least not in the form presented thus far.

The absence of statutory protection on termination of the services of dependent and independent contractors **is** particularly worrisome. Consequently, it is necessary to amend the definition of employee to encompass 'dependant' contractors who are under the supervision and control of the company, which they are contracted to service, as if they were employees, because to hold that they are equal in measure to the company is to equate contractual form with substance. This is even more so with the rise of 'employees independent contractors'. The advantage to the employer is

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[145] Ibid at pg 49

[146] Labour Relations Act 66 of 1995 as amended, at Section 200 A (1) (e).

[147] Theron and Godfrey op cit n 6 at 54.

that they seem to have the best of both worlds in terms of this arrangement, as they are able to avoid employment obligations and bargaining processes. Conversely, contractors lose out, as they assume the risk of the business as entrepreneurs without 'actual' control over the working conditions or 'independence' in respect of operational decisions.

In addition, these 'employees independent contractors' end up in a particularly vulnerable position because social insurance in South Africa is premised on formal full-time/standard employment. This means that only employees (and their employers) can contribute to the Unemployment Insurance Fund in terms of the Unemployment Insurance Act 30/1996 (UIA).[148] In developed countries where no such contributions exist, the problem may not be as acute as it is in developing countries. The issue for developed countries would be the scale of benefits rather than an individual's eligibility for qualification.

The above-mentioned UIA and the Compensation for Occupational Inquiries and Diseases Act 130/1993 (COIDA)[149] exclude certain atypical workers. In the South African context, this scenario may carry racial undertones because of the legacy of apartheid: most atypical workers (migrant workers, casual workers, and civil servants) are blacks.[150] Recently, however, the issue of domestic workers has been addressed in that, effective from 2002, they are now eligible to receive unemployment benefits.

A paper prepared for the Workshop of the Stellenbosch Economic Project on Social Safety Nets revealed the following:

> The exclusions as well as the fact that the South African unemployment problem consists of a significant number of people in informal employment and a large number of unemployed who have never been in informal employment, illustrate the inadequacy of South African unemployment insurance as a safety net in the case of unemployment and illness. In 1989 there were 5,564,134 employees

[148] The Unemployment Insurance Act 30 of 1996 (UIA).

[149] The Compensation for Occupational Inquiries and Diseases Act130 of 1993 (COIDA).

[150] Lund: State Social Benefits in S.A. 1993 International Social Security Review 17

who contributed to the Unemployment Insurance Fund, compared to an estimated economically active population of 10,856,000.[151]

5.4 Swaziland.

In Swaziland, the definition of employee found in the Industrial Relations Act is somewhat wider in that it includes 'any other arrangement involving control by, or sustained dependence for the provision of work upon, another person'.[152]Section 2 thereof, Interpretation, provides that 'employee' means –' a person, whether or not the person is an employee at common law, who works for pay or other remuneration under a contract of service or under any other arrangement involving control by, or sustained dependence for the provision of work upon, another person'. If these 'employee independent contractors' can satisfy the requirements of working for another, for pay or other remuneration, the existence of a contract for service, any arrangement involving control by and 'sustained dependence', then the courts in Swaziland would most likely find that they were indeed employees. As a result, they would get the benefits of protection under the Act and under any other relevant employment legislation.

The Swaziland position seems to subscribe to the reasoning applied by the Supreme Court of Appeal in the case of *Midway Two Engineering and Construction Services v Transnet Bpk* (quoted supra) where the court went beyond the decision in *SABC v McKenzie also discussed above*, to hold that a multifaceted approach should be employed in deciding these matters. It being accepted that the common law of South Africa has persuasive precedence in Swaziland as a fellow Roman Dutch jurisdiction. This open mindedness allows the court to consider all relevant issues defining the relationship before coming to a conclusion.

The position for Swaziland is further consolidated by the Employment Act of 1980, which provides that an employer means any person or body of persons who is placed in authority over that employee. Placed in authority could be interpreted in various

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[151] Kruger: An Overview of the South African Social Security System, Stellenbosch 1-2 June, 1992 at pg 19

[152] The Industrial Relations Act, n 1 of 2000 s 2 Interpretation.

ways depending on the circumstances at hand which allows for the multifaceted approach. This leaves issues of determining who is a worker / employee rather fluid and subjective, a stance hardly satisfactory to those affected.

CHAPTER 6

THE NEED FOR A NEW LEGAL FRAMEWORK

Traditionally, employment protection legislation has been geared towards individuals with stable, regular, full-time jobs, working for a single employer under an open-ended contract of employment. However, working patterns and norms have changed, and continue to change, giving rise to new types of working arrangements. These changes have left many workers outside the scope of the employment protection legislation – a problem that needs urgent redress.

The fact that some atypically employed workers, such as the self-employed for example, belong to two different markets is cause for concern, as labour law naturally attempts to separate the market for labour from the market for goods and services. The self-employed, however, tend to run commercial enterprises as well as performing remunerated work just as employees do. The challenge is to strike a balance between the conflicting regimes of labour law and commercial law, thus affording protection to self-employed workers whilst also protecting the competitiveness of their enterprise. It appears that in the future labour law should address the substantive terms of the employment relationship.

6.1 Developments in South Africa since 1997

In South Africa, the Basic Conditions of Employment Act (BCEA) 75 of 1997 as amended 1998[153] lends protection to a wide category of atypical or non-standard employees. It does not, however, solve the problems of defining an employee as such. Nevertheless, it does provide relief by leaving it to other law-making bodies such as ministerial determinations to adopt appropriate measures in fitting circumstances.
The wide personal scope of the Act is encapsulated in ss 55-58, which state that all the provisions of the Act are applicable to employees who work at least 24 hours in a

[153] The Basic Conditions of Employment Act, 75 of 1997 as amended.

month for an employer.[154] In essence, this means that casual, part-time, temporary and seasonal workers are all able to benefit from the protective measures of the BCEA. Previously, before the enactment of the BCEA in 1998, the definition of casual employees would have excluded day workers who were employed by the same employer for three days or less in any one week.

The comprehensive coverage of the current BCEA is further underscored by its permissiveness in allowing for flexibility in the arrangement of working hours, increased overtime pay, protection in the case of night work, longer maternity leave periods and family responsibility leave.[155]

It further appears that s 83 of the BCEA would, under the deeming provision, allow the Minister 'to deem any category of persons... to be employees for the purpose of this Act (the BCEA) or any sectoral determination'. This specifically protects workers who, because of restructuring for instance, find themselves classified technically as not being employees. The aim of the Section is thus to extend labour standards to such persons. By extension, the whole of the BCEA could be made applicable to categories of persons deemed to be employees.

The intention to extend protection to non-standard workers was already discernible in the BCEA 1997 where provision was made for the limited extension of labour law to certain categories of non-standard workers.[156] The Minister of Labour is also allowed to deem any category of persons to be employees for purposes of the Act or any sectoral determination. The implication is that it is left to certain actors to adopt measures if and when they deem it appropriate to do so and that there is no regulation coverage extension in the law itself.

Furthermore, for various reasons a rebuttable presumption as to who is an employee has recently been introduced. This form of protection is insufficient, too limiting, and does not address the core issue of the exclusion of non-standard workers on a principled basis. The restrictive definition in the BCEA has not been widened – but

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[154] Ibid n 51 Section 55-58.

[155] BCEA Op cit n. 153 ss 2, 3 and 4 (in terms of overtime it allows for one and half instead of one and a third, the normal remuneration)

[156] Section 55 (4) of BCEA provides that a so-called sectoral determination may in a sector and area prohibit or regulate task-based work, piecework, home-work, and contract work. It may also specify minimum conditions of employment for persons other than employees (s 55 (4) (K)).

what has been addressed is the problem that many employees faced in the past regarding the onus of proof. Also, the presumption remains rebuttable. There is still a need for appropriate protection to non-standard workers on a principled basis.

6.2 Need for Reform?

Labour law is inter alia for protecting workers, if it appears (as argued in this thesis) that an increasing number of workers are in a vulnerable position because 'Technically' they are not employees, then yet another set of in-roads need be made to extend a minimum floor of labour standards to those persons because;

1. The present legislation does not extend minimum conditions of service to non-standard workers who are not covered by the definition of employee.
2. Little, if any, accommodation is made for the voice of the non-standard labour force to be heard at institutional level. Voice regulation has yet to become a reality. This notion is advocated by the ILO[157] and has been endorsed,[158] as evidenced in the presidential report. Nonetheless, atypical employees have not been included/represented as separate categories on voice regulatory bodies including tripartite institutions.
3. Workers who are not involved in regular wage labour are left out of the distributional strategy provided for by the new LRA.[159] Unions have historically paid no attention to the plight of the unemployed and non-standard workers, whether because of an unwillingness to intervene or an inability, which may stem from a fear that the increasing use of atypical workers may further weaken the impact of sectoral bargaining.
4. Non-governmental intervention concentrates power to move ahead in a bureaucratic mechanism and also the shortcoming that those who are the object of the regulation are not officially involved in the decision-making process. Direct regulation of non-standard work through legislation would subject the process of extending protection to democratic control.

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[157] Op cit Standing A et al n. 55 at 486-502.

[158] Report of the Presidential Commission to Investigate Labour Market Policy (1996) 191-209.

[159] Op cit Standing A et al n 55 178.

6.3 THE CONSTITUTIONAL ARGUMENT.

The Republic of South Africa moved from a regime of Parliamentary sovereignty to that of a Constitutional State in 1996. Since then, all spheres of law have been increasingly modified to acquire alignment with the values and principles contained in the constitution. Thus we shall examine in this section of our advocacy for radical change, if there is or there is not a Constitutional basis for the state to have to protect its citizens in all forms employment formal and informal. We intend to consider the constitutional provisions relevant (in our view) to a labour law argument The inclusion of a preamble in any Constitution serves to give a symbolic and ideological purpose[160] for its enactment. South Africa is not different in this regard. The preamble provides inter alia;

> We, the people of South Africa,
> Recognise the injustices of the past...
> Believe that South Africa belongs to all
> Who live in it, united in our diversity?
> Lay the foundations for a democratic and
> Open society in which government is based
> On the will of the people and every citizen is
> Equally protected by law,
> Improve the quality of life of all citizens and
> Free the potential of each person;

It is acknowledged that even though a preamble is a declamatory part of the constitution, without any legal significance, it is however submitted that it (preamble) espouses values and principles obtaining or to be expected within a given social context. In the case of South Africa these aspirations are democracy, equal protection afforded by the law, human rights, justice and equality. On this ground alone, it is imperative for South Africa to consider extraneous legislative means of reforming

current labour law provisions (discussed above), to afford protection to all workers, in order to discharge morally, its Constitutional mandate. I would like to believe that herein lies the basis of all the ensuing Constitutional provisions as well as all legislation passed to breathe life into these ideals.

6.3.1 BILL OF RIGHTS.

Hailed as 'the corner stone of democracy in S.A,'[161] the bill of rights afford the government an avenue to interpret and practicalise promises and undertakings to its citizens. As this paper is not a general discussion on constitutional law, I will now pick out the sections relevant to this discussion, not forgetting that s7 compels the State to respect, protect, promote and fulfil all the rights in the Bill of Rights.

6.3.1.2 UNFAIR LABOUR PRACTICES

Most of the rights are for the benefit of '*everyone*' or put differently, they may not be denied to '*no-one*[162]'. Of interest to this treatise is section 23(1) which provides that

> 'Everyone has the right to fair labour practices.'

It is the considered view herein that although the reference to everyone is wide, the restriction to beneficiaries of this right should not have excluded atypically employed workers. As argued above, the restriction imposed by the definition '*employee*' and '*worker*' in the LRA and BCEA sought to circumscribe the scope of application of the right to fair labour practices to the detriment of non-standard employees. Meanwhile the Constitutional Court, in its First Certification judgment, remarked in relation to s 23 that:

> The primary development of this law will, in all probability, take place in the labour courts in the light of labour legislation. That legislation will always be

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[160] Currie and de waal; the new constitutional and admistratiive law, juta 2003
[161] Ibid s7 (i).

subject to constitutional scrutiny to ensure that the rights of workers and employers entrenched in s 23 are honoured[163].

Further the Constitutional Court disagreed with the Labour Appeals Court (LAC) to hold that indeed the former s 197 negatively affected the workers' rights to fair labour practice in the case of *Nehawu v University of Cape Town (UCT) and Ors*[164]. The LAC had upheld the 'outsourcing' agreement between UCT and Supercare as not being a transfer of a going concern in terms of s197 of the LRA. Nehawu contended at the Constitutional Court that the interpretation of the (now repealed) s 197 of the LRA adopted by the majority of the LAC infringed on the rights of the workers to fair labour practices conferred by s 23(1) of the Constitution. The UCT argued that the Constitutional Court lacked jurisdiction and contended that where one is dealing with a statute that gives effect to fundamental rights granted in the Constitution, the only Constitutional matter that arises relates to the constitutionality of its provisions. If the latter were not the case, the Constitutional Court would have jurisdiction in all labour matters. The Constitutional Court was not convinced with this agreement and instead held that, in relation to a statute, a constitutional matter may arise either because of the constitutionality of its interpretation or if its application is in issue or because the constitutionality of the statute is in issue.

The court ruled that the fact that there was no agreement to transfer the workforce between the UCT and the contractors did not, as a matter of law; prevent the finding that the outsourcing was a transfer of a business as a going concern.

The principle of constitutional supremacy was vindicated in this decision. It empowers citizens to challenge a law or conduct of the state, which violates the Bill of Rights. As a result of a justiciable Bill of Rights, it is possible for the Constitutional Court to set aside, with final effect, a law passed by the democratically elected legislature. Hence, it is submitted herein that, the non-inclusion of non- standard forms of employment under the protective labour legislation excludes atypical employees from the provisions of fair labour practices. Ordinarily, the provisions of s23 would have been concretized

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[162] Currie and De Waal;'The New Constitutional and Administrative Law'
[163] Ibid at p 350

and implemented in the provisions of statutes such as the LRA, the Basic Conditions of Employment Act 75 of 1997 and the Employment Equity Act 55 of 1998.
It is believed that in the absence of specific provision for non-standard employment, a direct invocation of the right to fair labour practices should sustain.

6.3.1.2 Bound

In most jurisdictions the Bill of Rights regulates the relationship between individuals and the state[165]. However the South African constitution is not confined to the individual and the state, it recognizes that private abuse of human rights may be as pernicious as violations perpetrated by the state. This is why the court in *NUMSA and ORS v Bader Bop (PTY) LTD and ANO*[166]did not go along with the decision of the LAC which held that a strike by a minority union was unlawful. The issue at hand was the interpretation of s14 of the LRA (Trade Union Representatives) read with s 65(2)(Limitations on right to strike or recourse to lockout).

The Constitutional Court held that the interpretation of the LAC amounted to too great an infringement on the right of the minority trade union to strike. In terms of the Human Rights considerations, the Constitutional Court is bound by the spirit and dictates of guaranteeing rights and freedoms to all South Africans enshrined in the Constitution. Equally therefore, South African labour law is bound to protect individuals in atypical employment, currently threatened by their exclusion in the current legislation.

6.3.1.3 EQUALITY.

Section 8 of the Constitution of the Republic of South Africa guarantees the right to equality. It provides that:

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[164] (2002) 11 CC 1.11.3
[165] Op cit note 162 at 322. This is referred to as the vertical relationship. Vertical application means that the Bill of Rights accords rights to individuals and imposes duties on the state.
[166] (2002) 11 CC 1.11.2

(i) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(ii) Equality includes the full and equal enjoyment of all rights and freedoms....

The requirement for equality provides for sameness of treatment it its formal sense, while in the substantive sense it seeks to ensure equality of outcomes[167].

The Constitution would have been superficial if it had to concern itself with formal equality only. It is humbly submitted herein that it was meant to focus *inter alia* on the purpose or effects of the rules and conduct and not merely on their form. In the current context, the prohibition against discrimination is only violated when a right in one of the substantive sections are conferred on some but not on others[168]. The Constitutional Court seems to hold that a substantive approach to equality would therefore seek to promote the value of human dignity and prevent arbitrary treatment[169]. What human dignity would be served if the atypically employed workers are subjected by non-inclusion in labour legislation protection to the whim of the employer meanwhile, their colleagues in formal employment enjoy full protection? Human dignity must surely lie at the heart of the prohibition against unfair discrimination.

Another argument might observe that since the employment (formal) statistics in South Africa indicate that Blacks are overwhelmingly in non-standard forms of employment, the observation opens upon the possibility that less favourable treatment of such workers amounts to unlawful race discrimination. Given the failure of employment protection legislation to safeguard the rights of atypical workers, it may not be long before we hear of a case under the anti-discrimination clauses as a means of seeking redress.

Courts should act as a searchlight to ensure proper equality. They must look for pockets of entrenched inequality, socio-economic rights should forever remain on the agenda of the courts.

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[167] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (cc) para 60-62.
[168] Op cit note 162 at 349.

6.3.1.4 HUMAN DIGNITY.

Section 10 of the Constitution provides that,

"Everyone has inherent dignity and the right to have their dignity respected and protected."

Human dignity must inform the basis of protection against **inhuman** and degrading punishment.

It is argued (supra) that since social security benefits are dependent on the definition of employee, which excludes non-standard forms of employment, the state has therefore deprived the atypically employed specific social security that would otherwise have accrued to the beneficiary. Hence the impairment of human dignity especially in cases of health and safety standards, disability grants and retirement. It is contended that '*the intrinsic worth of human beings*' and that '*human beings are entitled to be treated as worthy of respect and concern*[170]', should be the guiding principles of the new and canvassed dispensation regardless of whether one is engaged in typical or atypical employment.

6.4 SWAZILAND.

Even though Swaziland as a country has not adopted a Constitution formally, we beg to include in this debate certain provisions of the draft Constitution which serve to indicate the philosophy of employment legislation and rights.

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[169] *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 53.
[170] Per O'Regan J, in *S v Makwanyane* 1995 (3) SA 391 (CC) at para 44.

Equality Before The Law s21- provides that (i) 'All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.'
The crucial issue in this text is the desire to be inclusive of all citizens under applicable legislation. Equality means sameness of treatment in the formal sense and in consideration of the outcomes. If workers in standard employment are protected then there ought to be provision for the non- standard as well, both in form and in substance. Since atypical workers are not specifically covered, as in the case of South Africa, Swaziland needs to accordingly review its labour legislation to afford specific and intentional protection to non-standard forms of work. This position is in tandem with sec 33 of the draft Constitution that tasks Parliament to enact laws to *inter alia*:

(4) (a) provide for the right of persons to work under satisfactory, safe and healthy conditions;

(b) ensure equal payment for equal work without discrimination;

(c) ensure that every worker is accorded rest and reasonable working hours ...;

(d) protect employees from victimization and unfair dismissal or treatment.

6.5 SYNOPSIS of CONSTITUTIONAL ARGUMENT.

The plea and observations in this part of the dissertation seeks to create an awareness that:

1. The constitutional mandate has not been 'wholly' interpreted in the LRA, BCEA and the EEA in the case of South Africa, and in the Industrial Relations Act in the case of Swaziland.

2. The rights to equality, human dignity and fair labour practices are beckoning the call for an inclusive worker protection regime.

6.6 INTERNATIONAL INITIATIVES.

The extent of the problem of none or insufficient legal protection for non-standard workers is not just a big issue for individual States, it is an acute problem enjoying the attention of regional groupings, who have a mandate to ensure that citizens of member countries enjoy legal protection in the sense of being afforded basic regional standards in order to curb cross migration and its concomitant immigration problems.

6.6.1 Developments in the Southern African Development Community

Given the inadequate social protection and labour law protection in the region of the Southern African Development Community (SADC), this dissertation ventures to suggest that responses at both regional (SADC) and country level are needed, and investigates some of the distinct and innovative developments in the region, which may potentially form the basis for social protection. This paper advocates for in particular, the possibility of adopting an international or regional minimum standards and human rights baseline approach for purposes of social security coordination and the strengthening of social and labour law protection in the region.
The contribution highlights certain core elements, which inform the context within which social protection and labour law protection in the SADC region is bound to operate.

6.6.1.1 The Southern African Development Community.

With a membership of 14 States, the Southern African Development Community (SADC) is one of the poorest regions in the world, and its combined growth rate (which was 1.5% in 1999) has been consistently low. It is characterised by high levels of unemployment and underemployment, as well as the inadequacy of current labour and social protection standards and regulations. Of the estimated population of 200

million people, about 40% thereof still live in conditions of abject poverty. It is estimated that SADC member states need a sustained minimum growth rate of around 6% per annum to alleviate poverty. A recent ILO / SAMAT study[171] indicates the core context, which informs the State and development of social security systems in the region as **one of** limited economic productivity, persistently high inflation rates, high and increasing informal sector employment, skewed income distribution, etc. The study concludes that:

> Together, these conditions create a great need for social security in Southern Africa. Large segments of the population live and work on the edge of poverty; formal sector employment is limited and declining; inflation erodes incomes and savings; and the AIDS epidemic is reducing national productivity and leaving a generation of children without parental care. At the same time, low productivity means that social security is difficult to finance; and weak and undeveloped systems of governance pose major structural barriers to efficient administration.[172]

One of the striking features is that most of the social security schemes across Southern Africa mainly focus on protecting people who are employed in the formal sector. **[Ironic, isn't it?]**

It is tempting to conclude that there has been an almost complete failure of labour law systems in the region, in particular as far as it concerns the extension of significant protection to those who work outside the formal sector. A real threat, therefore, exists that the insufficient protection extended to workers may expose them to a 'race to the bottom'[173] in an attempt at country level to attract investment. The mushrooming of unregulated informal social security schemes seeks to close the gaping hole, much to the concern of the systemic risk central banks were formed to safeguard.

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[171] Fultz, E. and Pieris, B., Social Security Schemes in Southern Africa: An overview and proposals for future development, Harare, ILO, 1999.

[172] Ibid at page 7.

[173] Olivier, Marius, 'Social Protection in the SADC Region: Opportunities and Challenges'.

Much still has to be done in the areas of analysing the role and function of informal social security mechanisms, and linking them to the formal system, as well as dealing effectively with non-nationals.

Labour law in the region is based on legislation 'borrowed' from outside jurisdictions and 'bent' **in** an attempt to suit domestic purposes, rather than being based on indigenous initiatives and case law developments. It is trite knowledge that most colonies inherited their colonial masters' legal systems such Swaziland, Botswana and Lesotho and South Africa with their Roman Dutch common law systems and the use of English Law in civil matters. For present day purposes we need to note as follows;

* In order to ensure comprehensive protection, covering both the included and the currently excluded categories of workers, it would appear necessary to broaden the scope of labour law into a more comprehensive social law approach, thus changing from the current philosophy of master and servant which does not recognize anything falling outside that scenario. Any wonder I refer to it as the all or nothing approach..
* Minimum standards at regional and individual country level should be introduced to protect both those who work formally and for those who work informally or are unemployed, in both the areas of labour law and social security. This thought is in tandem with the SADC Charter.

Granted, practicality dictates that the standards could differ according to whether people are formally employed or not. The ultimate aim is to have or to ensure a decent standard of living for all the people in the region.

The onus to redress the plight of workers must be on national governments and existing international and regional structures, as they carry the responsibility for adopting social legislation, preventing social dumping and promoting equitable growth. A Charter of Fundamental Social Rights in SADC[174] that underpins the need for social protection, in particular of workers and vulnerable groups, has been agreed upon, and is now open for ratification by Member States.[175]

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[174] ELS. MSP/2000/4.2.5. The final version is dated 10.08.2001.

[175] The Charter refers to the SADC Treaty and recalls the objectives contained in Article 5 of the SADC Treaty.

SADC Member States shall create an enabling environment such that every worker in the SADC Region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits. Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be able to receive sufficient resources and social assistance.'

Member states are also required to develop reasonable measures to enable men and women to reconcile their occupational and family obligations.[176] The Charter provides for consultation and participation of workers,[177] employment and remuneration,[178] and education and training of workers.[179]

Governments in SADC need to encourage one another to set up and accept adoption of minimum standards to afford protection to their citizens in formal and informal work arrangements. This will not only satisfy their stated objective of the Peer Review mechanism, but will put them in good position vis- a-vis their international obligations as members of the International Labour Organisation.

6.6.1.2 Guidance from the International Labour Organisation?

The International Labour Organisation (ILO) has considered the question of atypical work in its proposal on 'Contract Labour'. The definition of Contract Labour in the ILO proposal is 'work performed personally under actual conditions of dependency on or

[176] Article 6(c).

[177] Article 13.

[178] Article 14.

[179] Article 15.

subordination to the user enterprise, (so much so that) these conditions are similar to those that characterise an employment relationship[180]

In addition, the ILO proposed a set of ten criteria to determine whether a contract worker is dependant on or subordinate to a user enterprise. These include, *inter alia*, 'the extent to which the user enterprise makes investments and provides tools, materials and machinery... to perform the work concerned', ' whether the worker can make profits or run the risk of losses in performing the work', and 'whether the worker works for a single user enterprise'.[181]

The ILO proposal has not found favour among some member countries and has thus not yet been adopted, owing in part to the definitions contained therein. Employers contend that any regulation of contract labour would amount to interference in commercial contracts, which would negatively affect economic activity. In addition, they maintain that creating an ill-defined third category of workers between dependant workers and self-employed persons, would result in a lower level of protection than that enjoyed by dependant workers.[182]

The highest protector of human dignity at work – the ILO, acknowledges the debate: the International Labour Conference is expressly required to introduce an element of flexibility into the instruments it adopts.[183] Labour standards thus have to have a 'variable content'. This is not to be construed in the sense of permitting the formulating of different standards on conditions of employment for the different regions. It is, however, an acknowledgement of a reality, which translates to the ability of nations to implement the imperatives. The Declaration of Philadelphia annexed to the ILO Constitution further makes it clear that it is expected of all countries to adhere to or progressively work toward fulfilling principles set forth by the ILO. It states that:

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[180] Proposed Convention concerning Contract Labour, Report V (2B), ILO, 1998.

[181] Ibid-n 169 supra.

[182] ILO Technical Document for Meeting of Experts on Workers in Situations Needing Protection, May 2000, 9.

[183] Article 19 (3) of the ILO constitution declares that: 'In framing any convention or recommendation of general application the conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organisation, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries'.

> [These principles] are fully applicable to all peoples everywhere and that while the manner of their application must be determined with due regard to the stage of social and economic development reached by each people, their progressive application to [all] peoples... is a matter of concern to the whole civilised world.[184]

However much the ILO endeavours to adapt its standards to the specific constraints of developing countries, in most countries the definitions of informal/atypical work can hardly be accommodated in the ILO mandatory rules, however flexible they may be. This is because, by definition, an atypical or informal job is not covered either in texts or daily practice by national labour laws – and even less by international labour standards. International conventions apply to wage earners, and in the few cases which seek to cover atypically employed workers like self-employed individuals, it is sometimes difficult to apply them to those categories.

Very often exceptions and flexibility clauses found in conventions explicitly exclude from their scope all or some workers, even if they are wage earners in the informal sector e.g. those employed in family business or small agricultural enterprises.[185] However, even if there were such provisions specifically for the atypical worker; they would be difficult to impose at the national level and to monitor at the international level.

As far as the ILO is concerned, it therefore means that when the International Labour Conference adopts a new convention, it must seek the middle ground: On the one hand, it must avoid the rigidity that might prevent ratification of labour standards and their application to at least a part of the working population of developing countries. On the other hand, it may not exclude workers, whether they earn wages or not, who particularly need the protection afforded by such a convention.

Should we not look elsewhere for a solution to this problem? Economics, perhaps, rather than legal measures?

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[184] The Declaration of Philadelphia. Annexed to the ILO Constitution.

[185] Minimum Age Convention, 1973 (No. 138).

6.6.1.2.1 Two Comments

(a) Legal prescriptions are not equal to an industry or region overcoming its development problems. Economic problems require economic solutions and that is the limit of legal action.

(b) Labour standards are not useless: they are an essential means of ensuring that successful attempts to free a town, region or branch activity from economic paralysis and poverty will benefit everyone and that economic development will be accompanied by social and human development.

6.6.1.3 The Concept of Decent Work

In its endeavour to promote decent work standards, the ILO has adopted four strategic objectives:[186]

i.) Promoting and realising fundamental principles and rights at work.

ii.) Creating greater opportunities for women and men to secure decent employment and income.

iii.) Enhancing the coverage and effectiveness of social protection for all; and

iv.) Strengthening tripartism and social dialogue.

The concept of decent work encompasses the following:

- Access to freely chosen employment exercised under safe and non-discriminatory conditions;
- Adequate income in relation to basic economic, social and family needs and responsibilities;
- Fair and equal treatment irrespective of national origin, race ethnicity, gender or age;
- Adequate social protection;
- Opportunities for training and skills development; and
- Freedom to participate in decision-making on the issues that affect work, either directly of indirectly through freely chosen representatives.[187]

[186] ILO Addressing The Decent Work Deficit in African Agriculture: priority issues, Discussion Paper No. 21 – Mohammed Mwamadsingo.

The aim of all these programs is to seek strategies necessary for the sustainable enhancement of productivity and to provide an efficiency framework for socio-development as well. The rationale for decent work can be gleaned from two perspectives, firstly, the perspective of fundamental and universal rights, regardless of mode of employment, and secondly, the perspective of the role of decent work in sustainable production and thus its contribution to sustainable development and economic viability.

The adoption of labour laws and regulations is an excellent means of implementing ILO standards, promoting the ILO Declaration and the Fundamental Principles and Rights at work, and putting the concept of Decent Work into practice.
All ILO member states,

> 'even if they have not ratified the conventions in question, have an obligation arising from the very fact of membership in the organisation, to respect, to promote and to realize, in good faith and in accordance with the (ILO) constitution, the principles concerning the fundamental rights which are the subject of those conventions.'[188]

Due to the lack of guidance on such an important sphere of worker protection, the ILO may be criticised of gradually transforming into an organisation primarily devoted to the promotion of fundamental rights, rather than one engaging in setting standards for social justice. It would be useful for member states to get minimum standards in response to the emerging challenges for labour law as opposed to the current vacuum in the international regulation of labour[189]. Given the realities of world markets, this is as significant as was the absence of a permanent body devoted to the interests of labour, social justice and peace at the start of this century[190].

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[187] Ibid at (vii)

[188] ILO Declaration on Fundamental Principles and Rights at Work: www.ilo.org/declaration (accessed on 01.08.2004 at 1200hrs).
[189] Murray J, Social Justice For Women? The ILO Convention on Part-time Work.IJCLL&IR VOL. 15 1,3.
[190] Ibid n 178 at p19

The lack of a definitive ILO convention dealing with the scope of employment law does not, however, assist the prevailing uncertainty everywhere as to who is covered by labour law – hence many workers are being left unprotected. Even though it is acknowledged that the ILO as the highest-ranking guardian in the international arena on labour law regulation has issued a number of different instruments and recommendations pertaining to a range of employment policy issues, it has not successfully persuaded member countries to follow its direction or guidance in solving the problematic definition of employee.

In any event, it appears that extending the meaning of employee to encompass dependant contractors who are 'in a position of economic dependence upon, and under an obligation to perform duties (for some other) person, more closely resembling the relationship of an employee than that of an independent contractor',[191] would give the necessary protection to such contractor. Easier said than done. The reason might be that it is proving difficult to widen the definition of employee because of the current conception of master and servant. The appropriate question is therefore should we not reconceptualise our philosophy and consequently our labour law.

[191] Benjamin P.: Who needs Labour Law? The Scope of Labour Protection; unpublished paper, Labour Law Conference, Durban, 2000,7

CHAPTER 7

7.1THE FUTURE: THE NEED FOR FUNDAMENTAL REFORMS

As long as our understanding of labour law is based on the common law, the temptation will remain to regard labour legislation as a corrective for the ills of the common law framework, and not as an autonomous statement of public policy, designed to regulate work and protect those who render it. It has been observed by Hepple[192] that:

> Attempts to rationalise the coverage of legislation or to simplify the law so that it can be understood by employers, workers and tribunals, or to reconcile legislation with autonomous sources of regulation, in particular collective bargaining, or to make workers' rights more effective, are bound to collapse if they are built on the cornerstone of the common law.[193]

The proposed approach for reform seeks to indicate, albeit not exhaustively, what the ideal content of labour legislation should be. It also advocates the re-evaluation of the values and assumptions inherent in conventional legal concepts by highlighting problems thereof. It is a plea for a 'root and branch solution'[194] that will free labour from civil law categories so that it can become more responsive to the social and economic needs of these and future generations.

7.2 Reconceptualising Labour Law

[192] Hepple, B; Restructuring Employment rights 15 ILJ 1986 (uk) 69.
[193] Ibid at p 83.
[194] Wedderburn, 'Labour Law: from here to autonomy', ? 16 ILJ 1987 (UK) at page 5.

7.2.1 Limitations of the Conventional Approaches

(i). The conventional approach of subjecting labour law to domination by concepts and institutions (contracts and collective bargaining) risks making them the central concern of labour law at the expense of its underlying functions and problems. The real problems – e.g. wage levels, productivity, unemployment – may end up disguised, or even disappear from view entirely. At worst, they may never be addressed. The result is that constructive debate about appropriate social and economic policy and the role of the law is thus restricted to a single paradigm. Instead of asking how the law should be adapted to advance social and economic policies, the question becomes whether the 'new' jurisprudence can be accommodated within the pre-determined paradigm. The advantage of the former question is that it allows us to begin to question the social adequacy of conventional concepts and institutions, including the core concepts of contract and collective bargaining. In other words, the ideal is for the concepts to adapt to problems, and not vice versa.

(ii). The activity of work attracts many more relationships[195] than conventionally acknowledged, that is, between workers *inter se*, workers and the supervisors, workers and owners, workers and trade unions, and workers and the state. All of these are generally regarded as falling outside the province of labour law. Further, other branches of the law relevant to employment[196] tend to be ignored, such as the law of property and the principles of public law.

(iii). The conventional approach obscures the fact that law is a secondary (although not unimportant) force in human affairs and especially in labour relations.[197] This limits the scope for interaction between labour law and other disciplines.

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[195] Collins, H. 'Market power, bureaucratic power and the contract of employment', ILJ (1986) UK 1 at page 3.

[196] Davis, D. 'From contract to administrative law: the changing face of South African labour law' in Visser, DP (ed.) Essays on the History of Law, 1989, 79.

(iv). The basic substructure on which our labour law is currently founded, viz. the contract of employment, has a number of shortcomings, which may be regarded as so fundamental that it may be disqualified from serving as the foundation stone:

(a) It is false to assume that contractualism equals efficiency and social justice. It is argued by Brassey[198], *inter alia*, that the common law is not concerned with either of these. On the one hand, it sanctions arbitrary and irrational conduct by employers, while on the other hand giving workers only as much justice as they can bargain for.

(b) Contractualism implies a relationship that is abstract and impersonal, requiring limited commitment from the parties. It ignores the personal meaning and values of work.

(c) The guiding contractual values of freedom and consent not only legitimise the subordinate status of the worker, but they shield the content of the contract from judicial interference. In this regard, Selznick contends that

> [E]ach party would take care of its own interests and provide for them in a freely bargained agreement. The limited moral commitment of the employer justifies any arrangement he may impose. The terms of the agreement... would have to be relied on for substantive justice in the plant.[199]

(v). Because of the tension between the individualism of the common law and the protective purposes of labour legislation,[200] the contract of employment is not an appropriate mechanism for importing into the employment relationship, given the public policy considerations inherent in labour legislation.[201]

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[197] Sir Kahn Freund's Labour and the Law by Davies and Freedland (3 ed) at 13.

[198] Brassey, M. in Brassey et al, The New Labour Law, 1987 at pages 2-5.

[199] Selznick, P. 'Law, Society and Industrial Justice', 137.

[200] Kahn-Freund's Labour and the Law at page 12.

[201] Jordan, B. 'The Employment Relationship: Contract or Membership?' LLD Thesis, US 1990, at 173-4.

7.2.2 Advantages of the New Approach

It is contended that part of the limitation in resolving labour law protection issues for non-standard workers is as a result of tenaciously holding onto foreign concepts that are not accommodative of the changing forms of work. Developed countries have clear-cut distinctions which define employment, a luxury developing nations can ill afford because of the plethora of work arrangements that exist. Freeing labour law there from might benefit the desired reforms in that;

7.2.2.1 Concepts and institutions are organised around the subject matter and not vice versa, to measure the adequacy of legal norms accordingly.

7.2.2.2 The scope of the labour law is broadened to include areas, which, for no logical reason, fall outside the conventional framework.

7.2.2.3. The approach avoids concepts, categories and comparisons that may have limited usefulness and may even be misleading.

7.2.2.4. It throws new light on the actual role and social purpose of employment and labour relations legislations.

7.2.2.5. By replacing the emphasis on concepts and institutions with an emphasis on work and workers, we make labour law more responsive to influence from other disciplines.

7.3 The Diminishing Role of Collective Bargaining?

It is argued herein and elsewhere that the fundamental features of the labour market for both current and future generations in response to the societal demand of the globalised information society **should** comprise well-educated professional workers who might wish to act as an individual to secure better jobs and enhance their

respective careers.[202] Consequently, individual bargaining could gain greater prominence. In this scenario, society will need a new system to correct an asymmetry of information and bargaining power that would still exist between individual employers and employees. In addition, policies to secure strategic career development and the 'co-serori' mixture could be added to the existing education and training system.[203]

The philosophy of policy determination would be guided according to Sugeno and Suwa[204] by, *inter alia*, the following:

7.2.1 A clearer recognition of the linkage between law and the market.[205]

7.2.2 The law must be sufficiently solid in regulating to protect basic human rights, but should not be too rigid when intervening in economic activities – flexibility is important.

7.2.3 Social protection should be futuristic: it is not just the existence of the job that must be protected, but the continuation of a career ought to be part of the equation.

7.2.4 The new law is bound to pay more attention to individual rather than collective bargaining. The distribution and co-ordination of roles between the state, employers, unions and individual workers will of necessity need to change.

The above approach may potentially convert the current situation from a zero sum game into a win-win situation that satisfies most participants, particularly non-core staff.

Developed economies would obviously be more attuned to realizing the benefits of this proposal than still developing countries. However, the contention is that due to globalisation, even the less developed economies have to consider these arguments because the state of their economy does not insulate them from problems of worker protection for the atypically employed. In fact, the problem of worker protection is as

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[202] Op cit note 29 at p108.

[203] Sugeno and Suwa, Op cit n 30.

[204] Op cit n 29 at p108.

universal as work itself. A unique phenomenon in developing countries such as South Africa and Swaziland is the reality of uneducated and educated workers in the population, which has to be accommodated in the new dispensation. A new dualism rearing its head.

The purpose **of this chapter** has been to plead for a new, autonomous framework for labour law. It is a plea for the liberation of law, for a 'root and branch' solution that will free labour law from civil law categories, so that it can become more responsive to the social and economic needs of the time.

7.4 Conclusion

It is clear that the changing composition of the labour force requires fundamental adjustments in both labour and social security law. The preceding discussion exposes the plight of the atypically employed by revealing that the law generally does not protect them against abuse.[206] In the South African context, the limited protection afforded by the BCEA in its definition of employee, as we have seen, does not encompass all categories of workers. At the institutional level, too, there is no mechanism to hear the voices of this huge group of people. This is despite the fact that the ILO's Report on Country Review[207] was supported by and found favour with the South African government.[208] It is thus proposed in this dissertation that tripartite bodies like NEDLAC ought to include atypical employees in their consultative structures in order to accommodate their voices on labour regulation.

The reluctance of unions to adopt a clear stance in this regard may stem from the fear that an increase in the use of atypical employees may weaken sectoral bargaining. Ironically, sectorally based collective agreements could actually provide an avenue for the regulation of minimum conditions of service. Fortunately, the amended s 200A of the LRA did place the plight of atypical workers on the agenda; the growing phenomenon of non-standard employment cannot be wished away. Clearly, the labour law of the future will need to address the substantive terms of this different

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[206] Howitz and Franklin op cit n 64 at 35.

[207] Standing et al (1996) op cit n58 at 486-502.

[208] Report of the Presidential Commission to Investigate Labour Market Policy (1996) at 191-209.

employment relationship, which now seems to dwarf the more traditional labour law relating to labour management relations.

On the international level, the European Community has identified that the key issue is to strike a balance between achieving flexibility and ensuring security for the atypically employed worker. This requires, *inter alia*, the restructuring of industrial relations: Downsizing, outsourcing, subcontracting, teleworking and joint ventures bring new dimensions to the world of work for which traditional labour law provisions do not appear to have adequate answers.[209]Regional organisations such as SADC and the ILO seem particularly poised to initiate reforms.

Referring to employment protection in the advent of new forms of work, **Numhauser-Henning** (2001)[210] holds that 'flexible knowledge' can potentially stand up to the challenges of new forms of employment. Consequently, this line of though concludes that 'rights to education and training are (not only) an increasingly important part of employment protection, but [can] also be a substitute or complement to employment protection.'[211]

Whereas this proposition might provide some relief, it nevertheless has many limitations and excludes many types of work relationships. It does however seem to be relevant in particular occupations (information technology and other white-collar jobs), although it does not discuss the constraints of, *inter alia*, training costs, time and knowledge ownership. In application, this option is selective and hardly goes to the heart of the problem, especially in developing countries whose bulk of the 'earning' population is engaged in atypical work and cottage industries.

The traditional concept of employee, built on dependent subordinated work, has become both more difficult to uphold and less relevant as a definition of the personal scope of labour law. Inspiration, invention and imagination are greatly needed to resolve this crisis, and, although the task is difficult, it is an urgent one, since the world in which we live must answer these vital questions.[212]The intellectual challenge

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[209] Ibid at para 43.

[210] Ann Numhauser-Henning: op cit n29.

[211] Ibid at pg. 114.

[212] JM Servais, Flexibility and Rigidity in International Labour Standards, International Labour Law Review, Vol. 125, No. 2, 1996.

in the reconceptualisation debate needs serious consideration. Therein perhaps, lies the future. Time will tell.

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