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**CONTRACTING WORK OUT TO SELF EMPLOYED WORKERS:
DOES SOUTH AFRICAN LAW ADEQUATELY RECOGNISE AND
REGULATE THIS PRACTICE?**

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CONTRACTING WORK OUT TO SELF-EMPLOYED WORKERS: DOES SOUTH AFRICAN LABOUR LAW ADEQUATELY RECOGNISE AND REGULATE THIS PRACTICE?

Labour law is premised on the paradigm of a full-time, indefinite and bilateral employment relationship between employer and employee. Increasingly, this standard employment relationship model is being undermined by the proliferation of non-standard forms of work as employers seek greater labour market flexibility. These forms of work have been driven by three processes, namely casualisation (the engagement of workers on a fixed-term, casual or part-time basis), externalisation via commodification of the employment relationship (the engagement of workers in terms of a commercial contract, which excludes labour law from the relationship) and externalisation via intermediation (the use of intermediaries such as subcontractors).

This study focuses on a work arrangement or practice referred to as contracting work out to self-employed workers. This involves contracting work out to individual workers who in turn employ other workers to assist them. The study considers the use of this practice in South Africa, where it emerged in the 1990s. It examines empirical research on the practice in the mining, clothing and construction sectors, and in relation to truck drivers. South African employers have argued that this practice advances government's small business and black economic empowerment policies.

This study argues that the real motivation for this practice is employers' desire to avoid the risks and costs associated with directly employing workers. This is borne out by the case studies, which demonstrate that the self-employed worker is denied labour protection as they are designated as entrepreneurs and employers. In addition, the workers they employ are denied protection because the self-employed worker with whom they have a contractual relationship is usually not in a position to comply with labour legislation. It is argued that the practice results in precarious and insecure work for self-employed workers and their workers and presents significant challenges for its regulation.

The study analyses South African labour law to determine whether it regulates the practice of contracting work out to self-employed workers. It finds that while there is some direct recognition of the practice, it is not adequately regulated in South African law. This has allowed non-state institutions to regulate the practice in ways that may entrench the non-protection of self-employed workers and their workers. The study argues for the adoption of legislation to regulate the practice to protect self-employed workers and to hold enterprises responsible for the labour rights of the workers engaged through self-employed workers.

Pamhidzai Hlezekhaya Bamu (August 2011)

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ABBREVIATIONS

BBBEEA	Broad Based Black Economic Empowerment Act
BCEA	Basic Conditions Employment Act
BEE	Black Economic Empowerment
BIBC	Building Industry Bargaining Council
CMT	Cut, make and trim
COIDA	Compensation for Occupations Injuries and Disability Act
CPIA	Country Policy and Institutional Assessment
EEA	Employment Equity Act
EPL	Employment Protection Legislation
FDI	Foreign Direct Investment
IFI	International Financial Institutions
ILC	International Labour Conference
ILO	International Labour Organisation
IMF	International Monetary Fund
LOSC	Labour-only subcontractors
LRA	Labour Relations Act
MBA	Masters Builders Association
NBCRFLI	National Bargaining Council for the Road Freight and Logistics Industry
NEDLAC	National Economic Development and Labour Council
OECD	Organisation for Economic Co-operation Development
OHSA	Occupational Health and Safety Act

SASCA	South African Sub-Contractors Association
SANDU	South African National Dance Union
SDA	Skills Development Act
TES	Temporary Employment Services
UIF	Unemployment Insurance Act
WB	World Bank
WEF	World Economic Forum

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CHAPTER 1: INTRODUCTION

Work is important to people the world over, as most people depend on work to sustain themselves and to meet their material and other needs. To the average person, work is significant not only as a source of income, but as a critical aspect of one's "sense of self" and a means of achieving personal fulfilment.¹ It is also an important avenue through which individuals integrate themselves into society and the economy.² Work therefore plays an important role in promoting societal well-being, building social cohesion and advancing economic development.³

Given its socio-economic significance, it is hardly surprising that societies are committed to building legal, social and economic structures that aim to promote job creation and regulate the conditions under which work is performed.⁴ Labour law is one of the central legal structures regulating the world of work and is the primary focus of this thesis. In this study, labour law will be understood as an amalgam of laws that regulate various aspects relating to work.

Labour law has traditionally provided rules to regulate the formation and protection of workers' and employers' organisations and thereby facilitate collective bargaining between employers and workers.⁵ It also provides minimum working conditions relating to issues such as wages, working hours, time off and health and

¹ See J Stiglitz "Employment, social justice and social well-being" (2002) 141(1-2) *International Labour Review* 9.

² M Fortuny and J Al Hussein *Labour Market Policies and Institutions: A Synthesis Report on the cases of Algeria, Jordan, Morocco, Syria and Turkey* (Geneva, International Labour Office, 2011) 39.

³ See for example UN Economic and Social Council "Promoting full employment and decent work for all" Commission for Social Development Forty-sixth session, 6-15 February 2008 3.

⁴ See for example Fortuny and Al Hussein (note 2) 40-42.

⁵ P Benjamin *A Review of Labour Markets in South Africa: Labour Market Regulation: International And South African Perspectives* (Johannesburg, Human Sciences Research Council: 2005) 3.

safety in the workplace.⁶ In addition, labour law provides for employment- related social security schemes to cover unemployment and compensation for occupational diseases and injuries.⁷ Another function is the creation of mechanisms and institutions for the resolution of labour disputes.⁸ Finally, labour law promotes workplace equality and provides for skills development.⁹

The above shows that labour law does not regulate the entire spectrum of arrangements or relationships by virtue of which work is performed, but is preoccupied with the employment relationship.¹⁰ Broadly speaking, it covers the workers in an employment relationship – employees – who work for another in order to *earn* a living.¹¹ The employment relationship, which has also been referred to as the contract of employment, has therefore been understood as the port of entry into the realm of labour law.¹²

Traditionally, labour law has been premised on the assumption that the employment relationship is asymmetrical by virtue of the employee's subordination to the employer.¹³ It evolved out of the need to balance the power between the two parties by conferring rights and entitlements on the employee while imposing obligations and placing restrictions on the employer.¹⁴ On the basis of this

⁶ See generally D Du Toit, D, D Bosch, D Woolfrey, S Godfrey, J Roussouw, S Christie, C Cooper, G Giles, with C Bosch, *Labour Relations Law: A Comprehensive Guide* (Fourth Edition) (Durban: LexisNexis Butterworths, 2003) 477.

⁷ P Benjamin *A Review of Labour Markets in South Africa: Labour Market Regulation: International and South African Perspectives* (Johannesburg, Human Sciences Research Council: 2005) 4.

⁸ See generally Du Toit et al (note 6) 79.

⁹ See generally Du Toit et al (note 6) 589.

¹⁰ G Casale "The employment relationship: a general introduction" in G Casale (ed) *The Employment Relationship: A Comparative Overview* (Geneva: ILO, 2011) 1-33 33.

¹¹ See E Webster, "Making a living, earning a living: Work and employment in Southern Africa" (2005) 26(1) *International Political Science Review* 55.

¹² Casale (note 10) 33.

¹³ O Kahn-Freund, *Labour and the Law* (2nd Edition) (London: Steven and Sons, 1977) 6.

¹⁴ *Ibid.*

assumption, labour law has excluded those who work for themselves and are referred to as independent contractors.¹⁵ Consequently, navigating the so-called “binary divide” between an employee and independent contractor has been, and for the most part continues to be, central to determining the scope of labour law.¹⁶

1.1 PROBLEM STATEMENT AND SCOPE OF THESIS

This thesis is broadly concerned with the scope and application of labour law in a rapidly changing world of work marked by a multiplicity of working arrangements. The point of departure is that modern labour law assumes that employment conforms to the paradigm of the standard employment relationship.¹⁷ This paradigm evolved during the post War period of prosperity in North America and Western Europe.¹⁸ It is characterized by an indefinite, full-time, bilateral relationship where the employee is vertically integrated into the structure of the employing enterprise.¹⁹ As it became the dominant paradigm of work during this period, policy-makers chose the employment relationship as the site for the location of the rights and obligations created by labour law.²⁰

¹⁵ A Perulli, “Subordinate, Autonomous and Economically Dependent Work: A Comparative Analysis Of Selected European Countries” in G Casale (ed) *The Employment Relationship: a Comparative Overview* 137-187 (Geneva: ILO, 2011) 137-8.

¹⁶ N Countouris, “The employment relationship: A comparative analysis” in G Casale (ed) (2011) *The*

Employment Relationship: A Comparative Overview (Geneva: ILO, 2011) 35-68 38.

¹⁷ See for example D McCann *Regulating Flexible Work* (Oxford: Oxford University Press, 2009) 10; J Theron “The erosion of workers’ rights and the presumption as to who is an employee” (2002) *Law, Democracy and Development* 22 42.

¹⁸ See for example N Countouris *The Changing Law of the Employment Relationship* (Aldershot: Ashgate, 2007) 25.

¹⁹ See for example S Vettori *The Employment Contract and the Changed World of Work* (Aldershot, Ashgate, 2007) 8-9.

²⁰ J Stanford and L F Vosko, “Challenging the Market: The Struggle to Regulate Work and Income” in J Stanford, and L F Vosko, (eds) *Challenging the Market: The Struggle to Regulate Work and Income*

There is broad consensus that the world of work has changed dramatically and that work arrangements falling outside the standard employment relationship have proliferated in both developing and developed countries.²¹ These changes in the world of work have been primarily driven by the quest for flexibility in the labour market.²² The quest for labour market flexibility has in turn been fuelled by ideological forces: neoliberalism claims that rigid labour markets limit employers' ability to adjust their workforces and labour costs in response to rapidly changing market conditions.²³ Neoliberalism's advocates argue that rigid labour markets hamper employers' ability to compete in an integrated global economy characterized by more open markets and greater competition.²⁴

Employers have therefore sought to minimize the risks and costs associated with employment. Employers increasingly employ workers for a fixed term or limited duration, on an "as-needed basis" or for fewer hours than the average working week.²⁵ These kinds of relationships alter the temporal dimensions of the standard employment relationship and can be grouped under the banner of the process of

(Montreal & Kingston: McGill Queen's University Press, 2004) 3-30 7.

²¹ Countouris (note 18) 45-52; P Benjamin "Subordination, parasubordination and self-employment:

a comparative study of selected African Countries" in G Casale (ed) *The employment relationship: a comparative overview* (Geneva: ILO, 2011) 95-136, 95-102.

²² McCann (note 17) 11.

²³ See for example OECD, *The OECD Jobs Study Facts, Analyses and Strategies* (1994), accessed at <http://www1.oecd.org/sge/min/job94/part1.htm> on 10/01/2011; World Economic Forum, *Global Competitiveness Report 2010-2011* (Geneva: World Economic Forum, 2010) 7.

²⁴ World Bank *Doing Business 2005* (Washington DC: Oxford University Press, 2004) 31.

²⁵ J Giesecke "Socio-economic effects of atypical employment: evidence from the German labour market" (2009) 25(6) *European Sociological Review* 629 630; S Mills, "The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility" (2004) 25 *ILJ* 1203 1218-9; J Theron and S Godfrey, *Protecting Workers at the Periphery* Development and Labour Monograph 1/2000 (Cape Town: Institute of Development and Labour Law, 2000), 9-10.

casualisation.²⁶ Another process driving change in the world of work is externalization. This is a process whereby employers structure their operations to reduce the amount of work performed in terms of employment contracts and increase the amount of work performed in terms of commercial agreements.²⁷

Employers may directly externalize the work of individual workers by engaging them on the basis that they are independent contractors.²⁸ This is known as externalization by commodification of the employment relationship.²⁹ Alternatively, they may externalize workers indirectly by engaging their services through a third party with whom they have a commercial contract for the performance of services or for the supply of temporary workers.³⁰ The third party operates as an intermediary and the process shall therefore be referred to as externalization via intermediation.³¹

Importantly, the three processes described above do not occur in isolation, but often overlap and intersect each other.³² It is therefore easy to envisage a flexible employment practice, such as the use of a temporary employment agency,

²⁶ Theron and Godfrey (note 25) 9-11.

²⁷ Labour and Enterprise Policy

Research Group, UCT, "Changing Nature of Work and 'Atypical' forms of employment in South Africa" Unpublished Synthesis Report prepared for the Department of Labour (Cape Town, 2003) 4; R Le

Roux, *The World of Work: Forms of Engagement in South Africa* Development and Labour Law Monograph Series 02/2009, (Cape Town: Institute of Development and Labour Law, 2009) 18.

²⁸ P Benjamin, "Who needs labour law? Defining the scope of legal protection" in J Conaghan, R Fischl

and K Klare, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford:

Oxford University Press, 2000), 75-92, 85. Mills (note 25) 1203

²⁹ Le Roux (note 27) 18.

³⁰ H Sato "Atypical employment: a source of flexible work opportunities?" 2001 4(2) *Social Science Japan Journal* 161 163.

³¹ Le Roux (note 27) 18.

³² D McCann (note 17) 5.

which involves both externalization via intermediation (with the agency being the intermediary) and casualisation where the workers are employed on a fixed term basis.³³ Such arrangements are more complex as compared to those that simply involve one of these processes.

The arrangements described above are neutrally referred to as non-standard or atypical forms of work or positively couched in the language of flexibility and choice. However, the underlying characteristic of work under these arrangements is their precariousness. According to Fudge and Owens:

Precariousness is a complex phenomenon, and involves four dimensions: (1) the degree of certainty of continuing employment; (2) control over the labour process, which is linked to the presence or absence of trade unions and professional associations and related to control over working conditions, wages and the pace of work; (3) the degree of regulatory protection; and (4) income level... identifying precariousness can be a difficult task because its different dimensions may intersect in numerous ways.³⁴

This definition of precarious work shows that the workers experience a high degree of uncertainty and risk and the workers tend to be vulnerable. Their vulnerability may result from socio-economic factors such as poverty, unemployment and/or under-employment.³⁵ According to Klerck:

The increasing use of 'flexible' employment, however, presupposes the prior existence of a group of workers whose labour power can be deployed in an intermittent and precarious manner. High levels of under and unemployment, combined with the absence of both a viable subsistence sector and a comprehensive welfare system, have forced many workers to take whatever jobs are on offer and not to report abusive labour practices and non-compliance with minimum standards.³⁶

³³ A Buzuidenhout, S Godfrey, J Theron with M Modisha, "Non standard employment and its policy implications" Unpublished Research Report submitted to the Department of Labour, (2003), 48-9; Le Roux (note 27) 29.

³⁴ J Fudge and R Owens "Precarious work, women and the new economy: The challenges to legal norms" in J Fudge and R Owens (eds) *Precarious Work, Women and the New Economy: The Challenges to Legal Norms* (Oxford: Hart Publishing, 2006) 3-27 5.

³⁵ G Klerck "Labour market regulation and the casualisation of employment in Namibia" (2003) *Winter South African Journal of Labour Relations* 63 65, 67, 81.

³⁶ *Ibid* at 67.

The vulnerability of the workers under these arrangements may also depend on certain social characteristics which enable enterprises to enforce their demands on the workers.³⁷ Thus, there tend to be many women, minority and marginalized ethnic groups and migrants working under precarious work arrangements.³⁸

Precarious work is also associated with the absence or limited application of legal regulation to the workers involved. This means that most workers who labour under non-standard work arrangements do not have the benefit of labour law's protection. This is because labour law continues to focus on the standard employment relationship and is yet to develop the appropriate conceptual tools to address the challenges that non-standard forms of work present for regulation.³⁹ These regulatory challenges are exacerbated in cases involving the intersection of different processes driving the processes that have given rise to non-standard forms of work.⁴⁰

1.1.1 Contracting work out to self-employed workers: the focus of the thesis

This thesis is broadly concerned with the changes in the world of work and the challenges they present for labour law. Given the diversity of the working arrangements or practice that employers have embarked on to achieve flexibility, this practice focuses on one practice in particular. This shall be referred to as contracting work out to self-employed workers. The thesis considers the employers'

³⁷ M Castells and A Portes "World underneath: the origins, dynamics, and effects of the informal economy" in A Portes (ed) *The Informal Economy: Studies in Advanced and Less Developed Economies* (Baltimore: Johns Hopkins University Press, 1989) 11-37 26.

³⁸ Fudge and Owens (note 34)12.

³⁹ J Fudge "Fragmenting work and fragmenting organizations: the contract of employment and the scope of labour regulation" 44 *Osgoode Hall Law Journal* (2006) 609 648.

⁴⁰ McCann (note 17) 5-6.

use of this practice in South Africa. The case studies below illustrate how the practice has been used in South Africa.

Box 1: Contracting work out to self-employed workers⁴¹

Case study 1: Homeworking

Taryn is a qualified machinist who worked for a large clothing manufacturer, TJ Fashions, in Cape Town for ten years. In 1998, TJ Fashions retrenched about half of its skilled and unskilled workers and began to contract work out to skilled workers operating from their homes. Some of them are former employees of the firm. Taryn is one such worker and frequently receives orders from the factory. The firm provides the fabric and other materials for each order. The firm pays Taryn a fixed rate per garment produced. It exercises strict control over the quality of the garments through detailed product specifications and penalties for products that fail to meet the required standards.

The orders she receives from the TJ Fashions are often very large and the deadlines for delivery would be impossible for her to meet on her own. She therefore employs three to four other workers to assist her to complete these orders. But the supply of work from this firm is never guaranteed and there are periods when she does not receive orders from it. During dry spells she seeks orders from other firms that may require extra labour to fill any “rush orders”.

Case study 2: Owner-drivers

BBB Limited is a manufacturing company that produces a variety of frozen foods and snacks. It has been operating for forty years. The firm used to employ drivers to distribute its products throughout the country. Since the early 1990s it has given its truck-drivers the option of becoming entrepreneurs and owners of their vehicles. Drivers who opt for the owner-driver scheme are required to resign from employment with BB Limited and enter into an exclusive owner-driver agreement. The owner-driver enters this agreement through the medium of a close corporation that s/he is required to register prior to entering the agreement. The close corporation then enters into a hire purchase agreement for the purchase of the vehicle from BB Limited. The firm pays the close corporation a fixed fee per delivery and makes a lump sum payment each month less the monthly truck rental fee and maintenance costs.

Jabu was employed as a driver by BB Limited for five years before opting for the owner driver scheme in 2001. He hires three workers to assist him with the deliveries. BB maps out the exact route that he has to follow to each destination. His truck continues to bear the BB logo and he is not

⁴¹ These are hypothetical examples constructed from the empirical research discussed in Chapter 4, section 4.1.2 of this work.

allowed to use it to deliver products from other firms. He and his workers are also provided with clothing bearing the BB logo and are required to wear them at all times when making deliveries.

The above scenarios are marked by several key features. First, TJ Fashions and BB Limited contract work out to Taryn and Jabu on the basis that the latter are entrepreneurs operating their own businesses. Second, Taryn and Jabu personally perform the work contracted out to them and hire assistance to help them to complete the work.

Third, the work that the enterprises contract out to Taryn and Jabu is the kind of work that they would ordinarily employ workers to do as it must be performed on an ongoing as opposed to an occasional basis. A fourth feature is that Taryn and Jabu do not have the resources to purchase the tools and equipment and purchase the materials necessary to perform the work they undertake to do. Finally, the firms exercise some degree of direct and/or indirect control over the work performed by Taryn, Jabu and the workers they employ.

Research conducted in South Africa shows that the practice described above first emerged on the mines in the late 19th century and was abandoned in about 1922.⁴² The practice resurfaced in the mining and other sectors such as clothing, construction and in relation to truck drivers during the 1990s.⁴³ Although the

⁴² A Buzuidenhout, "New Patterns of Exclusion in the South African Mining Industry" in K Bentley and A Habib (eds) *Racial Redress and Citizenship in South Africa* (Pretoria: HSRC Press, 2008) 179 208 187-9; B Kenny and A Buzuidenhout, "Contracting, Complexity and Control: An Overview of the Changing Nature of Subcontracting in the South African Mining Industry" (1999) *The Journal of the South African Institute of Mining and Metallurgy* 185 188-9.

⁴³ See for example, Buzuidenhout (note 41) J Crush, T Ulicki, T Tseane and E Jansen van Vuuren, "Undermining Labour: The Rise of Sub contracting in South African Gold Mines" (2001) 27(1) *Journal of Southern African Studies* 5 10; *Organizing in the Informal Economy: A Case Study of the Building Industry in South Africa* ILO SEED Working Paper No,38 (Geneva: International Labour Office, 2003) 12-13; S Godfrey, M Clarke, J Theron with J Greenburg *On the Outskirts but Still in Fashion: Homeworking in the South African Clothing Industry: The challenge of organisation and*

extent of the practice has not been quantified, there is consensus that the prevalence of the practice has increased over the years.

The empirical research indicates that contracting work out in this manner has been encouraged and justified on the basis that it advances government policies to develop small businesses, which are perceived to be a key driver of economic growth and employment creation.⁴⁴ The practice is also associated with the empowerment of black workers and seen to be in line with the constitutional imperative to address the injustices of apartheid and with the black economic empowerment policies which give effect to the constitutional imperative.⁴⁵

In this thesis, it is argued that the *real* objective behind this practice is “to contract out of the employment relationship and the regulation that comes with it.”⁴⁶ The practice allows firms like TJ Fashions and BB Limited to benefit from the labour of Taryn, Jabu and their workers without bearing the risks and obligations that would come with employing them. It will be argued that this is achieved by bringing together the processes of externalization by commodification in respect of Taryn and Jabu, and externalization via intermediation in relation of the workers Taryn and Jabu employ.

Taryn and Jabu are engaged in terms of commercial contracts, and the protection of labour law is therefore excluded from their relationships with TJ

regulation Monograph 2/2005 (Cape Town, Institute of Development and Labour Law, 2005); Mills (note 25); H Cheadle and M Clarke, “Country Study: South Africa” International Labour Office National Studies on Workers Needing Protection (2000) 35-6.

⁴⁴ Crush, Ulicki, Tseane and Jansen van Vuuren (note 39) 9-10; C Skinner and I Valodia, “Informalising the Formal: Clothing Manufacture in Durban, South Africa, unpublished paper, University of KwaZulu Natal School of Development Studies 11.

⁴⁵ Mills (note 25) 1213-4.

⁴⁶ Theron and Godfrey (note 25) 9.

Fashions and BB respectively.⁴⁷ These firms designate Taryn and Jabu as independent contractors, thereby commodifying their (would-be) employment relationships with them.⁴⁸ However, the designation as independent contractors does not translate into equal bargaining power vis-à-vis the firms that contract work out to them. These relationships are typically asymmetrical, with the likes of Taryn and Jabu having little bargaining power or influence over the terms of their contracts.⁴⁹

The firms also externalize the labour of the additional workers on the basis that they are employed by Taryn and Jabu. The liability for the working conditions and obligations in terms of labour law are shifted onto the Taryn and Jabu who are ostensibly their employers.⁵⁰ On a strictly contractual analysis, these workers have no rights or recourse against TJ Fashions or BB because they have no direct contractual relationship with them.⁵¹ This has been described as externalization via intermediation.

The intersection of the two processes of externalization has far-reaching consequences for the working conditions and labour rights of Taryn and Jabu and

⁴⁷ *Ibid* at 22-57.

⁴⁸ Le Roux, R "The regulation of work: Whither the contract of employment?: An analysis of the suitability of the contract of employment to regulate the different forms of labour market participation by individuals" Unpublished PhD Thesis, University of Cape Town, 2008 191.

⁴⁹ Godfrey, Clarke, Theron with Greenburg (note 43) 15; C Van der Westhuizen, "Women and Work Restructuring in the Cape Town Clothing Industry" in E Webster and K Von Holdt, *Beyond the Apartheid Workplace* 335-355 347.

⁵⁰ European Commission, Directorate-General for Employment, Industrial Relations and Social Affairs *Transformation of Labour and the Future of Labour Law in Europe* (Luxembourg, EC Commission, 1999)[*"The Supiot Report"*] 9; J Fudge, "The Legal Boundaries of the Employer, Precarious Workers and Labour Protection" in G Davidov and B Langille (eds) *Boundaries and Frontiers of Labour Law: Goal and Means in the Regulation of Work* (Oregon: Hart 2006)295-316 302;

Godfrey et al (note 43)13-14.

⁵¹ Supiot Report (note 50) 10; Theron (note 17) 40.

their workers. As already mentioned, Taryn and Jabu are designated as independent contractors and purportedly removed from the scope of labour law. In addition, their ability to remunerate and provide fair conditions to their workers largely depends on the terms of their service contracts with the firms they contract with.

In light of the pressures to lower service fees to outbid the competition, it is more than likely that Taryn and Jabu are unable to pay decent wages or provide for social security schemes to cover risks such as unemployment, sickness and retirement.⁵² Taryn and Jabu are unlikely to be able to provide their workers with secure employment or guaranteed working hours as they have little control over the duration of their service contracts or the amount of work provided.

The above suggests that there is inequality between workers who labour under these contracting arrangements and those who fall under the standard employment relationship.⁵³ This fragments workers and undermines the power of organised labour and collective action.⁵⁴ Case studies undertaken in South Africa highlight the difficulty of organizing amongst these workers, many of whom are vulnerable due to the precariousness of their jobs and their low wages.⁵⁵ These studies indicate that fear of victimization and dismissal inhibits most workers from joining trade unions.⁵⁶

⁵² Godfrey et al 37; P H Bamu and S Godfrey *An Analysis of Collective Bargaining Arrangements in the Construction Industry*, (Cape Town, Labour Research Service, 2009).

⁵³ Crush et al (note 39) 14; Godfrey et al (note 43) 17.

⁵⁴ Castells and Portes, (note 37) 31, as cited in E Webster, A Benya, X Dilata, C Joynt, K Ngoepe, M Tsoe "Making Visible the Invisible: Confronting South Africa's Decent Work Deficit" (Sociology of Work Unit, University of Witwatersrand) Research commissioned by the Department of Labour (2008) 12.

⁵⁵ A Mosoetsa, "The Consequences of South Africa's Economic Transition: The Remnants of the Footwear Industry" in E Webster, and K Von Holdt *Beyond the Apartheid Workplace: Studies in Transition* (Pietermaritzburg: University of KZN Press, 2005) 317-334 330.

⁵⁶ M Bennett *Organizing in the Informal Economy: A Case Study of the Clothing Industry in South Africa* ILO SEED Working Paper No. 37 (Geneva: International Labour Office, 2003) 26; T Goldman

This section has used case studies to help provide an overview of the practice that shall be referred to as contracting work out to self-employed workers in this thesis. It has outlined the key features of the practice and highlighted the consequences for the workers involved. What remains is to define, in broader terms, the parties that have thus far been referred to as JT Fashions and BB Limited, Taryn and Jabu and the workers of Taryn and Jabu. These definitions shall be used to refer to parties in a similar position throughout this study.

Firms such as JT Fashions and BB Limited shall be referred to as core enterprises in this study. These are the firms or entities that give the work out to self-employed workers and who ultimately benefit from the work done in terms of the contracts.

Those in Taryn and Jabu's position shall be referred to as self-employed workers in this thesis. The juxtaposition of the terms "self-employed" and "worker" brings together the fact that the person actually performs the work personally (albeit with some assistance), and that s/he does so ostensibly on the basis that s/he works for her/himself. These are distinguished from own account workers, who personally perform the work, but do not employ other workers to assist them.⁵⁷ Finally, workers in a similar position to that of Taryn and Jabu's workers shall be referred to as the workers of self-employed workers or workers employed by self-employed workers.

Organizing in the Informal Economy: A Case Study of the Building Industry in South Africa ILO SEED Working Paper No, 38 (Geneva: International Labour Office, 2003) 32.

⁵⁷ M Chen, J Vanek and J Heintz "Informality, Gender and Poverty: A Global Picture" *Economic and Political Weekly* May 27, 2006 2131 2132.

1.1.2 Aims and significance of this study

This thesis is broadly concerned with the challenges that labour law faces in regulating non-standard working arrangements in the changed world of work. It therefore provides an analytical account of how these arrangements have developed and their consequences for the workers involved from a broad international perspective.

Given the sheer diversity of the work arrangements that characterize the changed world of work, it would be impossible to do justice to all of them in this study. The study therefore focuses on the contracting out of work to self-employed workers. It uses this as a prism within which to analyse the broader debates about the limitations of conventional labour law to regulate non-standard working arrangements. In order to provide a concrete legal framework within which to analyse the regulation of the practice, this study focuses on the South African legal system, within which the author is very familiar.

The key research question in this study is whether and to what extent South African labour law recognises and regulates the practice of contracting work out to self-employed workers. There are several reasons for focusing on this practice as opposed to other working arrangements or practices. The first is that this practice has not been subjected to as much rigorous academic debate amongst legal scholars as other forms of work such as part-time, fixed term and temporary agency work. To the extent that the practice has been considered in academia, these analyses have largely been confined to the field of sociology, with less being written about it in the socio-legal or purely legal fields of study.

The second reason is that despite the prevalence of the practice, it has hardly featured in legislation nor been the subject of detailed and sustained scrutiny by courts in South Africa or in other jurisdictions. There is therefore very little hard law regulating the practice. Consequently, there is a need to interrogate and conceptualise this practice from a legal perspective, to consider the extent to which it is already regulated and to put forward some tentative suggestions as to how it should be regulated.

Third, the practice provides some insight into the challenges that labour law faces in addressing multi-dimensional non-standard work arrangements. As has been mentioned, the practice to be scrutinized in this thesis is constituted by the intersection of externalization via commodification and externalization via intermediation. It therefore interrogates what solutions the law does or should provide to regulate the position of a worker whose status is unclear and who is ostensibly an employer. This raises questions about the legal consequences for the workers employed by the self-employed worker. Labour law is therefore challenged to develop a holistic approach that recognises and provides solutions to such multi-dimensional arrangements.

Fourth, the practice that will be scrutinized is also significant because it presents a policy dilemma which calls on policy-makers to navigate between the goals of labour protection on the one hand, and small business promotion and black economic empowerment on the other. This is aptly captured by Theron:

Should this emergent contractor be regarded as being in a vulnerable position, and should the relationship between the emergent contractor and the core enterprise be regulated? The core business controls such satellite enterprises or contractors through commercial contracts, of which service agreements ... are common forms. To seek to regulate this kind of [relationship] transgresses the boundary between commercial and labour regulation that has hitherto been regarded as inviolate. There is also no ready answer to the argument that

the emergent contractor is simply an entrepreneur of the very kind industrial policy should seek to promote and who should as far as possible be left to his or her own devices.⁵⁸

These dilemmas have far-reaching consequences for self-employed workers and the workers they employ, as well as for the core enterprises that contract work out to them.

Should labour law cover the self-employed worker to ensure that s/he may claim protection in relation to matters such as working hours, paid leave, minimum wages and termination of employment against the core enterprise? Or should self-employed worker be receiving business support to enable them to expand their enterprises and enable them to comply with labour legislation in relation to her/his workers? Are these options mutually exclusive? And should the workers of the self-employed worker be allowed to bargain with the core enterprise in relation to working conditions or have legal recourse against the core enterprise for unfair treatment? While there are no easy solutions to these dilemmas, this study attempts to engage and grapple with them.

To return to the key research question, this thesis considers whether and to what extent South African labour law recognises and regulates the practice of contracting work out to self-employed workers. As the empirical studies on the practice will show, self-employed workers and their workers do not receive the benefit of labour law's protection in South Africa. Through an analysis of the body of South African law that regulates non-standard working arrangements, the study will consider whether South African labour law has developed legal principles to regulate this practice and whether its existing principles regulating other arrangements could be extended to be applied to the practice under scrutiny.

⁵⁸ Theron (note 17) 37.

The key finding of the study is that South African labour law recognises and directly regulates the practice of contracting work out to self-employed workers to a limited extent. In addition, some of legal approaches that have been developed to regulate other working arrangements may be extended and developed to cover the practice under scrutiny. It will therefore be found that to a large extent, the ingredients for the regulation of the practice under scrutiny are already part of South Africa's labour law regime. These existing principles could potentially be applied to extend labour rights to self-employed workers and to impose liability on the core enterprise for the working conditions and labour rights of the workers of self-employed workers.

The study argues that not only is there the potential for the improved regulation, but there is also an urgent need for more robust regulation of the practice in the South African context. This is because, in the absence of clarity on the labour rights of self-employed workers and their workers, non-state institutions have developed their own initiatives to regulate the practice at a sector or firm level. These initiatives exclude labour law's application to the self-employed workers and, for the most part, absolve the core enterprise from any liability in relation to the workers employed by self-employed worker. There is therefore a need for clear legislation to set out the labour rights of self-employed workers and their workers in order to guide the initiatives embarked on by trade unions, bargaining councils and corporations.

The study also examines the extent to which the International Labour Organisation (ILO) recognises and regulates the practice of contracting work out to self-employed workers. It does so through an analysis of the ILO's debates on contract labour and the discussions on the employment relationship which culminated in the adoption of Recommendation 198 on the Employment

Relationship. It will be found that while the ILO recognised the existence of the practice and the dilemmas it presents, it failed to translate these into binding legal instruments. The analysis of the discussions within the ILO, however, highlights some principles which could be applied when regulating the practice under scrutiny.

Finally, drawing on the lessons learned from the analysis of South African law, and lessons gleaned from non-state institutions and the ILO, this thesis proposes a framework for legislation that would regulate the practice under scrutiny. The proposed framework adopts a holistic approach that considers the dynamics of the relationships between the core enterprise, the self-employed workers and the workers employed by self-employed workers.

1.1.3 Methodological approach adopted in this thesis

This study comprises a desk-based analysis of existing sources relating to the subject matter covered. Although located within the field of law, it is not a purely doctrinal study of the law on the changed world of work. Instead, it adopts a broader “law in context” approach that recognises that law does not operate in a vacuum and must be considered within the context in which it operates.

The study therefore engages with a broader body of sources and literature than the statutes, court decisions, international law and legal commentary. It considers literature from the fields of history, sociology and socio-legal studies to examine how the world of work has changed and the forces behind these changes. Importantly, it considers the literature on the political economy to provide an understanding of the ideological underpinnings of the quest for labour market

flexibility. It also recognises and considers the efforts of non-state institutions such as trade unions, bargaining councils and enterprises their strategies to regulate the practice under scrutiny.

While the core of this study is located within the South African jurisdiction, a comparative approach has been adopted to the analysis of the broader issues discussed herein. This is necessary because labour law and the employment relationship were originally developed in the global North and was transplanted into the global South. It is therefore prudent to make use of the wealth of jurisprudence and scholarship that has been developed in these countries, with the aim of considering how the debates and the discourse apply in the South African context.

In addition, the literature on the practice of contracting work out to self-employed workers has not been fully developed in South Africa. It is therefore necessary to consider comparative jurisprudence and the commentary of legal scholars from other jurisdictions to conceptualise the practice and gain an understanding of the challenges it presents for legal regulation. Looking beyond the South African jurisprudence and literature will also contribute to developing an understanding of the practice's implications for labour regulation and for considering possible legal solutions.

1.2 OUTLINE OF THE THESIS

The present chapter is an introduction which has identified the nature of the problems sought to be examined and outlined the approach that will be adopted.

It is important to understand why the scope and application of labour law is a matter of concern for legislatures, lawyers, workers, judges, and broader society.

Chapter two aims to provide the necessary background to understand *what* labour law is, *why* it exists and *who* it applies to. It is divided into two main parts. It first addresses the *what* and the *why* dimensions by identifying the key features of labour law and canvassing a number of theoretical and institutional justifications for its existence.

The chapter then addresses the *who* question by discussing the employment relationship, which labour law seeks to govern. It canvasses the broad developments across a number of jurisdictions, beginning with the binary divide between employees and independent contractors. It considers how labour law has progressively developed strategies to expand the scope of the employment relationship, for instance, by widening the range of criteria for identifying an employee. It also shows that some jurisdictions have recognised intermediate categories of workers and provided them with limited labour protection. The chapter demonstrates that while the scope of labour law continues to evolve and appears to be expanding, it is still firmly based on the employment relationship.

Chapter three points to a trend that seems to contradict the trend towards the expansion of labour law's scope discussed in chapter two. It argues that labour remains preoccupied with a particular paradigm of employment known as the standard employment relationship. It considers the origins of the standard employment relationship and the circumstances under which was chosen as the paradigm for the application of labour law and work-related social protection. It then considers the socio-economic and political changes that have led to the disintegration of this model and the rise of non-standard forms of work. These are

neoliberalism and globalisation, which have combined to fuel a quest for labour market flexibility.

The forms of non-standard work are canvassed in detail and discussed in terms of three processes, namely casualisation, externalization by commodification and externalization by intermediation. These processes increasingly hamper labour law's ability to protect workers and the work associated with them is precarious and insecure. Importantly, it is argued that these forms of work do not occur in isolation but often intersect with each other. This exacerbates the challenges of legal regulation and is a further impediment to the provision of labour protection.

Chapter four narrows the discussion from the broad processes discussed in chapter three to focus on the core subject of this thesis. It considers the contracting out of work to self-employed worker in the South African context. It argues that the practice of contracting work out is the point where externalisation via commodification intersects with externalisation via intermediation.

The first part of this chapter presents evidence that employers are contracting work out to workers on the basis that they are independent contractors who employ other workers to assist them. The discussion begins with a historical account of the practice in Britain where it first developed in the 18th century and was known as the "gang labour" or "butty system". It then considers the early emergence of the practice on the mines in South Africa from late 19th century until its abolition in 1922. The discussion then focuses on the re-emergence and contemporary use of this practice by South African employers, drawing from empirical research in the clothing, construction, mining and transport sectors.

The second part of the chapter identifies the forces that are driving the proliferation of this practice in South Africa. Many businesses have justified it on the grounds that it empowers workers, furthers small business development and is in line with black economic empowerment (BEE) policies. It is however argued that the growth of the practice has been fuelled by a desire to avoid the costs and risks associated with labour legislation in a labour market that is perceived to be inflexible.

The third part considers the consequences of the practice of contracting out as the point of intersection between the two forms of externalisation. It shows how externalisation by commodification has effectively excluded self-employed workers from the scope of labour protection by virtue of their designation as independent contractors and employers. It considers how externalisation via intermediation designates the self-employed worker as the employer of the workers s/he purports to employ despite the fact that s/he is not in a position to fulfil the obligations relating to employment. It argues that the externalisation of the labour of the self-employed worker and her/his workers makes it easier for employers to casualise their labour, adding a further dimension to the practice. The consequences for the workers involved are that they work under precarious conditions and do not have the benefit of labour law's protection.

The purpose of **chapter five** is to consider the regulation of the practice of contracting work out to self-employed workers in South Africa. Its point of departure is that the practice under scrutiny presents two key challenges to labour law. The first relates is that the practice undermines certain key assumptions on which conventional labour law is based. The practice also presents a challenge to labour law due to the intersection of the processes of externalisation and

casualisation, which give it a multi-dimensional character. It is argued that labour law must overcome these challenges in order to adequately regulate the practice.

The chapter analyses the body of South African labour laws and principles that have been developed to regulate non-standard work. These relate to addressing externalisation via commodification and externalisation via intermediation. The analyses reveals that the recognition and direct regulation of the practice in South African law is limited, but that a number of broader principles within the labour law regime could be extended to regulate the practice. It is submitted that there is a need to enact legislation to specifically regulate the practice, given the fact that non-state institutions have developed their own approaches to regulating the practice and determining whether and when labour law applies to self-employed workers and their workers.

Chapter six considers the history of the ILO's efforts to regulate what it has referred to as "contract labour". It traces the evolution of the ILO's understanding of contract labour. The discussion covers three key periods which highlight important events in the history of the ILO, spanning from 1956 to the present. It analyses how the ILO's conceptualisation of contract labour and formulation of responses to the problem has changed over time. The purpose of the analysis is to determine the extent to which the ILO specifically recognized and regulated the practice of contracting work out to self-employed workers.

The chapter shows that the ILO's discussions on contract labour recognised the fact that some contractors more closely resembled dependent workers than entrepreneurs. They recognised the difficulties of such situations for the contractors involved, as well as the workers they employed. However, the ILO failed to translate

its recognition of the existence of and the challenges posed by this practice into legal principles into binding international instruments.

The discussion ends with an analysis of the final outcome of the discussions on contract labour, namely Recommendation 198 on the Employment Relationship. It argues that this is a blunt instrument that reinforces the binary divide, focuses on bilateral relationships and is almost silent on triangular and multilateral arrangements. It does very little to regulate the practice under scrutiny.

Finally, **chapter seven** draws together the key issues raised in this thesis and to provide some tentative recommendations as to how the practice under scrutiny could be regulated in the South African context. The first part of this chapter seeks to draw out the critical issues in what shall be called the broader debates canvassed in chapters two and three, particularly in so far as they relate to the scope of labour law. The second part looks more closely at the situation of self-employed workers and their workers and how the law has attempted to regulate the practice. Importantly, it makes some recommendations as to how the practice can be better regulated in South African law, drawing on existing principles in South African law as well as international and comparative perspectives.

CHAPTER 2: WHAT IS LABOUR LAW AND WHO DOES IT APPLY TO?

The introduction to this thesis outlined the scope of this work and identified the practice that it seeks to analyse. It described this practice as contracting work out to self-employed workers. This is one of many practices that have enabled employers to take work outside the scope and protective realm of labour law. A detailed discussion on the means through which workers are increasingly falling outside the scope of labour law is canvassed in chapters three and four.

This chapter aims to provide the necessary background to understand those chapters by outlining *what* labour law is, *why* it exists and *who* it applies to. It is divided into two main parts. The first part addresses the *what* and the *why* questions by identifying the key features of labour law and canvassing a number of theoretical and institutional justifications for its existence. The second part seeks to address the *who* question by discussing the employment relationship, which labour law seeks to govern. The conclusion draws together the implications of the interrelationship between the three questions discussed.

These three questions relating to labour law are universal as they have been the subject of intellectual debate, legislative deliberations and judicial decisions in all jurisdictions, albeit to varying degrees. Thus, the following discussion draws widely from various authors, legislation and case law developments from around the world. The majority is drawn from the developed world, where labour law was originally developed and where it has been subjected to rigorous analysis for longer. However, bearing in mind the fact that the jurisdictional location of this thesis is

South Africa, an attempt is made to pay particular attention to how the debates have unfolded in this jurisdiction.

2.1 LABOUR LAW AND ITS PURPOSE

A look into the statute books and judicial decisions of any jurisdiction will reveal that it has laws that regulate the labour market,¹ that is, the place where people exchange their productive capacity (or labour) for remuneration. These laws may allow workers to form and join organisations through which they can bargain with employers to determine the terms and conditions of work. They may set limits on the number of hours and days that a person should be allowed to work and set minimum periods which a worker can spend away from work for various reasons. They may even stipulate the minimum amount that workers should receive and any benefits that employers should grant them. Importantly, labour laws set out the circumstances under which an employer may dispense with the services of a worker.

Labour laws may also stipulate the precautions and measures that employers must take to safeguard the health and safety of workers, and may require employers to compensate workers for occupational injuries and diseases. Moreover, they may provide for the training of workers to ensure that they keep up with the demands of their work and have the knowledge and skills to improve their prospects for advancement. Labour laws may prohibit employers from discriminating against

¹ Benjamin defines labour market regulation as a range of laws and policies whose primary purpose is to regulate the labour market. P Benjamin *A Review of Labour Markets in South Africa: Labour Market Regulation: International and South African Perspectives* (Johannesburg, Human Sciences Research Council: 2005) 2.

workers on the basis of characteristics such as their gender, nationality, or sexual orientation.

Broadly speaking, these are some of the main issues that are typically covered by the body of laws referred to as labour law. Different jurisdictions cover some or all of them to varying degrees, placing emphasis on some aspects more than others. The definitions, scope and application of the various principles also differ from jurisdiction to jurisdiction. And, over the years, the labour laws of each country have evolved to adapt to and reflect the prevailing socio-economic circumstances and the political convictions of those in power. Given the diversity of labour law across jurisdictions and its historical evolution, one would be hard pressed to identify a unifying principle which underlies and provides a justification for the existence of labour law.

This part considers why there is a need for labour law. Put differently, it considers the purpose or vocation of labour law. It does so firstly from the perspective of commentators who have tried to give theoretical perspectives on labour law's purpose. These accounts are descriptive, that is, they explain what labour law actually seeks to do and prescriptive, that is, they consider what labour law should seek to achieve. The theoretical perspectives are discussed in section 2.1.1.

This is followed by a discussion from the perspective of two institutions responsible for the making of labour law at both the international and national levels in section 2.1.2. The International Labour Organisation (ILO) will be considered as it is the body responsible for international labour law. Its aims and

objectives will be considered as they underpin the international labour law instruments adopted and inform member states' labour legislation and policy.

The South African legislature (through selected constitutional provisions and labour statutes) will be examined as the national body responsible for labour legislation in South Africa. South Africa presents a pertinent case study as it is the selected jurisdiction for this paper. Its labour laws have also been strongly influenced by the country's political history, its transition to a constitutional democracy and its membership in the ILO.

2.1.1 Theoretical perspectives on labour law's purpose

This part considers the purpose of labour law, beginning with the classical account that asserts that labour law aims to address the imbalance of power between employers and employees. It then considers a number of alternative accounts which have essentially argued that labour law's purpose is broader than the protection of workers. Finally, it considers the market failures approach that states that labour is not about protecting workers, but about correcting labour market failures.

The classical account of labour law is premised on the notion that employment relationships differ from other commercial relationships established by ordinary contracts. It has long been accepted that employment relationships differ substantially from ordinary commercial contracts in that they are characterized by inequality of bargaining power between employers and employees.² One of the foremost proponents of the classical account of labour law –

² B Langille "Labour Law's Back Pages" in G Davidov and B Langille (eds) *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oregon: Hart 2006) 13-36, 23.

Sir Otto Kahn-Freund – argued that the relationship between an employer and an isolated worker was inherently unequal, being one between “a bearer of power and one who is not a bearer of power”.³

The characterisation of the employment relationship as unequal was based on the assumption that the employment relationship necessitated submission and subordination on the part of the employee.⁴ This assumption was closely related to Coase’s theory on the emergence of the capitalist firm as a result of a trade-off between two possible modes of organising production. These were contracting on the market outside the firm on the one hand, and internal co-ordination of production by the entrepreneur within the firm on the other.⁵ The capitalist firm was established as a result of a choice to integrate productive functions under the entrepreneur’s control.⁶ According to Coase, the firm was therefore constituted by the establishment of employment relationships whereby workers agreed to obey the directions of the employer in exchange for remuneration.⁷

Consequently, the exercise of hierarchical control over these integrated functions has traditionally been regarded as essential to ensuring that the exercise

³ O Kahn-Freund, *Labour and the Law* (2nd Edition) (London: Steven and Sons, 1977) 6.

⁴ E Herz, “The Contract of Employment: I” 31 *International Labour Review* (1935) 837, at 846; Kahn-Freund (note 3) 6.

⁵ Coase’s theory explaining the emergence of the capitalist firm highlights the significance of transaction costs for the choice between different ways of organizing production. He identified two alternative means of organizing production, namely market exchanges outside the firm on the one hand and internal coordination of production by the entrepreneur on the other hand. R H Coase “The nature of the firm” (1937) 4(16) *Economica* 386 at 388.

⁶ Coase argued that the reason for the existence of the firm was that it reduced some of the high transaction costs associated with market transactions. Coase (note 5) 388-392. “Although transaction costs are hard to define, they do not include the principal costs of making a product such as the raw materials and labour, but identify the ancillary costs which comprise the costs of making the necessary business arrangements and the costs of monitoring performance of contracts.” H Collins “Quality assurance in subcontracting” in S Deakin and J Michie *Contracts, Co-operation and Competition* (Oxford: Oxford University Press, 1997) 284-306 292.

⁷ Coase (note 5) 391, 403-4.

of these functions can be flexibly moulded and directed in line with the firm's aims and needs.⁸ The employment relationship has traditionally been regarded as the medium through which this hierarchical control is exercised, and therefore, an essential tool for business organisation.⁹ Thus, the exercise of hierarchical control or authority by the employer over the worker has been seen as an indispensable characteristic of the employment relationship.¹⁰ In terms of Coase's theory, the employer's right of control was the factor distinguishing employees from independent contractors.¹¹

Proponents of the classical theory therefore argue that labour law's purpose is "to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship".¹² Labour law has therefore traditionally focused on the hierarchical relationship between employer and employee and regarded as a mechanism to balance or redistribute the uneven power between employer and employee.¹³ It is for these reasons that labour law has traditionally applied (and for the most part, continues to apply) to the employees as opposed to independent contractors.

On the basis of this classical account, labour law has used two main mechanisms to redress the imbalance of power between employers and employees. One mechanism involves the use of procedural tools to facilitate the representation and empowerment of workers and enable them to participate in decision-making

⁸ G Casale "The employment relationship: a general introduction" in G Casale (ed) *The employment relationship: a comparative overview* (Oregon: Hart, 2011) 1-33 17-9.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Coase (note 5) 403-4.

¹² Kahn-Freund (note 3) 6.

¹³ K Klare, "The Horizons of Transformative Labour and Employment Law" in J Conaghan, R Fischl, and K, Klare, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford : Oxford University Press, 2000) 3-29, 3; Casale (note 8) 19.

through collective bargaining.¹⁴ It has however been argued that that collective bargaining does not guarantee a just outcome for employees.¹⁵ The second mechanism is to rewrite the bargain, through minimum standards such as wage-setting and safety standards¹⁶ and through rules limiting the employer's decision making powers relating to employee discipline, demotions and dismissals.¹⁷ According to Hyde, the recognition of the employment relationship as the site of the greatest need for legal intervention also led to its recognition as the logical site to administer social security measures.¹⁸

While the classical account has been widely accepted, there are other accounts of the purpose of labour law. The accounts of Langille, Davis and Freedland, and that of Benjamin claim that labour law's vocation not only includes but goes beyond merely redressing the imbalance of power between the parties to secure worker's welfare. Other critics such as Hyde, reject the notion that the aim of labour law is to address unequal relations and argue that labour law seeks to address market failures that arise when work is unregulated. These accounts are discussed below.

Davis and Freedland reject the idea that labour law is "simply about securing the welfare of workers" and argue that labour law must also meet the requirements of efficiency.¹⁹ By this they mean that labour law should serve, or at the very least not compromise, the economic viability and competitiveness of employing

¹⁴ A Hyde, "What is Labour Law" in Davidov and Langille *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oregon: Hart 2006) 37- 61, 47; Langille, (note 2) 24; Benjamin (note 1) 5.

¹⁵ Langille (note 2) 25.

¹⁶ Benjamin (note 1) 5; Langille (note 2) 25.

¹⁷ Casale (note 8) 19-20.

¹⁸ Hyde (note 14) 47.

¹⁹ P Davies and M, Freedland, "Labor Markets, Welfare and the Personal Scope of Employment Law" (1999-2000) 21 *Comparative Labor Law and Policy Journal* 231 at 232.

enterprises at a micro-economic level.²⁰ Von Prondzynski has similarly argued while the protection of the rights and interest of workers remains central to labour law, it needs to take a more explicit and positive view of employer interests and the promotion of business success.²¹ Central to these arguments is the notion that labour law must balance these two objectives, namely securing workers' welfare and meeting the requirements of efficiency.

Benjamin argues that labour lawyers have begun to reassess labour law's vocation and recognize that it can no longer be restricted to protecting employees.²² He suggests that modern labour law has four broad objectives. The first is to promote allocative and productive efficiency and economic growth. The second is macroeconomic management, by achieving wage stabilization, high employment levels and international competitiveness. The third is to establish and protect fundamental rights. The fourth is to redistribute wealth and power in employment contexts.

Adopting a different approach, Langille contends that a number of changes including the growing informality of work have called the classical account of labour law into question. In his view, the classical account of labour law with its focus on redistribution and constraining market activity has presented labour law as being opposed to investment, market activity and globalisation.²³ He rejects the view that social justice and economic development are mutually exclusive, but argues that

²⁰ *Ibid* at 233.

²¹ F Von Prondzynski, "Labour law as a business facilitator" in H Collins, P Davies and R Rideout *The Legal Regulation of the Employment Relation* (London: Kluwer House, 2000) 99-110 109-10.

²² Benjamin (note 1) 5.

²³ Langille (note 2) 28-32.

“human freedom is both the goal of and the necessary precondition to the construction of just and durable economies and societies”.²⁴

Langille argues for the “development as freedom” approach as an alternative to the classical account. On this approach, labour law extends beyond redressing the power imbalance to include liberating and enabling them to realise their human capital.²⁵ Realising workers’ human capital enhances labour productivity and efficiency, which in turn encourage economic development.²⁶ Langille argues that in order to fulfil these purposes, labour law must integrate policies relating to education, family care, training and active labour market policies more closely into its framework.²⁷

Stiglitz also provides an argument for enhanced worker protection as an important part of the process of development. He argues that development is about more than capital accumulation, but is about the transformation of society and the improvement of people’s living standards.²⁸ He argues that development must be equitable, sustainable, democratic and must conform to the principles of social justice.²⁹ In the context of this broader understanding of development, the improvement of the welfare and security of workers through labour rights is central and becomes an end in itself.³⁰

²⁴ *Ibid* at 33.

²⁵ *Ibid* at 34.

²⁶ *Ibid* at 33-4.

²⁷ *Ibid* at 34.

²⁸ J Stiglitz “Employment, social justice and social well-being” (2002) 141(1-2) *International Labour Review* 9 at 20-1 25-6.

²⁹ *Ibid*.

³⁰ *Ibid*.

The above accounts of Davies and Freedland, Benjamin and Langille argue that labour law's vocation is broader than redressing the imbalance of power and securing the welfare of workers and include serving broader economic objectives such as increasing productivity, efficiency and economic development. These commentators argue that the classical account provides an incomplete explanation for the existence of labour law.

Another account of labour law's purpose relates to market failures. On this account, labour law prevents socially sub-optimum or inefficient outcomes that result when markets are left unregulated because "economic actors are individuated and cannot overcome collective action problems".³¹ On this account, unregulated markets are characterized by labour market failures, including inelasticity of supply, collective action problems, low trust and opportunism that prevent the formation of efficient long-term contracts, inadequate incentives for investment in human capital and information asymmetries.³² Hyde argues that through techniques such as collective bargaining measures, minimum contractual terms and dispute resolution institutions, labour law addresses these market failures to achieve socially beneficial outcomes.³³

At a glance, the market failures approach seems opposed to the classical account of labour law as a mechanism to achieve protection and redistribution. Some scholars have however argued that the relationship between these two accounts is more complex than this.³⁴ Collins argues that in some cases they overlap

³¹ Hyde (note 14) 53.

³² H Collins, "Justifications and Techniques of Legal Regulation of the Employment Relation" in H Collins, P Davies and R Rideout, *The Legal Regulation of the Employment Relation* (London: Kluwer House, 2000), 3-28, 6; Hyde (note 14) 54.

³³ Hyde (note 14) 53.

³⁴ Collins (note 32) 6, 16; L Dickens, "Problems of fit: changing employment and labour regulation" (2004) 42(4) *British Journal of Industrial Relations* 595 at 607.

and may be complementary, and may be used in conjunction justify similar policies and interventions.³⁵ Dickens contends that the two accounts are different sides of the same coin, and can be used as alternative explanations to justify the same legislative interventions, depending on the audience.³⁶

The above discussion shows the diversity of theoretical perspectives on the purpose of labour law. The need to redress the power imbalance between employers and employees is a recurring theme amongst the perspectives presented and continues to provide a solid foundation for the existence of labour law. However, this cannot be seen as an end in itself, but a means of achieving desirable social ends such as ensuring the welfare of workers and their families and improving their standard of living, thereby fostering broader social and economic development.

Although the greater protection of workers is often seen to be inimical to those of employers, it can be argued that this can be beneficial to employers. Labour law is an important mechanism for preventing reliance on destructive competition strategies such as low wages and unsafe working conditions.³⁷ By setting minimum conditions within which employers must operate, labour law forces them to focus on constructive competition strategies aimed at improving and innovating management systems, technology, products processes, worker organisation and worker competence.³⁸

³⁵ Collins (note 32) 6, 16.

³⁶ Dickens (note 34) 607.

³⁷ Benjamin (note 1) 6.

³⁸ W Sengenberger, "International Labour Standards in the globalised economy: obstacles and opportunities for achieving progress" in J, Craig and M, Lynk, (eds) *Globalization and the future of Labour Law*, (Cambridge: Cambridge University Press 2006) 331-355, 337-8.

In addition, by requiring employers to make “reliable assurances of fair treatment, employment security as well as mechanisms for worker participation in the management of the businesses”,³⁹ labour law fosters worker motivation and commitment to an enterprise. The latter are indispensable for the improvement of efficiency, competitiveness and productivity.⁴⁰ Sengenberger argues that worker participation through freedom of association, collective bargaining and social dialogue fosters cooperation and mutual trust, which enhance both micro- and macro-economic performance.⁴¹

Having considered the purpose of labour law at a theoretical level, it is necessary to consider some institutional perspectives about the purpose of labour law.

2.1.2 Institutional perspectives: the ILO and the South African legislature

³⁹ Benjamin (note 1) 6.

⁴⁰ J Heintz, *Globalization, economic policy and employment: Poverty and gender implications*, Employment Strategy Papers, 2006/3, Employment Policy Unit, Employment Strategy Unit (Geneva:

International Labour Office, 2006), 68; Benjamin (note 1) 6; Sengenberger (note 38) 338; K Banks, “The impact of globalization on labour standards: A second look at the evidence” in J Craig and M Lynk, (eds) *Globalization and the Future of Labour Law* (Cambridge: Cambridge University Press, 2006) 77-107, 86; G Klerck “Labour market regulation and the casualisation of employment in Namibia” (2003 Winter *South African Journal of Labour Relations* 63 , 87-8; ILO, International Labour Conference. 95th Session 2006 Report V(1) *The Employment Relationship* (Geneva: International Labour Office, 2006) , 10; K Rittich, “Rights, Risk and Reward: Governance Norms in The International Order and the Problem of Precarious Work” in J Fudge and R Owens (eds), 31-52,37.

⁴¹ Sengenberger (note 38) 338. He contends that these results come about in various ways. Firstly, workers’ contribution of their knowledge and experience improve managerial decision-making. Second, consultation and negotiation ensure that conflicting interests are considered and accommodated. Third, collective agreements brings transparency to wage-setting and avoids discontent. Fourth, collective bargaining outcomes bring about predictability, accountability and increased certainty in investment decisions.

The ILO's main objective is to "advance the opportunities for men and women to obtain decent work in conditions of freedom, equity, security and human dignity".⁴² Its main aims are to promote workers' rights, to encourage decent work opportunities, to enhance social protection and to strengthen social dialogue on work-related matters.⁴³ Decent work is at the centre of the ILO's agenda and programmes. According to the ILO:

[d]ecent work sums up the aspirations of people in their working lives. It involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men... These objectives hold for all workers, women and men, in both formal and informal economies; in wage employment or working on their own account; in the fields, factories and offices; in their home or in the community.⁴⁴

The first pillar, job creation, requires that labour law promote inter alia skills development, job creation and sustainable livelihoods.⁴⁵ Guaranteeing rights at work is the second pillar in the Decent Work Agenda and entails that labour law secure recognition and respect for the rights of workers.⁴⁶ These would include freedom of association, protection against unfair discrimination, and protection of security of employment.⁴⁷

The third pillar is extending social protection, which requires the promotion of inclusion and productivity for working men and women. These goals are secured

⁴² "About the ILO", accessed from the ILO website, www.ilo.org on 20/02/2010.

⁴³ *Ibid.*

⁴⁴ ILO "Decent Work" accessed at www.ilo.org/Themes/Decentwork on 15/09/2009 and "Decent Work for All" accessed at http://www.ilo.org/global/About_the_ILO/Mainpillars/WhatisDecentWork/lang-en/index.htm on 15/09/2009.

⁴⁵ ILO, "Decent Work Agenda" accessed from <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-en/index.htm> on 12/05/2011.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

by ensuring that working conditions are “safe, allow adequate free time and rest, take into account family and social values, provide for adequate compensation in the case of lost or reduced income and permit access to adequate health care”.⁴⁸ The final pillar is the promotion of social dialogue involving workers’ and employers’ organisations, which is essential to increasing productivity, avoiding workplace disputes and building social cohesion.⁴⁹

At the individual level, decent work contributes to one’s general well-being and empowerment as well as the realisation of one’s personal dignity and fullest potential as a human being. At the community level, it contributes to the stability of families, peace and improved standards of living in communities. At the broader societal level, decent work contributes to social justice, poverty reduction, economic prosperity and equitable, inclusive and sustainable development.

One of the key ways in which the ILO drives the Decent Work Agenda is through the adoption of international labour standards. By ratifying ILO conventions, member states undertake to ensure that they take measures to uphold the standards in their domestic spheres. The alignment of domestic labour law with these international standards is therefore important. In addition to their specific undertakings, member states by joining the ILO undertake “to work towards attaining the overall objectives of the Organization to the best of [its] resources and fully in line with [its] specific circumstances”.⁵⁰ One could also argue that in addition to South Africa must strive to realise the aspirations of workers as expressed in the Decent Work Agenda.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (Adopted by the International Labour Conference at its 86th Session, Geneva, 18 June 1998), Item 1(b).

Turning to labour law in South Africa, it is necessary to briefly consider the historical context. During the 19th and 20th centuries the British and later the apartheid governments enacted a myriad of master and servant laws, pass laws, land deprivation and other laws to secure coloured and African workers as cheap and docile labour in the agricultural, mining and manufacturing sectors.⁵¹ Labour law during that period was therefore part of a complex legal regime designed to achieve and maintain the systematic repression of black workers.⁵² This political and ideological vision informed labour market policy for decades until it gradually dismantled from the 1970s.⁵³ It was replaced by an inclusive system after the transition to a constitutional democracy in 1994.

In 1996, Parliament adopted the Constitution as the supreme law of South Africa in order to inter alia “[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”.⁵⁴ This transition involved a shift to a constitutional order in a sovereign and democratic state whose founding values included human dignity, the achievement of equality and the advancement of human rights and freedoms.⁵⁵ These democratic values are

⁵¹ D Du Toit et al *Labour Relations Law: A Comprehensive Guide* (Fourth Edition) (Durban: LexisNexis Butterworths, 2003) 6-8.

⁵² From 1924, discrimination in the labour market was entrenched through a dual industrial labour relations system which denied Africans membership in registered trade unions and excluded them from the mainstream labour relations system. This protected white workers from competition from cheaper black labour and also served the interests of employers. S Terreblanche, *A History of Inequality in South Africa: 1652-2002* (Scottsville: University of Natal Press, 2002), 10-14; Du Toit et al (note 51) 6-8.

⁵³ This began with the repeal of the master and servant laws in 1974 and the deracialisation of industrial relations law in 1981. Du Toit et al (note 51) 10-11.

⁵⁴ Preamble of the Constitution of the Republic of South Africa, 1996.

⁵⁵ Section 1 of the Constitution of the Republic of South Africa, 1996.

affirmed and the rights enshrined in the Bill of Rights⁵⁶ which is “a cornerstone of democracy in South Africa”.⁵⁷

Importantly, the Bill of Rights enshrines the right of “everyone” to fair labour practices in section 23(1). The Constitution does not define the concept of fair labour practices and the Constitutional Court has held that it is incapable of precise definition and has held that what is fair will ultimately depend on the circumstances of a particular case and that this will involve a value judgment.⁵⁸ In *National Education Health and Allied Workers’ Union v University of Cape Town and Others*,⁵⁹ the Court found that guidance may be sought from domestic experience and international experience as reflected in ILO instruments, as well as foreign instruments.⁶⁰

An analysis of the South African Constitution reveals that is more than a document specifying the rights of the country’s citizens against the state and delineating the power of the various organs of government.⁶¹ It is an instrument that is “self conscious about its historical setting” and its commitment to social transformation through the realisation of social justice and the achievement of substantive equality.⁶² According to Klare:

The Constitution envisages equality across the existential space of the social world, not just within the legal process. Implicit is an understanding that foundational law is not and

⁵⁶ Chapter 2 of the Constitution.

⁵⁷ Section 7 of the Constitution.

⁵⁸ *National Education Health and Allied Workers’ Union v University of Cape Town and Others* (2003) 24 ILJ 95 (CC), paras 33-34.

⁵⁹ *Supra* note 58.

⁶⁰ *National Education Health and Allied Workers’ Union v University of Cape Town and Others supra* para 34.

⁶¹ K Klare, “Legal Culture and Transformative Constitutionalism” (1998) 14 *South African Journal of Human Rights* 146 at 153.

⁶² *Ibid.*

cannot be neutral with respect to the distribution of social and economic power and of opportunities for people to experience self-realization.⁶³

South African society is thus committed to “the systematic implementation of policies and measures that are necessary to promote the values and achieve the social order envisaged by the Constitution of the Constitution as the highest source of legal authority”.⁶⁴ This commitment has been referred to as transformative constitutionalism.⁶⁵

The concept of transformative constitutionalism sets the context within which the right to fair labour practices must be understood.⁶⁶ An examination of country’s key labour statutes reveals how they fall within the broad project of transformative constitutionalism. It demonstrates how the legislature has given effect to the right to fair labour practices and other constitutional rights and values such as equality and dignity. This brief discussion focuses on the Labour Relations Act, the Basic Conditions of Employment Act, the Employment Act and the Skills Development Act which are the central labour statutes in South Africa.

At the centre of the legislative framework is the Labour Relations Act (LRA).⁶⁷ This Act states that its purpose is “to advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of this Act”.⁶⁸ The LRA’s primary objects include the provision of a framework for collective bargaining to determine terms and conditions of

⁶³ *Ibid* at 154.

⁶⁴ Social Law Project “Advancing domestic workers rights in a context of transformative constitutionalism”, Paper presented at the Domestic Workers’ Research Project Conference, Cape Town, 2010 9.

⁶⁵ Originally developed by Karl Klare (note 13) above. See also Social Law Project (note 64) 9.

⁶⁶ Social Law Project (note 64) 10.

⁶⁷ Labour Relations Act 66 of 1995 (LRA).

⁶⁸ Section 1 of the LRA.

employment and formulate industrial policy.⁶⁹ It also aims to promote orderly collective bargaining, sectoral level collective bargaining employee participation in decision making in the workplace⁷⁰ and effective dispute resolution.⁷¹ Importantly, (though not mentioned in the objects) the LRA defines unfair labour practices and unfair dismissals and provides for the employee's remedies in such cases.⁷²

The Basic Conditions of Employment Act (BCEA)⁷³ is another key statute which gives effect to section 23(1) of the Constitution. It aims to advance economic development and social justice by *inter alia* establishing basic conditions of employment and regulating the variation of basic conditions of employment.⁷⁴ The Employment Equity Act (EEA)⁷⁵ is another key South African labour statute. Its preamble acknowledges the "disparities in employment, occupation and income within the national labour market" resulting from apartheid. The Act thus aims to promote "equal opportunity and fair treatment in employment through the elimination of unfair discrimination".⁷⁶ It also provides for "affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce".⁷⁷

The Skills Development Act (SDA)⁷⁸ is also an important part of the legislative framework on labour matters. Its key objectives include the provision of

⁶⁹ Section 1(c) of the LRA.

⁷⁰ Section 1(c) of the LRA.

⁷¹ Section 1(d) (iv) read with the long title of the LRA.

⁷² See Chapter VIII of the LRA.

⁷³ Act 75 of 1997.

⁷⁴ Section 1 of the Basic Conditions of Employment Act 75 of 1997.

⁷⁵ Act 55 of 1998.

⁷⁶ Section 2 of the Employment Equity Act.

⁷⁷ Section 2 of the Employment Equity Act.

⁷⁸ Act 97 of 1998.

opportunities for employees to acquire new skills and to enable new labour market entrants to obtain work experience.⁷⁹ It pays particular attention to the needs of marginalized workers, including those that are historically disadvantaged, retrenched workers and workers who have difficulty in finding employment.⁸⁰ The SDA envisages that its measures will improve the quality of life of workers, as well as their job prospects and labour mobility.⁸¹ In addition, it aims to benefit employers, by enabling them to find qualified workers; to improve their productivity and competitiveness and to improve their return on investment in training and skills development.⁸²

This brief overview shows that South Africa's labour law is informed and underpinned by the constitutional values, rights and commitment to social transformation. In addition it shaped by South Africa's position as a member of the international community. More particularly, it is shaped by the country's obligations as a member of the ILO. These obligations include South Africa's specific obligations in terms of conventions that it has signed ratified.⁸³ Thus, the purpose clauses of the LRA and BCEA expressly include giving effect to South Africa's international law obligations as a member of the ILO.⁸⁴ In addition, South Africa as a member of the ILO has an obligation to uphold and promote the fundamental objectives and promote the principles of the ILO.

⁷⁹ Section 1(c) of the Skills Development Act.

⁸⁰ Sections 1(c), (e) and (g) of the Skills Development Act.

⁸¹ Section 1(a) of the Skills Development Act.

⁸² Sections 1(a) and (b) of the Skills Development Act.

⁸³ Section 231(1) and (2) of the Constitution provide that international agreements entered into by the Republic become binding on the state when they are approved (ratified) by the legislature. In order to make these international obligations operative in the national sphere, they must be enacted into law in terms of section 231(3) of the Constitution.

⁸⁴ Section 1(b) of the Labour Relations Act and section 2(b) of the Basic Conditions of Employment Act.

International law is also indirectly operative in South Africa's domestic sphere by virtue of section 233 of the Constitution which governs the interpretation of legislation. This provision requires that any court, tribunal or forum interpreting any legislation must prefer "any interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".⁸⁵ This would apply to the interpretation of all labour legislation in South Africa. The EEA expressly provides that it *must* be interpreted in compliance with South Africa's international law obligations, and particularly those contained in ILO Convention 111 concerning Discrimination in Respect of Employment and Occupation.⁸⁶

The perspectives of the ILO as expressed in its mission and Decent Work Agenda and the South African legislature expressed through the Constitution and labour legislation confirm the conclusions drawn on the theoretical perspectives in 3.1.1 above. These institutions are unashamedly biased in favour of workers. It is clear that they regard labour law as addressing the power imbalance and protecting workers not as an end, but as a means to achieving a number of desirable social outcomes. They envisage labour law not only governing, but transcending the relationship between employer and worker and driving social transformation at the level of the individual, the community and of broader society. It is submitted that the concept of decent work encompasses the universal aspirations that labour law seeks to pursue. Thus, labour law must address the areas covered by the four pillars identified in the Decent Work Agenda, namely job creation, rights at work, extending social protection and promoting social dialogue.⁸⁷

⁸⁵ Section 233 of the Constitution.

⁸⁶ Section 3(d) of the Employment Equity Act.

⁸⁷ ILO, "Decent Work Agenda" accessed from <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-en/index.htm> on 12/05/2011.

The brief outline evolution of labour law in South Africa raises two key issues about the purpose of labour law within particular jurisdictions. The first is the possibility of a disjuncture between the above notion of the *ideal* purpose of labour law in the broad sense and the *actual* purposes that the labour laws of a particular jurisdiction may seek to achieve. Apartheid labour laws provide an example of how labour law was used to achieve the most pernicious objectives. The second is that the actual purposes of labour law in a jurisdiction are not immutable and may evolve over time or change drastically as a result of *inter alia* political agendas and regime changes. While these observations capture the reality in some jurisdictions at particular points in time, they do not undermine the ideal purpose of labour law, but rather point to the need to align labour laws with the ideal.

Having canvassed the purpose of labour law, it is necessary to consider the legal parameters within which labour law operates. When does labour law apply and when does it not? Who is covered by its protective features and who falls outside of its scope? According to the classical account, labour law specifically focuses on the *employment relationship* which differs radically from other legal relationships. The next section considers the employment relationship as the gateway to labour law and how it has been conceptualised and identified in different legal systems.

2.2 THE EMPLOYMENT RELATIONSHIP: THE GATEWAY TO LABOUR LAW

There is broad consensus on the centrality of the employment relationship to the application of labour law.⁸⁸ In general terms, the employment relationship establishes the legal link between the employee or worker on the one hand and the employer, to whom the worker provides services in return for remuneration under certain conditions.⁸⁹ The employment relationship is the medium through which reciprocal rights and obligations between employer and the worker are created.⁹⁰ The employment relationship arises as a result of an agreement between the employer and the employee. The contract of employment is the framework for the employment relationship.⁹¹

Closely related to labour law's focus on the employment relationship is the binary divide between employment and self-employment which is "at the heart of the classification of work relationships".⁹² The binary divide has traditionally been used as the basis on which to draw the line between workers who should benefit from labour law protection and those who do not.⁹³ Legislatures, judges and academics all over the world have thus been preoccupied with distinguishing between an employee who is subject to an employment relationship, and an

⁸⁸ International Labour Office *The employment relationship* Report V, International Labour Conference 95th Session (Geneva: ILO: 2006) 3; C Engels "Subordinate employees or self-employed workers" in R Blanpain (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* VIIIth and revised edition (Netherlands: Kluwer Law International, 2004) 275-291 275.

⁸⁹ International Labour Office *The scope of the employment relationship* Report V, International Labour Conference 91st Session (Geneva: ILO: 2003) 22.

⁹⁰ Casale (note 8) 5.

⁹¹ International Labour Office (note 89) 22.

⁹² N Countouris, "The employment relationship: A comparative analysis" in G Casale (ed) (2011) *The*

employment relationship: a comparative overview (Geneva: ILO, 2011) 35-68 at 38.

⁹³ S Vettori, *The Employment Contract and the Changed World of Work* (Aldershot, Ashgate: 2007) 3; A Perulli, "Subordinate, Autonomous and Economically Dependent Work: A Comparative Analysis of

Selected European Countries" in G Casale (ed) (2011) *The employment relationship: a comparative overview* 137-187 137-8; Engels (note 88) 275-6; Countouris (note 92) 39.

independent contractor who is subject to the ordinary commercial law. Drawing this line and identifying the employment relationship has been the cause of much contention and confusion both within and across jurisdictions.

Section 2.2.1 considers the broad international developments in relation to the identification of the employment relationship. Section 2.2.2 focuses on the evolution of the employment relationship and the tests for identifying it in the South African context.

2.2.1 Developments on the employment relationship: comparative perspectives

This section considers the broad international trends in defining and identifying the employment relationship. It considers the legislative and common law criteria for identifying the employment relationship and distinguishing between an employee and an independent contractor. It also identifies recent legislative and other approaches that have been adopted to provide greater clarity on the identification of the employment relationship. Because the intention is to provide a broad picture of the different approaches adopted, much reliance is placed on recent international and comparative surveys of these developments. In some cases, the approaches adopted in specific jurisdictions are discussed to give a more concrete illustration of the developments.

The labour law in the statute books is the starting point for understanding the nature of the employment relationship in most jurisdictions. Most labour laws define the employment contract and may define the parties to it, that is, the employer and the employee. Definitions of the employment contract are either

substantive or descriptive and vary in the terminology and level of detail.⁹⁴ Substantive definitions establish the conditions that constitute an employment relationship and distinguish it from other contracts.⁹⁵ Thus, an employment contract may be defined as an agreement under which the worker agrees to work under conditions of submission to the employer or under the employer's direction, authority, supervision or control.⁹⁶

Descriptive definitions, on the other hand, describe the employment contract without identifying any factors that characterize it as such.⁹⁷ For example, a contract of employment may simply be defined as a contract between an employer and an employee.⁹⁸ Descriptive definitions feature in most common-law jurisdictions.⁹⁹

In most cases, the legislative definitions (whether substantive or descriptive) are insufficiently precise and the courts have played an important role in determining the exact detail and content of these terms.¹⁰⁰ Over time, the courts have developed a number of tests to identify an employment relationship and distinguish it from ordinary commercial contracts.

Initially, the main indicator was the performance of work under the employer's supervision and control in return for wages.¹⁰¹ It has been suggested in chapter two that the use of this criterion was closely linked to the theory that the capitalist firm was constituted by contracts under which workers undertook to

⁹⁴ International Labour Office (note 88) 20.

⁹⁵ Casale (note 8) 26.

⁹⁶ *Ibid.*

⁹⁷ International Labour Office (note 88) 21-22.

⁹⁸ Casale (note 8) 26.

⁹⁹ International Labour Office (note 88) 21-22.

¹⁰⁰ Countouris (note 92) 39.

¹⁰¹ Casale (note 8) 23.

submit to the control of the entrepreneur-employer. The initial requirement was the exercise of actual control over the performance of work, but this became less relevant due to the increase of technically skilled workers who determined the technical aspects of their work.¹⁰² Gradually, courts moved towards a test requiring the employer's right or ability to exercise control.¹⁰³

With time, the courts acknowledged the inadequacy of the control test as a complete test¹⁰⁴ particularly in light of socio economic changes and the proliferation of non-traditional forms of work.¹⁰⁵ A number of alternative tests have been developed. These include the integration test which seeks to determine whether the worker was a part of the organisation for which they were performing work.¹⁰⁶ Another test is the business test, which seeks to determine whether the worker is performing work for his or her own account, with a negative answer regarded as indicating that the worker is an employee.¹⁰⁷

Most jurisdictions have adopted a multi-factor test, which involves making an assessment of each situation on the basis of a combination of factors.¹⁰⁸ These include the duration and permanency of the relationship, the extent of supervisory control and authority exercised, the periodicity of payment, the party responsible for social security payment and provision of tools, integration of the work into the enterprise's normal activities, and the relative investments of the worker and the enterprise.¹⁰⁹ Although no single factor is decisive of the existence of an

¹⁰² Engels (note 88) 285.

¹⁰³ *Ibid.*

¹⁰⁴ M Freedland *The Personal Employment Contract* (Oxford: Oxford University Press, 2003) 20.

¹⁰⁵ Countouris (note 92) 51.

¹⁰⁶ Engels (note 88) 285.

¹⁰⁷ Freedland (note 104) 20.

¹⁰⁸ Countouris (note 92) 52.

¹⁰⁹ Casale (note 8) 24.

employment relationship, the subordination and control factor is often given greater weight as it is still regarded as “the hallmark of an employment relationship”.¹¹⁰

Despite the adoption of several tests for this purpose, the determination of the existence of an employment relationship remains a difficult task in most jurisdictions. A number of strategies have been developed to provide greater clarity. For example, some jurisdictions have adopted codes of practice which provide guidelines as to how to determine the existence of an employment relationship. These codes may provide a set of factors that indicate the existence of an employment relationship. They may also outline principles to guide decision makers, for instance, the emphasis on primacy of fact over form.¹¹¹

Codes of practice are usually the product of consultation and consensus between the social partners, that is, employers’ organisations, workers’ organisations and government.¹¹² Codes of good practice do not constitute legislation but are “soft law” instruments which are not binding on decision-makers. However, the latter are required to consider them when making decisions as to employment status. Ireland and South Africa have adopted codes of good practice on the employment relationship.¹¹³

In addition, some jurisdictions have introduced legislative provisions to facilitate the establishment of an employment relationship and to ease the burden of

¹¹⁰ *Ibid.*

¹¹¹ See for example Item 16 the South African Code of Good Practice on Who is an Employee, Government Gazette No 29445, General Notice 1774 of 2006 issued 1 December 2006.

¹¹² For example, the Irish and South African codes were formulated by the tripartite Employment Status Group and the National Economic Development and Labour Council respectively.

¹¹³ See South African Code of Practice, Government Gazette No 29445, General Notice 1774 of 2006, 1 December 2006; Ireland “Code of Good Practice for determining employment or self-employment status of individuals” accessed from <http://www.welfare.ie/EN/Publications/Documents/code-of-practice-on-employment-status%5B1%5D.pdf> on 12/12/2010.

proof which the worker needs to discharge in order to prove entitlement to labour protection.¹¹⁴ One approach has been to provide for a presumption of employment if certain factors are proved. Legislation may provide for a “substantive” presumption of employment, whose effect is that an employment relationship is conclusively established if specified conditions are met.¹¹⁵ Alternatively, legislation may provide for a “procedural” presumption, which means that “if certain indicators are present, the relationship is deemed to be an employment relationship” subject to the alleged employer or the objective facts demonstrating otherwise.¹¹⁶

In South Africa, amendments to the Labour Relations Act and the Basic Conditions of Employment Act created a rebuttable presumption of employment, “regardless of the form of the contract”, if one or more of certain listed factors are proved.¹¹⁷ Once one or more of these factors are proven and the presumption is triggered, the onus rests on the employer to present evidence to rebut the presumption. The factors are as follows:^{118 119}

- (a) the manner in which the person works is subject to the control or direction of another person;
- (b) the person’s hours of work are subject to the control or direction of another person;
- (c) in the case of a person who works for an organisation, the person forms part of that organisation;

¹¹⁴ International Labour Office (note 88) 28.

¹¹⁵ Casale (note 8) 28.

¹¹⁶ *Ibid.*

¹¹⁷ Section 200A of the Labour Relations Act and section 83A of the Basic Conditions of Employment Act.

¹¹⁸ Section 200A (1) LRA and section 83A of the BCEA.

¹¹⁹ However, in terms of section 200(A) of the LRA The provisions creating the presumption expressly exclude workers who earn above a certain income threshold from its benefit. The threshold is periodically determined by Minister of Labour in terms of section 6(3) of the BCEA. Benjamin argues that the rationale for this is to exclude skilled and professional workers who presumably have the bargaining power and would not be in need of labour protection. P Benjamin, “Who needs labour law? Defining the scope of legal protection” in J Conaghan, R Fischl, and K Klare, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2000), 75-92, 92.

- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
- (e) the person is economically dependent on the other person for whom he or she works or renders services;
- (f) the person is provided with tools of trade or work equipment by the other person; or
- (g) the person only works for or renders services to one person.

Another legislative mechanism that has been developed to ease the recognition of employees is the deeming of certain categories of workers as employees. Deeming provisions differ from presumptions in that while the latter focus on the particular circumstances of the particular worker, the former rely on the circumstances relating to a particular category of workers. Australia is one of the few jurisdictions where such provisions have been enacted and implemented. Several Australian states provide for the deeming of certain classes of workers as employees.

Two general approaches to deeming can be identified. In terms of the first approach, the legislature delegates the deeming power to an administrative body which decides on an ad hoc basis. This approach was adopted by Queensland's Industrial Relations Act.¹²⁰ Section 275 of that Act empowers the Queensland Industrial Relations Commission to declare a class of persons who were not employees to be employees for the purpose of the Act. The Commission may make such a declaration on application by an organisation, a state peak Council or the Minister. A statement by the then Minister of Employment, Training and Industrial Relations made it clear that section 275 was intended to recognise and protect categories of workers who were contractors but who would normally be employed as workers.¹²¹

¹²⁰ Queensland Industrial Relations Act of 1999.

¹²¹ "Developments in deeming provisions" accessed from the Mallesons Stephen Jaques Law Firm website, accessed at http://www.mallesons.com/publications/WER_Update/5515689w.htm on 01/11/2010.

In determining whether a class of persons would more appropriately be regarded as employees, the Commission may consider a number of factors.¹²² These factors relate to the nature of the work done and any circumstances that make the workers vulnerable, including the relative bargaining power of the persons, their economic dependency and the particular circumstances of low-paid workers.¹²³ In the first decision that applied the provision, the Commission declared 90 independent contractors engaged by a security contractor to be the latter's employees for the purposes of the Act.¹²⁴ This approach provides for some flexibility in allowing the Commission to make a determination on a case by case basis but fails to provide certainty from the outset.

The second approach to deeming is the blanket approach, whereby legislation stipulates the categories of workers that are to be deemed employees.¹²⁵ Schedule 1 to the Act deems inter alia milk vendors, cleaners, painters, bread vendors, outworkers in clothing trades, blinds fitters, public lorry drivers to be employees for the purposes of the application of the Act.¹²⁶ For each category of workers, the Schedule stipulates which party will be regarded as the employer of the deemed employee.¹²⁷ The schedule also provides for regulations to deem any person or class of persons to be employees.¹²⁸ While this provides for more certainty from the

¹²² Section 275(3) of the Act.

¹²³ Other factors include whether the contract was designed to avoid the provisions of labour legislation, and the circumstances of particular groups including women, young persons and outworkers.

¹²⁴ *ALHMWU v Bark Australia* [2001] QIRComm 22 (28 February 2001); 166 QGIG 254.

¹²⁵ New South Wales Industrial Relations Act 1996 No 17.

¹²⁶ See Items 1(a) to (l) of Schedule 1 to the NSW Industrial Relations Act.

¹²⁷ For instance, bread manufacturers who manufactured, prepared or baked the bread or bread rolls were taken to be the employer of the bread vendors.

¹²⁸ See Item 1(m) of Schedule 1 to the NSW Industrial Relations Act.

outset, a closed list of workers excludes unlisted categories of workers who may be equally vulnerable.¹²⁹

Thus far, the discussion has focused on the divide between employees and independent contractors and focused on how a distinction is drawn between these two categories. Some jurisdictions have moved beyond the binary distinction and recognised a third category of workers in the so-called grey zone between employees and independent contractors. This intermediate category of workers is typically recognised in terms of legislation and granted a more limited set of labour rights than employees. These third categories are recognised in the United Kingdom, Germany, Italy and certain states in Canada.

In Canada, the Ontario Court of Appeal was the first to recognise the existence of an intermediate category of a worker who deserved some degree of protection. In *Carter v Bell & Sons Canada Ltd*¹³⁰ the Ontario Court of Appeal found that the plaintiff was not the defendant's employee. It had to determine whether the plaintiff nevertheless had a right to reasonable notice of termination of an contractual relationship. The Court found that despite the commercial nature of the relationship between the parties, there were factors that indicated that the relationship was of "a more permanent character".¹³¹ The Court concluded that the plaintiff was entitled to reasonable notice. The Court's reasoning was as follows:

¹²⁹ The Australian Federal Independent Contractors Act of 2006 subsequently amended the deeming provisions in states' laws. The new Act inter alia, aims to protect the freedom of independent contractors to contract and to prevent interference with the terms of genuine independent contract agreements. Section 7 (1) of the Independent Contractors Act overrides all state and territory laws which deem certain categories of workers to be employees and grants them employment rights. However, section 7(2) preserves such state or territory laws to the extent that they relate to outworkers and those that relate to owner drivers and contract carriers.

¹³⁰ 1936 O.R. 290.

¹³¹ At para 7.

There are many cases of an intermediate nature where the relationship of master and servant does not exist but where an agreement to terminate the arrangement upon reasonable notice may be implied. This is, I think, such a case. The mode of remuneration points to a mercantile agency pure and simple, but the duties to be performed indicate a relationship of a more permanent character. The choice of sub-agents and their training, the recommendation of them to the company for appointment, the supervision of these men when appointed, all point to a more permanent relationship.¹³²

In 1986 the Woods Task Force on Labour Relations adopted a recommendation that dependent contractors be recognised and covered in terms of collective bargaining legislation.¹³³ This was in response to an article written by Harry Arthurs who argued for the recognition of dependent workers, who were economically and would find it difficult to survive without collective action.¹³⁴ Ontario is one of seven jurisdictions that adopted the concept of dependent contractors and granted them equal rights as employees in their collective bargaining legislation. Section 1 of the Ontario Labour Relations Act of 1995 defines an employee to include a dependent contractor. It then defines a dependent contractor as follows:

“dependent contractor” means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of *economic dependence* upon, and under an obligation to perform duties for, that person *more closely resembling the relationship of an employee than that of an independent contractor* (“entrepreneur dépendant”).

Two key characteristics relating to the terms and conditions under which the work is performed define a dependent contractor. The first is that the terms and

¹³² At para 7.

¹³³ *Canadian Industrial Relations: The Report of the Task Force on Labour Relations* (1969) at 30, as discussed in M Bendel, “The Dependent Contractor: An Unnecessary and Flawed Development in Canadian Labour Law” 32(4) (1982) *University of Toronto Law Journal* 374 at 375. The Report recommended that the Canada Labour Relations Board be given discretion to recognise groups of dependent contractors as bargaining agents within a specified market and grant them immunity from the criminal law of restraint of trade and from the operation of combines’ legislation.

¹³⁴ H W Arthurs, “The Dependent Contractor: A Study of the Legal Problems of Countervailing Power (1965) 16(1) *University of Toronto Law Journal* 89 at 114-5.

conditions place the dependent contractor in a position of dependency to the person for whom s/he works. The second is that the terms and conditions put the dependent contractor in a position that more closely resembles an employee than an independent contractor. Workers meeting these criteria and therefore being dependent contractors are given the same treatment as employees for the purposes of the Act, which regulates and promotes collective bargaining, employee involvement and communication between employees and employers in the workplace.¹³⁵

Dependent contractors are only recognised and afforded collective bargaining rights in terms of the Ontario Labour Relations Act. However, subsequent Court decisions have *obiter* endorsed the recognition of dependent contractors for the purposes of the common law right to reasonable notice.¹³⁶ In *McKee v Reid's Heritage Homes Ltd*¹³⁷ the Ontario Court of Appeal held that the recognition of an intermediate category was in line with the statutory category of a dependent contractor in the Ontario Labour Relations Act.¹³⁸

The United Kingdom also recognises and grants rights to workers in the intermediate grey zone between employment and self-employment. In the case of this jurisdiction, two categories of intermediate “workers” are recognised and are afforded different degrees of protection. The broader category of worker is

¹³⁵ Section 3 of the Ontario Labour Relations Act of 1995.

¹³⁶ In *Slepenkova v Ivanov* [2007] O.J. 4708 the Ontario Superior Court of Justice found that the plaintiff was an employee and entitled to Reasonable notice. In an obiter dictum, it opined that even if it had found that the plaintiff was not an employee, it would have found that she was a dependent contractor and entitled to reasonable notice at paras [61]-[64]. The circumstances and finding of the Ontario Court of Appeal were similar in *McKee v Reid's Heritage Homes Ltd* [2009] ONCA 916.

¹³⁷ [2009] ONCA 916.

¹³⁸ At Para [29].

recognised and protected by race and sex discrimination legislation.¹³⁹ The statutes define an employee to include a person working under “a contract personally to execute any work or labour”.^{140 141} It has been suggested that this definition is broad enough to cover independent contractors, provided that they perform the work personally.¹⁴²

The definition has had far reaching effects on the definition of employment in the realm of discrimination law. Davies and Freedland argue that the framers of the legislation did not intend to redefine the boundary of employment legislation in general,¹⁴³ but wished to prohibit discrimination in access to all opportunities, including those that were not characterized by inequality of bargaining power and vulnerability to economic exploitation.¹⁴⁴

The second concept of a worker is found in post-1996 UK labour legislation and is narrower than the broad worker definition in discrimination. Section 230(3) of the Employment Rights Act (ERA) of 1996 refers to a worker, defined as a person who has entered into or works under a) a contract of employment (and is therefore an employee)¹⁴⁵ and b) “any other contract... whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client of a client or customer of

¹³⁹ Section 82 of the Sex Discrimination Act 1975 and section 78 of the Race Relations Act 1976.

¹⁴⁰ *Ibid*

¹⁴¹ Although it does not specifically mention the word ‘worker’, commentators have taken this broader definition of employment to create the concept of a “worker” in the UK. See for example A C L Davis, *Perspectives on Labour Law* (United Kingdom: Cambridge University Press, 2004) 87.

¹⁴² Davis (note 141) 88.

¹⁴³ This is because it was not drafted by the Department of Employment, “the institutional embodiment of the tradition and craft of employment legislation”, but by the Home Office, where less emphasis was placed on this. Davies and Freedland (note 19) 236.

¹⁴⁴ *Ibid* at 236-7

¹⁴⁵ Section 230(1) of the Employment Rights Act of 1996 provides that an employee is an individual who has entered into or works under a contract of employment.

any profession or business undertaking carried on by the individual.” This definition has been included in subsequent UK labour legislation.¹⁴⁶

In terms of section 230(3) of the Employment Rights Act 1996, a worker is a person who has entered into or works under a contract of employment or any other contract that fulfils three criteria: that there is mutuality of obligation between the parties to the contract; that the worker must be under a duty to perform the work personally; and that the worker must not be running a business.¹⁴⁷ The criterion for establishing the third requirement is whether the worker is dependent on the alleged employer.¹⁴⁸

Workers in the narrow sense are protected by provisions which regulate working time, rest periods, leave;¹⁴⁹ minimum wages, access to wage related records;¹⁵⁰ wage protection¹⁵¹ and protected disclosures.¹⁵² They may not be discriminated against on the basis of their part-time status.¹⁵³ Workers are also entitled to be accompanied and assisted at grievance and disciplinary hearings¹⁵⁴ and their collective bargaining rights are protected.¹⁵⁵ Finally, are protected from

¹⁴⁶ The National Minimum Wage Act 1998 (section 54), the Working Time Regulations of 2000 (SI1998/1833), Regulation 2, the Part Time Workers (Prevention of Less Favourable Treatment Regulations of 2000 (SI 2000/1551), Regulation 1; The Employment Relations Act 1999, and the Employment Relations Act of 2004 (section 13).

¹⁴⁷ Davis (note 141) 87.

¹⁴⁸ *Ibid* at 88.

¹⁴⁹ See the Working Time Regulations 1998.

¹⁵⁰ Sections 1 and 9 of the National Minimum Wage Act.

¹⁵¹ Section 13 of the Employment Rights Act 1996.

¹⁵² Section 47B read with sections 43A to L of the Employment Rights Act 1996.

¹⁵³ See the Part-Time Work Regulations, which, with the exception of regulation 7, apply to workers.

¹⁵⁴ Section 10 of the Employment Relations Act 1999.

¹⁵⁵ See section 29 of the Employment Relations Act 2004.

suffering any detriment in employment as a result of exercising or enforcing any of the rights mentioned above.¹⁵⁶

Despite the extension of many rights to the narrow category of workers, they are excluded from a range of protections. These include protections relating to the provision of employment particulars, the right to guarantee payments, time off work, suspension from work, maternity and parental leave, termination of employment, unfair dismissal, redundancy payments and rights on insolvency of employers.¹⁵⁷

According to Davies and Freedland, “[t]he ‘worker category seems to be designed consciously to include those in an employee-like situation who, it is now felt, should be within the actual or potential sphere of application of the core provisions of labor law.”¹⁵⁸ The UK has thus developed a four-tier system of protection with the degree of protection increasing along the continuum. At the bottom are independent contractors who do not perform work personally and are excluded from all labour legislation. The second category covers workers in the broad sense (including independent contractors) who perform work personally and

¹⁵⁶ See regulation 31 of the Working Time Regulations, sections 23 and 24 of the National Minimum Wage Act, section 12 of the Employment Relations Act, and regulation 7 of the Part-time work Regulations. Workers are however not protected from being dismissed for reasons related to their enforcement of their rights, as such rights are restricted to employees.

¹⁵⁷ See the Employment Rights Act: Part I relating to the right to employment particulars; Part III relating to guarantee payments; Part IV relating to Sunday working for shop and betting workers; Part V providing for rights not to suffer detriment (with the exception of those relating to protected disclosures); Part VI relating to time off work; Part VII relating to suspension from work; Part VIII relating to maternity leave and parental leave; Part IX relating to termination of employment; Part X relating to unfair dismissal; Part XI relating to redundancy payments and Part XII relating to rights on insolvency of employees.

¹⁵⁸ Davies and Freedland (note 19)237-8. They argue that “The impression that this case is greatly strengthened by the admittedly somewhat opaque provision of Section 23 of the Employment Relations Act of 1999, which gives powers for the making of statutory regulations to alter the personal scope of existing employment legislation; the underlying intention appears to be to enable particular items of legislation to be extended from ‘employees’ to ‘workers’ in the above sense.”

are covered by discrimination legislation. Next are workers in the narrow sense, who perform work personally outside of a profession or a business undertaking. These are protected discrimination legislation and have a limited set of broader labour rights. Finally, employees who work in terms of a contract of employment have the full range of labour and social protections.

Germany has also recognised an intermediate category of worker. In 1974 German law recognised the notion of *arbeitnehmerähnliche Person* defined as “persons who [in spite of their formal independence] are economically dependent and, like an employee, in need of social protection”.¹⁵⁹ To be part of this category, the worker must work alone and most of her/his work must come from a single employer.¹⁶⁰ These quasi-employees enjoy procedural labour rights, protection against sexual harassment, social security contributions and protection and health and safety protection.¹⁶¹

While there is some support for recognizing that some workers who do not fall squarely within the binary divide and therefore need protection, some problems with this expanded approach have been identified. Freedland has argued that the multiplicity of categories of protected workers creates uncertainty and confusion as to how the two worker categories relate to each other and to the contract of employment.¹⁶² Another problem is the disjointed scheme of the protection, which has led to a failure to provide a rational and coherent system of protections for all workers.¹⁶³

¹⁵⁹ Countouris (note 92) 43-4.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² M Freedland, *The Personal Employment Contract* (Oxford: Oxford University Press, 2003), 23, 25-6.

¹⁶³ D McCann, *Regulating Flexible Work* (New York: Oxford University Press, 2008), 50; Davis (note 141) 91.

At the international level, the ILO attempted to adopt international instruments on contract labour in 1998.¹⁶⁴ The draft convention on contract labour defined the latter to cover inter alia “workers having a direct contractual relationship (other than a contract of employment) with the user enterprise where there was dependency or subordination similar to those characterizing an employment relationship”.¹⁶⁵ In terms of this draft convention, States would have to ensure that contract workers received adequate protection as regards working time and other working conditions, maternity protection, occupational safety and health, remuneration, and statutory social security.¹⁶⁶

The International Labour Conference failed to reach a consensus on the adoption of international instruments on contract labour in 1998. The Conference adopted a resolution to identify workers in need of protection.¹⁶⁷ This led to a series of discussions which culminated in the adoption of the ILO Recommendation 198 on the Employment Relationship in 2006.

The Recommendation encourages member states to formulate and apply a national policy for reviewing, clarifying and adapting the scope of relevant laws and regulations.¹⁶⁸ It also suggests that member states consider a number of measures in determining the existence of an employment relationship including deeming

¹⁶⁴ See International Labour Conference, 86th Session, Geneva June 1998, Report V(1) *Contract Labour*, Fifth Item on the Agenda; International Labour Conference 86th Session, Geneva, June 1998, *Contract Labour* Report V (2A), (Geneva: ILO, 1998).

¹⁶⁵ Draft article 1 of the draft Convention on Contract Labour, see International Labour Conference, 86th Session, Geneva June 1998, Report V(1) *Contract Labour*, Fifth Item on the Agenda.

¹⁶⁶ Article 6 of the first Draft Convention on Contract Labour.

¹⁶⁷ International Labour Conference, 86th Session, June 1998, “Resolution concerning the possible adoption of international instruments for the protection of workers in the situations identified by the Committee on Contract Labour”.

¹⁶⁸ Paragraph 1 of Recommendation 198.

provisions and presumptions of employment.¹⁶⁹ In addition, it lists a number of factors that could indicate the existence of an employment relationship.¹⁷⁰ The ILO's attempts to regulate contract labour and the employment relationship are discussed more fully in chapter 6 of this work.

This section covered the broad international trends in identifying an employee and distinguishing the latter from an independent contractor. It considered the substantive and descriptive statutory descriptions and the various judicial tests that have been adopted in different jurisdictions. It showed how some jurisdictions have adopted strategies to provide greater clarity and ease in identifying an employee. These include presumptions of employment, deeming provisions and the development of codes of practice on identifying an employee.

In some jurisdictions, the binary divide between employees and independent contractors has been found to be inadequate and an intermediate category of workers has been recognised and granted limited labour rights. At the international

¹⁶⁹ See paragraph 11 of Recommendation 198.

¹⁷⁰ Paragraph 13 of Recommendation 198. 13. Members should consider the possibility of defining in their Laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include:(a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;(b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.

level, a recommendation has been adopted to encourage states to take measures to provide clarity on the employment relationship. The following section briefly considers the development of the employment relationship in South Africa. It is important to place these developments in context because South Africa is the main focus of this work.

2.2.2 The development of the employment relationship in South Africa

Deakin argues that the contract of employment has evolved at a different pace and in response to different socio-economic circumstances in each jurisdiction.¹⁷¹ This section briefly considers how the contract of employment has evolved over time in South Africa. This discussion draws heavily on the work of Le Roux because it is the most authoritative account of these developments from the arrival of Jan van Riebeck in the 17th century through to the 21st century.¹⁷²

The discussion considers two main developments, namely, the development of a unified concept of employment and the establishment of a binary divide between employees and independent contractors. Le Roux's account demonstrates that these distinct but related developments took place as a result of complex interactions between various strands of law, including English law, Roman Dutch law, social security legislation, industrial relations legislation and judicial decisions.

¹⁷¹ S Deakin, "The Comparative Evolution of the Employment Relationship" in Davidov and Langille, *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford: Hart Publishing, 2006) 89-109; S Deakin, "The Many Futures of the Contract of Employment" in J Conaghan, R Fischl and K Klare, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2000), 177-196.

¹⁷² R Le Roux, "The Regulation of Work: Whither the Contract of Employment? An Analysis of the Suitability of the Contract of Employment to Regulate the Different Forms of Labour Market Participation by Individual Workers" Unpublished PhD Thesis, University of Cape Town, 2008, 22-87.

Le Roux's account shows that the coverage of the earlier legal arrangements governing workers was highly fragmented and that South African law only recognised a unitary concept of employment during the late 1970s. This was attributable to three main factors. One factor was the law's differential treatment of workers according to their race, with black workers being subject to Master and Servant Laws¹⁷³ while the "white upper class workforce" was subject to the general contract of employment and to industrial relations legislation that expressly excluded black workers.¹⁷⁴ Another factor was the application of the control test to identify an employee, which "had the effect of excluding, in particular, higher status workers from the protection of these laws".¹⁷⁵ The third factor was the application of social welfare legislation, which excluded workers on the basis of their earnings and certain categories of workers such as casuals, outworkers, subcontractors, domestic workers and agricultural workers.¹⁷⁶

Le Roux argues that the movement towards a more unified concept of an employee began in the late 1970s, with the gradual deracialisation of the labour legislation.¹⁷⁷ In addition, the abandonment of the control test as the determining factor for the existence of an employment relationship ended the exclusion of upper class workers from the protection of labour laws.¹⁷⁸ Another important

¹⁷³ These made the registration of contracts compulsory and made breaches of contract (including failure to commence work, desertion, negligence, insolence) criminally punishable. Despite their punitive nature, they also had some protective elements, for instance, the provisions for paid sick leave, notice for contracts of service for more than a month, and the provision of food and lodging for servants required to live on the masters' premises. Le Roux (note 172) 29-30.

¹⁷⁴ *Ibid* at 31-6.

¹⁷⁵ *Ibid* at 45-7.

¹⁷⁶ *Ibid* at 36-41, 68, footnote 301

¹⁷⁷ This was the result of the abolition of Master and Servant Laws in 1974 and the inclusion of black workers in industrial relations legislation following the recommendations of the Wiehan Commission of Enquiry into Labour Legislation in 1979. See *Ibid* at 40.

¹⁷⁸ *Ibid* at 40-1.

development was the more unified concept of employment in key social security statutes, which have a limited number of exclusions from their application.¹⁷⁹

Related to the development of a unitary concept of employment has been the recognition of a binary divide between an employee and an independent contractor. Most scholars trace this to the Appellate Division's decision in *Colonial Mutual Life Assurance Society Ltd v MacDonald*.¹⁸⁰ According to Le Roux, the judgment played an important role in establishing "the subsequent division between an employee and independent contractor that eventually became so deeply entrenched in South African law".¹⁸¹ Over four decades later the Appellate Division in *Smit v Workmen's Compensation Commissioner*, appears to have assumed that the distinction between employees and independent contractors originated from the Roman Dutch law *locatio conductio operarum* (contract of service) and the *locatio conductio operaris* (contract for services).¹⁸²

While Le Roux has questioned the supposed Roman-Dutch law pedigree of the binary distinction,¹⁸³ there is no doubt that these judicial developments have

¹⁷⁹ For example, the Compensation for Occupational Injuries and Diseases Act of 1993 and the Unemployment Insurance Act of 2000. See *Ibid* at 40-1.

¹⁸⁰ This decision considered a principal's vicarious liability for delicts (or torts) committed by its agent, and held that vicarious liability only arose where the agent was an employee of the principal, as opposed to a contractor or sub-contractor.

¹⁸¹ Le Roux (note 172) 46.

¹⁸² *Ibid*. See *Smit v Workmen's Compensation Commissioner* (1979) 1 SA 51 (A).

¹⁸³ She argues that had this been the case, the Courts would have made more than "mere occasional references" to it in previous decisions. She argues that instead, the *Smit* decision reflects a purist attempt to shift the dichotomy that was emerging under the influence of *Colonial Mutual* and the control test onto Roman-Dutch law categorizations. During the twentieth century, a battle raged between the purists and the pragmatists or modernists about the legitimacy influence of English law in the South African legal system. The purists regarded Roman-Dutch law as the basis of modern South African and sought to eradicate any impure influences from English system. The pragmatists were a looser group of lawyers who respected Roman-Dutch Law but nevertheless were happy to apply English law to modernize the rapidly dating Roman-Dutch law. Le Roux (note 172) at 63-4, 24-6.

had an impact on how an employee has come to be understood and defined in terms of industrial relations law. Thus, while pre-1995 labour legislation did not define employees in terms of a contract of employment, or the express exclusion of independent contractors,¹⁸⁴ the courts began to interpret the definition of employee to require the existence of a contract of employment and to exclude independent contractors.¹⁸⁵ She argues that this practice developed in the context of the establishment of an Industrial Court to hear 'unfair labour practice' disputes instituted by individual employees which made it necessary to determine the employment status of a litigant.¹⁸⁶

Consequently, the express exclusion of independent contractors from the definition of employees has been incorporated in almost all South African labour legislation.¹⁸⁷ The legislation contains a two part definition of an employee.¹⁸⁸ The first part defines an employee as a person (excluding an independent contractor) who works for another person and receives or is entitled to receive remuneration. The second part is an alternative to the first part, and defines an employee as "any other person who in any manner assists in carrying on or conducting the business of an employer".

¹⁸⁴ *Ibid* at 72-76, where she discusses the Industrial Disputes Prevention Act 20 of 1909, the Industrial Conciliation Act 11 of 1924, the Industrial Conciliation Act 36 of 1937, the Industrial Conciliation (which later became the Labour Relations Act) Act 28 of 1956.

¹⁸⁵ Le Roux (note 172) 80-82.

¹⁸⁶ The Industrial Court invariably relied on the common law understanding of an employee in terms of the dominant impression test and invoked the employee/independent contractor dichotomy.

See *Ibid* at 80-82.

¹⁸⁷ An exception is the section 1(1) (ix) of Occupational Health and Safety Act 85 of 1993, which does not expressly exclude an independent contractor from the definition.

¹⁸⁸ For instance, section 213 of the Labour Relations Act, section 1 of the Basic Conditions of Employment Act, section 1 of the Skills Development Act, section 1 of the Employment Equity Act.

Having discussed the development of a unitary concept of employment and the codification of the binary distinction, it is necessary to consider how South African courts draw the distinction between an employee and an independent contractor. Originally, the Courts applied the control test, with *Colonial Mutual Life v MacDonald*¹⁸⁹ being regarded as the *locus classicus* in this regard.¹⁹⁰ In terms of this test the employer's right to control and prescribe the work that had to be done and the manner in which it was done was essential to determining the existence of an employment relationship.¹⁹¹

The control test remained the test for employment for over four decades until the Appellate Division's decision in *Ongevallekomissari v Onderlinge Versekerings Genootskap AVBOB*.¹⁹² In that decision, the Court adopted a broader approach, holding that it was necessary to consider all the relevant facts to determine the dominant impression which the contract made upon a person. This test was confirmed in the *Smit v Workmen's Compensation Commissioner*,¹⁹³ where the Court found that it was necessary to qualify the *Colonial Mutual Life*¹⁹⁴ principle that the right of supervision and control was an indispensable requirement for the existence of a contract of service.¹⁹⁵ While the Court acknowledged that the degree of control had significant weight in determining whether a contract was one of service, it held

¹⁸⁹ *Supra*.

¹⁹⁰ Most standard labour law texts cite it as authority for this test, for instance, Du Toit et al (note 51) 69.

¹⁹¹ For a critique as to whether this decision can correctly be used as authority for the use of the control test to distinguish between employees and independent contractors see Le Roux (note 172) 43-6.

¹⁹² 1976 (4) SA 446 (A).

¹⁹³ 1979 (1) SA 51 (A).

¹⁹⁴ *Supra*.

¹⁹⁵ At 62 D.

that this was merely one factor among other potentially important factors, depending on the circumstances of a case.¹⁹⁶

The Appellate Division in the *Smit* decision also outlined the factors that may be considered when attempting to distinguish the contract of employment from the contract for services.¹⁹⁷ These have been subsequently endorsed and applied by the courts.¹⁹⁸ They are listed in the table below.

Employee	Independent Contractor
The object of the contract of service is the rendering of the personal services by the employee to the employer.	The object of the contract of work is the performance of a specified piece of work or the production of a specified result.
The contract of service places the employee at the employer's disposal and binds him/her to render personal services at the employer's behest.	The independent contractor is not (unless otherwise agreed upon) obliged to perform the work himself and may engage assistance or employees to do the work or to assist him in carrying out the work.
The employee places his services at the disposal of the employer who has a discretion to decide whether or not he wants the employee to render them.	An independent contractor is bound to perform the specified work or produced the specified result within the time agreed upon or within a reasonable time where no time has been agreed upon.
The employee is subject to the employer's will and must obey his lawful orders and instructions regarding what work must be done and how it must be performed.	The independent contractor is on an equal footing with the employer and bound by the terms of the contract as opposed to the instructions of the employer
The death of an employee terminates a contract of service.	The death of the parties to a contract of work does not necessarily terminate it.
The contract of service terminates at the end of the period of service agreed upon.	A contract of work terminates only when the specified work is completed or the

¹⁹⁶ At 62 D.

¹⁹⁷ At 61 A-H.

¹⁹⁸ See for example *SABC v MacKenzie* (1999) 20 ILJ 585 at para [9]; *Mandla v LAD Brokers* (2000) 21ILJ 1807.

specified result has been produced.

Although it has been criticized for failing to establish a test that identifies the characteristics of the employment relationship,¹⁹⁹ the dominant impression test continues to be the common-law test to determine whether a person is an employee or an independent contractor.²⁰⁰ A Court or arbitrator deciding on a matter must therefore determine the person's status after considering the totality of the circumstances in a given case. The determination of whether one is an employee or an independent contractor continues to be a contested issue.

It is beyond the scope of this work to embark on an in-depth discussion of how the courts have approached this question. However, some trends can be identified and a few are highlighted here. Courts give primary attention to the actual terms of the contract between the parties, but also consider the realities of the relationship between them to determine the nature of the relationship.²⁰¹ In other words, the Courts place "substance over form" as the determinative criterion.²⁰² The Courts have placed much emphasis on the object of the contract, with Courts emphasizing that the object of the contract of employment is to place the employee's productive capacity at the disposal of the employer.²⁰³

¹⁹⁹ See for example *SABC v MacKenzie supra* at para [8]. Brassey, "The Nature of Employment" 1990 (11) *ILJ* 889, p 920-1.

²⁰⁰ *Sanlam Life Insurance Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2009)30 *ILJ* 2903 (LAC); *St Clair and CFS Aviation CC t/a Corporate Flight Services* (2010) 31 *ILJ* 486 (CCMA); *Linda Erasmus Properties Enterprise (Pty) Ltd v Mhlongo NO & others* (2007) 28 *ILJ* 1100 (LC).

²⁰¹ *SABC v MacKenzie supra* at para [10]; *Board of Executors Limited v McCafferty* (1997) 18 *ILJ* 949 (LAC) para [25]; *Niselow v Liberty Life Association of Africa Ltd* (1998) 19 *ILJ* 752 (SCA); *Denel v Gerber* (2005) 26 *ILJ* 1256 (LAC).

²⁰² *Denel v Gerber* (2005) 26 *ILJ* 1256 (LAC).

²⁰³ *Board of Executors Limited v McCafferty supra* para [26]; *Niselow v Liberty Life Association of Africa Ltd supra*; *Bezer v Cruises International CC* (2003) 24 *ILJ* 1372 (LC); *Erasmus v Saambou Versekeringsmakelaars (Edms) Bpk & 'n ander* (1995) 16 *ILJ* 441 (IC); *White v Pan Palladium SA*

The boundary between employees and independent contractors continues to be the subject of much litigation and intense academic debate. In 2002, the legislature amended sections 200 and 83 of the Labour Relations Act and the Basic Conditions of Employment Act respectively to provide for a presumption of employment if certain facts are proved.²⁰⁴ This was followed by a Code of Good Practice on who is an employee, which was published in 2006.²⁰⁵ Both measures aim to provide more clarity and guidance to decision-makers who must decide whether or not a party before them is an employee. These have been mentioned in part 2.2.1 above and are discussed in more detail in Chapter 5.

This section considered the development of the employment relationship in the South African context. It showed that the country's social and political history shaped the development of a unitary concept of employment and the development of a binary divide between the employee and the independent contractor. The evolution of the tests for distinguishing between the two categories and identifying the employment relationship has nevertheless followed the international trends outlined in section 2.2.1 above. Further measures to clarify the scope of the employment relationship include the presumption of employment and the adoption of a code of practice.

Having considered the various approaches to categorising workers both internationally and in South Africa, the next section considers the significance of the employment relationship for the scope of labour law.

(Pty) Ltd (2006) 27 ILJ 2721 (LC); *Borcherds v C W Pearce & J Sheward t/a Lubrite Distributors* (1993) 14 ILJ 1262 (LAC).

²⁰⁴ These amendments are reflected in sections 200A and 83A of the LRA and BCEA respectively.

²⁰⁵ Government Notice 1774 of 2006.

2.3.3 The significance of the employment relationship

The discussion in the above sections showed how the law determines entitlement to labour law protection. It demonstrated that “[t]he need to categorize and define workers by employment status to determine the personal scope of labour protection and benefits ... is a central question”.²⁰⁶ The legal categories are not merely theoretical concepts reserved for abstract academic debate. They determine whether a worker can be allowed to join forces with other workers and engage with the employer as a collective. They determine whether a worker may refuse to work more than a stated number of hours per day. They determine what recourse a worker has should her/his employer inform that her/his services are no longer required. In short, the legal categories significantly affect the realities and experiences of workers.

The employee and an independent contractor are the legal categories that most legal systems have and continue to use to determine eligibility for labour law protection. There are different historical views about this. One view is that it is a universal and deeply embedded distinction that has permeated the jurisprudence and legislation of different legal systems over long periods of time.²⁰⁷ According to this view, the distinction can be traced to the Roman law distinction between the *locatio conductio operarum* whereby a worker undertook to render personal

²⁰⁶ L F Vosko, “Precarious Employment: Towards an Improved Understanding of Labour Market Insecurity” in L F Vosko, (ed) *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal and Kingston: McGill-Queen’s University Press, 2006) 3-39, 12.

²⁰⁷ Vetorri, (note 93) 3; Freedland (note 162) 14-16.

services to an employer and *locatio conductio operaris* where an independent contractor undertook to perform certain work or produce a specified result.²⁰⁸

Another view is that it developed “out of a series of profound economic, political, social and legal changes that took place in the European continent between the eighteenth and early twentieth centuries”.²⁰⁹ These changes include the industrial revolution and the evolution of the capitalist firm²¹⁰ and the development of the social welfare system in Great Britain.²¹¹ According to this view, the dichotomy is not an enduring and universal legal concept, but one that developed as a result of a particular set of social policies imposed by legislation upon a specific labour market in a certain jurisdiction at a given moment in time”.²¹² This second view, which defies the conventional wisdom, is explored in more detail below.

Proponents of the second view argue that the law’s preoccupation with this dichotomy presupposes the factual existence of a single model or unitary concept of employment that has never existed.²¹³ Their accounts point to the existence of diverse working arrangements during the period when labour law’s boundaries were being established.²¹⁴ Deakin describes the contract of employment as an artificial model imposed on a more complex reality of labour relations.²¹⁵ According to Countouris:

there is little doubt that the consolidation of an all-embracing unitary notion of the contract of employment exercising a centripetal force in respect of a vast variety of work

²⁰⁸ Vetorri (note 93) 3.

²⁰⁹ Countouris (note 92) 38.

²¹⁰ Perulli, (note 93) 137. Countouris (note 92) 38.

²¹¹ Deakin (note 171) 104; Freedland (note 162) 19-20.

²¹² Freedland (note 162) 19.

²¹³ *Ibid* at 14-16.

²¹⁴ Deakin (note 171) 104; Freedland (note 162) 17; Countouris (note 92) 38-9.

²¹⁵ Deakin (note 171) 104

relationships, was just as much a product of deeper political pressures of the nineteenth and twentieth centuries, as it was of economic ones. For instance, if it is true that the new industrial production arrangements caused a decline in 'intermediate forms of labour sub-contracting', legislation and to some extent judge-made legal principles also had an important role in further curbing the use of some of these pre-industrial employment practices, often by explicitly outlawing some of them. In the case of Britain, a country whose doctrinal analysis has been influential for other common law systems, legal history suggests that the employment relationship was largely the result of a socialising influence of [inter alia]... a wider set of political and legal pressures geared towards the decasualisation of work and discouraging heterogeneity in employment.²¹⁶

This shows that the unitary concept of employment is not a pre-existing legal phenomenon, but a social construct whose emergence was the product of political decisions based on expedience. Freedland thus refers to the "false unity of the contract of employment".²¹⁷ He argues that closely related to this, and equally false, is the assumption that "there is a strong and clear distinction between dependent employment and independent working".²¹⁸

Proponents of the second view have characterised the employment contract as an evolutionary notion that has adapted in "the face of changes in economic relations and political imperatives".²¹⁹ This was highlighted in Le Roux's account that shows that the unitary concept of employment and the binary distinction in South African law developed out of a series of economic and political changes. In addition, the courts and legislatures have progressively broadened the criteria for identifying the employment relationship, and devised a number of strategies aimed at doing so. One could argue that these developments have progressively expanded the scope of the employment relationship and thus shifted the boundary defining the binary divide.

²¹⁶ Countouris (note 92) 38-9.

²¹⁷ Freedland (note 162) 15.

²¹⁸ *Ibid* at 20.

²¹⁹ S Deakin, *The Many Futures of the Employment Contract* (CBR Working Paper No. 191, 2001) accessed from <http://www.cbr.cam.ac.uk/pdf/wp191.pdf> on 12/03/2011.

Moreover, some jurisdictions have expanded the scope of labour law more explicitly by introducing additional categories of workers who enjoy some of the protection afforded to employees. These developments point to the fact that the so-called traditional categories determining labour law's scope are hardly immutable and were never cast in stone. Rather, the legal categories are and continue to be subject to negotiation and the boundaries between them are constantly being tested and redrawn.

There can be no doubt that the choice of the employment relationship as the gateway to labour law protection has raised a number of challenges. While various legal systems have adopted measures to address these, it is evident that there are no easy solutions to these challenges. Faced with these difficulties and with the increasing number of workers who are excluded from labour law's scope, some critics have argued for the elimination of the legal categories and look beyond the employment relationship as the gateway to labour law.²²⁰ Others have argued that the problems associated with defining the employment relationship do not render it redundant, but rather point to the need to adapt it to changing environmental conditions.²²¹ These arguments are more fully canvassed in chapters five and seven,

²²⁰ J Fudge, "Self-Employment, Women and Precarious Work", in Fudge and Owens (eds), *Precarious Work, Women and the New Economy: The Challenges to Legal Norms* (Oxford and Portland, Hart Publishing, 2006), 219-220; J Fudge, "New Wine into old bottles?: Updating legal forms to Reflect changing employment forms" (1999-2000) 33 *University of Columbia Law Review* 129-152 at 148; R R Carlson, "Why the Law Still Can't an Employee When It Sees One and How It Ought to Stop Trying" (2001) 22 *Berkley Journal of Employment and Labour Law* 295 at 368; K Sankaran, "Protecting the Worker in the Informal Economy: The Role of Labour Law" in G Davidov, and D Langille, *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford: Hart Publishing, 2006) 205-220; A, Brooks, "Myth and Muddle – An Examination of Contracts for the Performance of Work" 1988) 11 *University of New South Wales Law Journal* 48 at 91-2.

²²¹ Deakin, (note 171) 104; Deakin, "The Many Futures of the Contract of Employment" (note 171) 179; G Davidov, "Reports of My Death are Greatly Exaggerated: 'Employee' as a Viable (Though

which (respectively) reflect on the challenges that the changed world of work present and make some tentative recommendations.

CONCLUSION

This chapter sought to lay a foundation for the following chapters by considering the purpose and scope of labour law. It determined that labour law's purpose is to ensure the protection of workers vis a vis their more powerful employees and thus balance the power imbalance between the parties. It established that this played a role in economic development and social transformation. Thereafter, the scope of labour law was considered and it was established that while the employment relationship remains the cornerstone, most legal systems have introduced measures to expand the concept or introduced additional categories of workers who receive limited labour law protection.

The following chapter presents a picture that runs parallel and yet seems to contradict the apparent expansion of labour law's scope. It considers the growing trend for workers to work under precarious conditions outside the protective ambit of labour law. It demonstrates that this is largely because despite its tendency to expand the scope of employment relationship, modern labour law has held on to certain assumptions about the employment relationship. Labour law has therefore failed to cover a growing number of workers who do not conform to the paradigm or model of employment that it assumes.

Over-used) Legal Concept" in G Davidov and B Langille, *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford: Hart Publishing, 2006) 133-152 151-2.

As has been shown in section 2.2.3, labour law has historically focused on one paradigm of work to the exclusion of other working arrangements and this is therefore not a new development. What is new, are the circumstances under which a growing number of workers are falling outside of this paradigm and are therefore excluded by labour law. The circumstances under which these forms of work have proliferated and their consequences for workers are the focus of chapter three.

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CHAPTER 3: THE QUEST FOR FLEXIBILITY: THE ROAD TO PRECARIOUSNESS

INTRODUCTION

Chapter two explained the purpose of labour law and discussed the employment relationship to which it applies. It outlined the evolution of the employment relationship and the development of the binary divide between employment and self-employment. Importantly, it explained how labour law in different jurisdictions has sought to redefine the employment relationship and to redraw the boundaries of the binary divide in order to expand the scope of labour law's protection.

The point of departure of this chapter seems to contradict the trend towards the more expansive approach to defining the employment relationship described in chapter two. This chapter argues that notwithstanding the progress in expanding the tests and criteria for defining employment, the employment relationship continues to be conceptualised and understood in terms of what has come to be known as the standard employment relationship, which emerged in the 1940s in Western Europe and North America. Labour law continues to assume that the employment relationship involves a full-time, indefinite relationship between the employer and the employee, where the latter works upon the premises of the former. The standard employment relationship and the circumstances under which it became the model of employment underlying labour law are discussed in part 3.1 of this chapter.

In this chapter, it is argued that labour law's focus on the standard employment relationship excludes workers engaged in other forms of work (herein referred to as non-standard forms of work) from its protection. It is argued that non-standard forms of work predated the emergence of the standard employment relationship and, have continued to exist alongside the latter. It is further argued that in the past few decades, these non-standard forms of work have proliferated as a result of the quest for greater labour market flexibility. This quest has largely been driven by the neoliberal agenda which has set the tone for economic and social policy in developed and developing countries in an era of globalisation. The quest for flexibility and the forces behind it are considered in part 3.2 of this chapter.

The next part describes the non-standard forms of work in greater detail. These include the seasonal, temporary and casual work; the employment of workers through temporary employment agencies and the use of various contracting arrangements. Instead of concentrating on the various forms of work per se, emphasis is placed on the processes that are driving the proliferation of these forms of work. These processes provide a better conceptual framework within which to understand how work is increasingly deviating from the standard employment relationship.

Casualisation explains how work is increasingly deviating from the time-related features of the employment relationship and moving more towards fixed-term, part-time and casual forms of work. By externalisation, employers are increasingly able to benefit from the labour of people who are not their employees. This may be either because workers are styled as independent contractors (and are therefore externalised by commodification of the employment relationship) or are

employed through third parties with whom the employer has a commercial contract (and are therefore externalization through externalization through intermediation)

The final part (part 3.4) argues that the term non-standard is neutral and disguises these working arrangements as the function of choices made by the workers and camouflages the ramifications of these forms of work for the workers involved. One important consequence is that work is rendered as labour law does not apply or cannot be effectively applied to the workers involved. The second, which follows from the first, is that the working conditions of these workers are precarious and insecure. It is argued that these processes undermine the protection of workers and the realization of decent work. The meaning of the terms “informal” and “precarious” will be more fully discussed to demonstrate the consequences of these processes for workers. The conclusion recapitulates the salient points raised in this chapter and draws out the implications thereof for the remainder of this thesis.

The debates and circumstances discussed in this chapter apply to both developed and developing countries and this chapter therefore adopts a global perspective. However, much reliance in the first and second parts of this chapter relies on literature from developed countries. This is because the historical analysis is grounded in North America and Western Europe and because the overwhelming majority of the literature relating to the standard employment relationship and the rise of neoliberalism and globalisation originates from these countries. However, attempts have been made to incorporate perspectives from developing countries including South Africa, particularly relating to non-standard forms of work and their consequences, as more literature from these countries is available.

3.1 THE STANDARD EMPLOYMENT RELATIONSHIP

Modern labour law is based on an employment model that has come to be known as the standard employment relationship. This part outlines the political and socio-economic context within which this model emerged. It also defines the key characteristics of the standard employment relationship. It draws extensively on the work of Standing, Vosko, Vettori, and the joint work of Stanford and Vosko because these authors provide a more detailed analysis of the circumstances under which the standard employment relationship became the norm.

The standard employment relationship emerged and became accepted as the norm for employment relations during the post War period of economic prosperity.¹ The post War period was generally marked by “the gradual extension of government commitment to labour standards and statutory protective regulations”, and the expansion of labour rights and social security.² This commitment is known as welfare state capitalism and it emerged when the international community and policy makers in North America and Western Europe “recognized the dangers of socio-economic inequality, and the global economic pressures tending to increase it”.³ Its development was accelerated by pressure from workers and employers, with the former demanding greater security and the latter driven by concerns about productivity.⁴

¹ A Kalleberg “Nonstandard employment relations: part-time, temporary and contract work” (2000) *26 Annual Review of Sociology* 341-342; J Stanford and L F Vosko, “Challenging the Market: The Struggle to Regulate Work and Income” in J Stanford, and L F Vosko, (eds) *Challenging the Market: The Struggle to Regulate Work and Income* (Montreal & Kingston: McGill Queen’s University Press, 2004) 3-30, 7.

² G Standing, *Global Labour Flexibility: Seeking Distributive Justice*, (London: McMillan Press, 1999) 55-6.

³ *Ibid* at 53.

⁴ L F Vosko, “Precarious Employment: Towards an Improved Understanding of Labour Market Insecurity” in L F Vosko, (ed) *Precarious Employment: Understanding Labour Market Insecurity in*

Welfare state capitalism was characterized by a strong state role in altering the balance of power and control between employers and workers through legislation and institutions that promoted neo-corporatist bargaining.⁵ Unionisation and collective bargaining increased substantially between the mid-1940s and mid-1970s, in the broad context of a regulatory structure that was “progressive and egalitarian, enhancing economic security and equality for some groups of workers”.⁶ During this period, labour became increasingly influential in the political sphere and was able to secure significant gains in wages and welfare benefits.⁷

The period was also marked by the expansion of the welfare state and the growth of various income security and public programmes, which helped to increase the incomes and income security of millions of workers.⁸ This was a result of the Keynesian consensus on macro-economic policy, which emphasized *inter alia*, the importance of full employment, and the role of the state as a guarantor thereof.⁹ Standing argues that although there was overall progress in most respects, the pace of progress varied from country to country.¹⁰

The dominant model of production during the era when welfare state capitalism prevailed in the North was Fordism.¹¹ Fordism was based on concepts of mass production and mass consumption, where economies of scale dictated that an

Canada (Montreal and Kingston: McGill-Queen’s University Press, 2006) 3-39, 6-7.

⁵ Standing (note 2) 53, 55.

⁶ Stanford and Vosko (note 1) 6; Standing (note 2) 57.

⁷ I Ul Haque “Globalization, Neoliberalism and Labour” United Nations Conference on Trade and Development Discussion Paper No. 173, 2004, 6.

⁸ *Ibid.* Stanford and Vosko (note 1) 6.

⁹ Ul Haque (note 7) 6; Standing (note 2) 74; Stanford and Vosko (note 1) 6.

¹⁰ Standing (note 2) 55-6.

¹¹ *Ibid* at 54. It was hoped that boosting demand for goods would create a virtuous circle that would generate employment.

enterprise needed many employees in order to survive.¹² Firms also followed the Taylorist system of a highly technical division of labour and a hierarchical job structure.¹³ This was based on internal labour markets with orderly and predictable pay systems and promotion patterns.¹⁴ Under these conditions, labour and social policy was organized around the “standard” employment relationship which was characterized by full-time hours, stable tenure and extensive non-wage benefits.¹⁵

The standard employment relationship revolved around a particular employment form, that is, full-time, permanent wage work, and entailed a bilateral relationship where the employee worked on the premises controlled by the employer.¹⁶ The standard employment relationship was also shaped by the normative model of the “gender contract”, which entailed that that the male breadwinner worked as a standard employee who earned a social wage while the woman performed unpaid care work, possibly received a secondary wage and received social benefits through her spouse.¹⁷

¹² S Vettori, *The Employment Contract and the Changed World of Work* (Hampshire, Ashgate: 2007) 8.

¹³ Standing (note 2) 54.

¹⁴ K Stone, “Flexibilization, Globalization, and Privatization: Three Challenges to Labour Rights in Our

Time” in B Bercusson and C Estlund (eds) *Regulating Labour in the Wake of Globalization: New challenges, New Institutions* (Hart Publishing: Oxford and Portland, Oregon, 2008) 115-36, 116.

¹⁵ It was therefore indirectly biased in favour of white men and to the exclusion of women, immigrants and marginalized race groups. This has led some to argue that despite the progressive and egalitarian thrust of labour regulation, it promoted inequality by focusing on standard employees. Standing (note 2) 54; Stanford and Vosko (note 1) 6.

¹⁶ Vettori (note 12) 8; Vosko (note 4) 6-7.

¹⁷ L Vosko, “Gender, Precarious Work, and the International Labour Code: The Ghost in the ILO Closet” in J Fudge and R Owens (eds) *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Oxford: Hart Publishing, 2006) 53-75, 55-56; R Crompton “Nonstandard employment, citizenship and social exclusion in Europe” in T P Boje, B van Steenbergen, S Walby (eds) *European societies: fusion or fission?* (London: Routledge, 1999) 132-14 135.

The standard employment relationship developed in industrialized countries during the post-war period and became “the normative model around which states designed and delivered labour and social policy”.¹⁸ The standard employment relationship was necessary for the socio-economic exchange of the era of Fordism.¹⁹ The exchange involved the employee receiving security and stability of employment through long-term contract in return for subordination to the employer’s control, rules and directives.²⁰ The standard employment relationship gave the employer a maximum degree of management prerogative and flexibility, allowed for the standardization of skills, and facilitated the rationalization of production and provided an efficient basis for profit generation.²¹ The standard employment relationship also had macro-economic advantages, the chief one being that it created some stability in occupational categories and skills which facilitated enterprise- and national level planning.²²

Two key points must be made about the standard employment relationship. The first is that while it may have been chosen as the norm around which labour and social security law were constructed in the post War period, it was never the only employment relationship in European and North American labour markets. Kalleberg, for example, argues that “history is replete with examples of peripheral labour forces and flexible labor markets in which work is unstable and temporary”.²³

¹⁸ Stanford and Vosko (note 1) 7.

¹⁹ Vettori (note 12) 9.

²⁰ B Langille, “Labour Law’s Back Pages” in Davidov and Langille (eds) *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oregon: Hart 2006) 13-36, 27; Vettori (note 12) 9.

²¹ G Z Mhone, “Atypical Forms of Work and Employment and Their Policy Implications” (1998) 19(2) *ILJ* 197 203.

²² *Ibid.*

²³ Kalleberg (note 1) 342.

The post War Fordist era in these countries was preceded by the practice of inside contracting where management provided machinery, factory space and raw materials and capital and entered agreements with contractors who hired and paid workers to produce goods.²⁴ While the number of standard jobs increased in industrialised countries during the post War Fordist period and became the norm by the 1950s, other forms of work continued to exist alongside it²⁵ despite policy pressures to suppress these forms of work.²⁶ Employers continued to rely on these forms of work to contain labour costs and as a buffer to protect standard employees.²⁷

The second observation is that while welfare state capitalism and the standard employment relationship originate from and reflect the socio-economic context in post War North America and Western Europe, they had an impact on social policies and labour law in other states in the South. Welfare state capitalism gradually extended its influence to low-income and developing countries in the South.²⁸ In Africa, this was largely a result of colonialism and the imposition of the labour laws of colonising states on their colonies.²⁹

The wholesale adoption of these labour laws brought with it assumptions about the socio-economic realities and assumptions underpinning the labour law

²⁴ *Ibid.*

²⁵ Kalleberg, Reskin, and Hudson, "Bad jobs in America: standard and nonstandard employment relationships and job quality in the United States" (2000) 65(2) *American Sociological Review* 256-257.

²⁶ N Countouris "The employment relationship: A comparative analysis" in G Casale (ed) (2011) *The employment relationship: a comparative overview* 35-68, 38-9.

²⁷ Kalleberg, Reskin, and Hudson (note 25) 257.

²⁸ Standing (note 12)74; Stanford and Vosko (note 1) 6.

²⁹ C Fenwick, ER Kalula and I Landau *Labour Law: A Southern African Perspective* (Geneva: International Institute for Labour Studies, 2007) 1-2.

systems existing in the colonising states.³⁰ Thus, the standard employment relationship was also adopted as the model underpinning labour legislation in South Africa³¹ and arguably in other African countries. However, the socio-economic and political context in these countries differed from that obtaining in the colonising states. It is submitted that within the African context, many workers were employed in terms of arrangements falling outside the standard employment relationship.

One of the reasons for this was the racial discrimination that underpinned colonial labour markets and labour regulation, which saw black workers as a source of cheap labour that needed to be organised and controlled.³² In this context, the majority of workers were employed on a fixed term, seasonal and casual basis and as outworkers and were excluded from labour and social security legislation.³³ The standard employment relationship was therefore the exclusive preserve of a minority of white workers.³⁴

These labour policies were reformed and deracialised by colonial governments under pressure to decolonize³⁵ and/or by new governments at the attainment of independence. These changes may have reduced the incidence of non-standard forms of work amongst black workers. Le Roux argues that the inclusion of black workers in the industrial relations system, the prohibition and

³⁰ *Ibid.*

³¹ J Theron, "The Shift to Services and Triangular Employment: Implications for Labour Market Reform" (2008) 29(1) *ILJ* 1 6-7.

³² Fenwick, Kalula and Landau (note 29) 3.

³³ R Le Roux, "The Regulation of Work: Whither the Contract of Employment? An Analysis of the Suitability Of the Contract of Employment to Regulate the Different Forms of Labour Market Participation by Individual Workers", Unpublished PhD Thesis, University of Cape Town, 2008 139-140. See also Clarke, "Checking Out and Cashing Up: The Rise of Precarious Employment in the Retail Sector" paper presented at the TIPS Annual Conference (Johannesburg, 2000), cited by Le Roux 140.

³⁴ Roux (note 33)139-140.

³⁵ Fenwick, Kalula and Landau (note 29) 3.

limitation of outwork and casual labour and the increase in full-time employment and agriculture led to the standard employment relationship began to taking hold in the late 1970s and 1980s.³⁶ It is submitted that even though such policy changes in South Africa and in other African countries may have increased the incidence standard employment, they did not completely eradicate employment relationships falling outside this standard.

The above observations point to the pre-existence of working arrangements falling outside of the standard employment relationship. They also point to the co-existence of non-standard employment relationships with the standard employment relationship even when it became a more common working arrangement. The proportion of standard to non-standard employment may be debatable and may have varied between different countries and within countries over time. Nevertheless, one can conclude that despite being the hallmark of labour law, the standard employment relationship never captured the totality of the working arrangements in industrialised and developing countries.

Whatever the position might have been during the post War Golden age, there is broad consensus that the world of work is undergoing significant changes and that more and more workers fall outside of the standard employment relationship. The boundaries defining the scope of labour law have been brought into question, as “traditional communities of workers who once aspired to or enjoyed protection no longer receive it, and the new communities with equally compelling claims to protection are likely to be denied it”.³⁷ This is a problem in both developed and developing countries.³⁸

³⁶ Le Roux (note 33) 139-140.

³⁷ H Arthurs, “What Immortal Hand or Eye? Who will Redraw the Boundaries of Labour Law?” in Davidov and Langille (eds) *Boundaries and Frontiers of Labour Law: Goals and Means in the*

In part 3.3 these developments in the world of work will be discussed in detail and it will be argued that the increasing non-protection of workers is due to the resurgence, adaptation and proliferation of old (non-standard) forms of work under new conditions. This is preceded by part 3.2, which outlines the new conditions under which these old forms of work have resurfaced. Essentially, it is argued that these forms of work have re-emerged as a result of the quest for flexibility which has been driven by the neoliberal agenda in an increasingly global environment.

Before proceeding to a detailed discussion of the neoliberal agenda, it is necessary to explain the circumstances under which the egalitarian policies embodied in welfare state capitalism were eroded. Welfare state capitalism began to decline in the North began in the 1970s, when the post War economic boom began to slow down due to a number of factors.³⁹ These include oil price shocks, high inflation, student youth protests, global financial instability, mass unemployment, and challenges posed by liberation movements in developing countries.⁴⁰ Business

Regulation of Work (Oregon: Hart 2006) 373-388, 373; International Labour Organisation, *The Scope of the Employment Relationship*, Report V(1), International Labour Conference, 91th Session, 2003 (Geneva: ILO, 2003) International Labour Organisation *The Employment Relationship*, Report V(1), International Labour Conference, 95th Session, 2006 (Geneva: ILO, 2006).

³⁸ See for example, G Klerck, "Labour Market Regulation and the Casualisation of Employment in Namibia", 2003 *South African Journal of Labour Relations* Winter, 63; Labour and Enterprise Policy Research Group, UCT, "Changing Nature of Work and 'Atypical' forms of employment in South Africa"

Unpublished Synthesis Report prepared for the Department of Labour (Cape Town, 2003); European Commission, Directorate-General for Employment, Industrial Relations and Social Affairs *Transformation of Labour and the Future of Labour Law in Europe* (Luxembourg, EC Commission, 1999) ["The Supiot Report"].

³⁹ Ul Haque (note 7) 6.

⁴⁰ Stanford and Vosko (note 1) 7; Standing (note 2) 59-69.

profits became squeezed as a result of workers' collective strength, the growth of the non-profit sector and increasing competition from other companies.⁴¹

The decline of the post-war Golden Age resulted in disenchantment with welfare state capitalism and the Keynesian policies,⁴² which had failed to deliver sustained economic growth despite earlier indications.⁴³ Consequently, intellectual debates about appropriate models of economic and social regulation took a new direction. According to Cahill, the crisis of the 1970s "provided the context in which previously marginal neoliberal ideals enjoyed new legitimacy" and began to appeal to policy makers.⁴⁴ Intellectuals who advocated libertarianism and free markets formed alliances with business and formed influential "think tanks" and began to influence politicians such as Margaret Thatcher in the UK and Ronald Reagan in the United States.⁴⁵ These events marked the emergence of neoliberalism.

3.2 THE QUEST FOR LABOUR MARKET FLEXIBILITY

This part considers the context within which the quest for flexibility in labour markets and labour law has arisen. It begins with a discussion of neoliberalism, which is the pre-eminent ideology shaping economic policy in most modern economies. The discussion outlines its fundamental precepts and its relationship with globalisation in section 3.2.1. It then discusses the neoliberal principles in

⁴¹ Stanford and Vosko (note 1) 7.

⁴² Ul Haque (note 7) 6; Standing (note 2) 58.

⁴³ E Eddy, "Beyond The Global Financial Crisis: Challenging the New Right Agenda" (2009) 28(1) *Social Alternatives* 3 3.

⁴⁴ D Cahill, "Is neoliberalism history?" (2009) 28(1) *Social Alternatives* 12 13. These ideas had been promoted since the 1940s by Friedrich von Hayek, and Milton Friedman through organisations such as the Mont Pelerin Society.

⁴⁵ F Stilwell, "The 'New Right' were wrong" (2009) 28(1) *Social Alternatives* 7 7; D, Harvey, "Neoliberalism as creative destruction" (2006) from http://www.interfacehs.sp.senac.br/images/artigos/79_pdf.pdf on 01/04/2011, 2.

labour markets and labour regulation, and the implications thereof in section 3.2.2. Essentially, it is argued that the combined effect of neoliberalism and globalisation has been a quest for flexibility in labour markets which has led to changes in perceptions about labour regulation and changes in working arrangements.

3.2.1 Neoliberalism's fundamental precepts and its link with globalisation

Neoliberalism encompasses a host of theories that dominate thinking on economic governance in both developing and developed nations and has gained greater prominence in an increasingly globalised world. It is a highly contested ideology and has been given different meanings in different contexts. This thesis adopts Harvey's definition, which defines neoliberalism as: "a theory of political economic practices that proposes that human well-being can best be advanced by the maximization of entrepreneurial freedoms within an institutional framework characterized by private property rights, individual liberty, free markets and free trade".⁴⁶

Neoliberalism aims to secure the dominance of private enterprises and investors in economic, political and social life.⁴⁷ One of its central tenets is that markets must be unfettered to ensure that they deliver the fairest distribution of income and the fairest economic results.⁴⁸ Neoliberalism's advocates claim that

⁴⁶ Harvey (note 45) 1.

⁴⁷ Stanford and Vosko (note 1) 11.

⁴⁸ W Sengenberger, "International Labour Standards in the globalised economy: obstacles and opportunities for achieving progress" in J Craig and M Lynk (eds) *Globalization and the Future of Labour Law* (Cambridge: Cambridge University Press, 2006) 331-353, 334; J Fudge and R Owens, "Precarious Work, Women and the New Economy: The Challenge to Legal Norms" in J Fudge and R Owens (eds) *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Oxford: Hart Publishing, 2006), 6.

flexibility is necessary to allow firms to adjust to new market conditions without being encumbered by unnecessary regulation.⁴⁹

The above implies that neoliberalism envisages the weakening and withdrawal of government powers. However, some commentators have shown that neoliberalism has allowed for active and powerful government regulations, provided these are favourable to businesses and investors.⁵⁰ In fact, neoliberalism recognises that the critical role of the state in creating and preserving an institutional framework that promotes individual and commercial freedom.⁵¹

According to Cahill, this apparent conflict regarding the role of the state exemplifies the “significant disparity between neoliberalism theory and practice”.⁵² He argues that “[r]ather than withering away, as neoliberal theory would have it, the state has played an active, indeed activist, role in the introduction, implementation and reproduction of neoliberalism.”⁵³ Thus, states must take measures to safeguard property rights, to secure the integrity of money, create markets, support markets, and promote free trade.⁵⁴ This entails reforms in areas such as taxation, monetary and fiscal policies⁵⁵ and the public sector.⁵⁶

⁴⁹ World Bank *Doing Business 2004* (Washington DC: World Bank and Oxford University Press, 2003) xii.

⁵⁰ Standing (note 2) 75; Stanford and Vosko (note 1) 12.

⁵¹ Harvey (note 45) 14-5.

⁵² Cahill (note 44) 12 13.

⁵³ *Ibid.*

⁵⁴ Harvey (note 45) 14.

⁵⁵ J Heintz, *Globalization, economic policy and employment: Poverty and gender implications*, Employment Strategy Papers, 2006/3, Employment Policy Unit, Employment Strategy Unit (Geneva:

International Labour Office, 2006), 57. For example, taxation should be lowered to encourage investment and economic growth. B Jessop, “From Thatcherism to New Labour: Neo-Liberalism, Workfarism and Labour Market Regulation” published by the Department of Sociology, Lancaster University at www.comp.lancs.uk/sociology/soc131rj.pdf accessed on 01/10/2009, 5.

⁵⁶ This usually involves the restructuring of state owned-enterprises, usually with the objective of

Importantly, neoliberalism advocates the promotion of free trade, through stimulating global market forces and the increased mobility of capital, goods and services.⁵⁷ Neoliberalism advocates the liberalisation of trade to enable economic actors to trade freely in the global economy. In order to consolidate this agenda, states have “participated in the construction of a regime of rules and structures governing economic relations between states”.⁵⁸ This regime includes international legal structures to provide greater security of market access to enable producers to easily enter product markets where they can operate competitively.⁵⁹ At the apex of these international legal structures is the World Trade Organisation, which is a multilateral trade system whose overriding purpose is to “help trade flow as freely as possible... because this is important for economic development and well-being”.⁶⁰

One could argue that neoliberalism has been a key driver of the process of globalisation. For the purposes of this thesis, globalisation will be understood to refer an advanced state of cross-border economic integration or interdependence, characterized by trade liberalisation, the growth of foreign investment, cross-border financial flows, cross-border production, and the resulting market competition.⁶¹ However, Heintz’s analysis shows that the relationship between neoliberalism and

privatization to reduce the government’s role in the provision of goods and services. Heintz (note 55) 57; Jessop (note 55) 5.

⁵⁷ Jessop (55) 5.

⁵⁸ Fudge and Owens (note 48) 5.

⁵⁹ K Banks, “The impact of globalization on labour standards: A second look at the evidence” in J Craig and M Lynk (eds) 79.

⁶⁰ World Trade Organisation, “What is the World Trade Organisation?”, accessed from http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm on 01/04/2011.

⁶¹ Ul Haque (note 7) 1; Stone (note 14) 119; V Marleau, “Globalization, decentralization and the role of subsidiarity in the labour setting: *in memory of Marco Biagi*” J Craig and M Lynk (eds) *Globalization and the Future of Labour Law* (Cambridge: Cambridge University Press, 2006), 108-142, 110. This thesis therefore adopts what Marleau describes as the narrow sense of globalisation, which focuses on economic changes, as opposed to the broad sense which also encompasses changes in the social, cultural and political spheres.

globalisation is not simplistic or uni-directional. He argues that globalisation and neoliberalism are closely related and mutually reinforcing, thus acknowledging that the relationship is complex and multi-directional.⁶² According to Heintz “policies of liberalization and macroeconomic stabilization are often justified as necessary adjustments to the process of global integration. At the same time, deregulation and privatization frequently facilitates the integration of markets across national borders”.⁶³

The complex interplay between neoliberalism and globalisation has also manifested itself through the International Financial Institutions (IFI), namely the World Bank (WB) and the International Monetary Fund (IMF). These have played a pivotal role in advancing the neoliberal agenda. The IFI have directly imposed neoliberal policies on borrower states by making the provisions of loans and financial assistance dependent on adoption and maintenance of these policies.⁶⁴

The IFI have also indirectly influenced states’ policies “because of their surveillance and comparisons of different market economies and role as arbiters of ‘good governance’ and best practice in respect of institutional or structural reforms”.⁶⁵ Reports such as the World Bank’s annual *Doing Business Reports* – which

⁶² Heintz (note 55) 13.

⁶³ *Ibid.*

⁶⁴ See J B Riddell, “Things fall apart again: Structural Adjustment Programmes in Sub-Saharan Africa”

(1992) 30(1) *The Journal of Modern African Studies* 53 at 53; E Van Waeyenberge, “Selectivity at work: Country Policy and Institutional Assessments at the World Bank” (2009) 21(5) *European Journal of Development Research* 792, at 799, 802, 810; K Rittich, “Rights, Risk and Reward: Governance Norms in the International Order and the Problem of Precarious Work” in J Fudge and R Owens (eds), 31-52, 32; Ul Haque (note 7) 7-8.

For a historical account of the evolution of conditionality in the World Bank and IMF, see Waeyenberge above and A Dreher *The Development and Implementation of IMF and World Bank Conditionality*, Hamburg Institute of International Economics Working Paper 165, (Hamburg: Hamburg Institute of International Economics, 2002).

⁶⁵ Rittich (note 64) 32.

rank all countries according to the ease of doing business within their borders – have become influential in this regard. The *Doing Business Reports* aim to motivate reforms through country benchmarking; to enrich international initiatives on development effectiveness and to inform theory in regulatory economics by providing the empirical foundation for theoretical work.⁶⁶ The *Doing Business* reports focus on various aspects of regulation including starting a business, employing workers, getting property, paying taxes, trading across borders and protecting investors. Rittich argues that these reports have become influential because of their quantity and the categorical terms in which they express their conclusions.⁶⁷

This section has briefly outlined neoliberalism's fundamental tenets and described its relationship with globalisation. While neoliberalism's general principles do not have a labour or employment label, it cannot be denied that they have real and far-reaching consequences for the labour market.⁶⁸ However, this thesis focuses on neoliberalism's specific principles regarding labour markets. It is to these principles that we now turn.

3.2.2 Neoliberal principles on labour market regulation

This section considers the neoliberal principles relating to labour regulation. It demonstrates that the common factor underlying these principles is the quest for labour market flexibility. The section focuses on the principles espoused by international institutions that have been influential in shaping domestic and

⁶⁶ World Bank *Doing Business 2004*, ix.

⁶⁷ Rittich (note 64) 32.

⁶⁸ H Arthurs, "Who's afraid of globalization? Reflections on the future of labour law" in J Craig and M Lynk (eds) *Globalization and the Future of Labour Law* (Cambridge: Cambridge University Press, 2006) 51-74, 57.

international economic policy in the last few decades. These relate to flexibility in wage setting, flexibility in the duration of employment and working time, flexibility in the regulation of dismissal and the promotion of active labour market policies.

The Organisation for Economic Co-operation and Development (OECD)'s *Jobs Study of 1994* documented and analysed the causes of rising unemployment in the OECD in the late 1980s and the early 1990s.⁶⁹ The report also considered possible policy solutions to the problem of unemployment. The report found that one of the major causes of rising unemployment in OECD countries was their inability to rapidly adjust to changes in markets.⁷⁰ This inability was largely attributed to rigidities in their economies, which were brought about by rigid labour legislation and social protection.⁷¹ This report used the successful economic performance of the US – having the most deregulated labour market, a factor that presumably contributed to relatively high levels of job growth – as a powerful example of the ‘flexibility agenda’.⁷²

Stanford and Vosko have described the findings and recommendations made in this report as the first statement of a coherent policy agenda towards increasing labour market flexibility.⁷³ Institutions such as the World Bank have also echoed these policy prescriptions in the *Doing Business* Reports and its Country Policy and Institutional Assessment (CPIA).⁷⁴ They have also featured prominently in arenas

⁶⁹ OECD, *The OECD Jobs Study Facts, Analyses and Strategies* (1994), accessed at <http://www1.oecd.org/sge/min/job94/part1.htm> on 10/01/2011.

⁷⁰ *Ibid* at 42.

⁷¹ *Ibid* at 25.

⁷² Stanford and Vosko (note 1) 11.

⁷³ *Ibid* at 10-11.

⁷⁴ The CPIA assesses the quality of a country's policy and institutional framework. The term “quality” refers to its conduciveness to fostering poverty reduction, sustainable growth, and the effective use of

such as the World Economic Forum, where labour market flexibility is a key criterion in determining a country's global competitiveness.⁷⁵

These institutions have recommended that states provide for wage flexibility by removing unnecessary restrictions and ensuring that wages reflect local conditions and individual skill levels and individual efforts.⁷⁶ Thus, wage levels should be primarily set at the enterprise level as opposed to centrally through legislation and industry level collective agreements.⁷⁷ These are believed to create distortions in the labour market⁷⁸ and raise wages to artificially high levels, thus impeding efficiency and restricting worker and employer flexibility to adjust to shocks such as new technologies and privatisation.⁷⁹ The WEF has argued that in addition for allowing for flexible setting of wages, efficient labour markets must “allow for wage fluctuations without much social disruption”.⁸⁰

development assistance. The World Bank uses the CPIA ratings in the allocation of its lending resources. See *World Bank Country Policy and Institutional Assessments: 2008 Assessment Questionnaire*, accessed from <http://siteresources.worldbank.org/IDA/Resources/731531181752621336/CPIA2008questionnaire.pdf> on 01/04/2011.

⁷⁵ Since 2005, the World Economic Forum has annually published a Global Competitiveness Report which is an analysis based on the Global Competitiveness Index (GCI), which the WEF describes as a

“highly comprehensive index for measuring national competitiveness, which captures the microeconomic and macroeconomic foundations of national competitiveness”. The WEF defines competitiveness as “the set of institutions, policies and factors that determine the level of productivity of a country”. The 12 pillars of competitiveness constituting the GCI are institutions, infrastructure, macroeconomic environment, health and primary education, higher education and training, good market efficiency, labour market efficiency, financial market development, technological readiness, market size, business sophistication, and innovation. See World Economic Forum, *Global Competitiveness Report 2010-2011* (Geneva: World Economic Forum, 2010) 3-8.

⁷⁶ OECD, *The OECD Jobs Study Facts, Analyses and Strategies* (1994), 45-52; World Economic Forum, *Global Competitiveness Report 2010-2011* (Geneva: World Economic Forum, 2010) 7.

⁷⁷ World Economic Forum (note 76) 425.

⁷⁸ Sengenberger (note 48) 334.

⁷⁹ *Ibid*; World Bank *Doing Business 2005* (Washington DC: Oxford University Press, 2004) 31.

⁸⁰ World Economic Forum (note 76) 7.

The international institutions have also advocated for measures to increase temporal flexibility voluntarily sought by workers and employers through temporary and part-time work.⁸¹ Another dimension of temporal flexibility relates to reducing restrictions on maximum working hours, overtime and rest periods.⁸²

Probably the most controversial recommendation made by the international institutions relates to employment security provisions. They have argued that labour markets should be allowed to function freely to reduce unemployment and provide job opportunities for more people.⁸³ According to the WEF, in order to be efficient, labour markets must have “the flexibility to shift workers from one economic activity rapidly and at low cost”.⁸⁴ These are critical of labour regulations that raise the costs of and procedures for dismissing workers as they tend to lock protected workers into relatively poor job matches which make it difficult for them to obtain better positions.⁸⁵ They argue that flexibility in hiring and firing would also ensure optimal job matching to secure the best worker for each job, thus raising productivity, efficiency and, ultimately, wages and output.⁸⁶

The neoliberal institutions claim that excessive dismissal regulations also make it difficult for employers to adjust their workforces in response to rapid technological and product market changes.⁸⁷ They also argue that these regulations tend to discourage employers from employing workers, thereby reducing the re-employment prospects of workers and increasing the chances of long-term

⁸¹ OECD (note 76) 45-52.

⁸² World Bank, *Doing Business 2011* (Washington DC: World Bank, 2010) 95.

⁸³ Ul Haque (note 7) 9; World Bank *Doing Business 2005* (note 79) 31.

⁸⁴ World Economic Forum (note 76) 7.

⁸⁵ OECD *Employment Outlook* Chapter 2 “Employment Protection and Labour Market Performance” 50-137, 69.

⁸⁶ World Bank *Doing Business 2005* (note 79) 31.

⁸⁷ OECD (note 85) 69.

employment or patterns of cycling between unemployment and temporary jobs.⁸⁸ This could exacerbate problems of labour market insecurity and social exclusion.⁸⁹ Neoliberal institutions have also recommended that greater emphasis be placed on active labour market policies with a focus on education and training systems to boost the acquisition of skills and competencies.⁹⁰ They advocate income security reform to reduce dependency on unemployment benefits and promote re-integration into employment by making the payment of benefits conditional on active job search.⁹¹

The World Bank has argued that excessive labour market regulations encourage informal enterprises and informal employment as employers seek to avoid the costs of compliance with regulations.⁹² It has argued that this in turn leads to social inequality, as labour regulations protect a few privileged outsiders while excluding the majority of workers and job seekers from protective labour and social protection.⁹³ To demonstrate this, the *Doing Business 2007* report shows that Malawi and Mozambique have strict regulations which apply to a very small minority of workers in the formal economy while the majority are excluded from protection.⁹⁴

Although the international institutions do not state this explicitly, underlying their reports is an assumption that a country's degree of labour market flexibility has an impact on investor decisions. The inclusion of labour market regulation in

⁸⁸ *Ibid* at 63.

⁸⁹ *Ibid* at 69.

⁹⁰ OECD (note 76) 45-52.

⁹¹ *Ibid*; OECD *Employment Outlook 2010* (Geneva: OECD, 2010) 170.

⁹² World Bank *Doing Business 2004* (Washington DC: World Bank and Oxford University Press, 2003), xv.

⁹³ *Ibid* xv; World Bank *Doing Business 2005* (note 79) 31; World Bank *Doing Business 2007* (Washington DC: World Bank and Oxford University Press, 2006) 21-22.

⁹⁴ World Bank *Doing Business 2007* (note 93) 20.

the assessment of “competitiveness” or the “ease of doing business” suggests that this is an important aspect considered by investors. This becomes more critical in a global economic environment where capital is scarce and mobile, leading to greater international competition to attract foreign direct investment (FDI).⁹⁵

While it is not necessary to undertake a detailed analysis of the accuracy of the neoliberal claims about labour regulation for the purposes of this thesis, a few remarks will be made here. One is that empirical studies undertaken to demonstrate the linkages between employment regulation and economic outcomes such as economic growth and investment, have yielded conflicting results⁹⁶ which shed doubts on neoliberal claims. Neoliberalism has failed to explain why Nordic countries whose economies are marked by inter alia high employment rates and world class competitiveness while their labour markets “are characterized by high rates of worker and employer organization and collective bargaining coverage, highly developed welfare states, high real wages and gender equality”.⁹⁷ This suggests that the relationship between labour regulation and economic outcomes is more complex than proponents of neoliberalism have suggested.⁹⁸

A second remark is that neoliberal accounts of labour law neglect the important role that adequate labour protection plays in ensuring social justice and improving the living standards of workers and their families. These outcomes are

⁹⁵ Banks (note 59) 79.

⁹⁶ OECD *Employment Outlook* 2004 (note 85) 63.

⁹⁷ Sengenberger (note 48) 340-341.

⁹⁸ Independent Expert Group “The World Bank Country Policy and Institutional Assessment: An Evaluation accessed from http://siteresources.worldbank.org/EXTCPIA/Resources/cpia_full.pdf on 10/10/2009 xv; P Benjamin and J Theron Costing, *Comparing and Competing: Developing an Approach for the Benchmarking of Labour Market Regulation* (Cape Town, Development Policy Research Unit, 2007) 16; Rittich (note 64) 34; A Trebilcock, “Using Development Approaches to Address the Challenge of the Informal Economy for Labour Law” in Davidov and Langille, (eds) *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oregon: Hart 2006) 75-76.

important aspects of the process of economic development, which should be understood to encompass more than employment levels, economic growth and investment levels. It is therefore submitted that a developmental trajectory that respects and promotes the rights and well-being of workers is more socially beneficial to one that relies on a race to the bottom. The arguments relating to labour law's contribution to social justice and economic development were discussed in greater detail in chapter two.

A final remark relates to an apparent shift in the World Bank's approach to labour standards in its *Doing Business* Reports. In recent years, the World Bank appears to have shifted from rewarding countries for non-existent or inadequate regulation and negatively rating countries for labour regulations merely because they limit an employer's scope for decision-making, even if they seek to promote fundamental principles such as non-discrimination which the *Doing Business* reports endorse.⁹⁹

Since 2008, the World Bank has been changing its methodology to avoid rewarding flexibility that undermines a basic level of social protection.¹⁰⁰ It has introduced new thresholds in line with ILO conventions and envisages adjusting the scoring system to ensure that it indicates excessive flexibility where countries do not regulate certain aspects of employment.¹⁰¹ While this is by no means a capitulation on the part of the World Bank, and while one may question its motives

⁹⁹ For instance, priority rules when considering retrenchments, which are aimed at protecting workers against arbitrary dismissal. For a critique of the *Doing Business* approach to scoring, see Benjamin and Theron (note 98) 34.

¹⁰⁰ World Bank, *Doing Business 2011* "Annex: Employing Workers" (Washington DC: World Bank, 2010) 94.

¹⁰¹ *Ibid.*

behind this shift, these changes signify an acknowledgement of the dangers of excessive flexibility and the value of ensuring some minimum level of protection.

While there may be some debate about neoliberalism's impact on economic outcomes within a global context, there is some consensus about that it has driven a quest for labour market flexibility which have affected governments' approaches to labour regulation and on employer's practices.¹⁰² Stone makes a strong case for the "triple onslaught" of flexibilisation, globalisation and privatization on labour standards thus:

The triple onslaught of flexibilization, which has rendered many of the old labour market skills and institutions obsolete, globalization, with its propensity for geographic dispersion, and privatization under neo-liberal ideology, with its repudiation of social legislation at the national level, all contribute to union decline and a diminishment of labour rights. Flexibilization increases employers' incentive to avoid unions because they perceive unions as promoting rigidity, uniformity, job security protections, and narrow job definitions. Globalization increases employers' opportunities to avoid unions and labour regulations in their quest for lower labour costs. In addition, global production chains, enhanced transportation and communication, and lower trade barriers give employers considerable leverage to avoid unions or limit their effectiveness. The development of transnational global governance institutions also undermines the political strength of unions at the national level. Privatization fosters policies that diminish legal protection for labour rights and collective bargaining, and contribute to rapidly growing income inequality.¹⁰³

What emerges from the above is that legal protection of workers and employment security has been reduced in two ways. The first is referred to as explicit disentitlement through legislative reforms, which have sought to make labour regulations more flexible.¹⁰⁴ At the turn of the century, Standing argued that explicit disentitlement had primarily affected industrialized countries, because their

¹⁰² C Thompson, "The Changing Nature of Employment" (2003) 24 (10) *ILJ* 1793, 1797; Rittich (note 64) 34-36; D McCann, *Regulating Flexible Work* (New York: Oxford University Press, 2008), 1; Arthurs (note 37) 373.

¹⁰³ Stone (note 14)123.

¹⁰⁴ Standing (note 2)170-171.

regulations and institutional safeguards were most developed.¹⁰⁵ More recent reports indicate that high income countries have continued to make labour laws more flexible and that some middle and low income countries have followed this trend.¹⁰⁶ Many scholars argue that greater economic integration may (at least in part) be driving a race to the bottom and weakening states as they seek to make their labour laws more acceptable to potential investors.¹⁰⁷

Among these trends is the shift from pro-collective regulations towards pro-individualistic labour regulations through policies eroding trade union influence and collective bargaining, primarily in the OECD.¹⁰⁸ Governments have also broadened the scope for flexible contract arrangements with regard to working time and the duration of employment contracts.¹⁰⁹ In addition, they have weakened and/or reduced the procedural and other restrictions on dismissal,¹¹⁰ thereby weakening employment protection.

The second way in which worker protection and employment security have been reduced is through implicit disentanglement, which entails the shifting of workers into statuses and situations involving less protection, poor working conditions and a lack of employment security.¹¹¹ Implicit disentanglement is a global phenomenon, and is evident in the move away from the use of standard, secure employment towards the use of temporary and part-time work, contracting out of

¹⁰⁵ *Ibid.*

¹⁰⁶ World Bank, *Doing Business 2005* (note 79) 26. The World Bank reports that some countries, particularly those in Sub Saharan Africa have retained or introduced stricter employment regulations. See World Bank, *Doing Business 2007* (note 93), 19 -20.

¹⁰⁷ Arthurs (note 68) 55; Fudge and Owens (note 48) 6; Standing (note 2) 68; Stone (note 14) 120-121.

¹⁰⁸ OECD, *Employment Outlook* (note 96)138; Standing (note 2) 97.

¹⁰⁹ *Ibid.* World Bank, *Doing Business 2005* (note 79) 26; World Bank, *Doing Business 2007* (note 93) 19-20.

¹¹⁰ Standing (note 2) 101; World Bank, *Doing Business 2007* (note 93)19-20.

¹¹¹ Standing (note 2) 170-171.

work, agency workers, homeworkers, teleworkers and concealed workers.¹¹² This has taken place at firm level and is closely linked to explicit disentanglement at government level, as argued by Stanford and Vosko:

The evolution of labour market policy at the governmental level has a natural analogue in the evolution of employment practices at the level of the firm. From the perspective of individual firms, 'flexibility' implies the rise of a new set of employment practices in which employers are able to alter their employment decisions more readily to accommodate fluctuations in demand, while avoiding responsibilities related to the provision of benefits and entitlements.¹¹³

Implicit disentanglement is marked by an increase in working arrangements or forms of work that deviate from the standard employment relationship which are the main focus of this thesis. Having outlined the conditions under which these non-standard forms of work have re-emerged, it is necessary to consider their characteristics more closely in part 3.3 below.

3.3 NON-STANDARD FORMS OF WORK

The discussions in parts 3.1 and 3.2 alluded to forms of work that deviate from the standard employment relationship. These have been identified as part-time work, the use of independent contractors, temporary work, and part-time work, casual work, contracting out, subcontracting, seasonal work and the use of temporary employment agencies.¹¹⁴ A number of appellations have been ascribed to these forms of work to signify their deviation from the standard employment relationship,

¹¹² A C L Davis, *Perspectives on Labour Law* (United Kingdom: Cambridge University Press, 2004) 78-9; K Klare, "The Horizons of Transformative Labour and Employment Law" in J Conaghan, R Fischl and K Klare, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2000) 3-29,17; Thompson (note 102) 171.

¹¹³ Stanford and Vosko (note 1) 12.

¹¹⁴ ES Fourie "Non-standard workers: the South African context, international law and regulation by the European Union" (2008) 4 *PER* 110 111; Kalleberg (note 1) 342.

including non-standard work, atypical, non-traditional, flexible, and contingent work.¹¹⁵ This thesis will refer to non-standard work as it speaks more directly to the deviation from the standard employment relationship.

Different approaches have been adopted towards categorizing the various forms of non-standard work and defining each particular form of work. This thesis adopts an approach that describes the three *processes* that have driven the proliferation of these forms of work will be preferred. These processes are externalization through the commodification of the employment relationship, externalization through the use of intermediaries and the casualisation of work.

These processes demonstrate how the work has come to deviate from the norm and fall outside the protective scope of labour legislation. Focusing on the processes driving change also enables one to identify the common features between some of the various forms of work. The key proponents of this approach include Theron, Godfrey, the Labour and Enterprise Policy Research Group and Le Roux and their work is extensively drawn upon.

The first process driving change is casualisation, which has fuelled a move away from the norm that work is full-time and permanent or indefinite. There are several forms of casualisation. Thus, it may involve the employment of workers on a short-term or temporary basis through fixed-term as opposed to indefinite contracts.¹¹⁶ They may be seasonal workers who are engaged to work for a specific

¹¹⁵ Kalleberg (note 1) 341.

¹¹⁶ J Giesecke "Socio-economic effects of atypical employment: evidence from the German labour market" (2009) 25(6) *European Sociological Review* 629 630; S Mills, "The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility" (2004) 25 *ILJ* 1203 1218-9.

season of the year, on fixed-term contracts.¹¹⁷ Workers may also be engaged on a part-time basis that is, working for fewer hours than those in the standard working week.¹¹⁸ Or they may be casual or contingent workers who are engaged occasionally when their services are required by the employer.¹¹⁹

While the process of casualisation does not change the workers' status as employees, it changes the composition or make-up of the workforce.¹²⁰ In theory, casualised employees fall within the scope of labour law and are entitled to the rights therein as in most cases the law does not distinguish between part-time and full-time or permanent and temporary employees.¹²¹ However, casualisation has the effect of "diluting the employment relationship" by making the application or enforcement of the rights more difficult.¹²² One reason for this may be that some provisions which have been drafted in accordance with the full-time and permanent model of employment and do not fit readily with part-time, fixed-term and casual employment.¹²³

Broadly speaking, externalisation is a process of workplace restructuring where an employer benefits from work that is performed in terms of a commercial

¹¹⁷ Mills (note 116)1218-9.

¹¹⁸ J Theron and S Godfrey, *Protecting Workers at the Periphery* Development and Labour Monograph 1/2000(Cape Town: Institute of Development and Labour Law, 2000), 9-10; Giesecke (note 116) 630; Kalleberg (note 1) 343.

¹¹⁹ Kalleberg (note 1) 355; Theron and Godfrey (note 118) 9-10.

¹²⁰ Theron and Godfrey (note 118) 9-10.

¹²¹ Du Toit et al *Labour Relations Law: A Comprehensive Guide* (Fourth Edition) (Durban: LexisNexis Butterworths, 2003) 67. An exception relates to employees who work for less than 24 hours per month for an employer. They are excluded from the Basic Conditions of Employment Act's provisions relating to working hours, leave, particulars of employment and termination of employment in terms of sections 6(1), 19(1), 28(1) and 36(1) of that Act respectively. They are also excluded from the application of the Unemployment Insurance Act in terms of section 3 of that Act.

¹²² Le Roux (note 33) 190.

¹²³ Mills (note 116)1220-1221.

contract as opposed to an employment contract.¹²⁴ Externalisation enables an employer to use a commercial contract to essentially transfer the obligations and risks that are associated with the employment relationship to another party.¹²⁵ These risks are the risks of having to pay wages and benefits despite fluctuations in labour needs, the legal risks associated health and safety and product liability, as well as the risks of industrial action by workers.¹²⁶ There are two types of externalization, which Le Roux has described as externalization through the commodification of the employment relationship, (externalization via commodification) and externalization through the use of intermediaries (externalization via intermediation).¹²⁷

Externalisation through commodification of the employment relationship involves an employer representing its relationship with a worker as a purely commercial agreement and thus converting an employee into an independent contractor or a self-employed worker.¹²⁸ In some cases, the workers are encouraged to form their own company or closed corporation and are provided with the necessary tools of trade they need to operate.¹²⁹ Despite changes in the method and manner of payment and provision of benefits, there is usually little substantive change in the day to day relationship between the employer and the worker.¹³⁰ In most cases, the worker continues to have an asymmetrical relationship with and to

¹²⁴ Labour and Enterprise Policy Research Group (note 38) 4; R Le Roux, *The World of Work: Forms of Engagement in South Africa* Development and Labour Law Monograph Series 02/2009, (Cape Town: Institute of Development and Labour Law, 2009) 18.

¹²⁵ Thompson (note 102) 1795-1796.

¹²⁶ *Ibid.*

¹²⁷ Le Roux (note 124) 18.

¹²⁸ *Ibid* at 27-8; Mills (note 116) 1204.

¹²⁹ Mills (note 116) 1203.

¹³⁰ *Ibid.*

be economically dependent on the employer, and this relationship resembles an employment relationship.¹³¹

These types of arrangements make it difficult to determine whether the relationship is an employment contract or a purely commercial arrangement, which has far-reaching consequences about whether the worker concerned is protected by labour legislation.¹³² Hyde argues that such situations arise because the law's focus on the employment relationship as the criteria for protection invites employers and workers to treat the boundary strategically and structure their relationships in ways that avoid labour legislation.¹³³

The third process driving change is the externalization of employment via intermediation. This process has given rise to arrangements involving three or more parties, thus deviating from the assumption that employment is a bilateral relationship involving two parties. These arrangements come into being by virtue of a commercial contract in terms of which an employer (styled as the client or user) benefits from the labour of workers who are employed by a third party (the intermediary).¹³⁴ They take on a diverse range of forms, including outsourcing, subcontracting, labour-only contracting, temporary employment services (also known as labour broking in South Africa) and franchising arrangements.¹³⁵

¹³¹ P Benjamin, "Who needs labour law? Defining the scope of legal protection" in J R Conaghan Fischl and K Klare, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2000), 75-92, 85. Mills (note 116)1203.

¹³² International Labour Organisation *The Employment Relationship* Report V (1) (note 37) 11.

¹³³ A Hyde, "What is Labour Law?" in Davidov and Langille (eds) *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oregon: Hart 2006) 37- 61, 47-8.

¹³⁴ H Sato "Atypical employment: a source of flexible work opportunities?" 2001 4(2) *Social Science Japan Journal* 161 163.

¹³⁵ International Labour Organisation *The Employment Relationship*, Report V (1) (note 37) 13; Mills (note 116) 1212-1218; Theron and Shane (note 118) 9-25.

The common denominator in these arrangements is that the intermediary undertakes the obligations of the employer of the workers producing the goods and providing the services. The employer usually exercises some control over the work performed by the workers and to a large extent dictates the duration and conditions of the workers' employment.¹³⁶ However, because it does not have a contractual relationship with the workers, it is absolved from the obligations related to employment.¹³⁷ The commercial contract between the employer and the employer places "a legal distance between the user of the enterprise and the risks associated with the employment relationship".¹³⁸

For the purposes of this thesis, forms of externalization by intermediation shall be classified in two broad categories, namely "job contracting" and the use of temporary employment agencies. In the case of contracting work out, commonly referred to as job contracting, the objective is to engage a person or persons to perform a specified piece of work within a specified time frame.¹³⁹ The object of the transaction is the provision of goods and services and the fee charged is based on the performance or output. There are usually no negotiations regarding how many and what kind of workers the contractor must employ to assist in the completion of

¹³⁶ European Commission, Directorate-General for Employment, Industrial Relations and Social Affairs *Transformation of Labour and the Future of Labour Law in Europe* (Luxembourg, EC Commission, 1999) ["The Supiot Report"], 9-10; J Theron, "Intermediary or Employer? Labour brokers and the triangular employment relationship" (2006) 26 ILJ 618, 619; Le Roux (note 114) 29; J Fudge, "The legal boundaries of the employer, precarious workers and labour protection" in Davidov and Langille (eds) *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oregon: Hart 2006, 295-315, 300; International Labour Organisation *The Employment Relationship*, Report V (1) (note 37) 13.

¹³⁷ European Commission ["The Supiot Report"] (note 136) 9-10; Fudge (note 136) 301.

¹³⁸ Le Roux (note 124) 18.

¹³⁹ R Moonilal, "Workers' Protection: The case of Trinidad and Tobago" Report submitted to the ILO Committee on Workers in Situations Needing Protection (2000), 25.

the work.¹⁴⁰ This is left to the discretion of the contractor who bears the responsibility for hiring and supervising the workers and completing the work.

In the case of temporary employment services or labour broking – which is often erroneously, it is submitted, referred to as labour only subcontracting¹⁴¹ – the purpose of the transaction is to provide a certain number of workers possessing specified knowledge and skills to the core enterprise for a specified time period and for a fee per worker provided. In most cases, these workers are handed over to the client, who assigns work to and supervises the workers.¹⁴² Temporary employment agencies have a contractual relationship with the workers assigned to clients and take responsibility for fulfilling the employment obligations associated with the placements.¹⁴³

Thus far, the processes of casualisation, externalization via commodification and externalization via intermediation have been described. Before proceeding to the next section, it is necessary to make two key observations about these processes. The first is that despite the presentation of these processes as distinct and separate from each other, there is considerable overlap between them.¹⁴⁴ In many cases, externalized arrangements are associated with casualisation of work.¹⁴⁵ For, instance, many temporary employment agencies and subcontractors provide

¹⁴⁰ *Ibid.*

¹⁴¹ See for example F Raday, “The Insider-Outsider Politics of Labor Only Contracting” (1998-9) 20 *Comparative Labour Law and Policy Journal* 413. Although it may be difficult to draw the line, it is submitted that the true meaning of labour only contracting or labour only subcontracting is job contracting in cases where the contractor or subcontractor does not provide materials and major equipment and provides labour only.

¹⁴² Moonilal (note 139) 26; Kalleberg (note 1) 346.

¹⁴³ Kalleberg (note 1) 346.

¹⁴⁴D McCann (note 102) 5.

¹⁴⁵ A Buzuidenhout, S Godfrey, J Theron with M Modisha, “Non standard employment and its policy implications” Unpublished Research Report submitted to the Department of Labour, (2003), 48-9; Le Roux (note 124) 29.

employment on a fixed-term or casual basis.¹⁴⁶ The implications of the overlapping processes will be considered in section 3.4 below.

The second observation is that while these forms of work have recently received increasing attention, there is evidence that most of the forms of work discussed above have existed in some form or another over the past two centuries.¹⁴⁷ Thus, as will be demonstrated more fully in respect of contracting work out in Chapter Four, the so-called “changing world of work” cannot be associated with the invention of entirely novel forms of work. Rather, the term is more reflective of the resurgence, adaptation and proliferation of old forms of work under new conditions.

The new conditions – which have been described in part 3.2 – include the ascendancy neo-liberal principles which have encouraged labour market flexibility to promote greater employment, promote firm efficiency, and thereby promote economic growth and prosperity.¹⁴⁸ Neoliberalism has gained credence in the context of globalisation, technological changes and increased market competition between firms in domestic and international markets.¹⁴⁹ Under these conditions, firms have sought greater flexibility in their operations to enable them to compete more effectively in rapidly changing markets. Many firms have therefore adopted

¹⁴⁶ *Ibid*; Mills (note 116) 1218.

¹⁴⁷ Mhone (note 21) 207-8. See S Deakin, “The Comparative Evolution of the Employment Relationship” in Davidov and Langille (eds) *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oregon: Hart 2006), 89 -109 at 107; Vosko (note 4) 5-6; Le Roux (note 33) 139-40; Kalleberg (note 1) 341 for discussions on Britain, Canada, South Africa and the United States respectively.

¹⁴⁸ Rittich (note 64) 34-6. These institutions include the World Bank. McCann (note 102)1.

¹⁴⁹ L Beneria “Shifting the risk, new employment patterns, informalization and women’s work” (2001) 15(1) *International Journal of Politics, Culture and Society* 19 19; Vettori (note 12)15; Fudge and Owens (note 48) 7; International Labour Organisation, *The Scope of the Employment Relationship*, Report V(1) (note 37)11; A Kalleberg, “Precarious work, insecure workers” (2009) 74(1) *American Sociological Review* 1 2.

the notion of a flexible workforce that is variable in size and can be reconfigured to rapidly respond to market changes.¹⁵⁰

This part has described the three processes driving the increase in non-standard work, namely casualisation, externalisation by commodification and externalisation by intermediation. The following part considers the character of non-standard work and their implications for the workers involved.

3.4 NON-STANDARD WORK AS PRECARIOUS WORK

Non-standard work is termed as such because of its deviation from the standard employment relationship.¹⁵¹ The label “non-standard” is neutral and does not cast these forms of work in a necessarily positive or negative light. This part canvasses literature from both developing and developed countries to determine how non-standard work has been characterised. It is acknowledged that some workers have positive experiences with non-standard work. However, it will be shown that for the majority engaged in non-standard forms of work, the work has negative consequences and can be characterized as precarious. It is the latter group of workers that form the focus of this thesis.

A number of studies have been conducted to determine the implications of non-standard work for the workers involved and consequences for broader society. They have been carried out in different countries over different periods and covering differing forms of work and in different industries therefore the results have been varied. Some of them have involved subjective analysis of workers

¹⁵⁰ Davis (note 112) 78 - 79; Klare (note 112) 17; Thompson (note 102) 1797.

¹⁵¹ McCann (note 102) 7; Fudge and Owens (note 48)10.

perceptions while others have been objective analyses and yet others have sought to assess perceived outcomes in light of actual outcomes. Some have been economic analyses while others are sociological. All these factors have an impact on the conclusions drawn in the various studies.

Most of the literature recognises that non-standard forms of work may provide some workers with flexibility, diversity, greater control over one's work and independence and that these workers may engage in non-standard work as a matter of choice.¹⁵² Thus, it has been argued that casualised forms of work have enabled working people (and especially women) to balance their participation in the labour market with their childcare and other caring responsibilities.¹⁵³ The literature has also recognised that for some workers, these non-standard forms of work may be well-paid and offer favourable working conditions.¹⁵⁴ These workers are typically highly skilled or "knowledge workers" whose possession of much-needed skills have enabled them to change the power dynamics traditionally associated with the standard employment relationship and thereby supersede it.¹⁵⁵

The model of the knowledge worker at the high end of the labour market represents a small segment of workers performing non-standard work.¹⁵⁶ For the majority of workers who fall at the lower end of the labour market, non-standard

¹⁵² A Makarevich "Gender inequality in the new economy: a study of occupational sex segregation in standard and nonstandard employment regimes" accessed from the All Academic Research website http://research.allacademic.com/meta/p_mla_apa_research_citation/2/4/1/8/2/p241820_index.html?phpssid=0cf748d53bc7c3b1ae21ec607eddc61 on 21/03/2011 at 2, 7; Sato (note 134) 162-3.

¹⁵³ R Crompton "Nonstandard employment, citizenship and social exclusion in Europe" in T P Boje, B van Steenbergen, S Walby (eds) *European societies: fusion or fission?* (1999) 132-147 at 141-2.

¹⁵⁴ P M Evans "(Not) taking account of precarious employment: workfare policies and lone mothers in Ontario and the UK" (2007) 41(1) *Social Policy and Administration* 29 at 31; Fudge and Owens (note 48) 7-8.

¹⁵⁵ Makarevich (note 152) 7; Fudge and Owens (note 48) 7-8; Rittich (note 64) 37.

¹⁵⁶ Rittich (note 64) 38.

work is better described as being precarious.¹⁵⁷ Precarious is a complex and multi-faceted phenomenon¹⁵⁸ and will be defined in terms of five key criteria for the purposes of this thesis.

Precarious work is characterized by job insecurity and instability¹⁵⁹ which involve short-term jobs and/or a high risk of job loss.¹⁶⁰ It is also associated with income insecurity, in the form of irregular, unpredictable and/or very low wages.¹⁶¹ In addition, precarious work may involve unpredictability of lack of control over one's working hours and the denial of entitlements such as paid annual and sick leave.¹⁶² Workers in precarious work have little or no access to social protection and benefits such as unemployment insurance, pension funds, or workers' compensation schemes.¹⁶³ Furthermore, precarious work presents little or no opportunities for training, and thus for career development or upward mobility.¹⁶⁴

Importantly, precarious work is marked by involuntariness and vulnerability on the part of the workers who perform it. Research from developed and developing

¹⁵⁷ Evans (note 154) 31; McCann (note 102) 7.

¹⁵⁸ Fudge and Owens (note 48) 11-12.

¹⁵⁹ O Isigicock "Precarious work versus decent work: the precariousness the perspectives of service sector employees in Turkey" (2009) 11(4) *Industrial Relations and Human Resources Journal* 79 82-83.

¹⁶⁰ McCann (note 102) 7; Mills (note 116) 2.

¹⁶¹ A Kritzinger, "Global markets, employment restructuring and female labourers on Western Cape fruit farms" (2005) 37(1) *Acta Academica* 99 103, 113; Isigicock (note 159) 82-83; Evans (note 154) 31.

¹⁶² A E Kim and I Park, "Changing trends of work in South Korea: the rapid growth of underemployment and job insecurity" (2006) 46(3) *Asian Survey* 437 444-5; P Barbieri and S Scherer, "Labour Market Flexibilization and its Consequences in Italy" (2009) 25(6) *European Sociological Review* 677 679 G Klerck "Labour market regulation and the casualisation of employment in Namibia" (2003) *South African Journal of Labour Relations* 63 81.

¹⁶³ Kritzinger (note 161) 103; Barbieri and Scherer (note 162) 679; E A Fayankinnu and O A Alo "Globalisation and work: an insight from the Ghananian and Nigerian Women Experience" (2007) 5(1) *Gender and Behaviour* 1129 1141.

¹⁶⁴ Barbieri and Scherer (note 162) 679; Klerck (note 162) 81.

countries shows that vulnerable groups such as women,¹⁶⁵ young people,¹⁶⁶ migrant workers (both documented and undocumented) and historically marginalized racial and ethnic groups¹⁶⁷ are disproportionately represented amongst those performing precarious work. Their vulnerability is exacerbated in societies in which low-skilled and unskilled workers are dispensable due to high levels of unemployment or underemployment.¹⁶⁸

It is suggested that precarious work is characterized by the absence of sufficient employment opportunities, inadequate social protection, the denial of rights at work and shortcomings in social dialogue. These are the key indicators of a decent work deficit, which is understood as the gap between the realities of the working conditions and the aspirations set out in the Decent Work Agenda outlined in chapter two.¹⁶⁹ Thus, precarious work can be understood or expressed in terms of the decent work deficit.

The above discussion demonstrates that non-standard workers whose work is precarious do not enjoy the benefit of labour law's protection. Their work can therefore be described as informal work, which can be defined as work to which

¹⁶⁵ Fayankinnu and Alo (note 163) 1141; Kim and Park (note 162) 447; Kritzinger (note 161) 103; Evans (note 154) 29.

¹⁶⁶ Barbieri and Scherer (note 162) 679.

¹⁶⁷ L McDowell, A Batitzky and S Dyer "Precarious work and economic migration: emerging immigrant divisions of labour in immigrant divisions of labour in Greater London's service sector" (2009) 33(1) *International Journal of Urban and Regional Research* 3 19-20; M Castells and A Portes, "World Underneath: the Origins, Dynamics, and Effects of the Informal Economy" in A, Portes, M, Castells and L.A Benton, (eds) *The Informal Economy: Studies in Advanced and Less Developed Countries* (London: Johns Hopkins University Press, 1989); NALEDI, "Casualisation of Employment in Southern Africa", (2006) unpublished research report accessed at www.naledi.org.za 12; Clarke et al 'Workers' Protection: update of the situation in South Africa' (Geneva: ILO, 2002) 27; Kalleberg (note 149) 9.

¹⁶⁸ Mhone (note 21) 207-8; Klerck (note 162) 81.

¹⁶⁹ International Labour Conference, Report of the Director General *Reducing the decent work deficit, a global Challenge* Report 1(A) of the 89th Session of the International Labour Conference, (Geneva, June 2001), section 1.2.

labour law is not applied in law or enforced or complied with in practice.¹⁷⁰ Thus, casualised workers may broadly qualify as employees but the law may impose qualification criteria that exclude casual, temporary and part-time workers. Alternatively, the law may include them but the workers may experience difficulties with enforcing the law. Those who are engaged as independent contractors in the context of externalization via commodification are unprotected due to the legislative exclusion of independent contractors from their ambit. In the case of externalization by via intermediation, workers may lack protection due to their inability to enforce their labour rights against the party that controls the conditions and duration of their employment.

It is submitted that if precariousness arises in the context of one of these processes operating in isolation, precariousness is magnified where these processes intersect and overlap.¹⁷¹ Workers who are caught at the intersection between the different processes are therefore likely to be even less protected and more vulnerable.¹⁷² They are also at a disadvantage because of the complexity of identifying appropriate ways to regulate and protect them.¹⁷³

Precariousness is also entrenched and exacerbated by the fact that the workers under these arrangements are difficult to organize and are therefore unable to participate in collective action to safeguard their interests and improve their position. Lack of organisation may be a result of trade unions' failure to adapt their organizing strategies to move beyond the paradigm of the standard

¹⁷⁰ R Hussmans "Statistical definition of employment: Guidelines endorsed by the Seventeenth International Conference of Labour Statisticians (2003)" (Bureau of Statistics, International Labour Office) accessed from <http://www.ilo.org/public/english/bureau/stat/download/papers/def.pdf> on 01/06/2011 6.

¹⁷¹ The intersection of these processes was mentioned in section 3.2 above.

¹⁷² Le Roux (note 124) 29; McCann (note 102) 7.

¹⁷³ McCann (note 102) 5-6.

employment relationship.¹⁷⁴ Some trade unions have also been found to be indifferent¹⁷⁵ and even hostile towards non-standard workers as they may view them as a threat to their protected status.¹⁷⁶ Workers under precarious arrangements may also avoid trade unions out of fear of reprisal by employers who may be hostile towards them.¹⁷⁷ Workers may also have doubts that they will benefit from union membership due to the precariousness or short-term nature of their work.¹⁷⁸

Thus far, the implications of precarious work have been considered only in relation to the workers and their immediate working conditions. The prevalence and proliferation of precarious work has wider socio-economic consequences for the labour market and broader society. First, it has fostered the stratification of the labour force, with non-standard workers experiencing the most precarious conditions at the lower levels of the hierarchy.¹⁷⁹ Secondly, the over-representation of certain demographic groups amongst precarious workers means that the risks and disadvantages of this work are concentrated amongst these groups.¹⁸⁰ This deepens social inequality along gender, age, ethnic and other lines, thus undermining social cohesion, and entrenching the social exclusion of these groups.¹⁸¹

¹⁷⁴ P H Bamu, and S Godfrey, *An analysis of collective bargaining arrangements in the construction industry* (Cape Town: Labour Research Service, 2009) 19-23.

¹⁷⁵ *Ibid.*

¹⁷⁶ Klerck (note 162) 75-6.

¹⁷⁷ Benjamin (note 131) 75-92, 85-6; Mills (note 116) 1220-1221; Kritzing (note 161) 117-8.

¹⁷⁸ S Ndungu and J Theron, "What kind of jobs? Creating opportunities for decent work" Research report submitted to the International Labour Organisation by NALEDI and the Labour and Enterprise Policy Research Group (2008), 125.

¹⁷⁹ Kritzing (note 161) 110.

¹⁸⁰ Giesecke (note 116) 642.

¹⁸¹ Crompton (note 153) 137; Barbieri and Scherer (note 162) 689; Giesecke (note 116) 642.

The discussion in this part has emphasized that the majority of non-standard workers experience precarious working conditions and do not enjoy the protection afforded by labour law. These workers experience decent work deficits as their reality falls short of the vision of the Decent Work Agenda. This is problematic because decent work is not intended to be for the benefit of a privileged few, but should cover all workers regardless of their status and where they work. Thus, this paper focuses on non-standard work to the extent that their work is precarious and falls short of the goals set out in the Decent Work Agenda. Its emphasis will therefore be on workers at the lower end of the labour market, that is unskilled and low-skilled workers, to the exclusion of more skilled knowledge workers.

CONCLUSION

Chapter two discussed the purpose of labour law and the employment relationship to which it applies. This chapter considered the conditions under which fewer workers are enjoying the protection and benefits that labour law offers and are working under precarious conditions. It argued that the quest for labour market flexibility has placed workers on the road to greater precariousness.

This chapter began by outlining the standard employment relationship, characterised by a full-time, indefinite, bilateral relationship where the employee works on the premises of the employer. This is the model around which labour law was constructed in the post War period and which continues to underpin modern labour law. The discussion pointed to the fact that other non-standard forms of work have historically preceded and existed alongside the standard employment relationship. More recently, however, the standard employment relationship seems to have been overtaken by non-standard forms of work. These have re-emerged and

proliferated as a result of the quest for labour market flexibility which has been fuelled by the ascendancy of the neoliberal agenda in an increasingly integrated world economy.

It then proceeded with a discussion of the three processes that have been driving the greater use of non-standard forms of work, namely casualisation, externalization by commodification and externalization by intermediation. The final part of the chapter showed that most non-standard workers at the lower end of the labour market work under precarious conditions characterized by decent work deficits. They therefore constitute the modes of implicit disempowerment of workers which has been associated with the neoliberal agenda and globalisation.

An important issue highlighted in this chapter was the possible intersection of different processes driving non-standard work. It was suggested that workers caught at the intersection of these processes are amongst the most vulnerable and experience greater precariousness. These observations are critical to understanding contracting work out to self-employed workers, which is the main focus of this thesis. This practice involves the intersection of at least two processes, namely externalization via commodification and externalization via intermediation. Chapter four considers contracting work out to self-employed workers.

CHAPTER 4: CONTRACTING WORK OUT TO SELF-EMPLOYED WORKERS

INTRODUCTION

Chapter two set the context for this thesis by analysing the tension between the protective purpose of labour law and the drive for greater flexibility in employment relations and in labour regulation. Chapter three then discussed the broad changes taking place in the world of work within this backdrop. It identified the three processes driving change, namely externalization by commodification of the employment relationship, externalization through the use of intermediaries, and casualisation of work. It pointed out that these processes do not necessarily take place in isolation, but often interact in complex ways.

As highlighted in the conclusion of the latter chapter, the practice of contracting work out to self employed workers can be described as the point where externalisation via commodification intersects with externalisation via intermediation. This chapter narrows down the discussion to focus on this practice, which is the core subject of this thesis. This chapter aims to paint a concrete picture of the development of this practice in the South African context. It considers the factors that have brought workers like Taryn and Jabu to work under this practice. It also considers the circumstances under which workers like Taryn and Jabu labour under this practice and the consequences of the practice for them and the workers they employ to assist them.

The discussion begins with a historical account of the practice in Britain where it first developed in the 18th century and was known as the gang labour or butty system. In South Africa, the practice first emerged on the mines in the late 19th century before it was abolished in 1922. The practice has emerged in a number of sectors since the 1990s. The discussion then focuses on the contemporary use of this practice by South African employers, drawing from empirical research in the clothing, construction, mining and transport sectors. The historical account and the empirical evidence are discussed in part 4.1 of this chapter.

Part 4.2 of the chapter identifies the forces that are driving the proliferation of this practice in South Africa. Many businesses have justified it on the grounds that it supports promotes small business development black economic empowerment (BEE) policies. The nature and import of these policies are discussed. This is followed by an analysis of contemporary discourse on the South African labour market regulation, which has been dominated by claims that the South African labour legislation is inflexible and hampers employment growth and global competitiveness. It is suggested that, although highly questionable, these sentiments have driven employers to seek ways of avoiding the costs and risks imposed by labour legislation.

Part 4.3 considers the consequences of the practice of contracting out as the point of intersection between the two forms of externalisation. It shows how externalisation by commodification has effectively excluded self-employed workers from the scope of labour protection by designating them as independent contractors. It considers how externalisation via intermediation designates the self-employed worker as the employer of the workers he purports to employ despite the fact that s/he is not in a position to fulfil the obligations that are associated with

employment. These are externalized through intermediation, with the self-employed worker being the intermediary.

This part also argues that the externalisation of self-employed workers and their workers also gives rise to the casualisation of the labour of self-employed workers and their workers. This therefore adds an additional dimension to the practice under scrutiny. The combined effect of these processes is that self-employed workers and their workers labour under precarious conditions and do not enjoy basic labour protections relating to regulation of working time, unfair dismissal, minimum wages and statutory social security benefits. One can therefore characterise the practice as part of a process leading to the informalisation of the work of self-employed workers and their workers.

The key finding that will emerge from this chapter is that self-employed workers and their workers who labour under the practice under scrutiny are not protected by labour law. The discussion will demonstrate how the application of labour law is excluded and hampered in relation to self-employed workers like Taryn and Jabu and their workers. The analysis in this chapter will therefore provide a basis on which to consider the extent to which South African labour law has developed rules that recognise and regulate this multi-dimensional practice. The latter enquiry is undertaken in chapter five.

4.1 THE PRACTICE OF CONTRACTING WORK OUT: THE EVIDENCE

A number of changes in the South African labour market have been identified over the last two decades. One such trend is that many established, formal businesses are

increasingly contracting work out to people who were previously or would ordinarily have been their workers. The contracts are concluded on the basis that the worker is an independent contractor and not an employee of the firm. In many cases, the work contracted out exceeds the normal workload for a single worker, and the contracts are concluded on the express or tacit assumption that the self-employed worker may employ other workers to assist him/her to complete the work undertaken.

This part begins with a historical account of the emergence of the practice of contracting work out in Britain in section 4.1.1. This brief overview is significant as the practice has a long history in that country dating back to the 18th century. It is suggested that it is no coincidence that the practice emerged on the (largely British-owned) mines in South Africa in the late 19th century. This appears to be the earliest incidence of the use of the practice in South Africa until its re-emergence in the 1990s. These developments in South Africa are considered in section 4.1.2. Finally, section 4.1.3 draws out the key characteristics of the practice of contracting work and explains how it must be understood for the remainder of this chapter.

4.1.1 Contracting work out to self-employed workers: a historical perspective from Britain

This section considers the practice of contracting work out to self-employed workers in Britain, where historical accounts of the practice show that it began in the 18th century. This discussion focuses on the work of Holbrook-Jones, Friedman and Thompson and McHugh, who have written extensively about how the organization of work has evolved over time in Britain. Their work combines broad overviews of trends in the country and in particular industries from the 18th century

to the late 20th century. The following discussion paints a broad picture of some of the trends identified by these authors.

Contracting work out to skilled workers was the norm prior to the development of the employment relationship and the industrial revolution.¹ The latter brought about the change from the use of hand-held tools and the domestic industry to the mechanization of work and the development of the factory production system.² However, these changes did not eradicate the practice of small-scale contracting, which continued to play a role in various industries during the eighteenth and nineteenth centuries. Writing about Britain's industrial revolution, Friedman notes the following:

Factories themselves were small by present standards, and the organization of work in many factories often contained vestiges of workshop practices from the Domestic Industry and Manufacture periods. In the metal industries around the Birmingham area in particular, even in large factories, rent for shop-room and payments for power and light were deducted from wages. Also the skilled worker in these factories, as in many other factories and workshops until late in the nineteenth century, was often an intermediate subcontractor and therefore an employer of labour. At blast-furnaces bridge-stockers and stock-takers, employed gangs to charge the furnace or control the casting. Butties contracted with management for working of a stall and employed their own assistants in coal-mines. Women workers in button factories employed girl assistants. The master roller in rolling mills and the overhand brass foundries and chain factories were all paid by the piece and in turn employed others.³

There were variations in the way contracting was carried out, depending on the nature of the sector or industry, the local practices in the different localities, and the amount of work that needed to be done. However, the basic structure was that a firm contracted with a skilled worker to do a certain amount of work for a fee and

¹ A L Friedman, *Industry and Labour: Class Struggle at Work and Monopoly Capitalism* (Hong Kong: MacMillan, 1977), 30-2; G Clark, "Industrial Law and the Labour-Only Sub-contract" 30 *Modern Law Review* (1967) 6, 7-9.

² Friedman (note 1) 30-31.

³ *Ibid* at 31-32.

the worker in turn employed and paid other workers to assist him or her with the work.⁴ In some cases, the contracting arrangements involved multiple layers of intermediaries between the firm and the worker-contractor carrying out the work. These intermediaries were either “foremen” or “piecemasters” who did not do the work themselves and subcontracted and/or supervised skilled and experienced workers.⁵

Contracting work out was carried out either internally or externally. In the former case, the contractor was employed by the firm and was paid a wage by the firm in addition to the agreed price for the work.⁶ In some cases, these employee-contractors took control of the work process and hired and supervised their own workers.⁷ However, in some industries such as engineering, the workers under the employee-contractor were also employed and paid by the firm.⁸ In this case, contracting was an internal management strategy to incentivize the existing workforce and ensure quality control through technical supervision.⁹

External contracting involved a contractor who was not employed by the firm and presupposed an arrangement between two separate entities, albeit of different sizes. This took place in *inter alia* the textile industry which transformed from a domestic industry into “a complex combination of factories and outworkers”

⁴ R Mankelov and F Wilkinson, “Industrial relations in iron and steel, shipbuilding and the docks, 1930 1960” in N Whiteside and R Salais (eds) *Governance, Industry and Labour Markets in Britain and France: The modernising state in the mid-twentieth century* (London: Routledge, 1998) 231-248 233.

⁵ M Holbrooke-Jones, *Supremacy and Subordination of Labour: The Hierarchy of Work in the Early Labour Movement* (London: Heinemann Educational Book, 1982), 125-6; Friedman (note 1) 62.

⁶ *Ibid* at 64-65; P Thompson and D McHugh *Work Organisations: A critical introduction* (London: MacMillan, 1990) 53.

⁷ Thompson and McHugh (note 6) 53.

⁸ Holbrooke-Jones (note 5) 64-5; Friedman (note 1) 212-5.

⁹ Holbrooke-Jones (note 5) 64-5; Thompson and McHugh (note 6) 53.

between the 1860s and 1880s.¹⁰ Friedman reports that during that period, many factories employed more outworkers than factory hands.¹¹ Relations between factories and outworkers were the most common example of “co-operative relations” between firms of unequal size where the larger firm played a dominant role in determining when the relations started and ended.¹² These relations between large and small firms could be characterized as relations between capital and labour, although the latter could not strictly be classified as wage-labour.¹³

There were a number of advantages of this practice for firms that contracted work out, whether it was internal or external contracting. One was that the system was performance-based and thus incentivized the contractors to work hard and to drive workers to work at a faster pace.¹⁴ Holbrook-Jones reports that piecemasters in the engineering industry in the late 19th century were believed to “flog the men to the highest pitch”.¹⁵

Another advantage was that the practice enabled firms to shift part of the responsibility and risks associated with work to contractors, and enabled firms to easily meet changes in demand and cope during transitions in operations.¹⁶ The flexibility allowed firms to easily dispense with workers during period when they were no longer required.¹⁷ Contracting was also useful where management had

¹⁰ Friedman (note 1) 33.

¹¹ *Ibid.*

¹² *Ibid* at 35.

¹³ *Ibid.*

¹⁴ Holbrooke-Jones (note 5) 64-6; Friedman (note 1) 62.

¹⁵ Holbrooke-Jones (note 5) 66.

¹⁶ Thompson and McHugh (note 6) 53; Friedman (note 1) 63.

¹⁷ Friedman (note 1) 33.

limited technical knowledge of the work process and thus saved firms the cost of employing qualified managers.¹⁸

Historical accounts indicate that contracting arrangements were largely characterised as exploitative and that ordinary workers resented contractors. These sentiments seem to have motivated trade associations such as the Journeymen Steam Engine Makers to require piecemasters to equitably distribute the bonuses amongst all workers.¹⁹ These imposed sanctions including fines and expulsion against members who worked as piecemasters or contractors who did not share bonuses received.²⁰

The contracting system declined in most industries during the late 19th and early 20th centuries.²¹ It however continued well into the mid-20th century in a few industries such as iron and steel, shipbuilding and the docks.²² One reason for the decline of the system was that management's realisation that it separated them from the activities of the workforce.²³ Management also realised that the practice made it difficult for them to evaluate, control and adapt working practices and excluded management from the social reproduction of labour.²⁴ In addition, "[t]echnical change reduced the importance of the skills and knowledge of the leading process workers and transformed labourers into machine operators, and

¹⁸ Mankelow and Wilkinson (note 4) 243; Thompson and McHugh (note 6) 53.

¹⁹ Holbrooke-Jones (note 5) 65.

²⁰ *Ibid.*

²¹ Thompson and McHugh *Work Organisations* (note 6) 58; Holbrooke-Jones (note 5) 66-7.

²² These include the iron and steel, shipbuilding and the docks. See Mankelow and Wilkinson (note 4) 243.

²³ Thompson and McHugh (note 6) 56.

²⁴ Mankelow and Wilkinson (note 4) 243.

this... put an end to contracting”.²⁵ Consequently, management began to abolish internal contracting to regain control of work operations.²⁶

The practice of contracting out re-emerged in the UK in the 1980s as part of the “flexibility offensive” which sought to avoid the rigidities and higher costs that were imposed by work rules and employment protection laws.²⁷ In a bid to secure numerical flexibility of the workforce, to reduce labour costs, and counter the militancy of trade unions, firms have increasingly contracted work out to self-employed workers or contractors.²⁸ In some cases, firms turned former employees into self-employed workers and suppliers of services by replacing employment contracts with commercial contracts.²⁹ The building industry is a well-known case of an industry where this has been taking place.³⁰

This section briefly considered the evolution of practice of contracting work out to workers who in turn employ other workers in Britain. Its rise in the 18th century was driven by employer’s desire to benefit from the knowledge of skilled workers and reduce labour and management costs while increasing productivity of workers. Its decline in the 19th century was associated with the increase in direct employment due to technical advancements and firms’ desire to exercise greater control of work processes. The late 20th century has seen the return of earlier

²⁵ *Ibid* at 233.

²⁶ Thompson and McHugh (note 6) 56.

²⁷ *Ibid*.

²⁸ J Watson and G Sharp, “Barriers to skills development in a local construction labour market” (2007) 22(2) *Local Economy* 123 124.

²⁹ S P Pinch, C M Mason, S J G Witt “Labour flexibility and industrial restructuring in the UK ‘Sunbelt’: The case of Southampton” (1989) 14(4) *Transactions of the Institute of British Geographers* 418 424.

³⁰ Clark (note 1)10-11; G Winch, “The growth of self-employment in British construction” (1998) *Construction Management and Economics* 16 531; Watson and Sharp (note 28) 124; Thompson and McHugh (note 6) 201; M Freedland, “Worker Protection” UK National Study for the ILO, (1999), accessed at www.ilo.org/public/english/dialogue/ifpdial/downloads/wpnr/uk.pdf on 08/06/2010, para 6.3.

contracting practices as a result of employers' quest to increase workplace flexibility and reduce labour costs. The next section considers case studies of the development of the practice in the South African context.

4.1.2 Contracting work out to self-employed workers in South Africa

This section considers the practice of contracting out to self-employed workers in South Africa, beginning with its early emergence in the mines in the late 19th century. The case studies discussed in this section show that, with the exception of the mining sector, contracting work out to self-employed workers is a fairly recent development in the South African labour market and only emerged in the 1990s. The case studies examine the practice in the mining, construction, clothing sectors and in relation to truck drivers.

The earliest incidence of contracting work out to self employed workers in South Africa's appears to have been mining industry during the late 19th and early 20th centuries.³¹ British firms owned and controlled the mines during this period.³² It is therefore likely that the introduction of this practice was an extension of the long-established use of the practice on the mines in Britain.

In South Africa, the practice was implemented along racial lines. White miners were engaged as subcontractors and in turn organized and supervised teams

³¹ A Buzuidenhout, "New Patterns of Exclusion in the South African Mining Industry" in K Bentley and A Habib (eds) *Racial Redress and Citizenship in South Africa* (Pretoria: HSRC Press, 2008) pp 179-208), 187-9; B Kenny and A Buzuidenhout, "Contracting, Complexity and Control: An Overview of the Changing Nature of Subcontracting in the South African Mining Industry" (1999) *The Journal of the South African Institute of Mining and Metallurgy* 185 188.

³² S Terreblanche *A History of Inequality in South Africa 1652-2002* (Scottsville, University of Natal Press, (2002) 182-3.

or “gangs” of African workers to do core mine work, often under exploitative conditions.³³ Kenny and Buzuidenhout report that “the white ganger had to take responsibility for supervising work, paying wages to the gang members and even providing explosives needed to perform the work”.³⁴ Mine managers abolished the practice in 1922 to reduce the number of white mine workers and cut labour costs during a profitability crisis in the gold industry.³⁵

After lying dormant for over 70 years, the practice of contracting work out to self-employed workers resurfaced in the mining industry in the 1990s.³⁶ Buzuidenhout reports that mines are increasingly subcontracting core mining tasks to subcontractors, many of which are micro enterprises established by miners who were previously their employees.³⁷ These miners employ less than ten workers and can be divided into “legitimate start-up firms and fly-by-night opportunists”.³⁸ In some cases, this practice has been used as part of mining companies’ “empowerment initiatives”, as described by a trade unionist:

[s]everal black workers were given the opportunity to go for training as certified miners. When they came back to the mine, the management proposed that they do not simply join the ranks of the white miners but be employed on a totally different basis. Each miner would be given an area to mine, he would recruit his own workers and be paid a large lump sum for the work done.³⁹

³³ Kenny and Buzuidenhout (note 31) 188.

³⁴ *Ibid* at 188.

³⁵ *Ibid* at 188-9.

³⁶ Buzuidenhout (note 31) 188-190.

³⁷ *Ibid* at 190.

³⁸ *Ibid*.

³⁹ National Union of Mineworkers “Contracting out”, 153, quoted in J Crush, T Ulicki, T Tseane and E Jansen van Vuuren, “Undermining Labour: The Rise of Sub-contracting in South African Gold Mines” (2001) 27(1) *Journal of Southern African Studies* 5 10.

The quote shows that re-emergence of this practice has to some extent had a racial dimension, albeit for different reasons to those behind initial emergence of the practice almost a century ago.

The re-emergence of the practice in the mining sector coincided with its emergence in the construction and clothing sectors and in relation to truck drivers. Employers in the construction industry began to contract general functions out to self-employed workers in the 1990s.⁴⁰ This marked a change the tradition in the construction industry whereby main contractors directly employed workers who carried out general functions such as bricklaying and plastering, and subcontracted specialist functions such as plumbing and electrical work to specialist subcontractors.⁴¹ Specialist subcontractors have always performed complex functions and provided their own labour, and all the necessary tools and materials to carry out the work undertaken.⁴²

Over the last three decades, there have been changes in the organisation of construction work, with main contractors have increasingly engaging artisans in general functions such as bricklayers, plasterers and carpenters on the basis that they are independent contractors.⁴³ These so called independent contractors are commonly referred to as labour-only subcontractors (LOSCs) in the building

⁴⁰ J Theron and S Godfrey, *Protecting Workers at the Periphery* (Cape Town: Institute of Development and Labour Law Monograph Series, 2000).

⁴¹ *Ibid*; T Goldman, *Organizing in the Informal Economy: A Case Study of the Building Industry in South Africa* ILO SEED Working Paper No,38 (Geneva: International Labour Office, 2003) 12-13.

⁴² Goldman (note 42) 12-13.

⁴³ A Buzuidenhout, S Godfrey, J Theron, with M Modisha, "Non standard employment and its policy implications" Unpublished Research Report submitted to the Department of Labour, (2003); J English, "An Assessment of Current Conditions in the Informal Construction Labour Sector and whether these Conditions Accommodate Training", Unpublished M Phil Dissertation (University of Cape Town, 2002); P H Bamu and S Godfrey, *Exploring Labour Broking in the Construction Industry*, (Cape Town, Labour Research Service, 2009).

industry, as they provide labour only.⁴⁴ Most of them do not have access to cash or credit required to purchase building materials.⁴⁵

Most LOSCs were previously employees in construction companies and the overwhelming majority are black (that is, African and coloured).⁴⁶ Most LOSCs have completed high school and many have completed some formal craft training. Most have received vocational training and are qualified artisans in their respective areas of work. They are given work on a project by project basis, and in many cases they work for one or a few construction companies. Some subcontractors have reported that they work exclusively for a firm that previously employed them on a permanent basis.

Contracts are negotiated with LOSCs on the basis that the latter have sufficiently skilled and experienced personnel to produce work of the standard required by the specification. Labour only subcontractors usually employ a group of up to ten workers to assist them. Because they cannot guarantee work beyond each project, the workers are hired on a project by project basis. However, in most cases, they have a regular group of workers whom they call upon. These usually comprise

⁴⁴ Theron and Godfrey (note 40).

⁴⁵ Western Cape Department of Human Settlements, "Emerging Contractors Concept Paper", background document for Emerging Contractors Workshop hosted by the Western Cape Department of Human Settlements in Cape Town, 23 April, 2010, 3, 5.

⁴⁶ Unless indicated otherwise information regarding labour only sub-contracting out in the construction industry was obtained from the following South African Research reports: Theron and Godfrey (note 40) Goldman (note 41) Buzuidenhout, S Godfrey, J Theron with M Modisha (note 43); J English, "An Assessment of Current Conditions in the Informal Construction Labour Sector and whether these Conditions Accommodate Training", Unpublished M Phil Dissertation (University of Cape Town, 2002); S K Ndungu, J Theron, S Godfrey, S Rakgosi and M Visser, "What Kind of Jobs: Creating Opportunities for Decent Work" (2008) Unpublished Report submitted to the International Labour Organisation; P H Bamu and S Godfrey, *Exploring Labour Broking in the Construction Industry*, (Cape Town, Labour Research Service, 2009); Western Cape Department of Human Settlements, "Emerging Contractors Concept Paper", background document for Emerging Contractors Workshop hosted by the Western Cape Department of Human Settlements in Cape Town, 23 April, 2010.

semi-skilled and unskilled workers, as most labour only subcontractors cannot afford to employ skilled artisans. In most cases the labour only subcontractor is usually the most skilled worker in the team and leads and supervises the team in the operations.

Similar changes have taken place in the South African clothing industry. The trend has emerged against the backdrop of trade liberalisation in the South African economy in the 1990s, which led to the significant reduction of import tariffs for manufactured goods including clothing.⁴⁷ The subsequent increase in cheap imports from low-wage paying economies has placed local manufacturers under significant pressure to reduce their production costs in order to remain competitive.⁴⁸

Consequently, many large formal factories have restructured their operations and retrenched substantial proportions of their workers to reduce the costs associated with standard employment.⁴⁹ The work in these factories is shared between a smaller core workforce of direct employees and subcontractors, some of whom are former employees. Other formal factories have shut down their main operations, retrenched their workforces and styled themselves as 'design houses'. These focus on designing garments and contract out all cutting, making and

⁴⁷ S Godfrey, M Clarke, J Theron with J Greenburg *On the Outskirts but Still in Fashion: Homeworking in the South African Clothing Industry: The challenge of organisation and regulation* Monograph 2/2005 (Cape Town, Institute of Development and Labour Law, 2005) 1, 6, 7.

⁴⁸ Godfrey, Clarke, Theron with Greenburg (note 47) 1, 6, 7.

⁴⁹ Information regarding the contracting work out in the clothing industry was obtained from the following South African case Studies: A Mosoetsa, "The Consequences of South Africa's Economic Transition: The Remnants of the Footwear Industry" in E Webster and K Von Holdt, *Beyond the Apartheid Workplace: Studies in Transition* (Pietermaritzburg: University of KZN Press, 2005) 317-334; M Bennett *Organizing in the Informal Economy: A Case Study of the Clothing Industry in South Africa* ILO SEED Working Paper No.37 (Geneva: International Labour Office, 2003); Godfrey, Clarke, Theron with Greenburg (note 47); Van der Westhuizen, "Women and Work Restructuring in the Cape Town Clothing Industry" in Webster and Von Holdt, *Beyond the Apartheid Workplace* 335-355; C Skinner and I Valodia, "Informalising the Formal: Clothing Manufacture in Durban, South Africa, unpublished paper, University of KwaZulu Natal School of Development Studies.

trimming functions to subcontractors who are experienced workers. Another development is the emergence of independent design houses that design garments and typically operate as intermediaries between clothing retailers and subcontractors who make the actual garments.

The subcontractors' operations are referred to as homework operations because subcontractors in the clothing industry typically operate from their own private homes. The home workers are paid a piece rate for each item produced. Some of these homeworking operations are more established cut, make and trim (CMT) operations that function like small factories and are fairly stable and sustainable. However, the majority are small scale survivalist operations that employ less than ten people and do not own their own machines. Godfrey et al describe the typical survivalist home working operation thus:

These tended to be small and most had been established within the five years preceding the interviews. Work was carried out in the living space of the home and family members were often involved in the work: daughters, sisters, unemployed boyfriends and husbands helped out with ironing, packaging and other tasks... In these operations there was barely a distinction between the 'owner' of the business and the homeworkers. The owner typically worked alongside other workers as a sewing machinist.⁵⁰

The owners of these operations cannot afford to buy fabric and other necessary materials and these are supplied by the party that contracts the work out to them. In the transport sector, long-distance haulage companies increasingly employ truck drivers on the basis that they are independent contractors. In some cases, they have persuaded their employees to sign contracts converting them into independent contractors. Most of these arrangements convert drivers into "owner-drivers".⁵¹

⁵⁰ Godfrey et al (note 47) 18.

⁵¹ Unless otherwise indicated, information relating to contracting of work out to truck drivers is drawn from Theron and Godfrey, *Protecting Workers at the Periphery* (note 40); P Benjamin, "Who needs labour law? Defining the scope of legal protection" in J Conaghan, R Fischl and K Klare,

Owner-driver schemes have also become popular with firms in various industries requiring in-house deliveries – such as food and beverage companies – many of which have retrenched their drivers and re-engaged them as independent contractors.⁵²

An owner-driver scheme involves a hire purchase agreement between the driver and the core enterprise for the purchase of the vehicle. The driver then operates on his own account and can hire assistants to help him/her with the driving and with deliveries. The owner-driver is paid a fee per delivery, and monthly instalments for the truck are deducted from their total earnings for each month. Other arrangements allow for the owner driver to simply rent the vehicle from the core enterprise on the basis that they pay a fixed weekly or monthly rental for the use of the vehicle. The driver uses the remainder to pay for expenses such as fuel, wages for assistants, maintenance of the vehicle⁵³ and keeps the remainder for him or herself.

The above case studies point to the growing incidence of a practice whereby employers contract work out to workers on the basis that they are independent contractors who can employ their own workers to assist them. A few points emerging from these studies must be noted before proceeding. The first is that while the case studies focus on specific sectors where the practice is particularly

Labour Law in an Era of Globalization: Transformative Practices and Possibilities (Oxford: Oxford University Press, 2000) 75-92; H Cheadle and M Clarke, "Country Study: South Africa" International Labour Office National Studies on Workers Needing Protection (2000) 35-6; S Mills, "The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility"; Webster et al "Making Visible the Invisible: Confronting South Africa's Decent Work Deficit" (Sociology of Work Unit, University of Witwatersrand) Research commissioned by the Department of Labour (2008).

⁵² Cheadle and Clarke (note 51) 35-6.

⁵³ There is variation as to whether the employer or the self-employed worker pays for the maintenance of the vehicle. This depends on the contractual arrangement between the parties.

prevalent, the practice is not limited to these sectors and has broader application in the South African economy. These arrangements are also being used in the manufacture of other goods⁵⁴ as well as by courier companies and by the cleaning departments of some hotels.⁵⁵

The second is that the above research reports are small-scale qualitative surveys that rely on the insights of key informants including workers, trade union and bargaining council representatives in the various sectors. While they indicate an increase in the prevalence of the practice, the reports do not quantify the extent to which enterprises are resorting to it. While Statistics South Africa's Labour Force Surveys measure employment and self-employment; permanent and temporary employment; and full-time and part time work, they do not capture the dynamics that relate to contracting out to self-employed workers and are therefore unhelpful in this regard. There is therefore a need for large-scale and periodic surveys of the labour market to identify trends in the world of work and quantify the extent of different working arrangements over time.

A third point relates to the difference in the evolution of contracting work out to self-employed workers in Britain and in South Africa. In the former, the earlier use of the practice spanned a longer period of time (from the 18th century to the early 20th century) and was more widespread as it was used in various sectors of the economy. By contrast, in South Africa, the earlier use of the practice spanned a shorter period (late 1890s to century to 1922) and appears to have been limited to the mining sector.

⁵⁴ Theron, "The Erosion of Workers' Rights and the Presumption as to who is an employee" (2002) *Law, Democracy and Development* 22 25.

⁵⁵ Mills (note 51) 1214.

These differences may relate to the differing trajectories of industrialisation and economic development in Britain and South Africa. They may also relate to structural differences in the labour market and to the fact that in South Africa, the British and later the Afrikaners used different labour practices such as employment of workers on temporary contracts and through the use of labour agencies. Such practices may have enabled employers to secure cheap labour and the required levels of productivity such that there was no need to resort to contracting work out.

4.1.3 Clarifying the scope of the practice

Having presented the evidence of the practice of contracting work out to self-employed workers, it is necessary to identify the key characteristics of the practice. Given the various possible permutations of externalisation of work, this section clarifies the scope of the practice and distinguishes it from situations that fall outside the scope of this thesis.

First, this thesis covers contracting out of a piece of work, or job contracting, whose main objective is to engage a person or persons to perform a specified piece of work or deliver a specified result by a specified time.⁵⁶ The object of the transaction is the provision of goods and services and the fee charged is based on the performance or output. There is no agreement regarding the number and type of workers the contractor must employ to assist in the completion of the work⁵⁷ as this is left to the discretion of the contractor who must hire and take responsibility for the workers.

⁵⁶ R Moonilal, "Workers' Protection: The case of Trinidad and Tobago" Report submitted to the ILO Committee on Workers in Situations Needing Protection (2000) 25.

⁵⁷ *Ibid.*

This practice must be distinguished from the employment of workers through temporary employment agencies or labour brokers, where the purpose of the transaction is to provide a specified number and type of workers to an enterprise for a stated period. In most cases, these workers are handed over to the client, which assigns work to and supervises the workers.⁵⁸ However, legislation and policies governing the use of temporary employment agencies are considered in later chapters. They are considered to the extent that their approaches to addressing externalisation by intermediation may provide inspiration in the development of strategies to address similar concerns with contracting work out to self-employed workers.

Second, the practice covers scenarios where employers continually or regularly contract out work that falls within their main business activities and key ancillary activities. This means that the practice focuses on the contracting out of which for which core enterprises would ordinarily employ workers directly. Determining an employer's core and ancillary activities would depend on the nature of the business involved and would be determined on a case by case basis.

A number of scenarios would therefore be excluded from the scope of the practice sought to be analysed. One would be where work is only contracted out occasionally or temporarily to meet unexpected demand, provided the regular permanent workforce could not reasonably cope with demand.⁵⁹ Another relates to the contracting out of work or services that are specialised and involve the use of

⁵⁸ *Ibid* at 26.

⁵⁹ B M Macaraya, "The Philippines: Worker Protection in a New Employment Relationship" Report submitted to the ILO Committee on Workers in Situations Needing Protection (2000) 29. These criteria explain the scenarios where Philippine law allows for contracting out of work and are useful for illustrating permissible from problematic cases for the contracting out of work.

peculiar skills, expertise and equipment that are beyond the capacity of the normal workforce and are required occasionally or under exceptional circumstances.⁶⁰

Third, while the case studies point towards the tendency to contract work out to *their former employees*, the practice includes contracting work out to workers with whom the core enterprise did not have a prior employment relationship. There need not be a prior employment relationship between the parties, provided that the work falls under the scope of functions that the enterprise would ordinarily have employed workers to do on a continuous or regular basis. This would be the case where the core enterprise directly employs other workers or previously employed workers to do this kind of work that is contracted out.

Fourth, while a direct contracting arrangement between the enterprise and the self-employed worker is envisaged, the practice may involve a number of intermediaries between these parties. Cases involving multiple intermediaries create difficulties as to when an enterprise should be held responsible for the actions of other entities or persons. It is submitted that the practice (at the very least) includes situations where an enterprise uses additional intermediaries to distance itself from the contract with the self-employed worker.

An example would be the creation of a “shell” or satellite enterprise which then contracts work out to self employed worker. This however raises questions as to whether the legal consequences should differ when the core enterprise deliberately attempts to distance itself from self-employed workers and when it genuinely has no knowledge and plays no part in the recruitment of the self-

⁶⁰ *Ibid.*

employed workers. These dilemmas shall be considered in chapter seven of the thesis.

To conclude, contracting work out to self-employed workers as envisaged in this thesis excludes the use of temporary employment services or labour brokers. Contracting work relates to work falling within the normal core and ancillary functions of the firm contracting out the work. It excludes cases where work is contracted out in exceptional and occasional circumstances. This practice includes contracting arrangements where there was no prior employment relationship between the core enterprise and the workers, provided that the work contracted comprises part of the core or ancillary functions of the enterprise. Finally, this thesis envisages that in some cases, contracting arrangements may involve the use of intermediaries between the core enterprise that contracts work out and the self-employed worker.

This part has considered the evidence of the practice of contracting work out to self-employed workers in Britain and in South Africa, where the practice has been on the rise in the past few decades. It has outlined the essential features and clarified the parameters of the practice. The next part considers the factors that led to the emergence of this practice and that have led to its increase in the South African context.

4.2 WHAT IS DRIVING THE GROWTH OF THIS PRACTICE IN SOUTH AFRICA?

This part seeks to explain what has motivated South African employers to make use of this practice in recent years. It explains that businesses have justified contracting work out on the “politically correct” grounds that it supports the small business development and black economic empowerment (BEE) policies. It is however argued that the true motivation behind the practice is employers’ desire to avoid their legal obligations in an environment where the neoliberal agenda prevails and where the labour legislation is believed to be too onerous on businesses.

The research reports discussed in section 4.1.2 above indicate that some South African businesses have justified contracting work out to workers on the basis that it empowers workers by enabling them to become entrepreneurs and furthers the government’s policy to promote small businesses.⁶¹ The government has identified small business development as a key engine for economic growth and employment creation. To this end, it has enacted legislation specific to small businesses and also tried to ensure that broader legislation and policies are sensitive to small businesses’ needs and create a conducive environment for small business creation and development.⁶² Government has also established a number of agencies to provide training and financial support for small business.⁶³

In addition, enterprises that contract work out have argued that the practice promotes government’s policy to empower black people, by enabling workers

⁶¹ Skinner and Valodia (note 49) 11; Crush, Ulicki, Tseane and Jansen van Vuuren (note 39) 9-10; Godfrey and Theron (note 40) 27 Theron (note 54) 46-7; Mills (note 51) 1214.

⁶² See the Small Business Development Act 102 of 1996, and see Department of Trade and Industry “Small and Medium Enterprise Programme” accessed from the DTI website <http://www.dti.gov.za/offerings/offering.asp?offeringid=236> on 01/03/2010.

⁶³ These include the Khula Enterprise Finance, the Small Enterprise Development Agency, and the National Youth Development Fund.

from previously disadvantaged groups to become entrepreneurs.⁶⁴ The BEE policy aims to redress the consequences of Apartheid laws and policies, which excluded black people from participating meaningfully in the mainstream economy. These policies included a discriminatory education system, laws prohibiting black people from moving and trading in certain commercial areas designated for white people, and discriminatory policies governing access to finance for black entrepreneurs.

South Africa's BEE policy is mandated by the Constitution, which enshrines equality as one of its founding principles and one of the fundamental rights in the Bill of Rights.⁶⁵ More specifically, the equality provision states that "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken".⁶⁶ Until 2003, there was no coherent policy on BEE and the term was loosely used by government, labour and business but the concept had no concrete meaning or substance. The Broad Based Black Economic Empowerment Act (BBBEEA),⁶⁷ which covers black economic empowerment in seven areas, namely ownership and management of enterprises, employment equity, skills development, preferential procurement, enterprise development and socio economic development.

The aim of the BBBEEA is to encourage enterprises to promote black economic empowerment and to measure their progress in the seven elements outlined above. To this end, companies may have their BEE contributions assessed and certified by approved BEE accreditation agencies. The primary lever to ensure

⁶⁴ Mills (note 51)1213-4; Crush et al (note 39) 9-10; Godfrey and Theron (note 40) 27. The term "black" is used broadly to denote indigenous African South Africans, South Africans of Chinese and Indian descent, and coloured people (South Africans of mixed race).

⁶⁵ See the Preamble and section 9 of the Constitution of the Republic of South Africa, 1996.

⁶⁶ Section 9(2) of the Constitution.

⁶⁷ Act 53 of 2003.

compliance is section 10 of the Act. This provision requires state organs and public entities to consider firms' BEE rating when making decisions about issuing of licenses, concessions, and when considering which firms to transact or partner with. A higher level of BEE compliance therefore "enhances prospects of success in tenders for government patronage and in this way, the Act adopts a "carrot and stick approach" to ensuring compliance.⁶⁸

Firms that do not transact directly with the state are not beyond the reach of the BBEEA. This is because companies that *do* transact with the state are under greater pressure to procure goods and services from BEE compliant firms. All firms are indirectly encouraged to comply as BEE compliance increases their chances of gaining contracts to supply firms that transact directly with the state.⁶⁹ M'paradzi and Kalula therefore argue that "in the interests of survival and competitive advantage, all suppliers at different tiers of the value chain [are] pressured to become BEE-compliant."⁷⁰

In the context of this broad framework, contracting work out to black self-employed workers could be couched as a BEE initiative in two ways. Firstly, a firm could argue that by encouraging ordinary workers to become entrepreneurs and providing them with support, they are contributing to the enterprise development element of the BEE policy. To this end, some firms have assisted their employees with the process of registering their businesses as close corporations,⁷¹

⁶⁸ A M'paradzi and E Kalula *Black Economic Empowerment in South Africa: A Critical Appraisal* (Cape Town: Institute of Development and Labour Law, 2007) 14.

⁶⁹ *Ibid* at 15. This is because firms that transact with the state are required to procure goods and services from BEE compliant firms.

⁷⁰ *Ibid*.

⁷¹ A closed corporation is a corporate entity established in terms of South African corporate law whose registration and reporting procedures are less stringent than standard company requirements.

facilitated business management courses and provided credit facilities to enable employee-turned entrepreneurs to purchase equipment required.⁷²

In the second case, contracting out to self-employed workers could be used to fulfil preferential procurement element of the BEE policy. This element requires businesses to give preference to black owned enterprises when purchasing goods and services. This has taken place in the construction industry, where contracting work to self employed workers or LOSCs has enabled main contractors to fulfil requirements that a certain percentage of work for a project is allocated to black-owned enterprises.⁷³

It is suggested that employer assertions that they contract work out to self-employed workers to advance small business development and BEE are questionable. It is suggested that the true agenda behind contracting work out by established enterprises is to contract out of employment obligations in respect of the workers concerned. The latter proposition becomes more credible when one examines contemporary South African discourse about the economy, the labour market and the role and impact of regulation, which has increasingly been influenced by neoliberal thinking.

Post-apartheid South Africa boasts of a comprehensive labour law regime which guarantees and protects the rights of workers in relation to a number of issues. In the years following the enactment of the new regime, a number of commentators, international institutions, political parties and other groupings have argued that South African labour laws are inflexible. These critics argue that the

⁷² For example South African Breweries, as discussed in Webster et al "Making Visible the Invisible: Confronting South Africa's Decent Work Deficit" (Sociology of Work Unit, University of Witwatersrand) Research commissioned by the Department of Labour (2008) 32-3.

⁷³ Goldman (note 41)13.

provisions are too stringent for small and emerging enterprises to comply with and thereby hamper the growth of these enterprises.⁷⁴

They also argue that the strict labour laws and high labour costs have negatively affected South Africa's competitiveness as an investment destination and led foreign investors to relocate to neighbouring countries with more investor-friendly labour markets.⁷⁵ This has happened in the clothing sector, where Chinese firms producing clothing for export to the United States have relocated their operations to Lesotho and Swaziland.⁷⁶ These countries have less stringent labour laws and the overall cost of labour is cheaper than the cost in South Africa.⁷⁷

Critics of the labour regime have also argued that the labour laws discourage employers from employing workers and thus hinder job creation.⁷⁸ One such critic has gone as far as to argue that labour laws deny unemployed South Africans the right to work:

Between our catastrophic levels of unemployment and the prospect of an economy with full employment stands the impenetrable barrier of our labour laws. These *wicked* laws are not

⁷⁴ A Kenny, " 'Wicked' labour laws deny basic human right to work" *Business Day* 19 April 2011; Democratic Alliance "Helping Small Business: Skills Development and Employment" Discussion Document (2006) accessed at http://www.da.org.za/docs/590/Small%20business%20%20skills%20and%20employment_document.pdf on 14/04/2011, 1, 3-4; "Labour law onerous: AHI" *Fin24.com* 25 February 2003 accessed at <http://www.fin24.com/Economy/Labourlaw-onerous-AHI-20030225> on 13/04/2011.

⁷⁵ See for example the Democratic Alliance, "Textile Sector Crisis: The DA's 8 Step Solution" (undated), accessed from http://www.da.org.za/docs/591/textilesectorcrisis_document.pdf on 12/03/2011, 7-8.

⁷⁶ S Godfrey, "What is the current state of the collective bargaining system", presentation at the Labour and Enterprise Policy Research Group Workshop on Labour at the cross-roads: labour and the workplace, held in Cape Town on 4-5 July 2011.

⁷⁷ *Ibid.*

⁷⁸ R Pike, "Labour law will add more bricks to wall against the jobless" *Business Day* 31 March 2011; Democratic Alliance, "Jobs in Jeopardy: How red tape undermines economic growth and job creation" (2007) accessed from http://www.da.org.za/docs/585/jobsinjeopardy_document.pdf on 01/03/2011, 1.

only throwing millions of our people into the dustbin of joblessness, not only crippling our economy, not only the cause of hideous poverty and humiliation, not only a primary reason for SA being about the most unequal society on the planet, but they are a violation of human rights. Our labour laws deny South Africans a fundamental human right: the right to work.⁷⁹ (emphasis added)

Two of the most widely criticised aspects of South African labour law relate to the setting of minimum wages and conditions of employment and the rules governing the dismissal of workers.

South African labour law has two mechanisms for the central determination of minimum wages and working conditions. The provisions of the Labour Relations Act encourage and promote centralised collective bargaining at sector level and this has provided a framework for many sectors to set terms and conditions at this level.⁸⁰ It also makes provision for the extension of terms and conditions of employment to non-parties to collective agreements provided the parties to the agreement represent the majority of employers and workers in the sector.⁸¹ In addition, the Minister of Labour is empowered to publish sectoral determinations setting minimum wages and conditions of employment for unorganised sectors where little collective bargaining takes place.⁸² There are 15 sectoral determinations covering, amongst others, hospitality, domestic workers, agriculture and civil engineering.

A strong critic of these mechanisms is the official opposition party, which argues that centralised wage setting through sectoral collective bargaining and sectoral determinations protect a privileged minority of workers to the detriment of

⁷⁹ Kenny (note 74).

⁸⁰ Du Toit, D et al, *Labour Relations Law: A Comprehensive Guide* (4th ed) (Durban: LexisNexis Butterworths, 2003) 227.

⁸¹ In terms of section 32 of the LRA.

⁸² In terms of chapter 8 of the BCEA.

job creation.⁸³ The Democratic Alliance and other critics invoke South Africa's poor performance in world rankings on the flexibility of wage determination in support of their claims.⁸⁴ For instance, the WEF Global Competitiveness Index ranked South Africa 131st out of 139 countries in 2010.⁸⁵

Turning to dismissals, the LRA provides that a dismissal must be for a valid reason (misconduct, incapacity or operational requirements) and must be in terms of a fair procedure.⁸⁶ The Act requires employers to consult with employees or their representatives before dismissing workers on the basis of operational requirements.⁸⁷ In addition, the Code of Good Practice on Dismissal requires firms to first try to resolve misconduct and capacity issues and to ensure procedural fairness.⁸⁸

The remedy for an unfair dismissal may be reinstatement, re-employment or compensation for up to 12 months or up to 24 month's pay, depending on the grounds of unfairness.⁸⁹ These provisions have been criticised for imposing onerous restrictions and costs on employers seeking to dismiss workers.⁹⁰ In 2010 the WEF ranked South Africa 135th out of 139 countries in terms of ease of dismissals.⁹¹

⁸³ Pike (note 78); Democratic Alliance, "Jobs in Jeopardy: How red tape undermines economic growth and job creation" (2007) 1 accessed from http://www.da.org.za/docs/585/jobsinjeopardy_document.pdf on 01/03/2011, 1. The Democratic Alliance is the official opposition party in South Africa.

⁸⁴ Pike (note 78).

⁸⁵ World Economic Forum, *Global Competitive Report 2010-11* (Switzerland: World Economic Forum, 2010) 39, 40.

⁸⁶ See 187 and 188 of the LRA.

⁸⁷ See sections 189 and 189A of the LRA.

⁸⁸ Schedule 8 of the LRA.

⁸⁹ See sections 193 and 194 of the LRA.

⁹⁰ J Harris, "South Africa's jobs security laws are inappropriate for a developing country" (2002) Free Market Foundation article, accessed at

The claims about the inflexibility of South Africa's labour laws have been challenged on various grounds, some of which are briefly discussed here. One relates to the limited coverage of the collective bargaining system, which is estimated to cover only a third of formal workers, with only five per cent of formal workers being covered by extensions.⁹² In addition, the regulatory system incorporates several mechanisms for flexibility, for example the exemption procedure from collective agreements and special provisions for small businesses in the collective bargaining system.⁹³

Another challenge is based on recent reports which show that South Africa's labour law provisions – especially those governing unfair dismissal – are not out of kilter with those of other jurisdictions.⁹⁴ One example is an OECD economic assessment of South Africa which compares its employment protection legislation (EPL) to that of other countries.⁹⁵ The report shows that “[o]verall, EPL in South Africa appears to be relatively flexible, with respect both to the average of OECD countries and to those other non-OECD member economies (Brazil, Chile, China and India) for which the indicator has been calculated.”⁹⁶

<http://www.freemarketfoundation.com/ShowArticle.asp?ArticleType=Issue&ArticleId=1196> on 15/04/2011.

⁹¹ World Economic Forum, *Global Competitive Report 2010-11* (Switzerland: World Economic Forum, 2010) 39.

⁹² H Bhorat, C van der Westhuizen, *A Synthesis of Current Issues in the Labour Regulatory Environment* (Cape Town, DPRU: 2008) 18-20.

⁹³ *Ibid*; S Godfrey, J Theron, M Visser, *Globalization, the impact of trade liberalization and labour law: the case of South Africa* (Geneva: ILO, 2007) 7-8.

⁹⁴ A Van Niekerk, *Regulating Flexibility and Small Business: Revisiting the LRA and BCEA: A Response To Halton Cheadle's Concept Paper*, Development Policy Research Unit Working Paper 07/119 (Cape Town: Development Policy Research Unit) 8-9.

⁹⁵ OECD, *OECD Economic Surveys, South Africa: Economic Assessment* (OECD, 2008) 122.

⁹⁶ *Ibid*.

An exhaustive analysis of this debate is beyond the scope of this paper. However, the above shows that the claims that South Africa's labour law regulations are excessively onerous on employers are questionable and may be exaggerated. What is more disconcerting about these perceptions about the labour regulatory system (and more relevant to this thesis) is the apparent link between these perceptions and the increase in employment practices that undermine labour rights.

Although it is difficult to conclusively establish a causal link, there are indications that employer perceptions about the cost and burdens of compliance with post-1994 labour legislation may be driving the growth of less secure working arrangements. This includes the engagement of consultants who have enabled employers to "convert" their employees into independent contractors to escape the so called hassles of employment legislation.⁹⁷ There are also suggestions that more employers have increasingly engaged workers through external contractors that assume the employer obligations relating to those workers.⁹⁸

Moreover, research into the growth of temporary employment services (TESs) in South Africa shows that while they were operating in South Africa before 1995, the number of firms has grown exponentially since the enactment of new labour⁹⁹ legislation in the country.¹⁰⁰ This suggests that the demand for TESs has been driven by employers' desire to use their services to avoid the obligations

⁹⁷ P Benjamin, "Informal Work and Labour Rights in South Africa" paper presented to the International Industrial Relations Association 5th African Regional Congress, Cape Town, March 2008, 4-5; Mills (note 51) 1215.

⁹⁸ *Ibid.*

⁹⁹ In terms of section 198 of the LRA, section 82 of the BCEA and section 57 of the EEA and the TES is the employer of workers supplied to its clients and therefore assumes responsibility for all employer obligations.

¹⁰⁰ J Theron with S Godfrey and P Lewis *The Rise of Labour Broking and its Policy Implications* Monograph 1/2005 (Cape Town: Institute of Development and Labour Law, 2005) 36.

imposed by labour legislation.¹⁰¹ Some TESs have capitalised on perceptions about onerous labour legislation and used their ability to assume this burden as a selling point. The remarks on the website of one such firm starkly illustrate this.

Box 1: Temporary employment services as a means of achieving flexibility¹⁰²

“In today’s environment, the current labour concerns include increasingly complex labour legislation; increased employer liabilities; fixed staff costs and low production; increased payroll costs and tax complexities; additional costs to cover absenteeism and holiday expenditure and increased time and costs in providing the training.”

“We handle all employees’ pay calculations, wages, all statutory obligations and attend to pay queries, thereby relieving our clients of this time consuming hassle.”

“Our clients do not have to carry the threat or cost associated with permanently employing staff; risks associated with unfair dismissal or any other labour disputes as a consequence of labour legislation.”

“Companies no longer have to deal with CCMA disputes, awards, unfair dismissals, union meetings or demands.”

While the above quotations relate to the use of TESs or labour brokers, it highlights employer perceptions about the rigidity of South African labour laws. More importantly, it signifies their desire and willingness to enter into arrangements that allow them to benefit from the labour of workers while avoiding the employment obligations relating to them.

¹⁰¹ *Ibid.*

¹⁰² All the quotations were accessed from “About Umkhonto”, Umkhonto Labour Holdings website, accessed at <http://www.umkhonto.co.za/pages/about> on 13/03/2011.

In this part, it has been argued that contrary to employer assertions about small business promotion and black economic empowerment, the primary reason for the increase in contract in contracting work out to self-employed workers is the desire to avoid employer obligations imposed by labour law. This finding is significant because, as will be shown in section 4.3 below, there is a close relationship between the true motivation behind the practice and the consequences for the workers involved.

4.3 CONTRACTING WORK OUT: THE POINT OF INTERSECTION

This part considers how the practice of contracting work out to self-employed workers enables core enterprises to avoid the labour and social security obligations that would be associated with the employment of self-employed workers and their workers. It argues that this is *primarily* achieved through combination of the two processes, externalization by commodification of the employment relationship in the case of self employed workers and externalization through intermediation in the case of the workers of self employed workers. It argues that contracting work out to self-employed workers represents the point of intersection of these two processes.

It is also argued that in most cases, the externalisation of self-employed workers and their workers also enables core enterprises to structure the duration of the contracting arrangements in their favour. They may do so through a series of short-term contracts without long-term guarantees of work. They may also do so by contracting work out to them on an ad hoc and uncertain basis. These strategies amount to casualisation and therefore introduce a third dimension intersecting with the two processes of externalisation.

This part is divided into four sections, the first dealing with the externalisation of self-employed workers by commodification and the second considering the externalisation of their workers by intermediation. These sections consider the following questions in respect of the relevant workers: What are the consequences of externalisation for self-employed workers and their workers? Why have self-employed workers and their workers continued to engage in these arrangements? The third section considers how casualisation features within these arrangements and introduces another dimension to the problem. The fourth section shows that in addition to being conceptualised in terms of externalisation and casualisation, the practice under scrutiny can also be understood in terms of vertical disintegration and informalisation.

While the discussion relies primarily on research conducted in South Africa, this part incorporates literature from other jurisdictions in order to shed more light on the phenomenon discussed. In this regard, the work of Fudge, Collins, Epstein and Monat, and Davies and Freedland is drawn upon. The work of Castells and Portes on subcontracting in South America dating back to 1989 is also highly instructive in this regard.

The comparative literature is not intended to provide a mechanical comparison between the position in South Africa and these jurisdictions. Instead, the purpose of including the comparative literature is to draw from the conceptualisation of the practice and articulation of the challenges it poses. This is because the practice of contracting work out to self-employed workers has not (in the author's view) been widely subjected to rigorous and sustained analysis in South African legal academia or in the legal system.

4.3.1 The self-employed worker: externalisation via commodification

The purpose of contracting work out is to designate the self-employed worker as an independent contractor. The case studies showed that some employers go as far as to assist former employees to register corporate entities in order to give the practice some legitimacy. The practice purports to turn an ordinary worker into an independent contractor. This process has been described as externalization via the commodification of the employment relationship. It has the effect of excluding the self-employed worker from the protection of labour law which regulates matters such as collective bargaining, wage setting, hours of work, paid holidays, sick leave, unfair dismissals and unfair labour practices.

In the context of contracting work out, there are two dimensions that may support a conclusion that a worker to whom work is contracted out is an independent contractor. The first is that some of these contracting arrangements do not require self-employed worker to work exclusively for one firm. This is important because in terms of South African law a more exclusive arrangement points towards the existence of an employment relationship.¹⁰³ Thus, a contracting arrangement that does not prohibit the self-employed worker from serving other clients points towards a conclusion that the self-employed worker is an independent contractor.

The second and more complex dimension arises where the contract between

¹⁰³ Section 200(1) of the LRA and section 83A of the BCEA create a rebuttable presumption of employment where inter alia, “the person only works for or renders services to one person” and “the person is economically dependent on the other person for whom he or she works or renders services”.

the self employed worker and the firm expressly allows for or anticipates that a self employed worker will employ assistants to help him/her to complete the work.¹⁰⁴ This is because employment is generally regarded as a personal relationship. This implies that if a worker employs other workers to substitute or supplement her/his labour, she is regarded as an employer. It would therefore seem to be an anomaly to extend employee protection to a person who is an employer¹⁰⁵ and who could potentially make a profit out of the labour of other workers.¹⁰⁶ This reasoning is captured by Carlson:

Perhaps the most likely sign that a worker is not an employee is that he is in fact an *employer*. An employer ordinarily hires an employee to perform his work personally, and the employee lacks the freedom to hire his own substitute not selected by the employer. A person who is free to hire other and to delegate all or part of his duties, and who does not thereby breach his contract with the employer, looks much more like an independent business person. In this situation, the employer exercises much less control over the work (he cannot even determine who performs the work) and the contractor bears more of the risk in the form of labor costs. The contractor also has the opportunity to expand his business and profits by hiring others so that he can perform more than one job at a time. Such a person is more likely, though not necessarily, an independent contractor.¹⁰⁷

This was the conclusion reached by the Labour Appeal Court in *Sanlam Life Insurance Ltd v Commission for Conciliation, Mediation & Arbitration & others*.¹⁰⁸ The Court had to consider the status of a financial advisor whose contract allowed her to register as a VAT vendor and to employ and remunerate other persons to assist her. The Court found that these factors were not found in typical employment contracts and found that she was entitled to act independently and held that she was an independent contractor.

¹⁰⁴ P Davies and M Freedland "Labor markets, welfare and the personal scope of employment law" (1999 -2000) 21 *Comparative Labor Law and Policy Journal* 231 246.

¹⁰⁵ Theron (note 54) 46-47.

¹⁰⁶ Godfrey et al (note 47) 18.

¹⁰⁷ R R Carlson, "Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop

Trying" (2001) 22 *Berkley Journal of Employment and Labour Law* 295 352.

¹⁰⁸ (2009) 30 *ILJ* 2903 (LAC).

A similar conclusion was reached in the UK in *Mirror Newspaper Group Ltd v Gunning*¹⁰⁹ where an applicant for the position of newspaper wholesaler was excluded from the protection of the sex discrimination legislation because the work did not have to be done by her personally, as the latter was allowed to engage others to do the work. The Court held that the respondent was to be treated as an intermediary employer, who was outside the protection offered to workers in employment, even where the latter was understood in the widest sense.

The problem with this reasoning is that the self-employed worker is regarded as an employer, thus obfuscating the fact that s/he may be in a situation of a worker or similar situation that requires that labour law be some extent applicable, either directly or by analogy.¹¹⁰ This results in the self-employed worker “being treated as a person not requiring protection as a worker when that may not be appropriate”.¹¹¹ Davies and Freedland argue that similar reasoning also arises where the worker enters into work arrangements through the medium of a small company or firm.¹¹²

The above signals a possible disjuncture between the assumption that a self-employed worker is an independent contractor and the reality that s/he may more closely resemble an employee. Truly independent contractors own the tools and other means of production, are able to provide the materials required to complete the work.¹¹³ By contrast, self-employed workers usually lack the entrepreneurial

¹⁰⁹ [1986] ICR 145 (CA).

¹¹⁰ Freedland (note 30), para 5.15- 5.18.

¹¹¹ *Ibid.*

¹¹² Davies and Freedland (note 104) 246.

¹¹³ E Epstein and J, Monat, “Labour Contracting and its Regulation I” (1973) 107 *International Labour Review* 451, at 451; J Fudge, E Tucker and L Vosko, “Changing Boundaries in Employment: Developing a New Platform for Labour Law” 10 *Canadian Labour and Employment Law Journal* 361 at 366.

skills and financial resources necessary to own the means of production and operate a more viable business.¹¹⁴ To the extent that they can be said to establish and operate a business, the role of self-employed workers is largely restricted to the supply of labour.

Independent contractors are also considered to be in a position to determine how work is to be done and therefore can operate independently.¹¹⁵ They are often in a weaker bargaining position when negotiating the terms of a contract with an established firm.¹¹⁶ In the South African context, the asymmetry of power is exacerbated by the acute shortage of jobs and the stiff competition between self-employed workers aiming to secure contracts. The power dynamics between the parties is reflected in the remarks of the owner of a home working operation:

[e]veryone is so desperate for work, even when you don't make money from the contract you still have to take it. Do you know how many 'factories' there are like this one? ... Someone will take the contract so you have to for the money they give.¹¹⁷

In light of these asymmetries of power, one could argue that contracting work out to self-employed workers is better described as contracting between capital and labour as opposed to ordinary commercial contracting between capital and capital.¹¹⁸

¹¹⁴ Van der Westhuizen (note 49) 342; van der Westhuizen, "Trade and poverty: a case study of the South African clothing industry" (2007) 31(2) *Journal of Studies in Economics and Econometrics* 109-117; Bamu and Godfrey (note 46) 20; Mills (note 51) 1215; Cheadle and Clarke (note 51) 33-4.

¹¹⁵ Fudge, Tucker and Vosko (note 113) 366.

¹¹⁶ Godfrey, Clarke, Theron with Greenburg (note 47) 15; Van der Westhuizen (note 49) 347; Y Chiang, "Subcontracting and its ramifications: A survey of the building industry in Hong Kong" (2009) 27 *International Journal of Project Management* 83.

¹¹⁷ Godfrey, Clarke, Theron with Greenburg (note 47) 15.

¹¹⁸ Winch (note 30) 532; W H F Yik and H K J Lai, "Multilayer subcontracting of Specialist works in buildings in Hong Kong" (2008) 26 *International Journal of Project Management* 399, 400; Friedman (note 1) 35.

There can be no doubt that the designation of self-employed workers as independent contractors is advantageous for core enterprises. It enables them to limit their obligations to the self-employed workers to the payment of the agreed service fees. These service fees may either be based on a rate per unit output or a flat rate for the job. There is no provision for minimum wages, paid leave, or contributions to social security funds under such arrangements. By commodifying what could be regarded as an employment relationship, employers simultaneously externalise self-employed workers and the responsibilities that would otherwise attach to an employment relationship. Consequently, employers deny self-employed workers rights to collective bargaining, minimum wages, leave and working hour protection, training opportunities and health and safety protection and compensation schemes provided for in legislation.

One could speculate as to why self-employed workers enter arrangements despite the fact that they may disadvantage them in terms of labour and social protection. One possibility is that self-employed workers have welcomed such initiatives because of the appeal of the enhanced prestige and status of an entrepreneur and employer, as opposed to being a mere worker.¹¹⁹ The prospect of establishing and operating a viable profit-generating enterprise may be an attraction for some self-employed workers.¹²⁰

While these “pull factors” may apply to some workers, the more likely possibility is that self-employed workers enter these arrangements as a result of “push factors”. Many self-employed workers have entered these arrangements in

¹¹⁹ Theron and Godfrey (note 40) 48; Theron, (note 54) 22 46-7; English (note 46) 113.

¹²⁰ English (note 46)113.

response to pressure from employers to convert their status, or because they have become unemployed after retrenchment and have no viable alternatives.¹²¹

This section has outlined the implications of contracting work out to self-employed workers for the latter and indicated that the practice effects the denial of their labour rights. As will be shown in the next section, the designation of the self-employed worker as an independent contractor has profound implications for the position of workers that the self-employed workers engages to assist him/her. These implications arise at the point where externalisation via commodification intersects with externalisation via intermediation.

4.3.2 The workers of self-employed workers: externalisation by intermediation

Contracting work out to self-employed workers creates significant challenges for the workers that are employed by the self-employed workers. The challenges arise from the fact that these workers effectively work for the core enterprise but are not considered its employees as they do not have a direct contractual relationship with it.¹²² This is illustrated in a trade unionist's remarks about an "empowerment initiative" in a mining company: "Each miner would be given an area to mine, he would recruit *his own workers* and be paid a large lump sum for the work done. *The workers would not be mine employees but employees of the miner.*"¹²³

The mine management's reasoning regarding responsibility for the workers reflects the general legal approach which attributes employer liability to the person

¹²¹ Cheadle and Clarke (note 51) 42; Godfrey, Clarke, Theron with J Greenburg (note 47) 15.

¹²² Epstein and Monat (note 113) 462.

¹²³ Emphasis added. National Union of Mineworkers (note 39).

or entity that is party to the employment contract.¹²⁴ In other words, “the law does not usually hold one employing entity (the core employer) responsible for the actions and the contractual relations of another (the subcontractor)”.¹²⁵ Collins has referred to this conundrum as the capital boundary problem.¹²⁶ The application of this contractual approach enables businesses to strategically organize their activities in order to benefit from the labour of workers while shifting the employer obligations onto the party that contracts with the workers.¹²⁷

In the context of the practice under scrutiny, the contractual approach enables a core enterprise to place a “legal distance”¹²⁸ between itself and the employment risks and obligations associated with directly employing them. Notionally, the workers of the self-employed worker have an employer with whom they can bargain on terms and conditions of employment and against whom they can exercise their legal rights. However, the relationship between the self-employed worker and her/his workers is structurally subservient to the contractual relationship between the self-employed worker and the core enterprise.¹²⁹ This means that the self-employed worker’s ability to pay the workers is constrained by the terms of her/his commercial contract with the core enterprise.¹³⁰

¹²⁴ J Fudge, “The Legal Boundaries of the Employer, Precarious Workers and Labour Protection” in G Davidov and B Langille (eds) *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oregon: Hart 2006) 295-315 301-2.

¹²⁵ H Collins, “Multi-segmented Workforces, Comparative Fairness, and the Capital Boundary Obstacle” in G Davidov and B Langille (eds) *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oregon: Hart 2006) 317-336 317-318.

¹²⁶ *Ibid.*

¹²⁷ Mills (note 116) 1214-5; Epstein and Monat (note 113) 462; Fudge (note 124) 301-2; Freedland, (note 30), para 5.15- 5.18.

¹²⁸ An expression used by R Le Roux in *The world of work: forms of engagement in South Africa* (Cape Town: Institute of Development and Labour Law, 2009) 19.

¹²⁹ Theron (note 54) 40.

¹³⁰ Epstein and Monat (note 113) 464-5; Theron (note 54) 40; Le Roux (note 128) 19.

The terms of this commercial contract are unlikely to be less favourable for the self-employed worker given her/his weaker bargaining position as discussed in section 4.3.1 above. The self-employed worker's weaker bargaining position is exacerbated by the pressure on the self-employed worker to lower her/his contract fees to outbid potential competitors and ensure repeat business with the core enterprise.¹³¹ A trade unionist highlights the impact of this asymmetrical relationship on the workers of the self-employed worker as follows: "You have the emerging employer and the big giant that squeezes him. Out of the little from the big employer, the small employer still needs to share that with the workers."¹³² It is therefore impossible to speak of meaningful collective bargaining between the self-employed worker and the workers s/he employs.¹³³

Under these circumstances, it is unlikely that the self-employed worker is in a position to provide favourable working conditions for her/his workers. The wages of these workers are likely to be lower and less secure than those of workers employed directly by more established enterprises.¹³⁴ Research on the clothing sector has highlighted the problem of low and insecure pay and linked it to working hours and the deadlines set by the core enterprise.¹³⁵ Van der Westhuizen describes the challenges experienced by those owning and working in home working operations:

lead times and the size of production runs have a direct impact on the length of the working day. They also affect the amount of money paid for the orders, as well as whether payment

¹³¹ Epstein and Monat (note 113) 464-5; Theron (note 54) 40; Godfrey, Clarke, Theron with Greenburg (note 47) 15.

¹³² Goldman (note 41) 13.

¹³³ Theron (note 54) 40.

¹³⁴ Van der Westhuizen (note 49) 343; Bamu and Godfrey (note 46) 20-22.

¹³⁵ Godfrey, Clarke, Theron with Greenburg (note 47) 21-2; Van der Westhuizen (note 49) 349.

is actually made. These are the primary mechanisms of control through which the levels of payments are driven downwards while productivity is driven upwards. [Make and Trim] workers desperate for income agree to orders with deadlines beyond their capacity. At the same time, they are reluctant to increase the number of workers, as that decreases the already meagre earnings per person.¹³⁶

Most self-employed workers do not have the financial capacity to honour statutory obligations relating to paid leave, sick leave and overtime pay.¹³⁷ Contributions to statutory funds including unemployment insurance or other social security benefits are also likely to be beyond their reach.¹³⁸ A self-employed worker may further be hard-pressed to provide health and safety protection and pay contributions towards statutory compensation schemes. This poses severe risks to the workers of self-employed workers in an environment where core enterprises reportedly contract out the most dangerous aspects of work, for example in the mining industry.¹³⁹

Another challenge is that these workers of the self-employed worker are unlikely to have access to meaningful training programmes to enable them to develop and enhance their skills.¹⁴⁰ This is because despite benefiting from their labour, the core enterprise does not consider the workers of self-employed as their employees and would be unwilling to invest in them. Secondly, a self-employed worker is unlikely to be registered as an employer with the Skills Development Fund in terms of the Skills Development Act or to afford to pay for other meaningful training programmes. Godfrey et al suggest that where the self-employed worker is

¹³⁶ C Van der Westhuizen (note 49) 349.

¹³⁷ Crush, Ulicki, Tseane and Jansen van Vuuren (note 39) 14; Bennett (note 49) ix Bamu and Godfrey (note 46) 21.

¹³⁸ Godfrey, Clarke, Theron with Greenburg (note 47) 14-15.

¹³⁹ Kenny and Buzuidenhout (note 31) 190.

¹⁴⁰ Goldman (note 41) 19, 20; Godfrey, Clarke, Theron with Greenburg (note 47) 42; C van der Westhuizen, "Trade and poverty: a case study of the South African clothing industry" (2007) 31(2) *Journal of Studies in Economics and Econometrics* 109 117; E Epstein and J Monat (note 113) 466.

able to provide training, it is likely to comprise on-the-job training primarily aimed at increasing output in the short-term.¹⁴¹

Moreover, the self-employed worker is unable to provide security of employment because her/his ability to do so depends on the continuation of a contract between him and the core enterprise, over which s/he has little control.¹⁴² While self-employed workers have long-standing relationships with their workers, the employment relationships more closely resemble a series of temporary or project-to-project contracts rather than permanent employment.¹⁴³ Where employment is terminated due to the unavailability of work, there is no provision for severance pay or unemployment benefits as the self-employed worker cannot afford these.¹⁴⁴ Effectively, the employment of these workers is casualised and precarious.

The above highlights the potential for significant disparities between the working conditions of self-employed workers' workers and those of workers that the core enterprise directly employs to do the same work.¹⁴⁵ The workers who are directly employed are more likely to enjoy better-paying, more secure employment with social security benefits.¹⁴⁶ Thus, contracting arrangements lead to the segmentation of the workforce, with workers under these arrangements forming an underclass of vulnerable and under-protected workers.¹⁴⁷ The disparity in working

¹⁴¹ Winch (note 30) 539.

¹⁴² Theron (note 54) 40; Van der Westhuizen (note 49) 349; Godfrey, Clarke, Theron with Greenburg (note 47) 20 -21.

¹⁴³ Godfrey, Clarke, Theron with Greenburg (note 47) 18, 19, 21.

¹⁴⁴ Theron (note 54) 46-7; Van der Westhuizen (note 49) 349.

¹⁴⁵ Crush, Ulicki, Tseane and Jansen van Vuuren (note 39)14; Epstein and Monat (note 113) 467.

¹⁴⁶ Godfrey, Clarke, Theron with Greenburg (note 47)17.

¹⁴⁷ Fudge (note 124) 302.

conditions can be a cause of mutual resentment between the externalized workers and the directly employed workers.¹⁴⁸

Moreover, fragmentation between contract workers and regular employees and the vulnerability of the former undermines the power of organized labour and collective action.¹⁴⁹ The case studies highlight the difficulty of organizing amongst these workers,¹⁵⁰ many of whom are vulnerable due to the precariousness of their jobs and their low wages.¹⁵¹ Workers under these arrangements are reluctant to join trade unions as they are afraid of being victimized or dismissed by their employers, who tend to be hostile towards trade unions.¹⁵² The proliferation of contracting practices also presents a conflict between the aims of extending support to all vulnerable workers and protecting the privileged position of those in standard employment. Unions are faced with the dilemma that organising workers of self-employed workers may amount to “legitimis[ing] employment practices that undermine the right to reasonable labour practices”.¹⁵³

One could argue that workers in South Africa accept work under these inferior conditions and are reluctant to enforce their rights because of the high levels of poverty and unemployment prevail in the country. One homemaker states that “[t]he money is terrible. If I could get another job I would. But tell me where there’s a job. I don’t see any.”¹⁵⁴ This reality is underscored by the owner of a homework operation:

¹⁴⁸ Crush, Ulicki, Tseane and Jansen van Vuuren (note 39) 14; Epstein and Monat (note 113) 467.

¹⁴⁹ Buzuidenhout (note 31)195

¹⁵⁰ Crush, Ulicki, Tseane and Jansen van Vuuren (note 39) 20.

¹⁵¹ Bamu and Godfrey (note 46) 22; Goldman (note 41).

¹⁵² Bennett (note 49); Goldman (note 41); Godfrey, Clarke, Theron with Greenburg (note 47) 29-30.

¹⁵³ Van der Westhuizen (note 49) 353.

¹⁵⁴ Godfrey, Clarke, Theron with Greenburg (note 47)19.

None of us had this work before, including all the girls working here. This money is better than nothing. Why must I pay those extras? You don't need to ask them to work overtime. You must just say 'you must work OT [overtime] today'.¹⁵⁵

The above demonstrates that given the South African labour market conditions, many workers believe that a poorly paying and precarious job is better than no job at all.

4.3.3 Casualisation of work: an added dimension

Sections 4.3.1 and 4.3.2 above explain how core enterprises externalise self-employed workers and their workers by entering into commercial contracts with self-employed workers. Essentially, they demonstrate that the practice of contracting work out to self-employed workers is primarily constituted by the intersection between externalisation via commodification and externalisation via intermediation. This brief section argues that the externalisation of these workers allows for employers to introduce a third process – casualisation – that in turn intersects with the two processes of externalisation.

By externalising self-employed workers and their workers, core enterprises are able to bypass the law regulating maximum working hours, rest periods, overtime, weekend and leave. They are also able to avoid claims brought on the grounds that they created a legitimate expectation of the renewal of contracts or continued employment. Having dispensed with the obligations to dismiss workers for a fair reason and according to a fair procedure, core enterprises can summarily terminate the commercial contract with the self-employed worker.

¹⁵⁵ *Ibid* 14.

Consequently, core enterprises are able to engage and dispense with workers as they see fit without regard for the consequences for workers. As was highlighted in sections 4.3.1 and 4.3.2 above, both self-employed workers and their workers experience uncertainty and insecurity about their work. Godfrey et al describe the challenges faced by workers in home working operations as follows:

... these operations often had an irregular supply of work, which meant that workers had erratic work schedules (working short-time during quiet months or occasionally not working at all for some weeks). They were however, expected to always be available for work if contracts came in. This made it difficult for workers to take on other work, let alone plan family activities very far in advance.¹⁵⁶

The above quotation indicates that there are two dimensions to the insecurity and uncertainty. The first relates to work schedules and hours of work, while the second relates to the continuity of work after each project or “job”. Both are determined by the core enterprise, with the self-employed worker and her/his workers having little or no say.

What emerges from the discussion is that the externalisation achieved by the contracting out of work enables core enterprises to casualise work and make it more precarious for the workers involved. The practice provides core enterprises with flexible responses to the seasonal or cyclical nature of demand.¹⁵⁷ The two processes of externalisation therefore intersect with casualisation so as to shift the costs and risks of precarious work onto self employed workers and their workers.¹⁵⁸ Given the exclusion of social security benefits from these arrangements, these workers are left to bear the social costs that come with having less work or no work at all.¹⁵⁹

¹⁵⁶ *Ibid* 19.

¹⁵⁷ Goldman (note 41)12; Van der Westhuizen (note 49) 349.

¹⁵⁸ Van der Westhuizen (note 49) 349.

¹⁵⁹ *Ibid*.

4.3.4 A different perspective: vertical disintegration and informalisation

Thus far, the practice of contracting work out to self-employed workers has been conceptualised in terms of externalisation via commodification, externalisation via intermediation and casualisation. These processes are driving the shift from standard to non-standard forms of work. In this section it is argued that the practice can also be understood in terms of two other processes, namely vertical disintegration (also known as decentralisation) and informalisation.

[t]here are actually two processes at work: the decentralization of large corporations into semiautonomous units and the informalization of as many of these units as possible, so that to the benefits of flexibility are added the advantages of unregulated activities in a regulated environment.¹⁶⁰

These processes relate to the structure of firms and the structure of firm relations within an economy and are closely related. Contracting work out to self-employed workers involves the disintegration of core enterprises into semi-autonomous units composed of self-employed workers and their workers. In addition, it involves the informalization of the work of self-employed workers and their workers. The two processes are described in turn below.

The first process of vertical disintegration does not break the organisation into “discrete atoms”, but into a looser and more multi-polar structure¹⁶¹ made up of “semi-autonomous units”.¹⁶² The “semiautonomous units” are so called because they are not fully integrated into the core enterprise and purport to employ their own

¹⁶⁰ M Castells and A Portes “World underneath: the origins, dynamics, and effects of the informal economy” in A Portes (ed) *The Informal Economy: Studies in Advanced and Less Developed Economies* (Baltimore: Johns Hopkins University Press, 1989) 11-37 26.

¹⁶¹ P Davies and M Freedland, “The Complexities of the Employing Enterprise” in G Davidov and B Langille (eds) *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oregon: Hart 2006) 273-293 284- 5.

¹⁶² M, Castells and A, Portes (note 160) 26.

labour, but are subject to its power and control.¹⁶³ The core enterprise may exercise control indirectly through quality standards and performance rules¹⁶⁴ or by virtue of intellectual property rights over the goods produced or sold or the services provided.¹⁶⁵ Casale has described the relationships between core enterprises and these units as “hierarchical market relationships”.¹⁶⁶ He argues that a big firm can use these types of relationships to “afford itself a level of hierarchy similar to the one exerted towards an internalized production stage, without the need to arrange an internal organization and the attendant costs”.¹⁶⁷

The objective and result of the second process – informalization – is that work done by the self-employed worker and her/his workers falls under the realm of the informal economy. The informal economy can be understood to comprise enterprises that are not regulated and employment that is not regulated.¹⁶⁸ The concept of the informal economy has been much contested since its “discovery” in Africa in the 1970s. It was initially conceived of as comprising small, unregistered and marginal enterprises in developing countries.¹⁶⁹ The concept has subsequently been developed and expanded as a multi-dimensional phenomenon that encompasses a range of economic activities, covers heterogeneous employment

¹⁶³ J. Theron, “Informalisation from above, Informalisation from below: what are the options for organization?” Unpublished Mimeo (University of Cape Town, 2007) 5.

¹⁶⁴ G Casale “The employment relationship: a general introduction” in G Casale (ed) *The employment relationship: a comparative overview* (Oxford: Hart Publishing 2011) 1-33 at 21-22.

¹⁶⁵ Theron (note 163) 5.

¹⁶⁶ Casale (note 164) 21-22.

¹⁶⁷ *Ibid.*

¹⁶⁸ J Theron, S Godfrey with M Visser *Work in Progress: Keywords for organizing and regulating work* (Cape Town: Institute of Development and Labour Law Working Paper, 2011) 32-34.

¹⁶⁹ ILO *Employment, Incomes and Equality: A Strategy for Increasing Productive Employment in Kenya*

(Geneva: International Labour Office, 1972); K Hart, “Informal Income Opportunities and Urban Employment in Ghana” (1973 11(1) *Journal of Modern African Studies*) 61-89.

relationships and cuts across formal and informal enterprises in both developed and developing economies.¹⁷⁰

A number of theories explain the existence of the different dimensions of the informal economy. For the purposes of this discussion, it is sufficient to distinguish between “informalisation from below” which is not the present focus, and “informalisation from above” which is closely related to contracting practices.¹⁷¹ “Informalisation from below” relates to informal activity initiated and organised at the household level as a means of survival and includes activities such as street trading.¹⁷²

On the other hand, “informalisation from above” relates to informal activity that is structurally driven by and linked to formal enterprises seeking to minimise employment-related costs.¹⁷³ Labour practices such as contracting work out by core

¹⁷⁰ See Annexure to the ILO Report *Decent Work and the Informal Economy* (Geneva: International Labour Office, 2002) ; “Guidelines concerning a statistical definition of informal employment, endorsed by the Seventeenth International Conference of Labour Statisticians” (November-December 2003) accessed from <http://www.ilo.org/public/english/bureau/stat/download/papers/def.pdf> on 01/03.2010; M Chen, J Vanek and J Heintz, “Informality, Gender and Poverty: A Global Picture” 2006 *Economic and Political Weekly* May 27 , 2131 2139 2132; I Valodia, *Formal and Informal Linkages in South Africa: Some Considerations* (Johannesburg: Human Sciences Research Council, 2006) 2; M Chen, “Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment” paper presented at the Expert Group on Development Issues and the United Nations University World Institute for Development Economics and Research Conference *Unlocking Human Potential: Linking the Informal and Formal Sectors* 17-18 September 2004, Helsinki, Finland 10-12.

¹⁷¹ These terms are used by Theron in J Theron, “Informalisation from above, informalisation from below: what are the options for organization?” Unpublished Mimeo (University of Cape Town, 2007).

¹⁷² J Theron (note171) 7; L Beneria, “Changing Employment Patterns and the Informalisation of Jobs:

General Trends and Gender Dimensions” (Geneva: International Labour Office, 2001) 5.

¹⁷³ J Heintz and R Pollen “Informalization, economic growth, and the challenge of creating viable labor

standards in developing countries” in N Kudva and L Beneria *Rethinking Informalization: Poverty, precarious jobs and social protection* (Cornell University Open Access Repository, 2005) 44-66 48; Beneria (note 172) 5.

firms have their centre of gravity in the formal economy, with the core enterprises taking the leading role in generating informality and poor working conditions.¹⁷⁴ Theron argues that such practices have enabled core enterprises to “informalise the formal workplace”.¹⁷⁵

The concept of informalisation from above is based on the structural account of the informal economy. The structuralist school relates to the segment of the informal economy that comprises subordinated economic units or micro firms and workers that serve to reduce input and labour costs, and thereby increase the competitiveness of large capitalist firms.¹⁷⁶ Its proponents argue that the activities in the informal economy are inextricably linked and subordinated to the formal economy.¹⁷⁷ They argue that these asymmetrical relationships between these informal activities and formal firms are an enduring feature of capitalist development.¹⁷⁸

This section argued that while contracting work out to self-employed workers can be understood in terms of externalisation and casualisation, it can also be understood in terms of vertical disintegration and informalisation. Through this practice, firms have changed from vertical integration to hierarchical relationships with operations owned by self-employed workers. These relationships are designated as commercial or market relationships but in reality allow core enterprises to exercise the control that they would exercise in terms of employment

¹⁷⁴ Beneria (note 172) 7-8.

¹⁷⁵ J Theron (note 171) 5.

¹⁷⁶ M Castells and A Portes (note 160).

¹⁷⁷ M Chen “Rethinking the informal economy: from enterprise characteristics to employment relations” in N Kudva and L Beneria *Rethinking Informalization: Poverty, precarious jobs and social protection* (Cornell University Open Access Repository, 2005) 28-43 29-30.

¹⁷⁸ Friedman (note 1) 35; M Chen, “Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment” (note 170) 6.

relationships. The asymmetrical relationships enable the core enterprises to simultaneously evade employer obligations and drive down labour costs associated with self-employed workers and their workers.

CONCLUSION

This chapter discussed the practice of contracting work out to self-employed workers on the basis that they are independent contractors. These self-employed workers in turn employ other workers to assist them. It began by tracing the origins of contracting out to self-employed workers which is reported to have begun across a number of sectors in Britain in the 18th century. One could argue that the earlier appearance of this practice on South African mines was the result of colonisation by the British in the 19th century. However, it is unclear why it does not seem to have pervaded other sectors during this early period.

The discussion of the case studies revealed that the practice emerged in various sectors the 1990s and has been increasingly used by employers. It was noted that employers have couched these practices as initiatives aimed at empowering workers promoting small enterprise development in a society where black economic empowerment has become imperative. However, in light of contemporary South African debates about labour markets and labour regulation, it was suggested that the practice appears to be fuelled by an aversion to the labour regime and a desire to evade the obligations it imposes on employers.

This hypothesis was borne out in sections 4.3.1 and 4.3.2, which illustrated that the practice is underpinned by the processes of externalisation via commodification and externalisation via intermediation. It was argued that this

practice of contracting work out to self-employed workers represents the point where these two processes intersect to purportedly create an entity comprising the self-employed worker and her/his workers. The discussion showed that to the extent that this practice has led to the creation of separate enterprises, they have not furthered government's developmental agenda, but have been used as a vehicle to enable core enterprises to dispense with the employer liabilities that would otherwise be associated with directly employing the workers falling under them.

It was argued that the externalisation of self-employed workers and their workers enable core enterprises to casualise their work, thus making their work insecure and unpredictable. The ultimate consequence of the combined effect of these processes is that self-employed workers and their workers work under precarious conditions and are denied the protection of labour law. The practice was also characterised as involving the inter-related processes of vertical disintegration and informalisation.

This chapter has focused on examining the empirical evidence of the practice of contracting work out to self-employed workers in South Africa and its implications for the workers involved. It has demonstrated the challenges that the intersection of the different processes constituting the practice present problems for the effective application to the workers involved. The issues raised in this chapter provide a compelling case for a closer analysis of the extent to which South African law recognises these issues and regulates them. This analysis is undertaken in chapter five.

CHAPTER 5: DOES SOUTH AFRICAN LAW RECOGNISE AND REGULATE THE PRACTICE?

Chapter four of this work described the practice of contracting work out to self-employed workers in the South African context. It revealed that while the practice is primarily constituted by the intersection of externalization via commodification and externalization via intermediation, it gives rise to and intersects with casualisation. The discussion also conceptualized the practice in terms of vertical disintegration of firms and the informalisation of the work of self employed workers and their workers.

The key finding of chapter four was that self-employed workers and their workers labour under insecure and precarious conditions that fall short of the labour standards. The non-protection of these workers points to the possibility that South African labour law does not adequately recognise the practice under scrutiny. It could also indicate that if South African labour law recognises the practice, it has failed to effectively regulate it. This chapter therefore analyses South African labour law to determine the extent to which it recognises and regulates the situation of people like Taryn and Jabu and their workers.

The point of departure in this discussion is that the practice under scrutiny is one of several arrangements that present several challenges to conventional labour law. It will be argued that the practice undermines three key assumptions underlying the convention legal framework based on the standard employment relationship. In addition, the practice highlights the need for labour law to develop legal approaches that recognise and address the multi-dimensional nature of most non-standard employment practices in the changed world of work. These challenges

that the practice presents for conventional labour law are discussed in part 5.1 of this chapter.

The main part of this chapter focuses on South African labour law in particular. Although South African law has developed strategies to regulate a number of non-standard employment practices, it has not developed specific rules to regulate the practice under scrutiny. The discussion therefore canvasses the body of legal rules that have been developed to regulate non-standard employment practices to assess their relevance and applicability to the practice under scrutiny. Part 5.2 considers the legal rules that regulate externalisation via commodification and may be applicable to the self-employed workers like Jabu and Taryn. Part 5.3 considers the legal rules that regulate externalisation via intermediation and may be applicable to the workers of Jabu and Taryn.

The final part of this chapter looks outside state-centred law to determine whether there are non-state rules or practices that regulate the practice under scrutiny. The discussion draws on some examples of strategies initiated by trade unions, employers and bargaining councils to ensure fair working conditions for self-employed workers and/or their workers. The lessons learned from these strategies and their implications for state regulation of the practice are considered.

5.1 WHAT CHALLENGES DOES THE PRACTICE POSE FOR LABOUR LAW?

This part outlines the shortcomings of conventional labour law which continues to presuppose the standard employment relationship as the paradigm of employment. On the one hand, it critiques three assumptions underlying this conventional legal

framework in light of the realities presented by the practice under scrutiny. Much reliance is placed on the work of Fudge, Freedland and Davies and Freedland that challenges the conventional framework. On the other hand, labour practices such as the one under scrutiny challenge labour law to move beyond one-dimensional solutions to increasingly multi-dimensional employment practices.

5.1.1 Challenging three assumptions underlying conventional labour law

The proliferation of increasingly multilateral and complex employment practices has undermined conventional labour law's conceptualization of the parties in the employment relationship and the organisation of work.¹ Three key assumptions will be discussed here. The first is the assumption that the employer is a unitary and bounded entity.² The second is the assumption that the employment relationship is a bilateral and personal relationship.³ The third is the assumption that the binary divide between employment and self-employment is the keystone for determining inclusion in and exclusion from labour law's protection.⁴

¹ M Freedland *The Personal Employment Contract* (New York: Oxford University Press, 2003), 36, 40; J Fudge "The Legal Boundaries of the Employer, Precarious Workers and Labour Protection" in G Davidov and B Langille (eds) *Boundaries and Frontiers of Labour Law: Goal and Means in the Regulation of Work* (Oregon: Hart 2006) 295-315 295.

² P Davies and M Freedland "The complexities of the employing enterprise" in G Davidov and B Langille (eds) *Boundaries and Frontiers of Labour Law: Goal and Means in the Regulation of Work* (Oregon: Hart 2006) 273-293 274-6; J Fudge "Fragmenting work and fragmenting organisations: the contract of employment and the scope of labour regulation" 44 *Osgoode Hall Law Journal* (2006) 609 618 622.

³ P Davies and M Freedland "Labour markets, welfare and the personal scope of employment law" 21 *Comparative Labour Law and Policy Journal* (1999-2000) 231 244; Freedland (note 1) 36-40; Fudge (note 1) 295 -315 298-300.

⁴ Fudge (note 2) 609 618 622; Davies and Freedland (note 2) 273-293 283.

The conceptualization of the employer as a single and unitary entity can be traced back to the “period during which employment relations could convincingly be analysed as being between an individual [human] master and an individual servant”.⁵ With the rise of corporate legal personality, labour law equated the limited liability company for the purposes of corporate governance to the human employer for the purposes of labour protection.⁶ This approach was reinforced during a period when productive relations were controlled and directed within a single capital entity, the vertically integrated firm.⁷

However, with the development of new organisational forms combined with pre-Fordist arrangements such as contracting, subcontracting and the use of employment agencies, the firm’s corporate structure has ceased to mirror its identity as an employer.⁸ With the rise of vertical disintegration, and flexible and corporate networks, the boundaries of the firm have become blurred, making it difficult to distinguish between the firm and the market.⁹ It is therefore more appropriate to conceptualise the employer not as a single and bounded entity, but as a multi-polar or multi-nuclear organisation.¹⁰

In the context of the practice under scrutiny, it is difficult to draw the line between BBB on the one hand and Jabu’s firm on the other. One could question whether Jabu’s firm is independent or is a nucleus within the “large, loose multi-nuclear” structure that now characterizes firms like BBB. In order to answer these questions in light of these contemporary realities, labour law needs to move beyond

⁵ Freedland (note 1)36.

⁶ Davies and Freedland (note 2) 273-293 274-6; Freedland (note 1)36; Fudge (note 1) 298-301; Fudge (note 4) 609 622.

⁷ Fudge (note 1) 295, 300-1.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Davies and Freedland (note 2) 273-293 273-4; 284-5.

the traditional unitary conception towards a more expansive approach to conceptualizing the employer.

Closely related to the unitary concept of the employer is the assumption that employment is a bilateral and personal relationship. This assumption also has its roots in the master-servant relationship and was sustained by the vertically integrated firm and the standard employment relationship.¹¹ Conventional labour law, with its assumption of a bilateral relationship and its preoccupation with corporate personality and privity of contract, allocates employer risks and responsibilities to the party with whom the workers have a contract.¹²

However, this model is overly simplistic and has failed to accommodate and account for the organizational realities of multilateral employment relationships involving employment agencies, contractors and subcontractors.¹³ Under these arrangements, the functions of an employer are distributed between different employing entities.¹⁴ For example, Taryn may employ and remunerate the workers in her home working operation, while the core enterprise uses the worker's services and (often indirectly) manages the process of work.

The increasingly multilateral nature of employment relationships and the distribution of employer functions amongst a number of employing entities raise questions about how best to allocate the risks and responsibilities associated with

¹¹ Fudge (note 1) 300-1.

¹² Fudge (note 2) 609 636; Fudge (note 1) 310.

¹³ Freedland (note 1)40-1.

¹⁴ Freedland (note 1) 40. He identifies four "main functions which are comprised in the notion of acting as an employer... (1) engaging workers for employment and terminating their employment; (2) remunerating workers and providing them with other benefits of employment; (3) managing the employment relation and the process of work; (iv) using the worker's services in a process of production or service provision."

employment.¹⁵ The conventional approach of attributing employer liability enables firms to strategically structure their organizational relations to shift the risks and responsibilities of employment onto less stable firms, with the most vulnerable workers ultimately bearing the risks.¹⁶ This was demonstrated in the analysis of the case studies in chapter four. Labour law is therefore challenged to transcend this narrow and formalistic approach to the attribution of liability and develop a conceptual framework that allows for “a holistic view of multilateral relationships” to ensure the fairer allocation of rights and responsibilities.¹⁷

The third assumption that the practice under scrutiny undermines is that the binary divide between employee and independent contractor is the keystone for determining the scope of labour law. As was indicated in chapter two, the adoption of this binary divide was the outcome of policy choices in the context of particular socio-economic circumstances. Brooks has argued that the binary divide has become entrenched due to “legislative habit” rather than “careful consideration”.¹⁸ The realities of the world of work have made it necessary to reconsider the choice of the employment relationship as the gateway to labour law. Amongst these realities is the tendency for employers to use the current boundaries strategically and enter into work arrangements that exclude their employer obligations.¹⁹ This was highlighted in chapter four where core enterprises label workers as independent contractors in order to exclude the application of labour law.

¹⁵ P Davies and M Freedland “Labour markets, welfare and the personal scope of employment law” 21 *Comparative Labour Law and Policy Journal* (1999-2000) 231 244.

¹⁶ Fudge (note 1) 301-2.

¹⁷ Davies and Freedland (note 15) 231 244.

¹⁸ R R Carlson “Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying” 22 *Berkley Journal of Employment and Labour Law* (2001) 295 at 368.

¹⁹ A Hyde “What is Labour Law?” in G Davidov and B Langille(eds) *Boundaries and Frontiers of Labour*

Law: Goal and Means in the Regulation of Work (Oregon: Hart 2006) 37- 61 48; Fudge, J “New Wine Into old bottles?: Updating legal forms to reflect changing employment forms” 33 *University of Columbia Law Review* (1999-2000) 129-152 at 148; Davies and Freedland (note 15) 231 235.

Another reality is that self-employment does not necessarily translate into economic independence and autonomy. Fudge highlights the diversity of the circumstances of the self-employed and argues that self-employment should be regarded in terms of a continuum rather than a homogenous category.²⁰ At the high end are the self-employed who have “the autonomy ... to realize their potential and align rewards with efforts”.²¹ At the low end are workers who, like Taryn and Jabu, “more closely resemble employees than they do entrepreneurs” but are excluded from labour protection because they are classified as independent contractors.²²

There are no hard and fast solutions to the challenges presented by the choice of the employment relationship as the gateway to labour protection. One strategy has been to develop an intermediate category of workers or dependent contractors who are entitled to limited labour protection. This strategy has been implemented in jurisdictions such as the UK and in Ontario in Canada and was discussed extensively in chapter two. While this strategy allows for greater inclusion, it creates additional difficulties in drawing the lines between the different categories of workers.²³

A second strategy is to develop a broader occupational category that looks beyond traditional employment as the gateway to labour protection. Supiot’s account has been the most influential in this regard. He points out the need to seek new institutional ways of protecting workers and to develop a new employment status “based on a comprehensive approach to work, capable of reconciling the need

²⁰ Fudge (note 2) 609 621.

²¹ *Ibid.*

²² J Fudge E Tucker and L Vosko “Employee or Independent Charting the Legal Significance of the Distinction in Canada” 10 *Canadian Labour and Employment Law Journal* 193 229.

²³ Fudge et al (note 22) 193 226-7.

for freedom and the need for security”.²⁴ On this view, labour law should broaden its scope to include not only paid work, but non-marketable forms of work such as voluntary training and unpaid domestic work. In this way, the notion of work or labour force membership, as opposed to paid employment, can be used as a basis for occupational status.

Supiot argues that the concept of labour force membership would provide an occupational status covering people throughout their transitions between the various forms of work they might perform throughout their lives.²⁵ He proposes a system in which social rights (that is, labour and social security rights) fall within four concentric circles.²⁶ The first would be universal social rights applicable irrespective of any kind of work, for instance, health care insurance. The second would cover those doing unpaid work such as voluntary training and unpaid care work, who would be provided with retirement benefits and accident cover. The third circle would cover the common law of occupational activity concerning health and safety law. The final circle would cover paid employment in situations of subordination and would provide specific rights for this category.

A third strategy that could be envisaged is to focus on the purpose of each piece of labour legislation and identify the factors that would entitle workers to benefit from the legislation.²⁷ This would require the legislature to determine the circumstances which workers should be covered by labour legislation, irrespective

²⁴ European Commission, Directorate-General for Employment, Industrial Relations and Social Affairs *Transformation of Labour and the Future of Labour Law in Europe* (Luxembourg, EC Commission, 1999) [“The Supiot Report”] 21-2.

²⁵ A Supiot et al, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (New York: Oxford University Press, 2001) 55.

²⁶ The Supiot Report (note 24) 21-2.

²⁷ A Brooks “Myth and Muddle – An Examination of Contracts for the Performance of Work” 11 *University of New South Wales Law Journal* 48 (1988) 91-2.

of their employment status.²⁸ Such an approach would allow for a more targeted approach to labour protection and to ensure the protection of the intended beneficiaries.²⁹ However, it would lead to a multiplicity of definitional criteria for each piece of legislation.

The above discussion is by no means an exhaustive account of the approaches to addressing the binary divide and the approaches discussed above are not without their difficulties. Nevertheless, it highlights the need for labour law to move beyond the notion that the binary divide is “an inevitable feature of a natural legal order”.³⁰ It also sheds light on the possibilities for the broader application of labour law once freed from the employee-independent contractor straitjacket. A broader approach would place less emphasis on legal status and focus more on the actual circumstances to ensure that workers who depend on their labour for a living were protected.³¹

However, the above strategies do not necessarily adopt a blanket approach to labour protection. They recognise that in some cases it may be appropriate to limit the availability of certain rights to certain workers and that this would mean that different eligibility requirements would apply to different rights. In addition, a differentiated approach would have to be adopted to ensure that the mechanisms for the implementation of the rights of workers were tailored to suit the different arrangements and circumstances under which they worked.³²

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Fudge (note 2) 609 647.

³¹ Fudge et al (note 22) 193 229.

³² Fudge et al (note 22) 193 230.

To summarise the discussion in this section, the practice of contracting work out to self-employed workers is one amongst many practices that has brought labour law's underlying assumptions into question. The discussion focuses on three assumptions, namely the unitary analysis of the employer, the characterization of employment as a bilateral and personal relationship, and the focus on the binary divide as the gateway to labour law. It was argued that in order to come to terms with the challenges presented by these various forms of work, labour law will have to develop new conceptual tools that are aligned with the new realities. The analysis of South African labour law in sections 5.2 and 5.3 will consider the extent to which the legal approaches discussed represent a shift beyond the traditional assumptions discussed above.

5.1.2 Addressing multi-dimensional working arrangements

The above section critiqued the *assumptions* underlying conventional labour law based on the traditional employment relationship and recommended how labour law can address the challenges posed by new employment relations. This section focuses on labour law's responses to non-standard labour arrangements. It pays particular attention to the challenges presented by the multi-dimensional nature of these non-standard labour arrangements such as the practice under scrutiny.

Most jurisdictions have developed legal rules in response to the increase in non-standard forms of work. To a large extent these developments have been brought about through legislation and have been introduced on an ad hoc basis. Thus, in response to externalization via commodification, legal systems have developed better tests to distinguish between employer and employee, introduced presumptions and deeming provisions, and developed intermediate categories of

workers or dependent contractors. Legal rules have been developed to address the allocation of responsibility for employer obligations in situations involving the use of employment agencies or outsourcing. In some jurisdictions, legal rules have been developed to that casualised workers, and particularly those working on temporary contracts, are not prejudiced by virtue of the nature of the employment contracts.

Underlying these legal solutions is an assumption that the processes giving rise to non-standard work arrangements can be easily compartmentalized and addressed in isolation. However, the practice of contracting work out to self-employed workers demonstrates that some of these arrangements do not come in neat little boxes labelled “externalization via commodification”, “externalization via intermediation” and “casualisation”. The situation involving TJ Fashions, Taryn and her workers can more accurately be described as a complex package incorporating all three processes. The multi-dimensional nature of this practice undoubtedly presents challenges for legal regulation.

As was indicated in the introduction, South African labour law does not present a comprehensive solution to the practice under scrutiny. The assessment of the body of South African labour law’s responses will highlight their predominantly one-dimensional nature as they focus on one dimension of the practice. The discussion in parts 5.2 and 5.3 will highlight the inadequacies of merely adopting these existing legal rules to address the practice under scrutiny. A possible multi-dimensional approach to regulating the practice will be presented in chapter seven.

The discussion in sections 5.1.1 and 5.1.2 has highlighted the challenges that the practice of contracting work out to self employed workers presents for labour law. Both are the challenges that modern labour law must confront and address if it is to effectively address the practice under scrutiny. South African law's responses to non-standard employment relationships in parts 5.2 and 5.3 below will be assessed in light of the extent to which they confront and address these challenges. In order to make this assessment, four key questions will be considered:

- Do the legal rules move beyond the conceptualisation of the employer as a unitary and bounded entity to embrace the notion of the employer as a multi-polar entity?
- Do the legal rules move beyond the conceptualisation of the employment relationship as a bilateral and personal relationship to recognise the growing multilaterality of employment relationships?
- Do the legal rules transcend the binary divide to consider the protection of workers in a broad sense?
- Do the legal rules recognise and address the multi-dimensional nature of the practice of contracting work out to self-employed workers?

5.2 LEGAL REGULATION OF EXTERNALISATION BY COMMODIFICATION

The outcome of externalization by commodification of the employment relationship makes it difficult to determine whether a person is an employee or an independent contractor. It highlights the complexities that have arisen in a context where the binary divide has been maintained between employees who are entitled to labour and social protection or independent contractors who are excluded from protection.

In the particular context of the practice under scrutiny, there is a question as to whether a worker who employs other workers should be entitled to protection.

This part considers two broad approaches that South African law has developed to ensure that workers deserving of protection are brought within its scope. The first approach expands the concept of an employee and adopts strategies to ensure that more workers are recognised as employees. Essentially, this approach aims to shift the boundary between employees and independent contractors to enlarge the scope of the former. This approach is discussed in section 5.2.1

The second approach emphasises the need to look beyond employment as the primary gateway to labour protection and suggests the need for a broader conception of work to cover a wider range of workers needing protection. In the South African context, there has been debate as to how the concept of a worker envisaged by section 23 of the Constitution, could play a role. This is discussed in section 5.2.2. Section 5.2.3 consolidates the discussion and analyses the significance of these two approaches in the context of contracting work out to self-employed workers.

5.2.1 Expanding the concept of the employee

As mentioned earlier, the first approach maintains the binary distinction between employees who are entitled to protection and independent contractors who are excluded from labour protection. It expands the protective scope of labour law by adopting strategies to ensure that more workers fall within the protected category of employees. South African law has adopted two strategies in line with this

approach. The first strategy is to develop the test and widen the criteria that may be considered to determine whether or not a person is an employee. The second approach is to allow for certain categories of workers to be deemed to be employees. These developments are discussed in turn below.

Strategy 1: Developing the test and expanding the criteria for identifying an employee

Three South African institutions have played a role in developing the test for distinguishing between employees and independent contractors and expanding the concept of an employee. The first is the judiciary which has developed a number of principles during the course of deciding matters brought before it. The second is the legislature, which has done so primarily through the presumption of employment. The third is the National Economic Development and Labour Council (NEDLAC), which drafted a Code of Good Practice on who is an employee in pursuance of a mandate from Parliament. While these developments have to some extent been discussed in chapter two, they are expanded upon and consolidated in this section in order to draw out the implications for the practice under scrutiny.

The Appellate Division's decision in *Colonial Mutual Life Assurance Society Ltd v MacDonald*³³ marked the beginning of an era when the employer's right to control the work to be done and the manner in which it was to be done was essential to determining the existence of an employment relationship. This meant that in the absence of the right to control the work and manner in which work was to be done, there could be no finding that there was an employment relationship. This continued to be the position for 45 years.

³³ 1931 AD 412.

The subsequent decisions of the Appellate Division in *Ongevallekomissari v Onderlinge Versekerings Genootskap AVBOB*³⁴ and *Smit v Workmen's Compensation Commissioner*³⁵ adopted the broader "dominant impression" test. In the latter decision, the Court held that the principle laid down in *Colonial Mutual Life Assurance* had to be qualified.³⁶ The Court held that while the right of control was an important factor indicating the existence of an employment relationship, it was not the sole factor, and had to be considered in light of the totality of circumstances gleaned from the contract as a whole.³⁷ The additional factors that the Court referred to were the object of the contract, whether the worker was required to render the services personally, the impact of the death of the worker on the relationship, and the conditions under which the contract could be terminated.³⁸

The implication of adoption of the dominant impression test is that it is in principle possible to find that an employment relationship exists in the absence of the employer's right of control. Arguably, the adoption of a wider test for identifying an employee has widened the scope the concept and thus increased the number of workers falling under this category. The dominant impression test has subsequently been applied by the courts to determine whether a person is an employee for the purposes of determining whether labour legislation applies.³⁹

The courts have also widened the concept of employment by moving beyond a purely contractual approach to a more substantive approach to determining the

³⁴ 1976 (4) SA 446 (A).

³⁵ 1979 (A) SA 51 (A).

³⁶ Note 33 at 62 D.

³⁷ Note 35 at 62 D-G.

³⁸ Note 35 at 61 A-H. For a more expansive list of the factors, see chapter two, section 2.2.2.

³⁹ See for example *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 ILJ 673 (LAC), *SABC v McKenzie* (1999) 20 ILJ 585 (LAC), *Mandla v LAD Brokers (Pty) Ltd* (2000) 21 ILJ 1807.

nature of the relationship between the parties. In *Smit*, the Appellate Division held that the determination was to be made on the basis of a “true construction” of the terms of the *contract* between the parties.⁴⁰ The Court disregarded oral evidence adduced by the appellant to show that the relationship was one of employment. The Court’s reasoning on this point appears to have been that because the evidence adduced in court was not corroborated by the provisions of the contract, it was irrelevant.⁴¹ This indicated the Court’s belief that the contract was the exclusive source of evidence necessary to determine the nature of the relationship.

Over the years, the Courts have relaxed their stance and moved towards considering facts and circumstances outside of the contract. They have moved beyond relying on the form contract and considered the realities of the relationships they give rise to. This approach was discussed in *Mandla v LAD Brokers*,⁴² where the Labour Court held:

...although the legal relationship must be gathered primarily from a construction of the contract between the parties, the label that is used to describe a relationship may be of no assistance if it is done to disguise the real relationship. One must also be wary to accept such labels at face value because the description of a person as an independent contractor takes him or her outside the ambit of the LRA and the protections provided thereby (in terms of the exclusionary provisions of s 198(3) of the LRA - quoted above). After all, the LRA concretizes important constitutional rights such as the fundamental right to fair labour practices. Moreover, the real relationship must be gathered from the contract as a whole and the realities of the relationship created thereby.⁴³

⁴⁰ Note 35 at 64 B.

⁴¹ See for example note 35 at 67 A, where the Court found: “Jochelson who was general manager and actuary of the company at the time of the accident gave evidence on behalf of the appellant. He testified inter alia that the appellant had to get permission from the company to go on holiday. It was a matter of arrangement which had to be fitted in for the good management of the company. It was a form of general control by the company over all of its agents. I must point out that exhs ‘A’ and ‘B’ make no mention of holidays or the taking of leave by agents.”

⁴² (2000) 21 ILJ 1807.

⁴³ Note 42 at para [41].

Several subsequent court decisions have adopted a similar approach and placed substance over form in determining the nature of the relationship and have highlighted the need to ensure that workers are not unfairly deprived of their labour rights.⁴⁴ On this approach, the Courts have reached conclusions that contradict the express terms of the contract of the parties.

The above shows that the courts have broadened the concept of an employee by discarding the narrow control test and by placing emphasis on the substance of the relationship between the parties as opposed to the formal terms of the contract. During the course of developing the tests to distinguishing between employees and independent contractors, the courts have considered two questions that could possibly relate to the practice of contracting work out to self-employed workers. One relates to whether a worker can be found to be an employee if s/he contracts with an employer through the medium of a corporate entity that s/he owns. Another relates to whether a worker can be found to be an employee if s/he employs workers to assist her/him.

The Labour Appeal Court had to decide on the first question in the case of *Denel v Gerber*.⁴⁵ In this case, the company D had contracted with another company, B for the provision of services which would be provided by B's owner, G. The Court had to decide whether G was an employee of D and could claim unfair dismissal protection in the LRA. The Court held that the fact that G owned the company which was obligated to provide the services to D did not preclude her from being found to be an employee of the company entitled to receive the services.⁴⁶ It concluded that

⁴⁴ *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC), *Hydraulic Engineering Repair Services v Ntshona & others* (2008) 29 ILJ 163 (LC), *National Education Health & Allied Workers Union v Ramodise & others* (2010) 31 ILJ 695 (LC).

⁴⁵ *Denel* (note 44).

⁴⁶ *Denel* (note 44) at para [93].

the fact that the services were to be provided through a corporate entity did not preclude a finding that an employment relationship existed between G and D.⁴⁷ It held that this principle gave effect to the realities of the relationship between the parties.

There appears to be a dearth of case law directly addressing the second question and the only decision that seems to have revolved around it is *Sanlam Life Insurance Ltd v Commission for Conciliation, Mediation & Arbitration & others*,⁴⁸ where the Labour Appeal Court had to consider the status of a financial advisor whose contract allowed her to register as a VAT vendor and to employ and remunerate other persons to assist her. The financial advisor in question had not neither registered for VAT nor employed any workers to assist her. The Court found that these provisions were not found in typical employment contract and that she was an independent contractor.

In addition to the courts, the South African legislature has also played a role in expanding the concept of the employee in line with the first strategy. In 2002, the Labour Relations Act and the Basic Conditions of Employment Act were amended to create a presumption of employment if certain factors were found to be present. The Explanatory Memorandum to the BCEA Amendment Bill highlighted that the purpose of these provisions was to address the proliferation of vulnerable workers and to ensure that they fell within the scope of labour and social protection.⁴⁹ The Memorandum stressed that was necessary in light of the Constitutional guarantee of the right to fair labour practices for 'every worker' as opposed to 'every employee'.

⁴⁷ *Ibid.*

⁴⁸ (2009) 30 *ILJ* 2903 (LAC).

⁴⁹ Explanatory Memorandum to the BCEA Amendment Bill, accessed from http://www.workinfo.com/free/sub_for_legres/data/membcea.html on 12/11/2010.

The Memorandum stated that the presumption was introduced to address three shortcomings relating to the law governing who is an employee.⁵⁰ First, the law had failed to identify the characteristics of an employee or establish a test to determine who is an employee, leaving these to the Courts' discretion. Second, the dominant impression test applied by the courts did not provide clear guidance for employers and employees. Another shortcoming identified in the Memorandum was the Court's formalistic approach to distinguishing between employee and independent contractor as opposed to a more purposive approach focusing on whether the worker should be protected by labour legislation.

The 2002 amendments to the Labour Relations Act and the Basic Conditions of Employment Act create a rebuttable presumption of employment, "regardless of the form of the contract", if one or more of certain listed factors are proved.⁵¹ Proof of any one or more of seven factors listed below can trigger the presumption that a worker is an employee. Once one or more of these factors are proven and the presumption is triggered, the onus rests on the employer to present evidence to rebut the presumption. The factors are as follows:⁵²

- (a) the manner in which the person works is subject to the control or direction of another person;
- (b) the person's hours of work are subject to the control or direction of another person;
- (c) in the case of a person who works for an organisation, the person forms part of that organisation;
- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
- (e) the person is economically dependent on the other person for whom he or she works or renders services;
- (f) the person is provided with tools of trade or work equipment by the other person; or
- (g) the person only works for or renders services to one person.

⁵⁰ *Ibid.*

⁵¹ Section 200A of the Labour Relations Act and section 83A of the Basic Conditions of Employment Act.

⁵² Section 200A (1) LRA and section 83A of the BCEA.

While it aims to bring about a new regime for determining the existence of an employment relationship, the presumption does not wholly substitute court decisions on the matter and the latter continue to be relevant. The provisions creating the presumption expressly exclude workers who earn above a certain income threshold from its benefit.⁵³ In such cases, the decision maker must rely on binding court decisions to determine whether the person is an employee.⁵⁴ In addition, binding court decisions are relevant in cases where an applicant establishes a factor that triggers the presumption and the employer leads evidence to rebut the presumption.⁵⁵ In such cases, the court decisions are relevant.

In addition to creating the presumption of employment, section 200A of the LRA mandated the National Development and Labour Council (NEDLAC) to issue a Code of Good Practice setting out guidelines determining whether persons are employees.⁵⁶ In pursuance of this mandate, NEDLAC published the Code of Good Practice: Who is an Employee in 2006.⁵⁷ While any decision-maker determining a worker's employment status must consider the provisions of the Code is not a substitute for binding court decisions.⁵⁸ It is therefore a "soft law" instrument.

The Code's primary purpose is to inter alia "promote clarity and certainty as to who is an employee" and to "ensure that a proper distinction is maintained

⁵³ Section 200A (2) LRA. The threshold amount is periodically determined by Minister of Labour in terms of section 6(3) of the BCEA. Benjamin argues that the rationale for this is to exclude skilled and professional workers who presumably have the bargaining power and would not be in need of labour protection. P Benjamin "Who needs labour law? Defining the scope of legal protection" in J Conaghan, R Fischl and K Klare (eds) *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2000) 75-92, 92.

⁵⁴ Item 22(a) of the Code of Good Practice: Who is an Employee Government Gazette No 29445, General Notice 1774 of 2006 issued 1 December 2006.

⁵⁵ Note 54 at item 22(b).

⁵⁶ Section 200A of the LRA.

⁵⁷ Note 54.

⁵⁸ Note 54 at item 11.

between employment relationships which are regulated by labour legislation and independent contracting”.⁵⁹ It primarily applies to the key labour statutes, namely the LRA, the BCEA, the EEA and the SDA. It also applies to other legislation that falls under the mandate of the Ministry of Labour, namely Unemployment Insurance Act (UIA), the Compensation for Occupational Injuries and Disability Act (COIDA), and the Occupational Health and Safety Act (OHSA).⁶⁰

Importantly, the Code presupposes that employees are in a weaker bargaining position and aims to ensure that they receive the protection of labour law and are not deprived thereof by contracting arrangements.⁶¹ The Code also aims to assist those charged with applying and interpreting labour law to understand and interpret the various employment relationships in the labour market including disguised and ambiguous employment relationships, atypical employment and triangular employment relationships.⁶²

Part 2 of the Code repeats the effect of the presumption of employment in the LRA and BCEA.⁶³ Part 3 reiterates the centrality of the dominant impression test in determining whether a worker is an employee.⁶⁴ It sets out the key factors distinguishing between employees and independent contractors as originally

⁵⁹ Note 54 at items 2(a) and (c).

⁶⁰ Acts 63 of 2001, 130 of 1993 and 85 of 1993 respectively. The definitions of an employee in these statutes are different from that contained in the LRA, BCEA, EEA and SDA. Nevertheless, this part provides that any person tasked with the interpretation and application of these definitions must consider the provisions in Parts 2 and 3 of the Code.

⁶¹ Note 54 at item 2(d).

⁶² Note 54 at item 2 (e).

⁶³ Note 54 at items 12 to 20.

⁶⁴ Note 54 at item 27.

discussed in the *Smit* decision.⁶⁵ It outlines other relevant factors, namely the form of remuneration, place of work and the provision of training.⁶⁶

The Code consolidates the principles of interpretation which should inform the determination of a worker's employment status.⁶⁷ These relate to constitutional interpretation, the importance of international law, the interpretation clauses of the various labour statutes, and the promotion of constitutional rights, especially the right to fair labour practices guaranteed in section 23.⁶⁸ Importantly, it emphasises the importance of placing substance over form, and the need to look beyond the contractual provisions to determine the realities of the relationship between the parties.⁶⁹

Importantly, the Code recognises and attempts to address two key features that may arise in relation to the contracting out of work to self-employed workers. Firstly, it recognises that in some cases workers provide services through legal entities such as companies and closed corporations. The Code provides that such arrangements do not preclude a person from being held to be an employee if the realities of the relationship point towards such a finding.⁷⁰ It however reaffirms the principle that a worker in this situation who uses the legal entity to gain tax advantages may be denied the relief provided by labour law on the basis of the "clean hands" principle.⁷¹

⁶⁵ Note 54 at item 32.

⁶⁶ Note 54 at items 42 to 50.

⁶⁷ Note 54 at part 5.

⁶⁸ Note 54 at items 59 to 68.

⁶⁹ Note 54 at items 28 to 31.

⁷⁰ Note 54 at item 31.

⁷¹ Note 54 at item 31.

Secondly, the Code of Good Practice on Who is an Employee recognises that some workers other workers and therefore play a dual worker-employer role. It recognises that this is common in some sectors where subcontractors are required to recruit workers to assist them. The Code states that although a worker's entitlement to hire workers is an indication of an independent contracting relationship, this does not preclude a finding that such a worker is an employee.⁷²

Item 37 of the Code suggests that in such situations, the relationship between the employer and the subcontractor and the relationship between the subcontractor and her/his workers must be examined to determine if an employment relationship exists. It provides that “[d]epending upon an examination of all the factors, including, for instance, the extent of control exercised by the [core enterprise], it is feasible that both the sub-contractor and the workers that he or she has engaged may be employees of the [core enterprise]”.⁷³ To the extent that it allows for a finding that the worker of a self-employed worker is an employee of the core enterprise, this provision could potentially establish an employment relationship between parties who have not concluded a contract of employment. This is a departure from the conventional approach that only recognises such a relationship where the parties have contracted with each other.

The question whether a contractor who employs workers can also be found to be an employee of the person that buys her/his goods and services has also been considered in the Indian context. Sankaran considers a case involving a salt worker in Gujarat, *Dharangadhara Chemical Works Ltd v State of Saurashtra*,⁷⁴ where the court found that “the fact that the person in question was allotted a plot of land to

⁷² Note 54 at item 37.

⁷³ Note 54 at item 37.

⁷⁴ [1957] 1 LLJ 577 (SC).

make salt by working himself together with workers employed by him would not take away from his workman (employee) status".⁷⁵ According to Sankaran, the decision seems to have been based on the fact that the contractor was bound to render personal services in terms of the agreement.⁷⁶ She argues that it is possible for such a person to be found to be an employee if all the characteristics of an employment relationship are present.⁷⁷

As indicated above, the only decision which appears to have considered this was *Sanlam Life Insurance Ltd v Commission for Conciliation, Mediation & Arbitration & others*.⁷⁸ The Court held that the contractual provision that allowed the worker to employ assistants was not typically found in employment contracts. The decision did not take account of the provisions of the Code of Good Practice on who is an employee.

Strategy 2: Deeming specific workers as employees

The second strategy falling under the first approach is to provide for the deeming of certain categories of workers to be employees. Legislation may confer the authority to deem on a legislative, executive or judicial office bearer or institution. In South Africa, section 83 of the BCEA empowers the Minister of Labour to publish a notice deeming any category of workers to be employees. Persons so deemed to be employees will be treated as employees for the purposes of the BCEA, any other legislation or a sectoral determination. The nature of the provision suggests that it

⁷⁵ K Sankaran, "Protecting the worker in the informal economy: the role of labour law" in Davidov and Langille, 205-220 212.

⁷⁶ Sankaran (note 75) 205-220 212-3.

⁷⁷ *Ibid.*

⁷⁸ Note 48.

was to bring workers that would not otherwise be found to be employees within the protective scope of labour law.

South Africa has not implemented its deeming provisions. It would therefore be useful to consider how it has been applied in other jurisdictions. The operation of deeming provisions in Australia was discussed in chapter two. It will be recalled from the discussion therein that there are two approaches to deeming workers as employees. The first is to allow for the designated authority to make a determination on an ad hoc basis with the guidance of a number of listed factors. The second is to provide for a predetermined list of occupational categories of workers who would be deemed as employees.

The question then becomes which of these approaches would be best to ensure the labour protection of self employed workers in a South African context. It is suggested that it would be more useful for the Minister of Labour to make determinations that certain categories of workers be deemed to be employees. These determinations could be made on the basis of sound empirical evidence of their need for protection. This would provide certainty and clarity and eliminate the need to litigate to determine if legislation was applicable. It would be worthwhile to constantly review the Ministerial determination and make necessary adjustments to ensure its currency and relevance to the world of work.

This section has discussed the first approach to addressing the problems with the binary divide which arise when work is externalised by commodification. The first approach involves maintaining the binary divide but the redrawing of the boundary

between employees and independent contractors to broaden the category of employees who are protected by labour legislation. This has been done by developing the test to expand the criteria for identifying an employee by the courts and legislature.

Another strategy has been to allow for the deeming of certain workers as employees, which is yet to be implemented in South Africa. The extent to which these approaches can be applied to the practice under scrutiny was discussed. The next section considers the second approach, which relates to abandoning the binary divide and developing a more expansive concept of a worker.

5.2.2 Beyond the employment contract: the concept of the worker

The second broad approach that could be used to externalisation by commodification seeks to transcend status as the criterion for eligibility for labour protection. Rather than seeking to redraw the lines between employees and independent contractors and other categories in between, it looks beyond the contract of employment as the focal point for the delivery of labour protection. This section considers how this approach could be operationalised in the South African context.

Section 23 of the South African Constitution guarantees a number of labour rights, the most pertinent to this discussion being found in the first two subsections. Section 23(1) provides that “everyone has the right to fair labour practices”. Section 23(2) provides that “every worker” has the right to form and join a trade union and to participate in trade union activities. The fact that the provisions make no reference to employees as the beneficiaries seems to indicate that the legislature

intended to cast the net of beneficiaries more widely than this narrow category. It is therefore necessary to consider how the courts and commentators have interpreted these provisions.

The meaning of a “worker” in section 23(2) was first considered by the Constitutional Court in *South African National Defence Union v Ministry of Defence and Another* (“the SANDU decision”).⁷⁹ The Court had to determine the constitutionality of section 126B (1) of the Defence Act⁸⁰ which prohibited members of the defence force from forming and joining trade unions. The SANDU argued that it violated the constitutional right of every worker to form and join a trade union.⁸¹

In considering the meaning of a “worker”, the Court found that section 23 used the word in the context of employers and employment and that in ordinary terms, this implied a contract of employment to provide services for an employer. Members of the defence force did not enter into contracts of employment, but rather ‘enrolled’ in the permanent force. On the face of it, this would mean that they would not be entitled to the rights enshrined in section 23.

However, the Court interpreted “worker” widely to include members of the defence force even though their relationship was unusual and not identical to an ordinary employment relationship. The court further found that a generous interpretation of the right was appropriate. Although members of the permanent force were not employees in the strict sense of the word, their enrolment conditions were in many respects similar to those of employees under a contract of

⁷⁹ (1999) 20 *ILJ* 2265 (CC).

⁸⁰ Act 44 of 1957.

⁸¹ Guaranteed in section 23(2) of the Constitution of the Republic of South Africa of 1996.

employment.⁸² The Court found that members of the permanent force were workers for the purposes of section 23(2) and accordingly held that their right to form and join trade unions was infringed by section 126B(1).

Examining the evolution of the role of the contract of employment and its role in light of the changes presented by the new world of work, Le Roux develops the approach adopted in the *SANDU* decision.⁸³ She concludes that the focal point for the application of labour protection should be the section 23(1) right of every worker to fair labour practices.⁸⁴ Le Roux argues that the omission of the word “employee”, signals the need for a wide interpretation of the concept of a worker that looks beyond the prerequisite of a valid contract of employment. Such an approach would prevent the marginalisation of workers in need of protection to ensure that they have the benefit of the right to fair labour practices.

Considering the definition of a “worker”, Le Roux notes the difficulty of defining a contract of employment or an employment relationship. She recommends that a worker be defined by personal service and one other factor (mentioned in the presumption of employment provisions) which need not be economic dependency.

⁸² The Court however acknowledged the importance of discipline and obedience in the defence force. It held that the requirement of strict discipline would not necessarily be undermined by holding that members of the permanent force constituted workers for the purpose of section 23(2), because in appropriate circumstances rights could be limited. Any such limitation of members’ rights would have to meet the requirements of the limitations clause in section 36 of the Constitution.

⁸³ Unless indicated otherwise, the discussion relating to Le Roux’s development of the concept of a worker draws from R Le Roux “The Regulation of Work: Whither the Contract of Employment? An Analysis of the Suitability of the Contract of Employment to Regulate the Different Forms of Labour Market Participation by Individual Workers” Unpublished PhD Dissertation, University of Cape Town, 2008 202-231.

⁸⁴ Her argument goes beyond the section 23(2) right to form and join trade unions, which was the focus of the *SANDU* decision. Her discussion centres on section 23(1), which more broadly guarantees everyone’s right to fair labour practices. Although section 23(1) refers to “everyone” as opposed to “every worker”, she bases the subsection as the basis for the development of the concept of a constitutional worker.

She concedes that this approach would result in a wide entitlement to the right to fair labour practice which may include some independent contractors. She argues that a narrow interpretation be given to the concept of an independent contractor to minimise the number of persons who may be excluded from the scope of the constitutional worker. She defines independence to mean the ability to discount the risks associated with working and the ability to operate independently outside the employer's organisation.

Le Roux then contends that at the very least, section 23 underwrites the rights contained in the Labour Relations Act, Basic Conditions of Employment Act and the Employment Equity Act, all of which were enacted to give effect to the section 23 right. She qualifies this broad approach with the caveat that it does not require that all workers so recognised would be entitled to all the rights provided for in the legislation. The nature and purpose of specific legislation would justify the carving out of limitations applicable to that specific legislation. The exclusion of certain categories of workers would have to be justified in terms of section 36 of the Constitution, which lays down the circumstances under which limitations on constitutional rights are permissible. She refers to this as "a diverse approach, allowing different workers the benefit of different labour practices".⁸⁵

Having considered Le Roux's interpretation of a worker in terms of the right to fair labour practices in section 23(1), one must consider whether the courts have developed this broader concept of a worker post *SANDU*. Three decisions have incorporated section 23 into their reasoning in decisions determining whether the applicant was entitled to labour rights provided in legislation.

⁸⁵ Le Roux (note 83) 224.

In *Wyeth SA (Pty) Ltd v Manqele*,⁸⁶ the Labour Appeal Court had to determine whether a person who has signed a contract of employment but has not started working can invoke unfair dismissal law if the contract of employment is unfairly terminated in the interim. It held that such a person is an employee and can have recourse to labour protection. It concluded that this interpretation of the definition of an employee was in line with section 3(b) of the LRA which required it to interpret the LRA's provisions in accordance with the Constitution to give full effect to the LRA's purpose to protect, promote and fulfil the right to fair labour practices in section 23 of the Constitution.⁸⁷

*Discovery Health Limited v CCMA & Others*⁸⁸ involved a foreign national (Lanzetta) who was not authorised to work in South Africa who had entered into an employment contract and was seeking to enforce labour protection.⁸⁹ The Labour Court concluded that to find that such a contract of employment was invalid would defeat the primary purpose of section 23(1). The Court accordingly held that the contract between the parties was valid, that Lanzetta was an employee as defined in the LRA and that the CCMA therefore had jurisdiction to determine an unfair dismissal dispute referred to it. The Labour Court also found, *obiter* that even if the contract were found to be invalid, Lanzetta was nevertheless an employee as defined by section 213 of the LRA because that definition did not depend on the existence a valid and enforceable contract of employment.

⁸⁶ *Wyeth SA (Pty) Ltd v Manqele & Others* (2005) 26 ILJ 749 (LAC), see also *Jack v Director-General Department of Environmental Affairs* [2003] 1 BLLR 28 (LC).

⁸⁷ *Wyeth* (note 86) at para [42].

⁸⁸ [2008] 7 BLLR 633 (LC).

⁸⁹ The Court considered the consequences of section 38(1) of the Immigration Act which prohibits the employment of undocumented foreigners and imposes criminal sanctions for employers who do so.

The legal question in “*Kylie*” v *CCMA & Others*⁹⁰ was whether a sex worker was entitled to rely on the LRA’s unfair dismissal’s provisions.⁹¹ The Labour Appeal Court found that the illegality of sex work did not preclude sex workers from being beneficiaries of the section 23 right to fair labour practices which was granted to “everyone”.⁹² It held that the law was not wholly inflexible in the application of the principle outlined by the court a quo, and that in limited circumstances. Having found that there illegality of the contact did not preclude the existence of an employment relationship which brought the appellant within the scope of the LRA, the purpose of the LRA and the vulnerability of sex workers, the Court held that:

In the circumstances, where a sex worker forms part of a vulnerable class by the nature of the work that she performs and the position that she holds and she is subject to potential exploitation, abuse and assaults on her dignity, there is, on the basis of the finding in this judgment, no principled reason by which she should not be entitled to some constitutional protection designed to protect her dignity and which protection by extension has now been operationalised in the LRA.⁹³

⁹⁰ [2010] 7 BLLR 705 (LAC).

⁹¹ Sex work is prohibited in terms of the Sexual Offences Act 23 of 1957 and as a result an employment to engage in sex work is void in terms of the common law. This case involved an appeal against the decision of the Labour Court in “*Kylie v Conciliation for Commission, Mediation and Arbitration & Others*” (2008) 29 ILJ 1918 (LC). The *court a quo* (the Labour Court) had held that a sex worker’s relationship with a brothel owner constituted an employment relationship despite the lack of a valid employment contract between them. The Court held that the enforceability of a sex worker’s unfair dismissal claim did not depend on whether the definition of an employee encompassed those without a valid contract, but whether public policy allowed courts and tribunals to encourage illegal conduct in the context of statutory and constitutional rights. The Court held that the principle that the courts should not sanction illegal actions applied to statutory rights and rendered a sex worker’s claim to the statutory right to fair dismissal in the LRA unenforceable. It held that the scope of section 23 labour rights did not include sex workers and brothel keepers as bearers of those rights and that if the contrary were found to be the case, the Sexual Offences Act justifiably limited the scope of section 23 in excluding sex workers and brothel keepers as rights holders.

⁹² “*Kylie*” (note 90).

⁹³ “*Kylie*” (note 90) at para [44].

The Court stated that its finding did not necessarily mean that sex workers would be entitled to the full range of LRA remedies as some (for example, an order of reinstatement) would be inappropriate in light of the illegality of the work.

This brief survey of the case law shows that the Courts have not used section 23(1) to develop the broader constitutional concept of a worker that transcends the traditional preoccupation with the employee. Rather, the courts have used section 23(1) to overcome hurdles that would have disqualified the respective workers from qualifying as employees in the traditional sense.

In the first two decisions, the Court referred to the fact that the right to fair labour practices accrues to “everyone” to find that a valid contract of employment existed and on this basis found that the respective applicants were employee. In “*Kylie*”, the Court ruled that the lack of a valid contract of employment did not disqualify the appellant from being an employee, although her entitlement to the statutory remedies was limited. The Court in *Kylie* therefore went a step further than the Court in *Wyeth* and *Discovery Health*. However, it did not go as far as to endorse the concept of a worker as the beneficiary of the rights independently of the notion of an employee.

What are the implications of these developments for the practice of contracting work out to self-employed workers? It is submitted that the development of the broad concept of a worker as envisaged by Le Roux has the potential to address the dilemmas of determining whether a self employed worker is an employee or an independent contractor. As workers they would be entitled to fair labour practices, and consequently, to at least some of the protection offered by labour legislation. It is suggested that this be the case although self-employed

workers employ others to assist them, and thus only partially meet the requirement of personal service.

However, the reality is that the court's application of section 23(1) has thus far been a far cry from the development of the worker as envisaged by Le Roux. The discussion in this section shows that the courts continue to use it primarily in relation of the employee. Thus, the viability of protecting the self employed worker on the basis of this expansive concept of a worker is presently very limited.

5.2.3 Analysis of the legal approaches

Externalisation by commodification is one of the two main processes underlying the practice of contracting work out to self-employed workers. The main consequence of this is that self-employed workers are designated as independent contractors and are therefore excluded from labour protection. Thus far, this part has considered two broad approaches adopted in South Africa that could be applied to addressing the challenges that externalisation via commodification poses.

The discussion showed that South African labour law has a fairly complex framework comprising a number of legal strategies and principles that could be used to address externalisation by commodification. The strategies have been adopted at different points in time by different institutions and overlap with and in some cases contradict each other. This section analyses the extent to which these principles could lead to the protection of self-employed workers within the broader framework of the key challenges that the practice presents for labour law. These challenges are captured in the four key questions outlined at the end of part 5.1.

Of the four key questions raised is *the extent to which the legal principles transcend the binary divide and the preoccupation with employment status and move towards a broader conception of a worker*. This will be discussed first because of its pertinence to the two broad approaches outlined above. The second approach which relates to the section 23(1) right to fair labour practices as developed by Le Roux, provides a promising and doctrinally appealing avenue for a broader concept of a worker which transcends the binary divide.

This would be one potential avenue to ensure that self-employed workers were protected in terms of labour law. However, this potential is far from being realised because with the exception of the *SANDU* decision – where the Court could not use the concept of an employee in relation to the defence force – the courts have shied away from the development of a more expansive concept of a worker that moves beyond the notion of the employee. The other decisions that have specifically referred to the right of “everyone” to fair labour practices have merely used this broadly granted right to broaden the concept of the employee to ensure the protection of the individuals seeking relief. This has been necessary in light of the fact that the protection offered by labour legislation continues to be restricted to employees. The consequence is that instead of using section 23(1) to develop a wider concept of a worker, the courts have largely used it to entrench the centrality of employment status to determining labour law’s scope.

The approach adopted by the courts in post-*SANDU* decisions is more akin to first approach focuses on the shifting the boundary binary divide and thereby expand the concept of the employee. This approach entrenches the importance of legal status and reinforces the preoccupation with employee as the main beneficiary of labour law. Although less appealing than the second approach, the first approach

is more developed in the South African legal system and could be used to ensure that the self-employed worker was protected in terms of labour law.

The discussion in section 5.2.1 highlighted a number of avenues by which a self-employed worker could be brought under the banner of an employee. One such approach could involve the deeming of certain workers as employees by the Minister in terms of section 83 of the BCEA. This has not yet been implemented in South Africa. Nevertheless, the Australian approach indicates how the strategy could be used to protect the very type of workers – home workers, building labour only subcontractors, owner -drivers – who constitute the bulk of self-employed workers in South Africa.

The primary avenue for determining employee status is through the courts which are charged with the application of labour law. The importance of giving effect to substance over form has been emphasised by the courts and has been re-affirmed in the provisions creating the presumption of employment as well as the Code. In terms of the decision in *Denel v Gerber* and the Code, a worker who contracts with an employer through the medium of a legal entity is not precluded from being found to be an employee of the employer. This principle could be applied to self-employed workers whose services are contracted through companies or close corporations that they are linked to. The Code also provides that a worker who employs other workers is not precluded from being found to be an employee on this basis. However, the Labour Appeal Court in *Sanlam* appears to have reached a conclusion that contradicts this principle.

This brings us to the second of the four key questions, namely, *whether the relevant South African labour law recognises and addresses the multi-dimensional*

nature of the practice of contracting work out to self-employed workers. That is, to what extent does the law recognise the fact that the practice is constituted by the externalisation via commodification and externalisation via intermediation?

The discussion in sections 5.2.1 and 5.2.2 showed that the Code recognises both these dimensions and seeks to ensure that the self-employed worker's position as both a worker and an employee does not preclude him from being found to be an employee. It goes further to provide that the workers of the self-employed worker can also be recognised as employees of the core enterprise if the latter exercises a high degree of control over them. In doing so, it attempts to ensure that neither self-employed workers nor their workers are denied labour protection because of their position under such contracting practices. This position is at odds with the conclusion reached in the *Sanlam* decision which (in effect) held that a person who is allowed to employ other people is typically an independent contractor.

The second question discussed above is related, but not identical to the third question, which relates to *whether the relevant South African principles move beyond conceptualising the employment relationship as bilateral and personal, but recognise that they are increasingly multilateral.* Again, it is only the Code which recognises the possibility that some contracting arrangements may involve more than two parties. Its solution is to designate the core enterprise the employer of both the self-employed worker and her/his workers should the circumstances indicate that core enterprise exercises a high degree of control over the workers. The Code does not spell out the consequences where the circumstances do not justify the designation of the core enterprise as the employer of all the workers.

The final question is *whether the relevant South African principles move beyond the conceptualisation of the employer as a unitary and bounded entity and acknowledge the increasing multi-polarity of the nature of employers*. This shift does not appear to be evident within the context of the legal approaches discussed above. The main focus of these approaches appears to be the definition of the employee or the worker and no attention seems to be paid as to how the employer is conceptualised and understood. It therefore appears that the assumption that the employer is a unitary and bounded entity still holds.

To conclude, this part has outlined the South African approaches to redefining the scope of labour law. The first approach is the expansion of the concept of the employee through various strategies which have involved the courts, the legislature and NEDLAC. The second approach related to looking beyond employment to a broader concept of a worker in terms of section 23 of the Constitution. The aim of the exercise was to determine the extent to which the broad approaches and the specific strategies and legal principles could be used to address externalisation by commodification within the context of the practice under scrutiny.

The legal principles were analysed to determine the extent to which they address the challenges that the practice of contracting work out to self-employers poses to labour law. The discussion showed that South African labour law has recognised and to some extent tried to address the challenges posed to labour law with respect to looking beyond the binary divide and employee status, recognising the multi-dimensional nature of the practice and recognising the multilateral nature

of these contracting arrangements. However, the strategies and principles discussed did not indicate a shift in the conceptualisation of the employer.

The next part of this chapter will consider the South African legal approaches to addressing the externalisation via intermediation, which is the second dimension involved in contracting work out.

5.3 LEGAL REGULATION OF EXTERNALISATION BY INTERMEDIATION

This part considers the approaches that South African labour law has developed to protect workers in multilateral employment relationships resulting from externalisation by intermediation. The first approach involves the attribution of joint and several liability to core enterprises engaging workers through temporary employment services (TESs, also referred to as labour brokers in South Africa). The second is the judicial doctrine of piercing the corporate veil in arrangements involving TESs and contractors. The final approach regulates the employment consequences flowing from the transfer of a business as a going concern from one employer to another.

The three approaches are considered in sections 5.3.1, 5.3.2 and 5.3.3 respectively. Each section considers the application relevant legal approach in the context of the situation that it was developed to regulate. It then briefly outlines how it could be applied to the practice of contracting work out to self-employed workers. The final section compares and contrasts the objectives and consequences of each of the legal approaches. It then analyses the extent to which the legal

approaches recognise and address the challenges to labour law as identified in part 5.1.

5.3.1 Joint and several liability for temporary employment services

South African labour legislation recognizes that a labour broker or temporary employment service is the employer of the workers that it supplies to its clients.⁹⁴ Section 198 of the LRA defines a temporary employment service any person who provides its clients with workers on a temporary basis for reward and undertakes to remunerate the workers. Section 198 further provides that the TES (as opposed to the client) is the employer of a person whose services are provided to a client by a TES (provided the worker is not an independent contractor).

Despite the designation of the TES as the employer, the client also has some obligations in respect of the employees of the TES. Section 198 of the LRA holds the TES and the client liable if the TES contravenes a collective agreement that regulates terms and conditions of employment; a binding award that regulates terms and conditions of employment; the BCEA or a wage determination. These terms and conditions mentioned typically regulate working hours and overtime, annual leave, sick leave, family responsibility leave, maternity leave, notice periods for termination of employment and retrenchment provisions. Notably, the client is not held jointly and severally liable in terms of the unfair dismissal and unfair labour practice provisions in the LRA.

Section 57 of the Employment Equity Act provides that the TES and the client are jointly and severally liable if the TES commits an act of unfair discrimination *on*

⁹⁴ Section 198 of the LRA and section 57 of the EEA.

the express or implied instructions of a client. This implies that joint and several liability can only be imposed if the party invoking the provision can prove that the client expressly or impliedly instructed the TES to commit an act of unfair discrimination. This makes the provision more onerous than section 198, which merely requires proof of a contravention of the applicable law. Section 57 further provides that for the purposes of Chapter III of the Act (relating to affirmative action measures), a person provided to a client by a TES is deemed to be the employee of the *client* if the person's employment with the client is for an indefinite period or for three months or longer.

The application of the joint and several liability provisions in the LRA and the EEA is limited to employment arrangements involving TESs to the exclusion of the practice of contracting work out to self-employed workers. Nevertheless, the principle of joint and several liability could potentially be applied to the practice under scrutiny. This would ensure that the core enterprise was held to be jointly and severally liable for the self-employed worker's contravention of binding law, judgments, awards and collective agreements. As will be shown in section 5.3.2 below, the doctrine of joint and several liability is embedded in South Africa's common law. It is one of several remedies at the courts' disposal when piercing the corporate veil in multilateral work arrangements.

5.3.2 Piercing the corporate veil

It is generally accepted that corporate entities such as companies have a separate legal personality and are separate from their owners.⁹⁵ This entails that acts of a corporate entity are only attributable to the corporate entity and cannot be

⁹⁵ *Dadoo Ltd & Others v Krugersdorp Municipal Council* 1920 AD 530.

attributed to their shareholders or members. However, there are circumstances under which it may be necessary to disregard the separate legal existence of the corporate entity and hold other persons – usually its owners – responsible for acts purportedly done by the corporate entity.⁹⁶ A decision to disregard the separate corporate existence of a corporate entity is referred to as piercing the corporate veil.

This section briefly surveys key decisions where the courts have applied of the doctrine to employment relationships. It begins by identifying the circumstances in which piercing the corporate veil is justified in the employment context. It then considers the consequences of the application of the doctrine to the employment context, that is, how shareholders or other third parties have been held responsible for the employer actions of corporate entities. This analysis is undertaken with a view to determining the extent to which it is applicable to externalisation by intermediation, and more specifically, to contracting work out to self-employed workers.

The law determining when it is justifiable to pierce the corporate veil is not finally settled. There is little controversy that the courts may pierce the corporate veil in instances where juristic personality is used improperly or fraudulently.⁹⁷ The early decisions of the Industrial Court held that the corporate veil would be pierced where it was necessary to “defeat an unconscionable attempt by an employer to thwart an applicant’s legitimate claim”.⁹⁸ There is less clarity on whether courts may pierce the corporate veil in the absence of fraud. In some decisions, the courts have

⁹⁶ *Esterhuizen v Million-Air Services CC (in liquidation) & Others* (2007) 28 ILJ 1251 (LC).

⁹⁷ *Group 6 Security Services (Pty) Ltd & another v Moletsane NO & others* (2005) 26 ILJ 1693 (LC) Para 53, *Esterhuizen* (note 96), *Gaymans v Ben Ngomeni t/a Working World, Pretoria* [2000] 9 BLLR 1047 (LC) para 7.

⁹⁸ *Wooll v Locomotion Foods t/a The Home of the Chicken Pie* [1994] 11 BLLR 117 (IC).

adopted a broader approach and have pierced the corporate veil in order to give proper effect to substance over form in employment relationships.⁹⁹

When will the courts find that an employer improperly or fraudulently used juristic personality to deny an applicant's legitimate claim? One example is where a corporate entity that has become liable to its employees (or foresees this possibility), goes into liquidation and resurrects itself as a different entity carrying on the same business. The newly constituted entity then denies liability on the basis that it is a separate entity from the original entity. This was the case in *Esterhuizen v Million-Air Services CC (in liquidation) & Others*,¹⁰⁰ where the manager of the employer close corporation had liquidated it to avoid paying the applicant the compensation awarded in a constructive dismissal claim. The later incorporated another close corporation (CC) which carried on the same business as the original entity.

The Labour Court held that the liquidation and incorporation had been carried out in a deliberate attempt to avoid compensating the applicant and held that the second CC was the same business as the first CC.¹⁰¹ It found that the manager was the puppet-master who had had absolute control over both CCs and was the common denominator behind the entire sequence of events.¹⁰² It held that both the second CC and the manager were jointly and severally liable for the payment of the award.¹⁰³

⁹⁹ *Hotel Liquor Catering Commercial & Allied Workers Union & others v Glamorock North (Pty) Ltd & Its Trading Divisions or Branches* (1999) 20 ILJ 2372 (LC) *Kruger v Jigsaw Holdings Ltd & others* (2006) 27 ILJ 1161 (LC).

¹⁰⁰ *Esterhuizen v Million-Air services* (note 96).

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ See also *Paper, Printing, Wood and Allied Workers Union v Lane NO as Trustee of Cape Pallet CC (in Liquidation & Another)* (1993) 14 ILJ 1366 (IC), where the Court found that the liquidation of one

Another example of fraud or improper use of juristic personality is where a corporate entity transfers its employees to a different entity and denies liability for its employment obligations on the grounds that it is no longer their employer and that the new employer is not bound by the obligations. In *Airlink Pilots Association SA v SA Airlines (Pty) Ltd & Another*,¹⁰⁴ the employer transferred some of its pilots to its subsidiary company and argued that the subsidiary was not bound by the relevant collective agreement and the seniority system. The Court found that the transfer of the pilots was a stratagem to avoid the obligations in terms of the collective agreement and pierced the corporate veil. In *Dyokhwe and Adecco Recruitment Services (Pty) Ltd & Another*,¹⁰⁵ the arbitrator found that the employer's transfer of some of its employees to a temporary employment agency was an attempt to avoid its obligations in terms of the Labour Relations Act. It found that this warranted the piercing of the corporate veil.

The above shows that policy considerations require the piercing of the corporate veil to protect workers against unscrupulous employers who use corporate personalities to avoid their legal obligations.¹⁰⁶ As indicated, there are some decisions which have held that fraud is not a prerequisite for piercing the corporate veil.¹⁰⁷ These have involved cases of associated entities, where the employees were formally employed by a subsidiary entity, but were in substance

CC and the Virtually simultaneous creation of the second respondent was a deceptive device to get rid of the part time work force while avoiding the consequences of retrenchment. The Court found that the circumstances justified the piercing of the corporate veil.

¹⁰⁴ (2001) 22 ILJ 1359 (LC).

¹⁰⁵ (2009) 30 ILJ 2989 (CCMA).

¹⁰⁶ *Buffalo Signs Co Ltd & Others v De Castro & Another* (1999) 20 ILJ 1501 (LAC).

¹⁰⁷ *Wooll* (note 98).

controlled by the holding company.¹⁰⁸ The courts' objective in piercing the veil in these instances has been to give effect to substance over form.¹⁰⁹

The courts have considered a range of factors in determining which entity controls the relevant employees. These include the day-to-day administration of businesses; the marketing practices of the entities; employment relations and practices.¹¹⁰ They have also considered which entity pays the workers and negotiates with them about matters of mutual interest, and which entity initiates and executes appointments and dismissals of workers.¹¹¹ The Courts have considered these factors with a view to determining which entity was “the directing and controlling mind” of the corporate entities or behind the specific transactions.¹¹²

Having considered the circumstances under which the courts are willing to pierce the corporate veil, we turn to the consequences it has for parties in an employment context. A number of measures have been adopted by the courts to give effect to substance over form, and to protect workers against the use of corporate personality to their prejudice. These measures depend on the circumstances of each case and the relief sought by the applicants. In some instances the court has pierced the corporate veil to hold that the “directing and controlling mind” behind the nominal employer is the true employer of the workers for all intents and purposes.¹¹³ In other cases, the court has held that the nominal

¹⁰⁸ Note 99.

¹⁰⁹ *Hotel Liquor* (note 99) at para 31.

¹¹⁰ Note 99.

¹¹¹ *Ibid.*

¹¹² *Hotel Liquor* (note 99) at para 31.

¹¹³ *Hotel Liquor* (note 99) at para 31. See also *Esterhuizen* (note 96).

employer and its owners (whether natural or juristic persons) are the co-employers of the workers or are one and the same entity employing the workers.¹¹⁴

In other decisions, the courts have held the associated entity or shareholder jointly liable with the nominal employer for the employment obligations in dispute.¹¹⁵ Another approach has been to set aside actions done in abuse of corporate personality. This approach was adopted in *Dyokhwe and Adecco Recruitment Services (Pty) Ltd & Another*,¹¹⁶ where a company purportedly retrenched a worker and re-engaged him on a fixed term basis through a TES. The CCMA found that the arrangement was a stratagem to enable the company to evade its employment liabilities and found that the company had remained the true employer of the worker.¹¹⁷ The courts have set aside corporate legal personality to the extent necessary to address the employment related matters brought before them.

The above discussion shows that doctrine has mainly been applied in relation to associated entities and between corporate entities and shareholders. However, the recent award in *Dyokhwe* shows that the need to give effect to substance instead of form may require the application of the doctrine beyond relations between associated companies and between corporate entities and their shareholders. The application of the doctrine in the context of TES arrangements implies that it could, by analogy, be applied where work is contracted out to a self-employed worker.

¹¹⁴ *Kruger* (note 99); *Footwear Trading CC v Mdlalose* (2005) 26 ILJ 443 (LAC).

¹¹⁵ See *Wooll* (note 98) where the Court noted that the member of the CC was attempting to evade the employer obligations and ordered that he be joined in the proceedings in his personal capacity.

¹¹⁶ Note 105.

¹¹⁷ *Ibid.*

The doctrine allows for some flexibility in terms of the remedy that may be granted to ensure the protection of workers and this would depend on the circumstances of each case. The corporate veil could be pierced to set aside a transaction to contract work out from a core enterprise to a business¹¹⁸ operated by a self-employed worker where it is clear that the employer's aim was to avoid its employer obligations. In such cases, it would be found that the original employer (the core enterprise) remains the true employer.

Even in the absence of fraud, the doctrine could be applied to hold that the core enterprise is the true employer of the workers of self-employed workers where it exercises substantial control over them. In addition, it could be applied to find that the core enterprise and the self-employed worker are joint employers of the workers. Finally, it could be applied to hold the core enterprise jointly and severally liable with the self-employed worker for employer obligations in cases where it exercises ultimate control over the workers of a self-employed worker with whom it has contracted.

5.3.3 Business transfer provisions

Provisions relating to transfers of business operations cover the transfer of workers from one employer (the transferor of the business) to the new employer (the transferee). They are designed to ensure that workers are protected during the transition from one employer to the other in the context of a transfer of a business. The provisions cover situations where an employer outsources or contracts work out to a service provider or intermediary and could potentially apply to contracting

¹¹⁸ It is submitted that the business need not necessarily be registered as a separate corporate entity, provided it is understood that the self-employed worker is operating her/his own business.

work out to self-employed workers. In South Africa, section 197 of the Labour Relations Act governs the consequences for employees in such cases. Before discussing the effect of the provision, it is necessary to consider the parameters within which it applies.

Section 197 relates to the transfer of a business. It defines a business as including “the whole or part of any business, trade or undertaking or service”.¹¹⁹ It defines a transfer as “the transfer of a business by one employer (‘the old employer’) to another employer (‘the new employer’) as a going concern”. With respect to a business, the Labour Court has held that it constitutes a discrete economic entity, comprising “an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues an economic objective”.¹²⁰

The courts have identified the components of a business to include tangible and intangible assets, workers, goodwill and operational resources.¹²¹ In *Schatz v Elliot International (Pty) Ltd & Another*, the court emphasised the need to determine the extent to which the components “are sufficiently and coherently structured for there to be an identifiable economic entity capable of being transferred”.¹²² The Constitutional Court has held that the question whether a business has been transferred as a going concern must be determined objectively in light of the circumstances of each case, having regard to the substance and not the form of the transaction.¹²³ The court has stressed the need to determine whether or not the same business is carried on by the new employer.¹²⁴

¹¹⁹ Section 197(1) (a) of the LRA.

¹²⁰ *Schatz v Elliot International (Pty) Ltd & Another* (2008) 29 (ILJ) 2286 (LC) at para [39].

¹²¹ *NEHAWU v University of Cape Town & Others* (2003) 24 ILJ 95 (CC); *Schatz* (note 120).

¹²² Note 120 at para [40].

¹²³ *NEHAWU* (note 121) at para [56].

¹²⁴ *Ibid.*

Section 197 provides that certain consequences flow from the transfer of a business as a going concern. The consequences listed in section 197(2) apply unless the parties conclude an agreement to the contrary.¹²⁵ Section 197(2)(a) provides that the new employer automatically substitutes the old employer in respect of the employment contracts with the latter's existing employees.¹²⁶ In addition, the new employer assumes the position of the old employer in respect of anything done by or in relation to the latter before the transfer including dismissal, unfair labour practices and acts of unfair discrimination¹²⁷

Section 197(2)(d) ensures the continuity of existing employment relationship (and continuity of the employee's period of service) after the transfer takes place. Importantly, the new employer must employ the employees on terms and conditions that are on the whole no less favourable than those on which they were employed by the old employer.¹²⁸ The new employer is also bound by arbitration awards and collective agreements that were binding on the old employer prior to the transfer.¹²⁹ Furthermore, the LRA provides that a dismissal is automatically unfair if the reason for it is a transfer of a business as a going concern as contemplated in section 197.¹³⁰ The latter provision seeks to ensure that the

¹²⁵ An agreement contemplated in section 197(2) must comply with the requirements of section 197(6), that is, it must be in writing and must be concluded between the old and/or new employer and a workplace forum, trade union or any other party that the employer would have to consult in respect of a collective agreement.

¹²⁶ Section 197(2) (b) of the LRA.

¹²⁷ Section 197(2) (c) of the LRA.

¹²⁸ Section 197(3) of the LRA.

¹²⁹ Section 197(5) of the LRA.

¹³⁰ Section 187(1) (g) of the LRA. An automatically unfair dismissal attracts a maximum compensation of 24 months' pay, whereas a dismissal that is otherwise unfair attracts a maximum of 12 months' pay as compensation. Despite section 187(1)(g), dismissals in the context of transfers may be justified if the employer can prove that the dismissals are based on its operational requirements. In such a case, they would have to comply with sections 189 and 189A which set out the procedure that must

security of employment of employees who are transferred to the new employer by virtue of section 197.

Although section 197 substitutes the old employer with the new employer after the transfer, it envisages the liability of the old employer for obligations arising prior to the transfer. Thus, section 197(9) provides that the old and new employers are jointly and severally liable for any claim concerning a term and condition of employment that arose before the transfer. The old employer's liability also arises in the event that the new employer dismisses the transferred employees within 12 months of the transfer.¹³¹ In such cases, the old employer is jointly and severally liable with the new employer for any leave, severance or other pay that accrued to the employee as at date of transfer.¹³²

Having considered the conditions for the application of section 197 and its application, it is necessary to consider whether the provision applies to the practice of contracting work out to self employed workers. In principle, there is a need to ensure the preservation of the terms and conditions of employment of workers who are transferred to self-employed workers and to attribute some liability to the core enterprise, albeit for a limited period. It is however unclear the practice would qualify as the transfer of a business as a going concern.

be complied with in operational requirements dismissals. Section 197 makes certain provisions for operational requirements dismissals in the context of transfers: In terms of section 197(7), the old and new employer must jointly determine the leave accrued to the employees, the severance pay that would have been payable to the employees in the event of retrenchment and any other accrued payments that are unpaid. The old and employer must reach an agreement about which employer (s) will be liable for the payments and what provision must made should they become payable. In addition, section 197(8) provides that for 12 months after the transfer takes place, the old employer is jointly and severally liable with the new employer to any employee who becomes entitled to these payments.

¹³¹ Section 197(7) read with section 197(8) of the LRA.

¹³² Section 197(7) read with section 197(8) of the LRA.

This is because the courts' enumeration of the components of a business discussed above seems to set a high threshold by focusing on the essence of the business being transferred. Using this instrumental approach,¹³³ contracting work out to self employed workers would amount to the transfer of a function or service and the necessary workers and assets required to perform it. It is unlikely that a core enterprise would transfer its goodwill and intangible assets such as intellectual property rights to the self-employed worker. Arguably, this would result in the performance of the same *function* in different hands, but not of the same *business* in different hands, thus excluding section 197.

However, the Constitutional Court in *NEHAWU v UCT* and the Labour Appeal Court have held that the transfer of services such as gardening, security and cleaning constitute services as contemplated within the definition of a business in section 197.¹³⁴ In *SA Municipal Workers' Union & Others v Rand Airport Management Co (Pty) Ltd*¹³⁵ the Court adopted the ordinary meaning of the word "service" and found that the transfer of airport cleaning and security services fell under section 197:

The provision of a facility to meet the needs or for the use of a person or a person's interest or advantage, assistance or benefit provided to someone by a person or thing; an act of helping or benefiting another; an instance of beneficial, useful or friendly actions; the action of serving, helping or benefiting another; behaviour conducive to the welfare or advantage of another; friendly or professional assistance.¹³⁶

The application of this broad definition to a service would mean that the transfer of a set of tasks would trigger the application of section 197. It is submitted that on the

¹³³ Fudge (note 1) 309.

¹³⁴ See *NEHAWU v UCT* and *SA Municipal Workers' Union & Others v Rand Airport Management Co (Pty) Ltd* (2005) 26 ILJ 67 (LAC). It will be recalled that section 197(1) (a) defines a business to include "the whole or part of any business, trade, undertaking or service".

¹³⁵ (2005) 26 ILJ 67 (LAC).

¹³⁶ Note 135 at para [17].

basis of this functional approach,¹³⁷ the contracting out of work to self-employed workers could amount to the transfer of a business for the purposes of section 197.

5.3.4 Analysis of the legal approaches

The preceding sections have considered three South African legal approaches that may regulate externalisation by intermediation, namely joint and several liability, judicial piercing of the corporate veil, business transfer provisions. While none of these approaches has been applied to the practice under scrutiny, there is room to argue that they may be adapted to regulate contracting arrangements. The extent to which the legal approaches are applicable to the practice under scrutiny varies and is discussed below.

The primary goal of the first and second approaches is to ensure that the core enterprise is held liable for the labour rights of the workers involved. It is submitted that the second approach is more appropriate for addressing the practice under scrutiny. The joint and several liability provisions are restrictive because their extension to the contracting arrangements would necessitate legislative amendments, while the doctrine of piercing the corporate veil is a judicial remedy that could more readily be extended to the practice under scrutiny under appropriate circumstances.

In addition, judicial piercing of the corporate veil can also be applied to a broader range of obligations than the joint and several liability provisions which currently do not cover unfair dismissals and retrenchments. Moreover, the judicial piercing of the corporate veil is more flexible than the joint and several liability

¹³⁷ Fudge (note 1) 309.

provisions as it allows for a broader range of remedies depending on the circumstances of each case. This better enables the courts to ensure that workers are not deprived of their rights and that effect is given to the realities of the relationships. Given the limitations of the joint and several liability provisions, they will not be discussed separately and this section will concentrate on the second and third approaches.

The third approach aims to guarantee the substantive working conditions and employment security of the workers who are transferred to a new employer to ensure that their terms and conditions of employment are not downgraded. It places responsibility for the continuity of the existing terms and conditions on the new employer. It also seeks to ensure that employers do not undertake business transfers to evade existing obligations in terms of arbitration awards and collective agreements. Given the Labour Appeal Court's broad definition of a service, it seems likely that the contracting out of work to self-employed workers could qualify as a transfer of a business in terms of section 197.

We now turn to discuss the extent to which the second and third approaches address the challenges to labour law outlined in part 5.1. These are discussed in order of their relevance to the approaches discussed.

The first question is *whether the legal approaches discussed above move beyond the conceptualisation of the employer as a unitary and bounded entity and recognise the increasingly multi-polar nature of the employer*. The business transfer provisions seem to continue to preserve the traditional notion of the employer, as they envisage to separate and readily identifiable employers, namely the *old* employer which transfers the business and the *new* employer which is the

transferee. They therefore envisage that the transfer shifts the employer obligations from the old employer to the new employer. The only departure from the strict unitary conception within these provisions lies in the provision for joint and several liability of the old employer for employer obligations that arose prior to the transfer.

The application of the corporate veil doctrine in labour matters has shown a more significant departure from the notion of the employer as a single and bounded entity. In applying this doctrine, the courts have recognised joint and several liability for employer obligations in situations where it may be appropriate. The courts have also gone a step further and recognised the possibility that two separate entities may be co-employers or may constitute a joint employer in respect of the same workers. These developments indicate that a recognition of the complex web of relationships that may arise in relation to a particular group of workers and the need to move past the tendency to equate a single corporate entity with the employer for the purposes of attributing employer liability.

Closely related to the question of the conceptualisation of the employer is the question *whether the legal principles discussed move beyond the conceptualisation of the employment relationship as a bilateral and personal contract and recognise and address multilaterally complex relationships?* The transfer provisions recognise the fact that there are more than two parties involved in transfers, namely the old employer, the new employer and the workers. However, the provisions seem to conceptualise the business transfer less as a composite relationship than as two separate bilateral relationships. They envisage that the bilateral relationship between the old employer and the new employer is extinguished upon transfer and replaced by the bilateral relationship between the new employer and the workers.

While the business transfer provisions do allow for the joint and several liability of the old employer for obligations existing *prior to* the transfer, they do not envisage the old employer's joint and several liability for employment obligations arising *after* the transfer. This may be appropriate in cases where the new employer ceases to have any influence over transferred business or the transferred workers the after the transfer. An example would be an "out and out" sale of a business from one employer to another where the new employer operates independently of the new employer.

However, the court's application of section 197 shows that it extends beyond these types of transfers to cover situations where the old employer contracts services out to contractors and continues to benefit from the labour of the workers after the transfer. In these cases, the transfer does not represent a clean break between the old employer and the workers and there may be a need to place some liability on the old employer to ensure the preservation of the workers' terms and conditions of employment under the new employer. Thus section 197's allocation of the post-transfer obligations on the basis of a purely bilateral relationship between the workers and the new employer fails to recognise the continued influence of the workers and the need for the re-allocation of responsibilities in contracting arrangements.

The corporate veil doctrine recognises the need to look beyond the bilateral relationships and to draw in other parties that may not have a direct contractual relationship with the workers but nevertheless exercise some control over them. The courts are therefore willing to allocate responsibility on the basis of a multilateral conception of employment. Consequently, the courts have ordered joint and several liability, or have found that entities that stand as separate corporate

entities are co-employers or constitute a single employer for the purposes of labour law.

The third question is *whether the legal approaches recognise and address the multilaterally complex nature of the practice under scrutiny*. That is, do they recognise that some work arrangements are constituted by the intersection of externalisation via commodification and externalisation via intermediation?

The transfer provisions do not recognise either of these processes as such, because they merely envisage that workers are transferred from the old employer to the new employer and assume that the post-transfer employment relationship comprises a bilateral relationship between an independent employer who should be able to provide for the continuation of existing terms and conditions of employment. They do not recognise that the new employer may be a self-employed worker who is arguably not an independent entrepreneur and would not be able to viably guarantee the continuity of the same terms of employment. In addition, the allocation of the post-transfer employment obligations squarely on the new employer's shoulders does not recognise that some business transfers may be used by employers seeking to place a legal distance between themselves and their workers in order to evade employer obligations.

At face value, the corporate veil doctrine only applies to address externalisation via intermediation only. This could be applied to pierce through the veil that the self-employed worker's enterprise posits between a core enterprise and the workers of the self-employed workers in order to render the former liable for the labour rights of the latter. The core enterprise could be held liable either as a third party who is held jointly and severally liable with the self-employed worker, or

as a co-employer with the self-employed worker, or as a joint employer with the self-employed worker.

It is submitted that the application of the corporate veil doctrine could also be extended to extend labour protection to the self-employed worker. This would require the piercing of the veil that the self-employed worker's enterprise posits between the core enterprise and the self-employed worker to recognise an employment relationship between these parties. This would be the case if the relationship between the self-employed worker and the core enterprise resembled an employment relationship in all other respects.

Piercing the corporate veil between the core enterprise and the self-employed worker would accord with item 37 of the Code which provides that persons that provide personal services through the corporate entities are not precluded from employee status. It would also be in line with the corporate veil doctrine's grounding in the principle of accounting for the realities of the relationships between parties and the imperative to give effect to substance over form. Accordingly, the corporate veil doctrine has the potential to address both the dimensions that constitute the practice of contracting work out to self-employed workers.

Finally, it remains to consider *whether the legal principles look beyond the binary divide between employment and self-employment as the determinant of the scope of labour law*. It is submitted that both these approaches are firmly based on the assumption that the employee status is the gateway to labour law's protection. The approaches do not envisage a broader conception of a worker to whom labour law may apply.

This section has considered the relevance of the business transfer provisions and the corporate veil doctrine to the practice under scrutiny. It also considered the extent to which these approaches address the challenges to labour law outlined in section 5.1. On the whole, the discussion showed that the corporate veil doctrine has greater potential to be adapted to address the practice of self-employed workers. In addition, the corporate veil doctrine goes further than the business transfer provisions in addressing the challenges that the practice poses to labour law in relation to the conceptualisation of the employer, the conceptualisation of the employment relationship and recognising and addressing the multi-dimensional nature of the practice. It however remains rooted in the assumption that employee status is essential for labour protection.

5.4 NON-STATE REGULATION OF THE PRACTICE

Thus far this discussion has considered the actual and potential role of the law in regulating the practice under scrutiny to ensure that self-employed workers and their workers are covered by labour law. To this end, parts 5.2 and 5.3 considered “hard law” as decreed by the legislature and developed by the courts as well as soft law in the form of NEDLAC’s Code of Good Practice on Who is an Employee. As such, the discussion has focused on state regulation developed by state institutions that have authority over the persons (both natural and legal) whose actions they seek to govern.

This part seeks to explore the actual role of non-state institutions and role players in governing the practice under scrutiny. The discussion considers regulation developed and implemented by self-employed workers, employers, trade

unions and bargaining councils at the coal face to govern the practice under scrutiny. This is important in light of the reality that states no longer enjoy a monopoly on governance or regulation as an increasing range of actors and forms of power are active in the management of social systems.¹³⁸ The growing part played by non-state regulation has implications for the role that law, and labour law in particular, plays in governing work arrangements.

The following sections discuss the strategies developed by trade unions, employers' organisations and bargaining councils in sectors where the practice is prevalent. They also consider measures taken by employers who contract work out to self-employed workers.

5.4.1 Organising labour only sub-contractors (LOSCs) in the building industry¹³⁹

The South African Sub-Contractors' Association (SASCA) was established in 2001 to represent the interests of LOSCs in the Western Cape building industry. Its establishment was sparked by a crisis in the building industry as a result of the decline during the late 1990s. During that period, many employers (including large contractors) in the building industry had persuaded building artisans to work as LOSCs rather than employees.

The emergence of these artisans as entrepreneurs and employers had significant consequences for labour relations in the building industry. Firstly, it

¹³⁸ From B Kempa and C Shearing, "Changes in Governance" *Akron Law Review* 41(1) 2008 1 3.

¹³⁹ This discussion on the South African Sub-Contractors' Association draws heavily from the following research report: P H Bamu and S Godfrey *An analysis of collective bargaining arrangements in the construction industry* (Cape Town: Labour Research Service, 2009) 32-4.

eroded a significant component of trade union membership as the artisans had ceased to be employees. Secondly, the LOSCs had very little bargaining power when negotiating rates with big employers and could not pay their workers in compliance with the minimum standards set by the Western Cape Building Industry Bargaining Council (the BIBC). The majority of the workers employed by LOSCs were not trade union members. Consequently, trade union membership was on the decline and the union's representivity in the BIBC had been eroded significantly.

These conditions created an impetus to establish an organisation to represent the interests of LOSCs in the Western Cape building industry. The establishment of the organisation was initiated by the director of one of the building trade unions. An application was submitted to the Department of Labour in September 2000 and the organisation was registered as an employers' organisation in June 2001. At the time, it had 31 founding members. A chairperson, vice-chairperson were elected and a secretary, marketing manager and two directors were appointed.

One of the main objectives was to provide LOSCs with a voice to counterbalance the dominance of the Master Builders' Association (MBA) in the bargaining council.¹⁴⁰ It was hoped that an association would establish standard rates for specific work to prevent undercutting amongst LOSCs and establish a uniform level for bargaining with main contractors. Another objective was to set

¹⁴⁰ Regional Master Builders' Associations were established in the early 1900s and have historically represented white contractors in the building industry. There are presently six provincial associations, namely Gauteng, the Western Cape, the Northern Cape, the Free State, Eastern Cape and KwaZulu Natal. There are also two regional associations, one in the North Boland and the other in the West Boland. They all fall under a national umbrella association, the Master Builders South Africa (MBSA), which plays a coordinating role while the member associations retain their autonomy to develop their own policies regarding issues such as collective bargaining. Master Builders' Associations are largely perceived to represent elite large and medium sized contracting firms to the exclusion of small and emerging contractors.

measures in place to prevent the underpayment of workers employed by LOSCs. The union hoped that strengthening LOSC operations would enable them to pay workers according to bargaining council rates. This would boost trade union membership.

LOSCs operating in the Western Cape were invited to join SASCA subject to a fairly simple application process. LOSCs did not have to be registered as corporate but had to be registered as employers with the bargaining council, the (Unemployment Insurance Fund) UIF and in terms of the Compensation for Occupational Injuries and Diseases Act (COIDA). SASCA provided information and assistance to prospective members who were not duly registered. As a result, no application for registration with the association was rejected. Applicants had to provide a list of projects undertaken within the past year and references who could attest to the standard of work and compliance with regulations.

Members were expected to pay annual subscription fees. The membership benefits that were envisaged were training and skills development, particularly in entrepreneurship and business management, as well as advice on tender processes. They would also receive information and assistance with insurance, industrial relations and occupational health and safety matters. They would also have the opportunity to advertise in a directory of subcontractors and be informed of industry developments through newsletters and bulletins. It was also hoped that displaying the SASCA logo would be a good marketing tool for members.

By 2003, SASCA claimed to have a membership of between 300 and 400 LOSCs, with the overwhelming majority of them being black and coloured. Of these, only 23 were registered with the BIBC. In addition, SASCA was allocated one of the ten seats reserved for employers in the bargaining council. While this gave them a

voice they probably did not have significant influence in the bargaining council. Relations with the MBA seemed to be generally hostile. However, some established contractors were co-operative and supportive of the organisation as they felt there was a need for it.

The Department of Labour deregistered SASCA as an employer organisation in 2006 on the grounds that it was no longer performing its functions as an employer organisation. The failure of SASCA was largely due to financial problems. Most of the members were 'small fish', who operated from their homes and lacked business acumen and managerial skills and were unable to handle their finances and pay their member subscriptions. At the time of deregistration, the association had 55 members.

5.4.2 The role of bargaining councils

This section considers the role of bargaining councils in regulating the practice of contracting work out of self-employed workers. It focuses on the measures taken by the Western Cape Building Industry Bargaining Council as well as the National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI).

Section 5.4.1 discussed the efforts to organise LOSCs in the Western Cape's BIBC and SASCA's representation in the BIBC during the period of its existence. In about 2000, the BIBC embarked on its own initiatives to regulate LOSCs in the region. These initiatives ran parallel to the SASCA initiative and have continued to be in place following its collapse.

It is important to note that a collective agreement concluded in a bargaining councils ordinarily binding on are parties to the agreements.¹⁴¹ In terms of the LRA, the parties of a bargaining council agreement can request that it be extended to non-parties to the agreement.¹⁴² The Minister of Labour may extend an agreement provided the employer organisations and trade unions that are party to the agreement represent the majority of employers and employees falling within the scope of the bargaining council.¹⁴³ The Western Cape BIBC has a long history of extending its collective agreements to non-parties, making them binding on all employers and employees falling within its scope.

For many years, the collective agreements for the regional BIBC have expressly provided that they apply to LOSCs operating in the region.¹⁴⁴ LOSCs are therefore bound by the collective agreement and are required to register with the Council.¹⁴⁵ The collective agreement seeks to encourage registration and compliance by prohibiting employers from subcontracting work to subcontractors that are unregistered with the Council and/or non-compliant with the collective agreement.¹⁴⁶

In addition, it holds employers that subcontract work jointly and severally liable for a subcontractor's contravention of the terms of the collective agreement in respect of its workers.¹⁴⁷ This provision applies irrespective of whether the subcontractor was registered and in good standing with the Council. It was

¹⁴¹ Section 31 of the LRA.

¹⁴² Section 32 of the LRA. Extensions are granted by the Minister of Labour.

¹⁴³ Section 32(3) of the LRA.

¹⁴⁴ Clause 1(2)(b) of the Building Industry Bargaining Council (Cape of Good Hope) Collective Agreement Government Gazette 33874 (17 December 2010).

¹⁴⁵ Note 144 at clause 6.

¹⁴⁶ Note 144 at clause 6A (3). The BIBC maintains and periodically publishes a register of employers who are in good standing and those who are not in good standing with the council.

¹⁴⁷ Note 144 at clause 6 A(4).

introduced to encourage contractors who contract work out to take active measures to secure the compliance of their subcontractors (including LOSCs).

The BIBC has also introduced a range of support services to incentivise employers to register and comply with the collective agreement. These include training on labour legislation, payroll facilities and access to a training programme on contracting.¹⁴⁸ These services provided to firms that are registered with the council and are in good standing with the BIBC. They are provided free of charge or for a nominal fee and are primarily aimed at small and micro firms (including LOSCs) that need support and would otherwise not be able to afford it.¹⁴⁹ The BIBC has also requested that government institutions make access to emerging contractor development programmes conditional upon registration and good standing with the council.¹⁵⁰

The NBCFRLI has adopted a different approach in relation to owner-drivers in the industry. The collective agreement requires employers including owner-drivers to comply with minimum conditions of employment in relation to their employees. Its collective agreement defines an owner-driver as “an employer who is the owner or part-owner or leaseholder or renter of *one or more* motor vehicles used in transporting goods for hire or reward and who himself drives any such motor vehicle” (emphasis added).¹⁵¹

¹⁴⁸ Note 144 at clause 6(8); S Godfrey, J Theron and M Visser, *The State of Collective Bargaining* (Cape Town: Development Policy Research Unit, 2007) 22-3.

¹⁴⁹ Godfrey et al (note 148) 22-3.

¹⁵⁰ *Ibid.*

¹⁵¹ Clause 2 of the National Bargaining Council for the Road Freight and Logistics Industry Collective agreement, Government Notice R 586 of 2009 (22 May 2009).

The collective agreement exempts owner-drivers who possess only one vehicle and are the permanent drivers thereof, as well as their employees from almost all of its provisions.¹⁵² Presumably, this is a concession aimed at relieving nascent entrepreneurs of the financial burdens associated with compliance to give them a space within which they can establish themselves and grow. Other bargaining councils have adopted a similar approach on a similar basis.¹⁵³ The collective agreement however requires these owner-drivers to furnish the council with their personal and business details and to comply with the minimum standards relating to working hours.¹⁵⁴

5.4.3 “From driver to entrepreneur”: providing business support to owner-drivers

The owner-driver scheme is probably one of the most successful programmes that have been used to externalise the labour of self-employed workers and their workers in South Africa. Much of their success appears to lie in their strong emphasis on black economic empowerment and their reliance on success stories of ordinary drivers who have become prosperous entrepreneurs. This is illustrated in the extract below:

From chauffeur to truck driver, to transport company owner with an annual turnover of more than R2-million, Ben Mvemve is living testimony to how hard work and perseverance, coupled with good entrepreneurial skills can pay off. Mvemve is an owner-driver contracted to the South African Breweries Ltd (SAB) in Durban and operates three vehicles with a staff of 12 people, delivering to a variety of outlets within an 80km radius of the city.¹⁵⁵

¹⁵² Note 151 at clause 1(3).

¹⁵³ S Godfrey, J Maree, D du Toit and J Theron *Collective Bargaining in South Africa: Past, Present and Future?* (Cape Town: Juta, 2010) 121-3.

¹⁵⁴ Note 151 at clauses 3 and 5(4).

¹⁵⁵ “Owner-driver programme a winning recipe” accessed from the BizCommunity website at <http://www.bizcommunity.com/Article/196/176/26196.html> on 12/01/2011.

Firms implementing owner-driver schemes not only use these heart-warming stories to capture the imagination of drivers to inspire them to seize the opportunity to take control of their own destinies. They also provide structured support programmes to enable drivers to progress from being employees to employers and owners of their own vehicles. The owner-driver schemes are divided into a number of clearly defined stages.

Typically, the owner-driver support programmes have three main components. First, financial support is essential to facilitate the purchase of the vehicle that sets the driver's transition from an employee to an owner into motion. The core enterprise usually undertakes to 'sponsor' or underwrite the loan agreement with a financial institution with whom it has a relationship.¹⁵⁶ Several of South Africa's large financial institutions have developed specific loan products to finance vehicle purchases for owner-driver schemes.¹⁵⁷

Second, the owner-drivers are provided with business management training in a number of areas, including financial planning, accounts, communication, problem-solving and customer service.¹⁵⁸ The owner-drivers may undergo intensive training during the early phases of the scheme and this is usually combined with intermittent training periods over a longer period of time. In many cases, owner-

¹⁵⁶ See Standard Bank, "Owner Driver Scheme, accessed from <http://www.standardbank.co.za/portal/site/standardbank/menuitem.de435aa54d374eb6fcb695665c9006a0/?vgnxtoid=4fc508f82045b210VgnVCM100000c509600aRCRD> on 1/04/2011.

¹⁵⁷ An example is Standard Bank, which operates a comprehensive "Owner Driver Scheme" package which includes a vehicle maintenance fund, insurance and contract evaluation services. See Standard Bank (note 156).

¹⁵⁸ See Cargo Carriers "Owner Driver Programme" accessed from http://www.cargocarriers.co.za/owner_drivers.asp on 15/05/2011; E Webster, A Benya, X Dilata, C Joynt, K Ngoepe, M Tsoeu "Making Visible the Invisible: Confronting South Africa's Decent Work Deficit" (Sociology of Work Unit, University of Witwatersrand) Research commissioned by the Department of Labour (2008) 34.

drivers are assigned to a mentor or business advisor whom they can consult for advice on specific business issues.¹⁵⁹

Third, owner-drivers receive training on a number of employment related matters to enable them to effectively perform their new role as employers.¹⁶⁰ The training is aimed at providing them with an understanding of industrial relations and the relevant labour legislation. Thus, the firms play a facilitative role by equipping owner-drivers with the necessary knowledge and skills to comply with their obligations as employers and provide fair working conditions. SAB Limited requires that its owner drivers to pay workers in accordance with minimum wages, and register as employers in terms of the UIA and COIDA.¹⁶¹ The extent to which SAB polices these requirements and sanctions non-compliance on the part of the owner-drive is however uncertain.

5.4.4 Analysis of the non-state regulation of the practice

The above sections have discussed some non-state initiatives designed to regulate the practice of contracting work out to self-employed workers. Admittedly, they do not provide a comprehensive or exhaustive account of the measures initiated by trade unions, self-employed workers, bargaining councils and employers. The discussion nevertheless provides some useful insights about the role that non-state parties can play in ensuring that self-employed workers and/or their workers enjoy some degree of labour protection.

¹⁵⁹ "From drivers to owner-entrepreneurs" accessed from the South Africa Info website at <http://www.southafrica.info/business/trends/empowerment/famousbee-210710.htm> on 23/04/2011.

¹⁶⁰ *Ibid.*

¹⁶¹ Webster et al (note 158) 33.

A key observation that can be made relates to the relationship between the non-state institutions and initiatives on the one hand and state institutions and state law on the other. The discussion above shows that the state and non-state institutions and forms of regulation do not operate in isolation from each other. It demonstrates a high level of interaction and interdependency between non-state institutions and state institutions (the Ministry of Labour), state law (legislation such as the LRA, UIA and COIDA) and state-sanctioned labour standards (collective agreements).

One could summarise the situation by saying that the non-state institutions have played a role in setting the parameters of whether and when labour law and collective agreements will be applicable to self-employed workers and/or their workers that are covered by them. The non-state institutions have also implemented measures to apply and enforce these laws and standards. However, this does not imply absolute harmony between state institutions and state law and the measures taken by non-state institutions.

It must also be noted that none of the non-state institutions discussed envisage the extension of labour law to the self-employed workers. Although the institutions acknowledge the role of self-employed workers as workers who contribute their own labour, they seem to place more emphasis on self-employed workers' decisions to profit from the labour of other workers and their potential to become successful entrepreneurs. They therefore treat self-employed workers as entrepreneurs and employers.

Importantly, the non-state regulation envisages that self-employed workers are primarily and for the most part, solely responsible for the working conditions

and labour rights of the workers they employ. A notable exception relates to the BIBC collective agreement which provides that firms that subcontract work to subcontractors will be held jointly and severally liable for the subcontractor's contravention of the provisions of the collective agreement or the terms of an arbitration award. The provision's efficacy in inducing large contractors to "become part of the enforcement mechanism with regard to sub-contractors"¹⁶² is unknown.

The measures implemented by non-state institutions are underscored by the principle that self-employed workers should comply with the standards set in labour law and collective agreements just as any other employer would be expected to. They however acknowledge their status as "emerging" entrepreneurs and provide additional support to place them in position where they can comply with legislation. This "developmental" approach is evident in the blanket exemption of owner drivers possessing one vehicle from the NBCRFLI collective agreement. It is also reflected in the provision of business skills and employment training and services provided by employers, the BIBC and envisaged by SASCA.

Despite the association's ultimate failure, the SASCA case study showed the role that organisation could play to address the power dynamics that characterise the relationship between the core enterprise, the self-employed worker and her/his workers. SASCA sought to grapple with the dilemma that most self-employed workers face, that is, their limited bargaining power vis-a-vis the core enterprise and the limitations that the product of that bargain places on the self-employed worker's ability to determine working conditions for her/his workers. SASCA sought to harness the collective power of self-employed workers to enable them to

¹⁶² Godfrey et al (note 148) 21.

secure a bargain that would enable them to improve the working conditions of their workers.

The discussion of the role of non-state institutions highlights the dilemmas that the practice presents for policy-making:

Should this emergent contractor be regarded as being in a vulnerable position, and should the relationship between the emergent contractor and the core enterprise be regulated? The core business controls such satellite enterprises or contractors through commercial contracts, of which service agreements ... are common forms. To seek to regulate this kind of [relationship] transgresses the boundary between commercial and labour regulation that has hitherto been regarded as inviolate. There is also no ready answer to the argument that the emergent contractor is simply an entrepreneur of the very kind industrial policy should seek to promote and who should as far as possible be left to his or her own devices.¹⁶³

The non-state institutions' answer to this question is that the self-employed worker is an entrepreneur. The different approaches they have adopted are unified in their focus on providing self-employed workers with the necessary support to enable them to develop their businesses and consequently be able to provide their workers with better working conditions. They do not envisage the extension of labour law to self-employed workers. With one exception, they do not envisage the imposition of liability on core enterprises for the labour rights and working conditions of the workers of self-employed workers.

On the other hand, the legal principles in parts 5.2 which envisage the possible extension of labour rights to self-employed workers who employ other workers. It is also at odds with the legal principles discussed in part 5.3, which envisage that core enterprises may be held liable for the labour rights and working conditions of the workers of self-employed workers as a result of the piercing of the corporate veil.

¹⁶³ J Theron "The erosion of workers' rights and the presumption as to who is an employee" (2002) *Law, Democracy and Development* 22 37.

In light of the above, it will be necessary for legislators and policy-makers to carefully consider the implications of the interface between state and non-regulation of the practice under scrutiny. The potential role that institutions such as bargaining councils, trade unions and even core enterprises could play in ensuring the effective application of labour law to self-employed workers and their workers cannot be under-estimated. Their strength lies in their proximity to the parties involved, which enables them to access and influence core enterprises and self-employed workers through a number of innovative strategies.

Notwithstanding their importance, non-state institutions should not be left to their own devices, but should operate within the parameters of a robust legal framework that specifically recognises and regulates the practice. Such a framework would set out clear principles determining when the self-employed workers and their workers must receive protection and the type and level of protection they would receive. This would require the crystallisation and more explicit articulation of the legal principles discussed in parts 5.2 and 5.3 to regulate the practice.

CONCLUSION

The aim of this chapter was to consider whether South African law adequately recognises and regulates the practice of contracting work out to self-employed workers. It began by identifying certain challenges that labour law would have to address in order to effectively regulate this practice. One of these challenges was the need to move beyond three key assumptions underpinning conventional labour law, namely that the employer is a unitary and bounded entity, that the employment relationship is a bilateral and personal one, and that the scope of labour law should

be restricted to employees as opposed to any other category of worker. The second related to the need for labour law to develop solutions that address the multi-dimensional nature of new work arrangements which undermine the application of labour law.

Parts 5.2 and 5.3 canvassed the body of rules that South African labour law has developed to regulate non-standard work arrangements in general. The discussion in these parts considered the legal approaches to addressing externalisation by commodification and externalisation by intermediation respectively. The primary aim was to identify any specific references to and rules governing the practice under scrutiny.

This was only found in the Code of Good Practice, which provides that a worker who provides her/his services through a corporate entity and/or employs other workers is not precluded from employee status. It provided that in cases where a worker who employs other workers is found to be an employee, her/his workers may be found to be employees of the core employer if they are subject to the latter's control. It was found that with the exception of this provision in the Code – which amounts to soft law and has no binding force – there has been no concerted effort to regulate the practice under scrutiny in a more comprehensive manner.

The discussion then turned to whether the legal approaches designed to address other non-standard forms of work provided any lessons that could be applied to regulating the practice under scrutiny. It was found that a number of the principles underlying the various approaches could be extended and adapted to apply to the practice under scrutiny. It was also found that the various legal

approaches could be extended to address the challenges that the practice poses to labour law to varying degrees.

Chief amongst these was the corporate veil doctrine. This could be applied to the practice under scrutiny to allow for a broader approach to the identification of the employer and the allocation of employer obligations in relation to workers of the self-employed worker. Depending on the circumstances, the doctrine could be used to hold the core enterprise liable as sole employer, jointly and severally with the self-employed worker (the latter being the primary employer), or as a co-employer or joint employer with the self-employed worker. This doctrine therefore transcends the narrow conception of the employer as a unitary and bounded entity, the understanding that the employment relationship is a bilateral one and the assumption that employer liability should only be imposed on the basis of a direct contractual nexus between employer and worker.

Having exhausted the actual and potential contribution of state-centred labour law, the discussion shifted to consider the role that non-state institutions have played in addressing the practice under scrutiny. The discussion showed more direct and concerted efforts to regulate the practice within the construction sector and in relation to truck drivers. The measures adopted were based on the premise that the self-employed worker is not an employee but an emerging entrepreneur and entrepreneur who requires business support to enable him/her to comply with labour law and collective agreements. A key issue arising in this context was the divergence between the approaches state and non-state institutions, which gives rise to the need to probe the interface between these institutions for the regulation of the practice.

The key finding from this chapter is that while the practice of contracting work out to self-employed workers is recognised in South African labour law, this recognition and the regulation thereof are fairly limited. Nevertheless, South African labour law can draw inspiration from the principles underlying the legal approaches that regulate other non-standard forms of work. These principles need to be crystallised and clearly articulated in legislation aimed at specifically regulating the practice under scrutiny. The initiatives of non-state institutions would therefore need to be constrained by the binding legal principles set in relation to the practice.

Chapter seven will discuss the key underlying principles and substantive principles that should form part of a framework of rules to regulate the practice under scrutiny. This preceded by an analysis of the role of the ILO in regulating contract labour in chapter six.

CHAPTER 6: DOES THE ILO RECOGNISE AND REGULATE THE CONTRACTING OF WORK TO SELF-EMPLOYED WORKERS?

INTRODUCTION

The International Labour Organisation (ILO) is the United Nations specialised agency whose mandate is to advance “opportunities for women and men to obtain and decent and productive work in conditions of freedom, security and human dignity”.¹ It was established in 1919 at the end of the First World War. Part XIII of the Treaty of Versailles which was signed to end the First World War was devoted to labour and laid the foundation for the Constitution of the ILO.²

The desire to establish a permanent labour organisation was borne out of the realization that “universal and lasting peace can be established only if it is based upon social justice”.³ The founders were also driven by humanitarian objective to combat the exploitation of workers and improve their condition.⁴ In addition, they recognised the growing economic interdependence between states and the need to establish minimum labour standards to prevent unfair competition between states.⁵

¹ ILO “The ILO at a glance” information brochure accessed from the ILO website at http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@webdev/documents/publicaton/wcms_082367.pdf on 12/02/2011.

² J M Servais *International Labour Law* (Netherlands: Kluwer Law International, 2005) 24.

³ Preamble of the ILO Constitution.

⁴ ILO “The ILO: What it is, what it does” information booklet accessed from the ILO website at <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> on 21/01/2011.

⁵ B Hepple “Global Trade and Labour Law” in Bronstein, A, *International and Comparative Labour Law: Current Challenges*, (Palgrave MacMillan and ILO, 2009) 87; Servais *International Labour Law* (note 1) 26, 36.

These objectives and ideals continue to be valid and form part of the ILO's ideological basis today.⁶

The ILO's work is guided by four strategic objectives. The first is to promote and realize standards and fundamental principles and rights at work.⁷ The second is to promote greater opportunities for people to have decent work and income.⁸ The third and fourth objectives are to enhance the coverage and effectiveness of social protection for all and to strengthen tripartism and social dialogue.⁹ The ILO's efforts to achieve these objectives are based on a tripartite approach involving cooperation between governments, employers' organisations and workers' organisations.¹⁰

The ILO has developed a number of approaches and strategies to realize its objectives. Central to the ILO's mandate is the adoption and monitoring of the application of international labour standards in the form of conventions and recommendations.¹¹ The ILO also develops and implements broader international policies and programmes to promote basic human rights, improve working and living conditions and enhance employment opportunities.¹² Importantly, it provides

⁶ ILO (note 4).

⁷ ILO "Mission and objectives" accessed from the ILO website at <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> on 30/01/2011.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ ILO (note 4).

¹¹ ILO "The ILO at a glance" information brochure accessed from the ILO website at http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@webdev/documents/publicaton/wcms_082367.pdf on 12/02/2011.

¹² ILO "The International Labour Organisation" information brochure accessed from the ILO website

At

http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@webdev/documents/publicaton/wcms_082361.pdf on 12/02/2011.

technical assistance to help countries to effectively implement ILO policies as well as training, education and research activities to support its programmes.¹³

The ILO's standards and programmes extend beyond workers in standard employment. The Decent Work Agenda, which is central to the work of the ILO, aims to extend labour and social protection to "all workers, and in particular poor or disadvantaged workers".¹⁴ During the course of its history, the Organisation has developed standards and programmes to protect marginalised and excluded workers including those in non-standard employment, the unemployed and those who labour in the informal economy.

This chapter considers the history of ILO's efforts to regulate what it has referred to as contract labour. Through a primary analysis of the Organisation's of various ILO instruments, reports, discussions, draft instruments, and other documents, it traces the evolution of the ILO's understanding of contract labour. In addition, it analyses how the ILO's formulation of responses to the problem has changed over time. As will be shown in the discussion below, contract labour is a complex and multi-dimensional phenomenon. The purpose of the analysis is to determine the extent to which the ILO has recognized and regulated the practice of contracting work out to self-employed workers, which is the focus of this study.

The discussion is divided according to the three key periods which highlight important events in the history of the ILO. The first period spans the years 1949 to 1992. The second period began in 1993 and ended 1998. The third period covers 1999 to the present.

¹³ *Ibid.*

¹⁴ ILO, "Decent Work Agenda" accessed from the ILO website at <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm> on 13/02/2011.

As will be shown in part 6.1, the first period was characterized by a fragmented approach to addressing contract labour as it was recognised to varying degrees at different levels of the Organisation. During this period, contract labour was mentioned in some ILO instruments and more directly recognized as a problem by several ILO industrial committees. In addition, the International Labour Conference (ILC) made reference to the plight of self-employed worker and their employees in a resolution on the promotion of self-employment in 1990. While there was some recognition of contract labour at the apex of the organisation during this first period, the development of a coherent understanding of and strategy to address it was not a priority.

Part 6.2 will cover the second period, which was marked by concerted efforts to put contract labour on the agenda at the centre of the Organisation. It will cover the build-up to the discussions on contract labour in the International Labour Conference in 1997 and 1998. The draft convention and recommendation on contract labour and their subsequent amendments will be discussed and analysed in details. Importantly, the reactions of government, employers and labour to the draft instruments will be outlined and the reasons for the Organisation's failure to adopt them considered.

The third period, which began in 1999, is covered in part 6.3. During this period the ILO progressively retreated from its earlier focus on contract labour towards situation of workers in need of protection. By 2003, it was clear that the ILO had chosen to focus more broadly on delineating the scope of the employment relationship. This was placed on the agenda of the 2003 International Labour Conference, which adopted a resolution for the drafting of international standards

delineating the scope of the employment relationship. The ILO adopted Recommendation 198 on the Employment Relationship in 2006.

What emerges from the analysis is that there was some recognition of the practice of contracting work out to self-employed workers during the discussions prior to 1998. This understanding, however, was not fully translated into the provisions of the draft provisions on contract labour. The analysis in this chapter will reveal that measures taken after 1998 represent a regression from the possibility of regulating contract labour. Hence, Recommendation 198 is a blunt instrument that cannot address the many dimensions of contract labour, including contracting work out to self-employed workers.

The disappointing outcome of the ILO's endeavours, however, does not render the analysis fruitless. Some lessons can be learned from engaging with the reports, discussions, resolutions and draft instruments on contract labour and the employment relationship. These lessons enhance the process of conceptualising the practice under scrutiny, understanding the conflicting interests involved, and developing legal solutions to the problem. The lessons drawn from this analysis will be reflected in the next chapter, which will make recommendations on the regulation of contracting work out to self-employed workers in the South African context.

6.1 1949-1992: A FRAGMENTED APPROACH TO CONTRACT LABOUR

Prior to 1993, the ILO had not developed a coherent framework within which to conceptualise, recognise and regulate contract labour. During this time, contract

was recognised and regulated in different ways and to varying degrees in a number of ILO bodies.

A few of the ILO's international instruments that regulated various issues, however, made some reference to contract labour in their provisions. In addition, contract labour was more directly recognized as a challenge by ILO industrial committees. These covered amongst others, the petroleum, clothing and the building, civil engineering and public works industries.¹⁵ The ILO instruments and the industrial committee conclusions on contract labour are discussed in section 6.1.1.

Another key development during this period was the recognition of contract labour in the ILO's discussions on the promotion of self-employment. This development is pertinent to this work because it specifically recognised the problems arising when work was contracted to self-employed workers who in turn employed others to assist them. The discussion and resolutions on self-employment are discussed in section 6.1.2.

Finally, section 6.1.3 provides a brief conclusion drawing the implications of these developments and the position in 1992.

¹⁵ Other industrial committees not discussed in this part are the Committee on Work on Plantations which discussed the matter in 1989 and 1994, the Forestry and Wood Industries Committee and the Food and Drink Industries Committee in 1991; the Inland Transport Committee; the Tripartite Technical Meeting for the Leather and Footwear Industry; The Iron and Steel Committee in 1992; the Chemical Industries Committee in 1995; the Metal Trades Committee in 1994; the Committee on Salaried Employees and Professional Workers in 1994. See International Labour Conference 85th Session 1997 Report VI (1) *Contract Labour*, Sixth item on the agenda (Geneva: International Labour Office, 1997) 72.

6.1.1 Contract labour in ILO conventions and industrial committees

Prior to 1993, only two conventions explicitly mentioned contract labour in their provisions. These were the Labour Clauses (Public Contracts) Convention of 1949 and the Indigenous and Tribal Peoples Convention of 1989.¹⁶

The Labour Clauses (Public Contracts) Convention sought to protect workers from the negative consequences of competition for public tenders and ensure fair working conditions for workers performing work in pursuance of public contracts.¹⁷ Article 1(3) enjoined public authorities to ensure the application of the convention to subcontractors and assignees of public contracts. The Indigenous and Tribal Peoples Convention called for special measures to ensure the protection of indigenous and tribal peoples employed in standard forms of work, including those who were employed by labour contractors.¹⁸

In addition to these conventions, several ILO instruments relating to health and safety issues, provided for the allocation of responsibility in situations involving two or more employers operating on the same site.¹⁹ The Safety and Health in Construction Convention expressly referred to subcontractors as employers.²⁰

¹⁶ ILO Conventions No. 94 and 169 respectively. See ILC 85th Session 1997 Report VI (1) *Contract Labour* (note 15) 71.

¹⁷ Articles 1 and 2 of Convention No. 94. See ILC 85th Session 1997 Report VI (1) *Contract Labour* (note 15) 71.

¹⁸ Article 20(3) (a) of ILO Convention 169.

¹⁹ See for example article 8 of the Safety and Health in Construction Convention, 1988 (No. 167) and article 12 of the Safety and Health in Mines Convention 1995 (No. 176) and articles 6(2), 16 and 17 of the Asbestos Convention, 1986 (No. 162).

²⁰ For example, and Article 2(e) of the Safety and Health in Construction Convention, 1988 (No. 167).

The brief analysis of the above conventions shows that there was some recognition of the notion of contract labour and the vulnerability of workers in contracting arrangements in the ILO. This recognition could be credited to the ILO's highest decision-making organ. It could however be argued that the references to contract labour were merely incidental to the primary focus of the respective conventions. Contract labour was a peripheral issue as there was no overarching understanding or definition of it, nor any coherent strategy specifically aimed at addressing it at the highest level.

Contract labour was more directly addressed by a number of ILO industrial committees from as early as 1955.²¹ In 1955 and 1956, the ILO's Petroleum Committee adopted a resolution concerning conditions of employment of contract labour in the industry.²² It noted the trend that oil firms were increasingly contracting work out to external contractors.²³ It also noted some of the work contracted out was of an irregular or temporary nature, but that there was a greater tendency for firms to contract out permanent or core functions of the enterprises.²⁴ The committee referred to the workers employed by contractors as contract labour.²⁵

The Petroleum Committee noted that in many cases, oil firms engaged a combination of direct employees and contract workers to perform the same kind of

²¹ ILC 85th Session 1997 Report VI (1) *Contract Labour* (note 15) 71.

²² Petroleum Committee, (Fifth Session, Caracas, April-May 1955 and Geneva, April 1956) Resolution

No. 44 concerning conditions of employment of contract labour in the petroleum industry. This is annexed to ILC 85th Session 1997 Report VI (1) *Contract Labour* (note 15) 71.

²³ Preamble to the Petroleum Committee, (Fifth Session, Caracas, April-May 1955 and Geneva, April 1956) Resolution No. 44 concerning conditions of employment of contract labour in the petroleum industry.

²⁴ *Ibid.*

²⁵ *Ibid.*

work alongside each other.²⁶ However, there tended to be disparities between the working conditions of the two groups of workers, with contract workers often working on less favourable terms.²⁷ This disparity was a source of potential division and discontent and could undermine harmonious relations amongst workers.²⁸

The Petroleum Committee resolved that the primary responsibility for guaranteeing favourable working conditions for contract workers lay with the contractor as their employer.²⁹ It called for collective bargaining between the parties as the primary mechanism to regulate working conditions.³⁰ In the absence of organizations representing these parties, the relevant public authority would be responsible for ensuring fair working conditions in contracting arrangements.³¹ This would entail the enactment of legislation and measures such as the licensing of contractors, the development of standard contracts and monitoring through inspections and enforcement through penalties of violations.³²

The Petroleum Committee noted that that oil firms benefiting from contract labour also bore some responsibility to the workers.³³ The Committee recommended that oil firms using contract labour should require contractors to provide fair wages and working conditions through contractual clauses and measures to ensure that contractors complied with them. They would also have to take measures to ensure adequate medical and supply services for contract labour

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Items 1-4 of Petroleum Committee Fifth Session 1956 Resolution (note 23).

³² *Ibid.*

³³ *Ibid.*

working in remote areas. Oil firms would also be required to avoid the arbitrary discharge of contract workers during the period of a contract.

Contract labour was again the subject of discussion by the petroleum committee at its eighth session in 1973.³⁴ In the preamble to the conclusions to this session, the Petroleum Committee noted the persistence development of new forms of contract labour and the threat that it posed to regular employment in the industry. The Committee attributed these developments to the failure to implement the resolutions of the fifth session resolutions in the petroleum industry.³⁵ It noted that “similar problems [could] arise in other industries with regard to the use of contract and casual labour”.³⁶

At its eighth session, the Petroleum Committee reaffirmed and expanded on the resolutions adopted at the fifth session. One proposal was to place limitations on the contracting out of technical processes for which equipment and permanent employees could be used by oil firms.³⁷ The Committee also called on governments to take positive steps to ensure that statutory minimum working conditions were applicable to contract workers.³⁸ It further proposed that oil firms assimilate temporary contract workers as permanent employees, where appropriate and after suitable training.³⁹ Oil firms could also train their workers to increase their internal mobility and reduce the need for temporary personnel and contractors.⁴⁰

³⁴ Petroleum Committee, (Eighth Session, Geneva, April 1973), Conclusions (No. 65) concerning social problems of contract, subcontract and casual labour in the petroleum industry. This is annexed

to International Labour Conference 85th Session 1997 Report VI (1) *Contract Labour at* 85-87.

³⁵ Preamble to Petroleum Committee Eighth Session (1973) Conclusions (note 34).

³⁶ *Ibid.*

³⁷ Item 2 of Petroleum Committee Eighth Session (1973) Conclusions (note 34).

³⁸ Item 6 of Petroleum Committee Eighth Session (1973) Conclusions (note 34).

³⁹ Item 11 of Petroleum Committee Eighth Session (1973) Conclusions (note 34).

⁴⁰ Item 12 of Petroleum Committee Eighth Session (1973) Conclusions (note 34).

The clothing industry identified contract labour as a matter of concern during the ILO's Second Tripartite Technical Meeting for the clothing industry in 1980.⁴¹ The Meeting noted the prevalence of contract labour, including homework, in the industry.⁴² This was to a large extent attributable to the seasonality of the clothing industry and the need for flexibility to meet fluctuations in demand.⁴³

The Meeting noted the difficulty of defining contract labour and the diversity of forms of contracting and subcontracting arrangements.⁴⁴ Some forms of contract labour were driven by wholesalers and retailers and others by manufacturers and some which spanned across international borders.⁴⁵ The dearth of reliable data on contract labour hampered a full understanding of its nature and extent in the different countries.⁴⁶ The Meeting called on the ILO to call on member states to provide appropriate statistics to facilitate further consideration of the subject.⁴⁷ It also called on the ILO to give more frequent and comprehensive attention to the problems experienced in the clothing industry.⁴⁸

The meeting identified several challenges arising in contract arrangements. These included unfair treatment, unequal treatment of contract workers and non-compliance with legislative provisions and collective agreements relating to wages,

⁴¹ Second Tripartite Technical Meeting for the Clothing Industry (Geneva, 23 September – 2 October 1980), Conclusions (No. 7) concerning contract labour in the clothing industry. This is annexed to International Labour Conference 85th Session 1997 Report VI (1) *Contract Labour* at 87-91.

⁴² Paragraph 1 of the Second Tripartite Technical Meeting for the Clothing Industry (1980) (note 41).

⁴³ *Ibid.*

⁴⁴ Paragraph 2 of the Second Tripartite Technical Meeting for the Clothing Industry (1980) (note 41).

⁴⁵ *Ibid.*

⁴⁶ *Ibid* at paragraph 3.

⁴⁷ *Ibid* at paragraph 4.

⁴⁸ *Ibid* at Paragraph 5.

benefits and health and safety standards.⁴⁹ These challenges were exacerbated in arrangements involving vulnerable groups of workers including undocumented migrants, women and children.⁵⁰ Working conditions amongst home workers also generally tended to be poorer than those of other workers.⁵¹

The Meeting identified a number of strategies to ensure that the advantages of subcontracting were not gained at the workers' expense and ensure that workers were adequately remunerated and protected. It called for the adoption of minimum international labour standards which would be supervised by the ILO.⁵² It recommended the adoption of joint and several liability to prevent unfair competition in the context of subcontracting arrangements.⁵³

The Meeting called for the equality of treatment between home workers and factory workers, especially in relation to wage rates, holidays and social security.⁵⁴ It recommended the promotion of the active engagement of social partners in the enforcement of protective measures.⁵⁵ In addition, it recommended that measures be taken to prevent labour trafficking and to protect undocumented migrant workers from abuse.⁵⁶

Finally, the Building, Civil Engineering and Public Works Committee of the ILO placed contract labour on the agenda of its twelfth session in 1992.⁵⁷ At the end

⁴⁹ *Ibid* at paragraph 7.

⁵⁰ *Ibid* at paragraphs 7, 17, 21.

⁵¹ *Ibid* at paragraph 7.

⁵² *Ibid* at paragraph 11.

⁵³ *Ibid* at paragraph 8.

⁵⁴ *Ibid* at paragraph 18.

⁵⁵ *Ibid* at paragraph 19.

⁵⁶ *Ibid* at paragraphs 21-4.

⁵⁷ Twelfth Session of the Building, Civil Engineering and Public Works Committee (Geneva, 2-10 December 1992), Resolution (No. 102) concerning contract labour and other forms of employment

of its discussions, the committee adopted a resolution on contract labour. In its resolution, it invited the Governing Body of the International Labour Office to request ILO member states to take a number of actions.

The first was to ensure compliance with appropriate labour legislation in respect of all workers, including contract workers.⁵⁸ States would also be required to ensure the statutory coverage of contract workers, the monitoring of their working conditions and enforcement of labour laws.⁵⁹ States would also be requested to enable contract workers to have access to regular conditions of employment.⁶⁰

The above discussion shows that industrial committees took a direct and substantive approach to addressing contract labour within their respective domains. While there was a need for more clarity on its scope, it was understood to encompass job contracting and, in some industries, the use of temporary employment agencies. A common finding was that contract labour created inequality between contract workers and standard employees. There was also some recognition that contract workers were more likely to be drawn from certain vulnerable social groups. The committees called on the ILO to take action and also recognised the need to involve contractors, user enterprises and governments in efforts address contract labour.

in construction. This is annexed to ILC 85th Session 1997 Report VI (1) *Contract Labour* (note 15) at 91-2.

⁵⁸ Item 1(a) of the Twelfth Session of the Building, Civil Engineering and Public Works Committee Resolution (note 57).

⁵⁹ *Ibid* at item 1(b).

⁶⁰ *Ibid*.

While the committee discussions and resolutions contributed more substance to understanding and regulating contract labour, they had limited immediate impact more broadly within the ILO. This was because the industrial committees were located on the periphery as opposed to the centre of the organisation. In addition, they had limited direct influence over decision-making bodies at the apex of the organisation. Nevertheless, the committee discussions helped to raise the profile of contract labour and provided some evidence to support further discussion on the subject.⁶¹

6.1.2 Contract labour and the promotion of self-employment

The ILO's recognition and regulation of self-employment before 1990 was limited to their inclusion in some international labour instruments regulating a wide range of issues. For example, self-employed workers were included in key conventions relating to freedom of association, forced labour and equal opportunity.⁶² In addition, several ILO instruments on employment policy provided for various programmes to support and promote the self-employed or those who wanted to enter self-employment.⁶³ Some ILO instruments on working conditions and social security also provided for the inclusion of self-employed workers.⁶⁴

⁶¹ ILC 85th Session 1997 Report VI (1) *Contract Labour* 72.

⁶² They were expressly or implicitly included in the Right to Organise Convention, No. 87, 1948; the Rural Workers' Organisations Convention No. 141, 1974; the Discrimination (Employment and Occupation) Convention No. 111, 1958; the Forced Labour Convention No. 29, 1930; the Forced Labour (Indirect Compulsion) Recommendation No. 35, 1930. For a detailed discussion, see International Labour Conference 77th Session 1990, Report VII *Promotion of Self Employment*, Seventh item on the agenda.

⁶³ See Employment Policy Convention No. 122, 1964; Employment Policy Recommendation No. 122, 1964: these read together, implicitly advocate the promotion of full, productive and freely chosen self-employment. The Older Workers' Recommendation No. 162, 1980 refers to retirement preparation programmes providing information on, inter alia, the possibility of becoming self employed. The Employment Promotion and Protection against Unemployment Convention and its Recommendation No. 168, 1988 requires member states to offer financial assistance and advice to

At this stage, the organisation had not comprehensively assessed the situation of self-employed workers, nor sought to develop a coherent strategy to assist and protect them. The move in this direction began with the discussion of the promotion of self-employment in the 77th session of the ILC.⁶⁵ A resolution on the promotion of self-employment was adopted in the same conference.⁶⁶ This was significant in the history of the ILO as it identified key features of self-employment, its potential economic role and priorities for national self-employment policies and ILO action. (It is also pertinent to this thesis, as it recognised the involvement of self-employed workers in contracting arrangements).

The Resolution acknowledged the developing interest in non-agricultural self-employment for generating employment under changed economic circumstances.⁶⁷ It advocated the promotion of freely chosen and productive self-employment which enabled individuals to “fulfil their potential and give free rein to their creativity and initiative”.⁶⁸ In addition, it was necessary to upgrade “low

those wanting to set up their own businesses. The Human Resources Development Recommendation No. 168 (1983) suggests that member states prepare and regularly update national plans for providing technical and management training for the self-employed. For a detailed discussion, see ILC 77th Session 1990, Report VII *Promotion of Self Employment* (note 62) 63-8.

⁶⁴ See e.g. the Night Work (Bakeries) Convention, No. 20, 1925; The Hours of Work and Rest Periods (Road Transport) Convention; the Income Security Recommendation, No. 67, 1944; The Social Security (Minimum Standards) Convention, No. 102, 1952 and the Invalidity, Old-Age and Survivors' Benefits Convention No. 128, 1967. For a detailed discussion, see ILC 77th Session 1990, Report VII *Promotion of Self Employment* (note 62) 63-8.

⁶⁵A preliminary report was tabled before the ILC; see ILC 77th Session 1990, Report VII *Promotion of Self Employment* (note 62).

⁶⁶ Resolution concerning employment promotion, Resolution IV of the Resolutions adopted by the International Labour Conference at its 77th Session (Geneva: International Labour Conference, June 1990).

⁶⁷ See item 1 of the Resolution concerning self employment (note 66). It identified slow economic growth, the ascendancy of free market policies and technological changes as some of the key drivers of the trend.

⁶⁸ Item 6 of the ILC Resolution concerning self employment (note 66).

productivity but potentially viable self-employment activities”.⁶⁹ It also affirmed the need to ensure that national policy and institutional frameworks facilitated access to self-employment opportunities.⁷⁰

The Resolution pointed out the complexity of defining self-employment and of distinguishing it from wage employment.⁷¹ It noted that self-employment entailed greater independence, control over labour time, risk-taking and responsibility for a range of economic and financial functions.⁷² These distinguishing characteristics were a matter of degree and a continuum existed between self-employed and wage workers.⁷³

A continuum also existed within the category of self-employed workers, ranging from the marginal to the prosperous self-employed workers.⁷⁴ Self-employed workers included own account workers who worked on their own, and self-employed employers or working proprietors who employed other workers.⁷⁵ Importantly, the Resolution recognised that the workers employed by the self-employed in these contexts were particularly disadvantaged in terms of working conditions and protection.⁷⁶

Furthermore, the Resolution recognised that many self-employed workers were not genuinely independent and more closely resembled wage workers.⁷⁷ It referred to these workers as the nominally self-employed and described nominal

⁶⁹ *Ibid.*

⁷⁰ *Ibid* at item 14.

⁷¹ *Ibid* at item 3.

⁷² *Ibid.*

⁷³ *Ibid* at items 4 and 5.

⁷⁴ *Ibid* at item 3.

⁷⁵ *Ibid* at item 5.

⁷⁶ *Ibid* at items 8 and 12.

⁷⁷ *Ibid* at item 4.

self-employment as precarious and based on exploitative and dependent relationships.⁷⁸ Such relationships were closely associated with contracting and subcontracting arrangements and were driven by a desire to evade the obligations imposed by protective labour legislation.⁷⁹ It is submitted that the nominally self-employed workers can be equated to the self-employed workers like Jabu and Taryn who are the focus of this study.

The Resolution proposed number of measures for the promotion and protection of self-employed workers and their workers. Many of these had a direct or indirect bearing on self-employed workers in contracting arrangements and their workers. These are discussed below.

A key priority was the extension of labour standards and social protection to the self-employed and their workers.⁸⁰ The Resolution emphasised the need to protect the nominal self-employed against subcontracting arrangements and labour contracts that resulted in their exploitation and the denial of their labour and social rights.⁸¹ It also recommended the promotion of social protection measures to cover both self-employed workers and their workers, who tended to be excluded from ordinary social protection schemes.⁸²

The Resolution also highlighted the need to design and implement direct measures to promote self-employment.⁸³ These measures would improve the productivity and earnings of self-employed workers and their workers.⁸⁴ Measures

⁷⁸ *Ibid* at items 12 and 13.

⁷⁹ *Ibid* at items 12 and 13.

⁸⁰ *Ibid* at item 17.

⁸¹ *Ibid*.

⁸² *Ibid*.

⁸³ *Ibid* at item 16.

⁸⁴ *Ibid* at item 16 (a).

would need to be taken to improve the access of the self-employed to credit, productive inputs, training and technical assistance.⁸⁵ The Resolution made special mention of the nominal self-employed as beneficiaries of such initiatives.⁸⁶

The Resolution emphasised the importance of reviewing regulations that exempted small enterprises and self-employment units from complying with labour legislation.⁸⁷ This would involve balancing the need to accommodate the special circumstances of self-employed workers with the need to protect the workers employed by self-employed workers.⁸⁸ The ultimate aim was to ensure the parity of their working conditions with those of other workers.⁸⁹

A third priority was the promotion of freedom of association amongst the self-employed and their workers.⁹⁰ The Resolution identified the need for the formation and strengthening of organisations by self-employed workers and co-operatives to protect and further their interests.⁹¹ These organisations would play an important role in strengthening the bargaining power of otherwise vulnerable producers and supporting the nominal self-employed to become genuinely self-employed.⁹² In addition, trade unions had to play a role through organizing the workers of self-employed workers.⁹³

The Resolution envisaged that the measures identified in it would be facilitated and implemented by governments, business associations, trade unions

⁸⁵ *Ibid* at items 16 (a) and (c).

⁸⁶ *Ibid* at items 16 (a) and (d).

⁸⁷ *Ibid* at item 17 (b).

⁸⁸ *Ibid* at item 17 (b).

⁸⁹ *Ibid*.

⁹⁰ *Ibid* at item 18.

⁹¹ *Ibid* at items 18(b) and (f).

⁹² *Ibid* at item 18 (f).

⁹³ *Ibid* at item 18 (e).

academic and non-governmental institutions.⁹⁴ It also highlighted the ILO's invaluable role in promoting self-employment at both the national and international level through various initiatives.⁹⁵ These included the facilitation of research; the provision of technical advice, training and assistance to national governments; and the encouragement of collaboration between various stakeholders.⁹⁶

The General Conference resolution invited the Governing Body of the ILO to request the Director-General to inform member states and employers' and workers' organisations of the conclusions adopted therein.⁹⁷ It also invited the Director General to take the conclusions into account in the development of the ILO Programme and Budget proposals for the 1992-3 and subsequent biennia, and the next medium-term plan.⁹⁸

The discussions and conclusions on self-employment were important because they were the ILO's first attempt to interrogate the potential for and challenges of promoting self-employment. The conclusions recognised the use of self-employment in the context of sub-contracting arrangements and the resultant poor working conditions of the workers involved. Some of the recommendations made direct reference to the nominally self-employed and to workers in sub-contracting arrangements. Other recommendations related to self-employed workers and their workers in general, but had some bearing on self-employed workers in contracting arrangements and their workers.

⁹⁴ See for example items 18(c) and (d) of the ILC Resolution concerning self employment promotion.

⁹⁵ See items 19-24 of the ILC Resolution concerning self employment promotion.

⁹⁶ *Ibid.*

⁹⁷ See Preamble to the ILC Resolution concerning self employment promotion.

⁹⁸ *Ibid.*

6.1.3 Conclusion: the position in 1992

This part has shown that the period prior to 1992 was characterised by recognition of contract labour in different ILO organs, in different contexts and to varying degrees. Contract labour was recognised in certain ILO conventions, in the discussions and conclusions of industrial committee meetings and in the discussions and conclusions on self-employment. It is necessary to reflect on the significance of these seemingly fragmented developments for the practice under scrutiny.

The ILO conventions that made some reference to contract labour constituted “hard law” and had greater weight in terms of their pedigree. However, they were substantively weak as they did not provide a solid understanding of the concept of contract labour and its many dimensions. This was because contract labour was merely one of many aspects related to the subject matter of the conventions. On the other hand, the conclusions of the industrial committees, while weaker in pedigree, were the result of more focused engagement on contract labour and its consequences for workers involved therein.

Both the conventions and the conclusions of the industrial committees focused on the protection of the workers employed by contractors. They therefore paid little attention to the possible diversity in the nature and circumstances of the contractors. As a result, there was no recognition that in some cases, some contractors were self-employed workers who more closely resembled wage workers than entrepreneurs.

To a limited extent, contract labour and its relationship with self-employed workers received some attention in the report and resolution on the promotion of

self-employment. However, as indicated above, these themes were not central to the debate on self-employment nor the subsequent programmes developed to promote it.

The discussions and resolutions on the promotion of self-employed workers considered a number of dimensions/forms of contract labour and, crucially, recognised the possibility that in some cases, self-employed were engaged as contractors. The resolution described these as nominally self-employed workers who were engaged in dependent and exploitative arrangements. It recognised that these arrangements had implications for these self-employed workers and their employees.

The resolution on self-employment made some recommendations regarding self-employed worker-contractors. Some of these emphasised the need to avoid the exploitation of and extend labour and social protection to self-employed worker-contractors and their workers. While this implied placing some obligations upon the user or core enterprise, the recommendations did not elaborate on how this could be achieved. Instead, the recommendations placed more emphasis on measures to turn the nominally self-employed into genuinely independent contractors who would be able to fulfil their labour and social obligations to their workers.

It must be noted that contract labour was not a central aspect of the 1990 discussions on contract labour. Moreover, the programmes that were subsequently implemented to promote self-employment have paid little, if any, attention to workers in contracting arrangements.

One may be tempted to conclude that the ILO's position on contract labour in 1992 was fragmented and of little consequence. The more compelling conclusion is that, taken together, these patchy and uncoordinated interventions paved the way for the recognition of contract labour as a matter requiring attention. It is more likely that these initial limited interventions provided the necessary foundation for the consideration of contract labour at the centre and apex of the organisation. The developments in this regard will be discussed in chapter 6.2 below.

6.2 1993-1998: PUTTING CONTRACT LABOUR ON THE ILO AGENDA

This part considers the developments leading to the development and consideration of international instruments at the International Labour Conference in 1998. The first section canvasses the initial discussions and research on contract labour from the early 1990s leading up to a formal discussion on contract labour at the 85th session of the ILC in 1997. The second section considers the draft convention and recommendation on contract labour which were considered by the 86th session of the ILC the following year. These draft instruments did not receive sufficient support for their adoption by the Conference. Section 6.2.3 provides a brief conclusion.

6.2.1 The initial discussions and research

The Governing Body of the ILO considered law and practice reports on contract labour at its sessions in 1993, 1994 and 1995 with a view to including contract

labour on the agenda of the ILO.⁹⁹ The reports had been prepared by the International Labour Office (“the Office”) and recommended that further research on the subject be undertaken to inform further discussions on the matter.¹⁰⁰ The Office then commissioned 20 research studies which were used to compile a law and practice report (hereinafter “the first report”) which considered the nature, prevalence and regulation of contract labour and possible international action.¹⁰¹

The Governing Body adopted a resolution to include contract labour on the agenda of the 1997 session of the ILC.¹⁰² Pursuant to this resolution, and in preparation for the 1997 session of the ILC, the Office circulated the first report amongst member states, employers’ organisations and trade unions. The salient points of the report are discussed below.

The first report stated that contract labour could arise in bilateral relationships between user enterprises and workers or multilateral relationships involving intermediaries.¹⁰³ In addition, two features had to be present. The first was the formal representation of the relationship between the user enterprise and the workers as one of independence and autonomy.¹⁰⁴ The second was the asymmetrical relationship between the two parties due to the dependency of the

⁹⁹ These were the 258th, 259th and 262nd sessions of the Governing Body. See ILC 85th Session 1997 Report VI (1) *Contract Labour* (note 15) 1.

¹⁰⁰ *Ibid.*

¹⁰¹ The countries from which research was commissioned were Argentina, Australia, Belgium, Canada, Cote d’Ivoire, India, Italy, Germany, Japan, Kenya, Malaysia, Mexico, Pakistan, Philippines, Portugal, Sweden, Thailand, the United Kingdom, the United States and Venezuela. This report was tabled for discussion at the ILC Conference and is cited as ILC 85th Session 1997 Report VI (1) *Contract Labour* (note 15).

¹⁰² This took place in the 262nd session of the Governing Body in March-April 1995.

¹⁰³ ILC 85th Session 1997 Report VI (1) *Contract Labour* (note 15) 6.

¹⁰⁴ *Ibid.*

worker on the user enterprise resulting from the former's subordination to the latter.¹⁰⁵

According to the first report:

The term 'contract labour' is most often used to refer to situations in which the substance of the relationship appears to be similar to an employment relationship while the form is a commercial one, or at least where there seems to be some combination of employment and commercial aspects to the relationships established.¹⁰⁶

This could occur, for example, where an enterprise hired an individual or group of workers to carry out the normal work of the enterprise but gave them the status of independent self-employed contractors or subcontractors.¹⁰⁷ It could also occur where the employer hired workers for the normal work of the enterprise through intermediaries who retained some of the employer functions such as payment of wages.¹⁰⁸ The report noted that:

Concerns arise in respect of these forms of contract labour mainly because of fear that the workers concerned, while substantively in the same relationship of dependency vis-à-vis the user employer as normal employees (although formally having the status of a commercial contractor or of an employee of a commercial contractor), will not receive the protection intended by labour law to be extended to such workers or that the employers' obligation under the law will be displaced from the enterprise in the best position to ensure their observance of an intermediary not in such a position.¹⁰⁹

The report also highlighted another important dimension of contract labour. This involved an employer contracting all or part of its normal or core functions to another enterprise.¹¹⁰ Such situations could become problematic if they undermined

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

the positions of the existing workers of the first employer or they could shift production from more stable and secure enterprises to less viable ones which were less likely to fulfil their employer obligations.¹¹¹

The report highlighted the diversity of arrangements falling under the banner of contract and distinguished between “job contracting” to “labour only contracting”.¹¹² It defined the latter as an undertaking by a contractor or subcontractor to supply goods or services for a fee, with the contractor or subcontractor being paid on the basis of the work done and not the number of workers employed or the time taken to complete it.¹¹³ It defined labour only contracting as an arrangement whose dominant purpose was the supplier of labour by the contractor or subcontractor to the user enterprise.¹¹⁴ Under such arrangements, the user enterprise assumed the control and supervision of the workers and paid the contractor for the number of workers provided and not for the finished work.¹¹⁵

The critical question for this thesis is whether the ILO report recognised the dilemma caused by the contracting practice under scrutiny. In other words, did the report recognise the practice of contracting work out to self-employed workers like Taryn and Jabu? It is submitted that the report did recognise the practice as it referred to multilateral relationships where the intermediary, to whom work was

¹¹¹ *Ibid* at 9.

¹¹² International Labour Conference 85th Session 1997 Report VI (1) *Contract Labour* (note 15) 7-8. Labour only contracting envisaged what have been described as labour broking or temporary work agency arrangements. In chapter four of this thesis it was argued that the term labour only (sub)contracting actually refers to situations involving contract for the performance of specified work, where the (sub)contractor was unable to provide the necessary tools and materials and primarily provided and supervised the labour that was required.

¹¹³ ILC 85th Session 1997 Report VI (1) *Contract Labour* (note 15) 7-8.

¹¹⁴ *Ibid*.

¹¹⁵ *Ibid*.

contracted, was an individual.¹¹⁶ These relationships were particularly prevalent in the construction, agriculture, manufacturing and transport sectors and were common in Latin America and some francophone African countries.¹¹⁷

The report cited the example of *talleristas* in Argentina, who undertook to perform an agreed amount of work for a fixed price and employed other workers to assist them with the manufacture of products.¹¹⁸ Argentine jurisprudence recognised the dual status of *talleristas*, namely as home workers in relation to user enterprises and as employers of the workers engaged.¹¹⁹ These situations also raised the question of who the real employer of the contract workers was.¹²⁰ The report also noted the definition of a *tacheron* in the Senegal Labour Code.¹²¹ This defined a *tacheron* as a master workman who contracted to do a piece of work and in turn recruited other workers to carry out the specific work.¹²²

More pertinently, the report highlighted the prevalence of intermediaries or contractors that were not established firms or businesses and whose legal status was unclear.¹²³ It also found that some arrangements that would otherwise be regarded as commercial relationships involved contractors or sub-contractors that did not have the economic or financial viability to meet their employer obligations to their workers.¹²⁴ Workers under these relationships were usually more economically dependent on the user enterprise than the subcontractor.¹²⁵

¹¹⁶ *Ibid* at 9-10.

¹¹⁷ *Ibid*.

¹¹⁸ *Ibid* at 10.

¹¹⁹ *Ibid*.

¹²⁰ *Ibid*.

¹²¹ *Ibid* at 33.

¹²² Section 95 of the Labour Code of Senegal, as at June 1996.

¹²³ ILC 85th Session 1997 Report VI (1) *Contract Labour* (note 15) 72.

¹²⁴ *Ibid* at 74.

¹²⁵ *Ibid*.

The first report concluded that such arrangements qualified as contract labour and needed special protection.¹²⁶ Thus, it can be said that the report clearly envisaged the practice of contracting work out to self-employers as falling within the scope of contract labour. It found that especially disconcerting where enterprises used it to contract out their core functions to labour only subcontractors and thus displaced permanent employees.¹²⁷

The first report then identified the existing regulations of contract labour in the different jurisdictions covered in the country studies.¹²⁸ These regulations took the form of legislation, judicial decisions and collective bargaining arrangements. In this respect, it discussed the extension of standard labour regulation to cover contract labour. It also considered the development of specific regulations to regulate contract labour. Finally, it considered the challenges that contract labour posed for collective bargaining and how the selected jurisdictions had responded to them.

The report also recognized the need to develop international labour standards to regulate contract labour. It identified two challenges to defining the scope and content of such standards. The first related to identifying the type of arrangements that would require regulation as contract labour relationships as opposed to normal employment or commercial relationships.¹²⁹ The second related to determining the nature of the substantive protection that had to be provided to the workers concerned.¹³⁰ Given the lack of consensus among countries about how

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid* at 26-70.

¹²⁹ *Ibid* at 74.

¹³⁰ *Ibid.*

to approach these dilemmas, the report recommended that any instrument(s) on the subject be very flexible to allow member states to choose among different options for protection.¹³¹

Annexed to the first report was a questionnaire which sought the views of governments, employers' organisations and workers' organisations on the form and content of international labour standards on contract labour. The responses were collated into another report ("the second report").¹³² The first and second reports were tabled before the 85th session of the ILC in June 1997 and were discussed by a specially constituted committee during that session.

The general conclusions of the Committee on Contract labour included a proposal for the adoption of a convention and recommendation on contract labour.¹³³ The Conference adopted the report of the Committee and approved the proposal for the adoption of international instruments.¹³⁴ The Conference also decided to place contract labour on the agenda its 86th session in 1998 for a second discussion regarding the proposed adoption of instruments.¹³⁵ The preparations for the 86th session and the draft conventions are discussed in section 6.2.2 below.

6.2.2 The draft instruments on contract labour

¹³¹ *Ibid* at 75.

¹³² International Labour Conference 85th Session 1997 Report VI (2) Contract Labour.

¹³³ International Labour Conference "Resolution to place on the agenda of the next ordinary session of the Conference an item entitled 'Contract Labour' ". See Item II of the Resolutions adopted by the International Labour Conference at its 85th session (Geneva, June 1997).

¹³⁴ *Ibid*.

¹³⁵ *Ibid*.

Following the 85th session, the International Labour Office prepared a draft convention and draft recommendation on contract labour. These were incorporated into a report which was circulated for comment amongst member states, employers' organisations and workers' organisations for comment.¹³⁶ The Office compiled the responses into a report and considered them in the amendment of the initial draft instruments.¹³⁷ The recommended changes and the revised draft instruments were incorporated in a third report.¹³⁸ The three reports were tabled for discussion at the 86th session of the ILC in 1998.

The main aim of this section is to trace the trajectory of the draft instruments on contract labour. It is divided into four sub-sections. The first sub-section considers the provisions of the initial draft instruments, which shall be referred to the first or initial draft convention and recommendation. The second sub-section considers the main criticisms made by the governments and employers' organisations of certain member states.

This is followed by a discussion of the second or revised draft convention and recommendation, with special attention to the changes made in the provisions. Essentially, it is argued that the revised draft instruments significantly diluted the definition of contract labour and the protection offered to contract workers in order to make it more palatable to member states and employers' organisations that had raised objections. However, as will be shown in the final sub-section, the Conference failed to adopt a convention and recommendation on contract labour at its 86th

¹³⁶ International Labour Conference, 86th Session, Geneva June 1998, Report V (1) *Contract Labour*, Fifth Item on the Agenda.

¹³⁷ International Labour Conference 86th Session, Geneva, June 1998, *Contract Labour Report V* (2A), (Geneva: ILO, 1998).

¹³⁸ International Labour Conference 86th Session, Geneva, June 1998, *Contract Labour Report V* (2B) Addendum.

session. The final sub-section outlines the Conference's conclusions on contract labour.

The initial draft convention and recommendation

The initial draft convention¹³⁹ defined contract labour as work performed for a natural or legal person (user enterprise) “where the work is performed by the worker personally under actual conditions of dependency on or subordination to the user enterprise and these conditions are similar to those that characterize an employment relationship under national law and practice”.¹⁴⁰ The definition also applied to work performed either in terms of a bilateral contract between the worker and user enterprise or where the worker was provided through a subcontractor or intermediary.¹⁴¹

In summary, draft articles 1 and 2 envisaged that the following situations would fall within the scope of the convention:

- i) workers having a direct contractual relationship (other than a contract of employment) with the user enterprise where there was dependency or subordination similar to those characterising an employment relationship;
- ii) workers engaged to work through a subcontractor, whether or not a contract of employment relationship existed between the worker and the

¹³⁹ This is included in ILC 86th Session 1998 Report V (1) *Contract Labour* (note 136).

¹⁴⁰ Article 1 of the first Draft Convention on Contract Labour, see ILC 86th Session 1998 Report V (1) *Contract Labour* (note 136).

¹⁴¹ It defined a subcontractor as “a natural or legal person who performs work for a user enterprise under a contractual arrangement with it, other than a contract of employment” and an intermediary as “a natural or legal person who makes contract workers available to a user enterprise without becoming formally the employer of these workers”.

subcontractor, provided the worker was dependent upon and subordinate to the user enterprise;

iii) workers engaged to work for a user enterprise via an intermediary, where there was no employment relationship between the worker and the intermediary.

In terms of draft article 2 of the first draft convention, two categories of workers were excluded from the scope of the proposed Convention. The first was workers who had a contract of employment with the user enterprise, as these would be covered by general employment legislation and conventions. The second were contract workers who were employees of a private employment agency providing contract labour to the user enterprise. These workers were specifically covered by a separate convention.¹⁴²

Draft article 2 also provided that the proposed convention would apply to all branches of economic activity and would cover all contract workers. However, states would have the power to exclude certain categories of contract workers who otherwise enjoyed adequate protection. States would also be able to exclude certain branches of economic activity from the application of the proposed convention where this would raise practical difficulties.

The remaining provisions of the initial draft convention provided details on how states could protect contract workers. Some of these imposed obligations on member states to provide for the substantive rights of contract workers in their labour legislation and policies. They also imposed obligations on states to take measures to make these rights a reality for contract workers. In this regard, article 8

¹⁴² The Private Employment Agencies Convention No. 181 of 1997.

required states to apply the convention through laws and regulations and establish effective measures and remedies to ensure the proper application and enforcement of the regulations.¹⁴³

The initial draft convention required member states to take measures to ensure that contract workers received adequate protection as regards working time and other working conditions, maternity protection, occupational safety and health, remuneration, and statutory social security.¹⁴⁴ Thus, states would have to provide adequate protection and clearly determine responsibilities for obligations relating to remuneration and social insurance contributions.¹⁴⁵ It also required them to prevent accidents and injury to the health of contract workers arising from contract labour. In addition, member states would have to ensure the compensation of contract workers for injuries and diseases resulting from the performance of contract labour.¹⁴⁶

Some of the provisions of the initial draft convention sought to promote parity between contract workers and ordinary employees. For instance, article 5 required member states to promote equality of treatment between contract workers and employees, taking into account the similarity of the work and the working conditions. More specifically, member states would have to ensure similar treatment regarding the right to organise and to bargain collectively, and freedom from employment or occupation-based discrimination.¹⁴⁷ In addition, states would be required to “take measures to ensure that rights or obligations under labour or

¹⁴³ Article 8 of the first Draft Convention on Contract Labour (note 140).

¹⁴⁴ Article 6 of the first Draft Convention on Contract Labour (note 140).

¹⁴⁵ Article 4 of the first Draft Convention on Contract Labour (note 140).

¹⁴⁶ Article 3 and 4(c) of the first Draft Convention on Contract Labour (note 140).

¹⁴⁷ Article 6 of the first Draft Convention on Contract Labour (note 140).

social security laws or regulations [we]re not denied or avoided when contract labour is used.”¹⁴⁸

The initial draft recommendation on contract labour supplemented the draft convention with a number of provisions. Importantly, it provided a list of criteria to be considered when determining whether conditions of dependency or subordination existed for the purposes of identifying contract labour.¹⁴⁹ These factors included, *inter alia*, the degree of control that the user enterprise exercised over the timing and manner of work, the method for determining payment and the extent of the user enterprise’s investment and provision of tools and materials. Ironically, these were the same criteria that the courts have traditionally used to distinguish employment from self-employment. It was therefore unclear how the criteria would be used to distinguish between self-employment and contract labour.

The initial draft recommendation reiterated the draft convention’s principle of equal treatment¹⁵⁰ and encouraged states to take measures in respect of certain rights and privileges.¹⁵¹ It also recommended some measures to ensure realization

¹⁴⁸ Article 7 of the first Draft Convention on Contract Labour (note 140).

¹⁴⁹ In terms of Paragraph 2 of the first Draft Recommendation on Contract Labour, attached to ILC 86th Session 1998 Report V (1) *Contract Labour* (note 136). The factors were “(a) the extent to which the user enterprise determines when and how work should be performed, including working time and other conditions of work; (b) whether the user enterprise pays amounts due to the contract worker periodically and according to pre-established criteria; (c) the extent of supervisory authority and control of the user enterprise over the contract worker in respect to the work performed, including disciplinary authority; (d) the extent to which the user enterprise makes investments and provides tools, materials and machinery, among other things, to perform the work concerned; (e) whether the contract worker can make profits or run the risk of losses in performing the work; (f) whether the work is performed on a regular and continuous basis; (g) whether the contract worker works for a single user enterprise; (h) the extent to which work performed is integrated into the normal activities of the user enterprise and (i) whether the user enterprise provides substantial job-specific training to the contract worker.”

¹⁵⁰ Paragraph 4 encouraged states to take measures to ensure the equality of treatment between contract workers and workers of user enterprises.

¹⁵¹ It recommended that states take steps to ensure that contract workers had the right to be

and enforcement of the rights of contract workers, including the allocation of responsibility for rights of contract workers. The initial draft recommendation suggested three mechanisms for doing so.

The first was the deeming of contract workers as the employees of the user enterprise or the user enterprise in certain instances.¹⁵² The second mechanism was the enactment of explicit provisions outlining the respective responsibilities of the subcontractor, intermediary and user enterprise for fulfilling duties owed to the contract workers.¹⁵³ The third was that states could provide that the subcontractor or user enterprise would be held jointly and severally liable for the financial obligations towards contract workers.¹⁵⁴

In addition to rules on allocation of responsibility, the first draft recommendation proposed that states could require subcontractors and intermediaries to register with and obtain a licence from a competent authority.¹⁵⁵ Registration would be conditional upon the subcontractor or intermediary demonstrating its ability to meet its obligations towards contract workers.

The draft recommendation also included additional proposals pertinent to the regulation of contract labour. For example, draft paragraph 13 encouraged states to compile and maintain statistics and other information on contract labour.

informed about their conditions of work, to freedom of association, and to refuse to perform work constituting a danger to their health and safety in Paragraphs 3, 11(2) and 7 respectively.

¹⁵² See paragraph 5 of the first Draft Recommendation (note 149). An example of such a case would be where contract labour was used to avoid duties imposed by labour and social security laws.

¹⁵³ See paragraph 8 of the first Draft Recommendation on Contract Labour (note 149). In the event that the responsible party failed to fulfil its obligations, the other party could be made to do so.

¹⁵⁴ Paragraph 9 of the first Draft Recommendation on Contract Labour (note 149).

¹⁵⁵ Paragraph 11 of the first Draft Recommendation on Contract Labour (note 149).

Draft paragraph 14 recommended that states take appropriate measures to protect foreign workers performing contract work within their territories.

Criticisms of the initial draft instruments

Member states were invited to comment on the first draft Convention and Recommendation.¹⁵⁶ Broadly speaking, most of the supporters of the draft instruments were employee organisations and governments of developing states. There was generally little support for the proposed instruments amongst employer organizations and governments of developed member states. The key objections raised against the proposed instruments are highlighted below.

At a fundamental level, some parties argued that contract labour fell beyond labour law and fell into the realm of commercial contracts, which were beyond the mandate of the ILO.¹⁵⁷ Similarly, some parties argued that the regulation of contract labour was an unnecessary constraint on freedom of contract and business activity.¹⁵⁸ They argued that such regulation would negatively impact economic efficiency and growth, labour market flexibility, employment levels and small and medium enterprise development.¹⁵⁹

¹⁵⁶The comments on the first draft instruments were collated in the second report before the ILC.

ILC 86th Session 1998, *Contract Labour Report V (2A)* (note 137).

¹⁵⁷ See for example, German employers' association, at 10; Confederation of Swiss Employers, at 18 of

ILC 86th Session 1998, *Contract Labour Report V (2A)* (note 137).

¹⁵⁸ See for example the governments of Australia and Austria, at 3 and Canada, at 6 of ILC 86th Session

1998, *Contract Labour Report V (2A)* (note 137).

¹⁵⁹ *Ibid.*

Some member states argued that the draft instruments effectively created a 'third category' of workers situated between employees and independent contractors and having inferior rights to those of ordinary employees.¹⁶⁰ Some governments, like Croatia, argued that an intermediate category of worker amounted to a fiction because the only basis for a relationship of dependency and subordination was an employment relationship giving rise to employee rights and obligations.¹⁶¹ Others, like Japan, Poland, Sweden and Switzerland, argued that the factual existence of subordination gave rise to employment protection regardless of the form of employment relationship.¹⁶² This made it unnecessary to establish a Convention for these situations.¹⁶³

There were also specific objections as to the definition of contract labour and to the scope of the proposed Convention's coverage. Many states questioned the need to include employees of subcontractors within the scope of the convention as they were in principle entitled to employee rights against their employer, the subcontractor.¹⁶⁴ These parties argued that it would be unfair to transfer the burden of these obligations on the core enterprise, who was not legally the employer of the contract workers.

In addition, there was controversy about the proposal for equal treatment between the contract workers and those who had recognised employment relationships. Some states argued that it was impractical and unfair to require the

¹⁶⁰ See for example Sweden, at 8 of ILC 86th Session 1998, *Contract Labour Report V (2A)* (note 137).

¹⁶¹ ILC 86th Session, Geneva, June, 1998 *Contract Labour Report V (2A)*, at 7.

¹⁶² *Ibid* at 12, 37, 39 and 40 respectively.

¹⁶³ *Ibid*.

¹⁶⁴ See Denmark, at 29; the Netherlands, at 35; Norway, at 36; International Organisation of Employers, at 42; Australia, at 43; Canada, at 44 of ILC 86th Session 1998, *Contract Labour Report V (2A)* (note 137).

equal treatment of contract workers.¹⁶⁵ They maintained that the requirement of equal treatment would be a serious disincentive to the use of such flexible arrangements.¹⁶⁶

Some parties raised objections relating to the relationship between the draft instruments and the national legislation in the members states. Some states stated that their national legislation adequately regulated the situation of workers within and outside the employment relationship.¹⁶⁷ Other parties expressed concern about the feasibility of an all-embracing and binding Convention given the diversity of situations in the different countries.¹⁶⁸ They suggested that a non-binding instrument such as a recommendation would be more appropriate.¹⁶⁹

There were concerns that the measures proposed in the draft instruments were inappropriate because they were based on incorrect assumptions about the true cause of problems arising from contract labour. Some parties argued that the true problem lay in the fraudulent use of contract labour to evade employer obligations.¹⁷⁰ They suggested that it would be better to provide more clarity on the distinction between employees and independent contractors, and introduce measures to combat fraud by employees. Others were of the view that there was

¹⁶⁵ Singapore, at 55 and UK's Confederation of Business Industry at 57 of ILC 86th Session, Geneva, June, 1998 *Contract Labour Report V (2A)*.

¹⁶⁶ On the other hand, Denmark argued that the Convention had not gone far enough and should have prohibited 'discrimination of any kind' between contract workers and those with employment contracts, 53 and 59 of ILC 86th Session 1998, *Contract Labour Report V (2A)* (note 137).

¹⁶⁷ For example, Singapore, p 17 and Poland, p 37 of ILC 86th Session 1998, *Contract Labour Report V (2A)* (note 137).

¹⁶⁸ Brazil, at 4 and Canada, at 5 of ILC 86th Session 1998, *Contract Labour Report V (2A)* (note 137).

¹⁶⁹ *Ibid.*

¹⁷⁰ See the Canadian Employers Council, at 5; Portuguese Confederation for Industry, at 15; United Kingdom, at 20 of ILC 86th Session 1998, *Contract Labour Report V (2A)* (note 137).

a need to progressively expand the scope of protection offered by labour law to cover all workers working under the authority of the person recruiting them.¹⁷¹

The revised draft instruments

The International Labour Office made several amendments to the initial draft instruments.¹⁷² It divided the draft convention into two parts. Part I (draft articles 1 to 7) would cover all contract workers regardless of whether they were in bilateral or triangular relationships, and the Part II (draft articles 8 to 13) would cover those in triangular relationships. Members signing the convention would be bound by Part I, and would have the option of accepting the provisions of Part II.

Draft article 1 of the revised draft defined contract labour as:

work performed for a natural or legal person (referred to as a 'user enterprise') by a person (referred to as a 'contract worker') where the work is performed by the contract worker personally under actual dependency on or subordination to the user enterprise and these conditions are similar to those that characterise an employment relationship under national law and practice but where the contract worker is not the employee of the user enterprise.

This definition removed all references to subcontractors and intermediaries. These terms had been identified as a source of confusion due to the different terminologies used in the various jurisdictions.¹⁷³

Part I of the revised draft required states to establish accessible, speedy and objective procedures for determining the existence of an employment relationship.¹⁷⁴ It also required member states to take measures to ensure that

¹⁷¹ See Belgium at 4 of ILC 86th Session 1998, *Contract Labour Report V* (2A) (note 137).

¹⁷² See "Suggested changes to proposed instruments on contract labour", Annex to International Labour Conference 86th Session, Geneva, June 1998, *Contract Labour Report V* (2B) Addendum.

¹⁷³ *Ibid* at para 5.

¹⁷⁴ Article 4 of the revised draft convention on contract labour (note 172).

contract workers were not denied their social security rights.¹⁷⁵ Furthermore, it required states to take measures to ensure adequate protection of contract workers in relation to rights to organise and bargain collectively, freedom from discrimination, minimum age, remuneration, occupational safety and health, compensation for work-related injuries and diseases and social security contributions.¹⁷⁶

Part II applied only to workers who were employed by one enterprise and were made available to work for the user enterprise.¹⁷⁷ Importantly, the definition recognised the possibility that the employing enterprise could be a natural or legal person. It contained one substantive provision which required member states to allocate the respective responsibilities of the user enterprise in relation to the contract workers.¹⁷⁸

The revised draft convention diluted the protection envisaged for contract workers in a number of ways. First, it relegated the provisions relating to triangular or multilateral relationships into the optional part of the convention. This effectively gave member states a choice as to whether or not they would be bound in terms of one of the key aspects of the proposed convention. Second, the revised draft excluded the provision in the initial draft that required the promotion of equal treatment between contract workers and standard employee. This provision was moved to the revised draft recommendation, which would have less binding force on member states.¹⁷⁹

¹⁷⁵ Article 3 of the revised draft convention on contract labour.

¹⁷⁶ Article 5 of the revised draft convention on contract labour (note 172).

¹⁷⁷ Article 8 of the revised draft convention on contract labour (note 172).

¹⁷⁸ Article 9 of the revised draft convention on contract labour (note 172).

¹⁷⁹ This was moved to paragraph 4(1) of the revised draft recommendation on contract labour (note 172).

Third, the revised draft Convention no longer required that contract workers receive the same treatment as employees with respect to the right to organise and bargain collectively, freedom from discrimination and minimum age. The revised draft merely required that they receive 'adequate protection' in relation to these rights.¹⁸⁰ Moreover, the second draft excluded the provision in the initial draft which required states to take positive measures to prevent accidents and injury of contract workers.

The revised draft recommendation did not contain significant changes to the initial draft. A few amendments were made to the initial draft in relation to matters such as equality of treatment and the allocation of responsibilities in multilateral contracting arrangements.¹⁸¹ A notable addition was the provision encouraging states to periodically review national law and practice to determine whether there were situations involving the use of contract labour that necessitated the adoption of new measures.¹⁸²

Outcome of the discussions at the 86th session of the ILC

At the first sitting of its 86th session, the ILC constituted a Committee on Contract Labour to deliberate on contract labour with a view to the adoption of international instruments on the matter. The Committee comprised about 190 members representing governments, employers and workers. It held 18 sittings during the

¹⁸⁰ Article 5(a) of the revised draft convention (note 172).

¹⁸¹ See for example paragraphs 4 and 7 of the revised draft recommendation on contract labour (note 172).

¹⁸² Paragraph 13 of the revised draft recommendation (note 172).

course of the 1998 ILC, and deliberated on the three reports including the two sets of draft instruments submitted to the Conference.

The contract labour reports and the draft instruments were discussed and debated during the course of the 1998 session of the ILC. However, the members failed to adopt a resolution adopting a convention and recommendation on contract labour. The International Labour Conference then adopted a resolution inviting the ILO's Governing Body to place contract labour on the agenda of a future session of the Conference, with a view to adopting a convention and recommendation.¹⁸³

The ILC also invited the Governing Body to instruct the Director-General to hold meetings of experts to examine three issues.¹⁸⁴ The first was to determine which workers in the situations that had been identified by the Committee, were in need of protection. The second was to identify appropriate ways in which these workers could be protected, and the possibility of dealing separately with the various situations. The third was to consider how such workers would be defined, bearing in mind the different legal systems and language differences. In addition to considering these issues, the ILC invited the Governing Body to take other measures to complete the work began by the Committee on Contract Labour.

6.2.3 Conclusion

This part has explained how contract labour came to be at the centre of attention and how the debate gained momentum within the ILO. Importantly, it traced the trajectory of the draft instruments and the changes in the definition of contract

¹⁸³ International Labour Conference, 86th Session, June 1998, "Resolution concerning the possible adoption of international instruments for the protection of workers in the situations identified by the Committee on Contract Labour".

¹⁸⁴ *Ibid.*

labour and in the protection offered to contract workers. It also canvassed the key objections that were raised against the initial draft instruments, which ultimately thwarted efforts to reach consensus and adopt the draft instruments on contract labour.

It is worth noting that during the period under scrutiny, the ILO adopted a Convention that appeared to include some of the very principles that had raised contention in the contract labour debate. The Home Work Convention, which was adopted in 1996, arguably regulates a species of contract labour. Article 1(a) of the Convention defines home work as work performed by a homemaker i) in her/his home or any other place outside of the employer's premises ii) for remuneration and iii) resulting a product or service meeting the employer's specifications regardless of who provides the materials and equipment. These three criteria seem to cast the scope of the Convention widely and to include workers who are not necessarily employees, provided that they are not independent contractors.¹⁸⁵

The Convention requires member states to promote equality of treatment between home workers and other wage earners in respect of a number of rights including freedom of association, maternity protection and remuneration.¹⁸⁶ It therefore appears to extend labour protection to workers falling outside the scope of the employment relationship. In addition, the Convention defines an employer as the person who gives (or contracts) home work out, either directly or through an intermediary.¹⁸⁷ It therefore places primary responsibility for employer obligations

¹⁸⁵ See Article 1(a) which excludes from the definition of a home worker any person who "has the degree of autonomy and of economic independence necessary to be considered an independent worker under national laws, regulations or decisions" and Article 4(1) which makes a comparison between "home workers and other wage earners".

¹⁸⁶ Article 4(2) of the Home Workers Convention 1996 (No. 177).

¹⁸⁷ Article 1(c) of the Home Workers Convention.

on the *source* and *beneficiary* of the work even if the home worker does not contract directly with the employer so defined.

A possible explanation for the ILO's adoption of a Convention that struck a similar cord as the failed contract labour instruments is the significantly narrower scope of the Home Workers Convention compared to the universal scope of the contract labour provisions. A full analysis of the provisions of the Home Work Convention is however beyond the scope of this discussion. We now turn to the events that unfolded in the wake of the failure to adopt instruments on contract labour.

6.3 POST-1998: SETTLING FOR THE HIGHEST COMMON FACTOR

This part considers the shift in the ILO's attention from contract labour to the employment relationship following the 86th session of the ILC in 1998. It shows that these developments continued in the regressive direction signalled by the revisions to the draft instruments on contract labour. It essentially argues that the adoption of the Recommendation on the Employment Relationship in 2006 amounted to a settlement for the "highest common factor" amongst member states. In other words, the ILO settled for an international instrument whose terms were acceptable to all the social partners within the ILO.

Section 6.3.1 discusses the key findings of the meeting of experts which was convened pursuant to the 1998 ILC resolution to explore the situation of workers needing protection. Section 6.3.2 considers the discussions on contract labour during the 2003 and 2006 sessions of the ILC, which led to the adoption of a

recommendation on the employment relationship in the latter year. Finally, section 6.3.3 reflects on the significance of the shift from contract labour to the employment relationship within the ILO.

6.3.1 *The meeting of experts*

The meeting of experts envisaged in the ILC Resolution was held in May 2000. Thirty-six experts were invited to a meeting to consider the situation of workers in need of protection. The meeting comprised 12 experts nominated after consultations with Governments, 12 after consultations with Employers and 12 after consultations with Workers. The experts' discussion was guided by a technical document which the Office had prepared for the meeting.¹⁸⁸ The salient points raised in that document are discussed below.

The technical document stated that the employment relationship remained the main form for the organisation and regulation of work.¹⁸⁹ It noted the growing number of workers who were unprotected either because the law did not apply to them, or because they could not enforce the protections to which they were entitled.¹⁹⁰ These changes were taking place in the context of globalisation,

¹⁸⁸ ILO Meeting of Experts on Workers in Situation Needing Protection (The employment relationship: Scope), Basic Technical Document, Geneva, 15-19 May 2000. The Office compiled the technical document from a series of country studies commissioned by the Governing Body and informal meetings held in the regions. The studies identified those situations where workers were in

need of protection, the problems resulting from absence or inadequacy of protection and the responses to such situations and guidelines for possible international standard-setting action.

¹⁸⁹ ILO Meeting of Experts Technical Document (note 188) at paras 19 and 20.

¹⁹⁰ *Ibid* at 26.

technological changes, shifts in economic policies, changes in the organisation of work and a changing working population.¹⁹¹

The technical document argued that the increase in the number of unprotected workers was due to an increase in disguised and genuinely ambiguous employment relationships. Disguised employment involved a deliberate attempt to conceal the true nature of the legal relationship by changing its legal form, for instance, casting an employee as an independent contractor.¹⁹² Objectively ambiguous relationships had arisen in the context of changes in the organisation of work and the work practices granting workers greater autonomy to do their work.¹⁹³ In addition to these developments, was an increase in multilateral work arrangements, which made it difficult to determine who the true employer is.¹⁹⁴

The technical document acknowledged that the move towards these “flexible” forms of work had not brought about increased the levels of competitiveness, investments and employment as promised by the proponents of the flexibility agenda.¹⁹⁵ Instead, these forms of work had negative consequences for workers, their families, employers and broader society.¹⁹⁶ Importantly, it resulted in segmentation and inequality between protected and unprotected workers.¹⁹⁷

The technical document concluded that the root of the problem of non-protection was “the all-or-nothing binary divide between those who [were]

¹⁹¹ *Ibid* at paras 97-100.

¹⁹² *Ibid* at 27.

¹⁹³ *Ibid* at 28.

¹⁹⁴ *Ibid* at 29.

¹⁹⁵ *Ibid* paras 113 and 114, 117-9.

¹⁹⁶ *Ibid* paras 110, 111 and 120 and 120.

¹⁹⁷ *Ibid* at para 125.

employed and those that [were] independent contractors".¹⁹⁸ It suggested that this could be addressed by extending the concept of employment to include those workers in intermediate situations who are nevertheless dependent.¹⁹⁹ Another possible approach was to provide basic protection for all workers irrespective of their status or the legal form of their relationship.²⁰⁰

The document concluded that it was appropriate for international standards to be established to set the tone for regulation in member states and encourage them to take action.²⁰¹ There was a need for measures to facilitate the refocusing of labour law through a number of measures.²⁰² It was suggested that these measures could clarify the extent to which employment relationships should be regulated; improve enforcement machinery and facilitate workers' access to the courts; fine-tune legislation as employment relationships evolved in practice; and ensure basic protection for all workers.²⁰³

After a week of discussions the meeting made some recommendations that were included in the common statement of their key findings. The experts recommended that states should adopt and continuously review national policies to clarify and adapt the scope of the regulation of the employment relationship in light of current employment realities.²⁰⁴ The experts also agreed that national policy might include, but not be limited to:²⁰⁵

¹⁹⁸ *Ibid* at 34.

¹⁹⁹ *Ibid* at 34-5.

²⁰⁰ *Ibid* at 34-5.

²⁰¹ *Ibid* at 60.

²⁰² *Ibid* at 60.

²⁰³ *Ibid* at 60.

²⁰⁴ Report of the Meeting of Experts on Workers in Situations Needing Protection (Geneva, 15-19 May, 2000), Common Statement by the Experts, para 5.

²⁰⁵ *Ibid* at para 6 of the Common Statement by the Experts.

- i) providing clear guidance about employment relationships, particularly the distinction between dependent workers and self-employed persons;
- ii) providing effective worker protection;
- iii) combating disguised employment which deprived dependent workers of legal protection;
- iv) ensuring non-interference with genuine commercial or genuine independent contracting; and
- v) providing access to appropriate dispute resolution mechanisms to determine the status of workers.

The meeting also concluded that the ILO could play an important role through facilitating the collation and exchange of information, adopting international instruments, and providing technical cooperation and assistance to member countries concerning the development of appropriate policies.²⁰⁶

It is worth noting that the employer experts were opposed to the adoption of an international instrument to address the situations discussed by the experts.²⁰⁷ They argued that the situations involved were vague and had not been well-defined. They also claimed that a single response would be inappropriate given the diversity of situations that needed to be addressed and given the diversity of approaches in the different jurisdictions. They further emphasised the need to balance the protection of workers with the employers' need for flexible working arrangements. They argued for interventions to be limited to measures to address fraudulent employment practices.

²⁰⁶ *Ibid* at paras 7 and 8.

²⁰⁷ Report of the Meeting of Experts on Workers in Situations Needing Protection (Geneva, 15-19 May, 2000) 41-2.

The employer experts essentially reiterated the objections they had raised against the draft instruments on contract labour. The subsequent adoption of the Recommendation on the Employment Relationship signifies the employers' failure to prevent the adoption of any international instrument to protect vulnerable workers. The subsequent discussions at the International Labour Conference and actual content of the Recommendation, however, demonstrate that their views influenced the substance of the provisions.

Following the meeting of experts, the ILO Governing Body placed the scope of the employment relationship on the agenda of the 91st session of the ILC which was held in 2003.²⁰⁸ The shifting of the focus to the employment relationship and the subsequent developments are considered in section 6.3.2 below.

6.3.2 Towards the adoption of ILO Recommendation 198 on the Employment Relationship

The report submitted to the 91st session of the ILC contextualised the shift from contract labour to the employment relationship against the backdrop of two key developments within the ILO.²⁰⁹ These were the adoption of the Declaration of the Fundamental Rights and Principles at Work in 1998 and the Decent Work Agenda in 1999. One consequence of these developments was the re-prioritisation of certain principles on the ILO agenda including freely chosen employment; fundamental

²⁰⁸ In terms of a resolution of the ILO Governing Body 280th Session, Geneva, March 2001, paras 32 59.

²⁰⁹ ILO, *The Scope of the Employment Relationship* Report V, International Labour Conference, 91st Session 2003 1.

rights at work; adequate incomes; and adequate social protection.²¹⁰ The Office linked these developments with the focus on the employment relationship thus:

The lack of protection of many workers represents a significant challenge to the achievement of this goal [that is, decent work] in many countries and regions of the world. It is clear that work cannot be considered if the worker is not protected against the main risks associated with it. The Decent Work Agenda therefore provides a valid and important conceptual framework for addressing the lack of protection of dependent workers within the scope of the employment relationship.²¹¹

The report prepared for discussion at the conference identified several reasons for the proliferation of dependent workers who lacked labour protection.²¹² These related to the nature of the law, including poor formulation and narrow scope.²¹³ Non-protection of workers was also attributable to the manner in which law was interpreted and applied, as well as problems with compliance and enforcement.²¹⁴ Workers were also unprotected because their relationships were objectively ambiguous or because employers deliberately disguised the true nature of their employment relationships.²¹⁵

The discussion of the scope of the employment relationship focused on two categories of unprotected workers. The first comprised workers who were in bilateral employment relationships that were disguised or objectively ambiguous.²¹⁶ The second comprised workers who were engaged in “triangular” employment relationships which made it difficult to determine who their employer was and who should be responsible for their labour rights.²¹⁷

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² *Ibid* at 2.

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ *Ibid* at 19-36.

²¹⁷ *Ibid* at 37-49.

At the end of the discussions, the Conference adopted several conclusions relating to the employment relationship. The Conference concluded that it was appropriate to adopt a recommendation on the employment relationship.²¹⁸ The recommendation would not provide a universal definition of the employment relationship, but would provide member states with some guidance as to the nature of the employment relationship.²¹⁹ The Conference stressed that the recommendation had to be flexible in light of the different social, economic, legal and industrial relations traditions in the member states.²²⁰

The Conference envisaged that the recommendation would focus on “disguised employment relationships and on the need for mechanisms to ensure that persons with an employment relationship have access to the protection they are due at the national level”.²²¹ At the same time, the recommendation would not interfere with genuine commercial contracts.²²² The Conference noted that no consensus had been reached about the regulation of triangular relationships.²²³

The Conference then invited the Governing Body to give them due consideration in its future action on the scope of the employment relationship. Subsequently, the Governing Body placed the employment relationship on the agenda of the 95th session of the ILC which was held in 2006. It was during this

²¹⁸ ILC 91st Session, Record of Proceedings, “Conclusions concerning the employment relationship” para 25.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ *Ibid* at para 25.

²²² *Ibid.*

²²³ To the extent that triangular relationships involved temporary employment agencies, these would

be regulated in terms of the Private Employment Agencies Convention 181 and Recommendation 188 of 1997. See para 25 of the Conclusions on the Employment Relationship (note 218). This left contracting and subcontracting arrangements outside of the scope of international regulation.

session that the Conference adopted Recommendation 198 on the Employment Relationship.

Recommendation 198 on the Employment Relationship comprises three parts. Part I (articles 1 to 8) covers national policy of protection for workers in an employment relationship. Part II (articles 9 to 18) relates to the determination of the existence of an employment relationship. Part III (articles 19 to 22) relates to monitoring and implementation.

Part I recommends that member states formulate and apply a national policy for reviewing, clarifying and adapting the scope of relevant laws and regulations.²²⁴ It also requires that national law or practice should clearly set out the nature and extent of protection given to workers in an employment relationship.²²⁵

Paragraph 4 of the Recommendation provides that national policy should provide guidance on effectively establishing the existence of an employment relationship and on distinguishing between employed and self-employed workers. National policy should also include measures to combat disguised employment relationships.²²⁶ It should also ensure the application of standards to workers in all forms of contractual relationships, including multilateral relationships, and should establish who is responsible for the rights of workers.²²⁷

Part I also recommends that states ensure effective protection of the certain vulnerable groups of workers including women workers, young workers, workers in

²²⁴ Paragraph 1 of Recommendation 198.

²²⁵ *Ibid* at para 2.

²²⁶ *Ibid* at para 4 (b).

²²⁷ *Ibid* at para 4 (c) and (d).

the informal economy, migrant workers and workers with disabilities.²²⁸ It also specifically mentions the need to consider the gender dimension of non-protection of workers and to have clear policies on gender equality to ensure better enforcement of laws.²²⁹ Paragraph 7 makes special mention of the need to take measures to protect and prevent the abuse of migrant workers.

Importantly, Part I makes provision for enforcing and securing compliance with national policies on the employment relationship.²³⁰ These include the provision of access to procedures and mechanisms for settling disputes regarding the existence and terms of an employment relationship.²³¹ Another step recommended is the training of those involved in the implementation and enforcement of laws and policies on the relevant international labour standards, comparative law and case law.²³²

Part II relates to the determination of the existence of an employment relationship. It endorses the principle of primacy of fact which requires that precedence be given to the facts of a given situation as opposed to the form or character that the parties give their relationship.²³³ Paragraph 11 suggests that member states consider a number of measures in determining the existence of an employment relationship, including deeming provisions and legal presumptions.

Paragraph 13 lists a number of factors that could indicate the existence of an employment relationship. These include control over the work, integration into the

²²⁸ *Ibid* at para 5.

²²⁹ *Ibid* at para 6.

²³⁰ *Ibid* at para 4.

²³¹ *Ibid* at para 4 (b).

²³² *Ibid*.

²³³ Paragraph 9 of Recommendation 198.

business, the requirement of personal service, the continuity of the relationship and the provision of tools, materials and equipment by the party requesting the work.²³⁴ Other factors include periodicity of payment, the worker's dependence on the income, the provision of payment in kind and the absence of risk for the worker.²³⁵ These indicators are "all, by and large, used by national judiciaries in what is clearly emerging as a consistent and universal 'multi-factor' test."²³⁶

Part III recommends that states ensure that there is a mechanism to monitor developments in the labour market and in the organisation of work and to advise on the adoption and implementation of measures concerning the employment relationship.²³⁷ Where possible, member states should collect information and statistical data and undertake research on the organisation of work.²³⁸ Member states are also encouraged to establish national mechanisms to ensure that employment relationships can be effectively identified in the context of transnational arrangements.²³⁹

6.3.3. *The employment relationship: the highest common factor*

Sections 6.3.1 and 6.3.2 above have related the events following the failure to adopt the draft contract labour instruments in 1998 to the adoption of Recommendation 198 in 2006. This section argues that the employment relationship represented the

²³⁴ *Ibid* at para 13(a).

²³⁵ *Ibid* at para 13(b).

²³⁶ N Countouris "The employment relationship: A comparative analysis of national jurisdiction approaches" in G Casale (ed) *The employment relationship: A comparative overview* (Oxford: Hart Publishing, 2011) 33-68, 66.

²³⁷ Para 9 of Recommendation 198.

²³⁸ *Ibid* at para 21.

²³⁹ Paragraph 22 of Recommendation 198.

highest common factors that member states could agree upon. It also reflects on the significance and effect of the Recommendation.

It will be recalled from section 6.3.2 that the report on the employment relationship that was tabled before the ILC for discussion at its 91st session stated that the reason for the ILO's shift in focus was attributable to broader developments in the ILO. These were the adoption of the Decent Work Agenda and the adoption of the Declaration on Fundamental Rights and Principles at Work.

It is submitted that the shift from contract labour to the employment relationship was instead a retreat from “a predictable lack of consensus around a project of ensuring that dependent workers come or remain within the protection of labour standards, even if they are not identified as employees”.²⁴⁰ The lack of consensus is attributable firstly, to the widely expressed government and employer view that anything that fell outside the employment relationship should not fall within the realm of labour law. It was also attributable to disputes relating to terminology and definition given the different ways in which it was understood in different member states and the diversity of situations that it covered.²⁴¹

The 1997 and 1998 debates and the responses submitted to the Office had revealed that the employment relationship was a concept familiar to all the parties.²⁴² Even the governments and employers' organisations that were most opposed to the regulation of contract labour argued that the solution lay in the development of better approaches to define the employment relationship. Thus, the

²⁴⁰ P Davies and M Freedland “Labor Markets, Welfare and the Personal Scope of Employment Law” 21 *Comparative Labor Law and Policy Journal* (1999-2000) 231 242-3.

²⁴¹ *Ibid*; G Casale “The employment relationship, a general introduction” in G Casale (ed) *The employment relationship: A comparative overview* (Oxford: Hart Publishing, 2011) 1-34 8.

²⁴² Casale (note 241) 1-34 8.

employment relationship represented the highest common factor amongst the member states.

Having established the motivation behind the choice of the employment relationship as the site of policy intervention at an international level, we consider the significance of the Recommendation for the broader project of ensuring the protection of workers in need. What are its underlying principles and what approach does it adopt? Does it give us the tools to better understand and address the challenges that the changed world of work presents?

The point of departure of the Recommendation is that the binary divide between employment and self-employment continues to determine the scope of labour law. It is therefore ironic that the ILO associated the shift towards the employment relationship with the fulfilment of its mandate in terms of the Decent Work Agenda and the Declaration of Fundamental Rights and Principles at Work. This is because both the Decent Work Agenda and the Declaration stress the need to ensure a minimum floor of labour standards and decent work for all workers regardless of their legal status or their location in the formal or informal economy. By focusing on defining and expanding the scope of the employment relationship in post 1998 discussions, and in Recommendation 198, the ILO has reinforced and entrenched the notion of the employment relationship as the gateway to (at least some fundamental) workers' rights, a notion which these two initiatives seek to dislodge.

Another issue is that the Recommendation does not provide new perspectives and new approaches to address the world of work. Buzuidenhout et al argue that the definitions of disguised and ambiguous relationships merely state the obvious,

but do not add anything towards “the development of a clear theoretical understanding of the changing nature of work”.²⁴³ Rather, it reinforces the notion of the employment relationship as a bilateral and personal relationship, without addressing the problem of fragmenting organisations and work.²⁴⁴

The Recommendation does recognise the need for member states to ensure the protection of workers in multilateral relationships and take measures to allocate responsibility amongst multiple parties. However, it does not confront and address the deeply embedded normative and conceptual difficulties that are associated with the conventional understanding of the employment relationship.²⁴⁵ It therefore fails to provide a new paradigm to enable member states to grapple with the difficult issues arising from the growing complexities arising in the world of work.

Finally, the approach adopted by the Recommendation can be described as “a gentler processual approach” that merely encourages member states to develop their own policies to review, clarify and adapt the scope of labour law to protect workers in employment relationships.²⁴⁶ On the one hand, this non-prescriptive and soft law approach may appear to be timid and regressive on the ILO’s part.²⁴⁷ On the other hand, this approach may reflect “the furthest point to which [the ILO] could hope to advance in the face of ... policy disagreement at supranational level and considerable conceptual diversity between member states”.²⁴⁸ The outcome of the

²⁴³ A Buzuidenhout, S Godfrey, J Theron with M Modisha *Non Standard Employment and its Policy Implications* (Unpublished Report Submitted to the Department of Labour, 2003) 22-3.

²⁴⁴ J Fudge “Fragmenting work and fragmenting organizations: the contract of employment and the scope of labour regulation” 44 *Osgoode Hall Law Journal* (2006) 609 631.

²⁴⁵ *Ibid.*

²⁴⁶ M Freedland “Application of labour and employment law beyond the contract of employment” 146

International Labour Review (2007) 3 18.

²⁴⁷ Buzuidenhout et al (note 243) 22-3.

²⁴⁸ Freedland (note 246).

discussions (i.e. the Recommendation) may be understandable given the ILO's aim to achieve tripartite consensus on international instruments adopted.²⁴⁹

6.4 CONCLUSION

This chapter has surveyed the evolution of the ILO's position in relation to contract labour. It considered the period prior to 1992, when the organisation recognised and regulated contract labour through certain conventions, the discussions on self-employment and the industrial subcommittees. Contract labour was placed on the ILC agenda and the move to adopt international instruments accelerated between 1993 and 1998. Following its failure to adopt a convention and recommendation on contract labour at the 1998 ILC, the Organisation retreated towards a focus on the less contentious and more universal employment relationship.

One critical question for this thesis is whether the ILO has adequately recognised the practice of contracting work out to self employed workers as an important dimension of contract work. In principle, the answer to this must be in the affirmative. The discussions and conclusions on self-employment and the 1997 reports on contract labour recognised the fact that some contractors more closely resembled dependent workers than entrepreneurs. They recognised the multi-dimensional nature of the practice and the difficulties of such situations for the contractors involved, as well as for the workers they employed.

However, as the contract labour debate progressed, the complexity and multi-faceted nature of contract labour was diluted. The drafting and amendments to the draft instruments and progressively weakened the definition of contract labour and

²⁴⁹ Fudge (note 244) 631.

the protections offered to contract workers. This trend is attributable to the desire to define and regulate contract labour on broadly acceptable terms that would attract the support of the social partners within the organisation. It can only be expected that over time, the nuances such as contracting work out to self-employed workers were lost in the process and did not feature in the legal instruments or the post-1998 debates.

It has been argued that the final compromise, namely Recommendation 198, is a blunt instrument that merely reinforces the binary divide and the conventional understanding of the employment relationship. It focuses on bilateral relationships and is almost silent on multilateral arrangements, and, worse still, contracting arrangements involving the likes of Taryn and Jabu. The provisions of the Recommendation do very little to provide conceptual and practical solutions to address the complexities of the changed world of work. Although disappointing, the final outcome of the ILO's endeavours to regulate contract labour is hardly surprising given the conflicting interests of the social partners on the issue, its multi-dimensional nature and the divergences in its definition and regulation across member states.

It is submitted that the Recommendation itself offers very little by way of lessons for crafting a legal solution to the practice under scrutiny. However, much can be gleaned from the approaches discussed and recommendations made in relation to self employment and contract labour. The Resolution on self-employment recommended the implementation of measures to ensure the extension of labour and social protection to the self-employed (including the nominally self-employed) and their workers. It made special mention of the need to

protect self-employed and other workers in subcontracting arrangements from exploitation and the denial of their labour and social security rights.

The Resolution on self-employment made concrete recommendations in relation to self-employed workers in particular. These related to the promotion of organisation amongst self-employed workers, and particularly those that were in subcontracting arrangements, in order to increase their bargaining power vis-a-vis those who contracted work out to them. In addition, it recommended the promotion of support to self-employed workers to improve their productivity and earnings, enable the nominally self-employed to become genuinely self-employed, and improve their capacity to comply with labour standards. These measures have been promoted by non-state institutions in South Africa, as was discussed in chapter five.

The draft instruments on contract labour distinguished between bilateral contracting arrangements and triangular contracting arrangements. These situations can be equated to externalisation via commodification and externalisation via intermediation respectively. Although they did not recognise the potential intersection of these processes in the context of the practice under scrutiny, their general principles to regulate bilateral and triangular contracting arrangements may be applied to it.

The draft instruments provided for the extension of certain labour and social security rights to contract workers in bilateral arrangements, and the criteria indicating control by and dependence on the user enterprise were satisfied. There is no reason in principle why such protection should not be extended as between self-employed worker and core enterprise even if the self-employed worker also employs other workers to assist him/her.

The draft instruments also provided several principles that could be applied to triangular contracting arrangements that could be applied to cover the workers of self-employed workers. These included the deeming of the contract workers employed by an intermediary or subcontractor to be the workers of the user enterprise and the enactment of provisions outlining the respective responsibilities of subcontractor or intermediary and the user enterprise. Another option was the joint and several liability of the user enterprise and the subcontractor or intermediary.

The possible inclusion of these principles within the South African context is discussed in the next chapter. Chapter seven *inter alia* outlines recommendations for regulating the practice of contracting work out to self-employed workers in South Africa.

CHAPTER 7: CONCLUSION

At the beginning of this thesis, we considered two scenarios involving Taryn, a home worker in the clothing sector, and Jabu, an owner-driver who works for a food processing firm. Both are engaged to do work on the basis that they are independent contractors. Although they personally do the work that is contracted to them, there is an express or tacit understanding that they may employ other workers to assist them with the work.

Taryn and Jabu's clients may convince them that they are emerging entrepreneurs who have a chance to grow and develop their businesses and become successful. On the face of it, this would mean neither Taryn nor Jabu is entitled to labour protection as they would both be regarded as independent contractors and therefore excluded from the ambit of South African labour law. Moreover, as "entrepreneurs", they are the employers of any workers they engage to assist them and are thereby responsible for the working conditions of these workers. This works in the clients' favour because they would be able to make use of Taryn and Jabu's labour and that of their workers without incurring employer liabilities in terms of the LRA, the BCEA, the SDA or any other labour legislation.

This thesis has essentially considered arrangements like those of Taryn and Jabu and how they are regulated in the South African context. In order to do so, it began by asking three questions: what is labour law? What is its purpose? Who does it apply to? This was canvassed in chapter two of this thesis. Next, it was necessary to consider the assumptions that have underpinned labour law's understanding of the employment relationship and to sketch out the broad context in which these

have become less relevant to the working world. The consequences of these changes for workers were also presented in chapter three.

Having sketched the broad debates in chapters two and three, chapter four narrowed its focus to the practice of contracting work out to self-employed workers in South Africa. After identifying the broad trends in this regard, it examined the consequences of this practice for self-employed workers and their workers. Chapter five outlined the challenges that the practice presents for labour law and considered the extent to which South African law recognises and regulates this practice. Chapter six analysed the extent to which the ILO recognises and regulates the practice.

This chapter draws seeks to draw together the key issues raised in and the lessons learned from this thesis. The first part (part 7.1) of this chapter seeks to draw out the critical issues in what shall be called the broader debates, particularly in so far as they relate to the scope of labour law. The second part (part 7.2) looks at the situation of self-employed workers and their workers and how the law has attempted to regulate the practice. Importantly, it makes some recommendations as to how the practice can be better regulated in South African law, drawing on existing principles in South African law as well as international and comparative perspectives. Part 7.3 ends with some concluding remarks on the limits of law.

7.1 THE BROADER DEBATES ON THE SCOPE OF LABOUR LAW

In order to contextualise the significance of the applicability of labour law to the practice under scrutiny, it was necessary to begin by considering the purpose of labour law and the socio-economic role it plays. After considering some theoretical

and institutional perspectives on the subject, it was concluded that labour law aims to address the imbalance of power between workers and employers, to empower workers and redistribute wealth between capital and labour and thus contribute to social justice.

Labour law aims to bring about social transformation by improving the living standards of workers and their families and thus fostering societal well-being. It was argued that if economic development is understood in these terms of social transformation, the improvement of living standards, and social inclusion, then labour law is an essential component for fostering development. It was also found that employers stand to gain from providing for greater worker protection and security as it contributes to greater productivity, efficiency and competitiveness.

The four pillars of the Decent Work Agenda were identified as key components of any labour law regime. The first pillar is aimed at job creation and relates to through measures aimed at skills development and the creation of sustainable livelihoods. The second relates to rights at work such as protection against unfair discrimination and employment security. The third relates to social protection and includes measures covering workplace safety, regulation of working time and work-life balance and the creation of social safety nets. Finally, social dialogue relates to engagement between workers' and employers' organisation.

Labour law has however been challenged by the ascendancy of neoliberal ideology which has advocated greater labour market flexibility in the context of globalisation and greater market competition. Proponents of neoliberalism have argued that rigid labour laws relating to matters such as wage determination, working time and employment security undermine firms' efficiency and ability to

adjust to rapidly changing market conditions and compete in global markets. They have also argued that rigid labour laws hamper countries' ability to attract and retain foreign direct investment.

In chapter three, it was argued that these claims are not conclusively borne out by the empirical evidence, and that these proponents fail to explain the existence of strong labour protection in some economies that are marked by high employment levels, high levels of investment and economic growth. It was concluded that given a choice between given a choice between the low road to development which undermines labour protection and the high road which promotes improved worker rights, the latter is preferable. Consequently, labour law continues to play a legitimate if not important role in promoting economic and social development.

Labour law's ability to perform a meaningful social and economic role is to some extent determined by its scope. As was explained in chapter two, the classical account of labour law associates labour law with the employment relationship and distinguishes between employment and self-employment. The origins of this binary distinction have been debated, with one view being that it has always been embedded in legal systems and with another being that it was adopted within the context of economic and social changes in Europe in the 18th century.

While there is some disagreement about the origins of the employment relationship, there is some consensus that it is not a monolithic concept whose nature and parameters are cast in stone. As the discussion in chapter two revealed, the employment relationship is an organic concept that has evolved and been redefined over time in response to changing socio-economic and political conditions

in the different jurisdictions. Many jurisdictions have maintained the binary distinction between employee and independent contractor, but most of these have widened the scope of the employment relationship by expanding the criteria identifying the employment relationship and introduced mechanisms that ease the burden of proving its existence. Other jurisdictions have gone further and identified and recognised intermediate categories of workers who are not employees in the strict sense and who receive a limited level of labour protection.

The discussion in chapters two and five revealed that that questions about the scope of labour law have preoccupied legislatures, courts, academics and international organisations all over the world for the past few decades and are likely to continue to do so in future. A number of questions remain. Does the employment relationship continue to serve a legitimate purpose or is it merely a remnant of an outdated status-based system that must be discarded? Do the principles of fairness and equity demand the extension of labour law to all workers who depend on their labour? Should the distinction between employees and other categories of workers be retained, either as the gateway to labour law or as a means of determining the rights that workers should be entitled to and the method of delivery of the rights? These are difficult questions for which there are no easy answers.

What then is the future of the contract of employment or the employment relationship? It is submitted that the prediction of its future must be grounded in an understanding of its historical evolution resulting from socio-economic and political changes and the interactions between the spheres of economic organisation, dispute resolution and political organisation.¹ On the basis of this historical analysis, Deakin

¹ S Deakin "The Many Futures of the Contract of Employment" in Conaghan, J, Fischl, R, and Klare, K, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2000) 177-196 185-6.

argues that we can expect (and are already seeing) a similar cumulative process occurring in response to changes in the world of work.² Consequently, we can envisage not one future, but “a number of different futures for the contract of employment”.³ Arthurs therefore rightly argues that “there can be no ‘answers’ – only contestations, no definitive ‘redrawing’ of ‘boundaries’ – only ongoing negotiations and tentative compromises”.⁴ The approach to be adopted will have to be “one of pragmatic adaptation and progressive solutions, both socially and legally”.⁵

This study has highlighted the complexities of determining who should be entitled to labour protection and what role legal status should make in making this determination. In principle, it endorses the need to move beyond the contract of employment or the employment relationship as the primary axis around which labour and social protection revolve. However, it recognises that the conceptual underpinnings and practical implications of this approach need to be more fully explored and developed.

In chapter three, it was argued that a further issue relating to labour law’s scope is that labour law continues to be premised on the paradigm of the standard employment relationship. This paradigm is characterised by a bilateral relationship where the employee works on the premises of the employer on a full-time and indefinite basis and presupposes a Fordist model of production. The standard

² Deakin (note 1) 190.

³ A phrase used by Deakin in Deakin (note 1).

⁴ H Arthurs “What Immortal Hand or Eye? Who will Redraw the Boundaries of Labour Law?” in G Davidov and B Langille (eds) *Boundaries and Frontiers of Labour Law: Goal and Means in the Regulation of Work* (Oregon: Hart 2006) 373-388 374.

⁵ J Javillier “The Employer and the Worker: The Need for a Comparative and International Perspective” G Davidov and B Langille (eds) *Boundaries and Frontiers of Labour Law: Goal and Means in the Regulation of Work* (Oregon: Hart 2006) 355-372 367.

employment relationship was adopted in North America and Europe during the post-war “Golden Age” of economic prosperity when economic policy was premised on welfare state capitalism. These assumptions and models also informed the development of labour law in the global South, including African jurisdictions.

However, over the last few decades, non-standard forms of work have proliferated in an increasingly globalised world characterised by greater competition and the quest for labour market flexibility. These changes have to a large extent been driven by the neoliberal agenda, which has been advocated by a number of international financial institutions. Importantly, it was highlighted that (at least some of) these non-standard forms of work existed before the Fordist era and, to some extent, continued to exist alongside the Fordist model.

This study discussed three processes driving the proliferation of non-standard work. The first is casualisation, which involves the changes in the temporal dimension of the standard employment relationship towards part-time, seasonal, casual and temporary work. Externalisation by commodification is characterised by the increased engagement of workers in terms of commercial contracts on the basis that they are independent contractors as opposed to employees. Externalisation via intermediation enables employers to benefit from the labour of workers who are ostensibly employed by another party with whom the employer has a commercial contract. Importantly, it was highlighted that these processes do not always occur in isolation, but may intersect with each other.

A critical argument made in chapter three was that most workers in non-standard work arrangements experience insecurity and instability of employment, low wages, excessive and unregulated working hours with little or no access to

work-related social security benefits. Workers in these arrangements are also unlikely to be organised. Their work can be described as precarious as they are largely excluded from the protection offered by labour law, either because they are not designated as employees or because they cannot effectively enforce their rights. Precarious work not only affects the well-being and living standards of these workers and their families, but contributes to segmentation of the workplace and social fragmentation, and thus exacerbates social inequality.

Undoubtedly, these non-standard forms of work challenge labour law's ability to protect workers. Most jurisdictions have (to varying degrees) responded to these non-standard relationships through legislative and other means. These have largely been developed on an ad hoc basis in order to deal with specific work arrangements. They have therefore been developed on the basis that they address exceptions to the standard employment relationship. It could therefore be argued that labour law has not developed a new paradigm to replace the standard employment relationship, which remains the primary model upon which labour law is based.

7.2 HOW SHOULD SA LABOUR LAW REGULATE THE PRACTICE OF CONTRACTING WORK OUT TO SELF-EMPLOYED WORKERS?

This part concentrates on contracting work out to self-employed workers, which is the focus of this study. Section 7.2.1 recapitulates the key findings on the practice as described and analysed in chapter four. Section 7.2.2 then highlights the key findings on the challenges for regulation of the practice as found in chapter five. These sections form the basis for a discussion of the principles which should guide the development of more effective regulation in the practice in section 7.2.3. Finally, section 7.2.4 outlines the key substantive principles that should be considered in the

development of a framework for the protection of workers involved in contracting arrangements.

7.2.1 Key findings on the practice

Chapter four of this thesis focused on the practice of contracting work to self-employed workers who in turn employ other workers to assist them. This practice has become prevalent in South Africa since the 1990s. This practice has enabled employers to contract work out to individuals who would ordinarily be regarded as employers on the basis that they are independent contractors. By engaging self-employed workers on the basis of commercial as opposed to employment contracts, employers have sought to externalise the labour of self-employed workers by commodifying what would otherwise be regarded as an employment relationship.

Where the employer expressly or tacitly authorises self-employed workers to employ others to assist them, core enterprises have effectively turned self-employed workers into employers who are therefore responsible for the working conditions of these additional workers. Core enterprises have therefore placed self-employed workers as buffers between themselves and these additional workers. This has been described as externalisation by intermediation throughout this thesis. The practice of contracting workers out in this way has been described as the point of the intersection of these two processes of externalisation.

Core enterprises in South Africa justify this practice on the grounds that it empowers workers and promotes entrepreneurship and job creation. However, it is ultimately the core enterprises that are the real winners as it enables them to exercise control over labour and reap benefits from it while shifting the risks and

responsibilities associated with it. Core enterprises may argue that this practice is their contribution towards realising South Africa's small enterprise development and BEE policies. But the analysis in chapter four revealed that the practice may just be a strategy to enable them to undermine the application of labour law and attenuate its effectiveness in protecting the workers.

Chapter four demonstrated that this practice has far-reaching consequences for self-employed workers and their workers. These workers do not have the benefit of working time protection, paid leave, health and safety protection and access to social protection and unemployment or work-related illness or injury. In addition, they cannot access meaningful training and skills development opportunities. It was further argued that the externalisation of the workers facilitates the casualisation of their work. Having excluded the risks and duties associated with employing the workers, the core enterprises operate without regard to the obligation to provide for employment security. The case studies highlighted the fact that self-employed workers and their workers constitute a dispensable workforce that core enterprises can discard at whim without regard to fair reasons, fair procedure and termination benefits.

The cumulative effect of the issues highlighted in chapter four is that self-employed workers and their workers constitute a marginal workforce whose working conditions are inferior to those of standard employees. Their position is exacerbated by the fact that, for a number of reasons, these workers are difficult to unionise. The non-unionisation of these workers further entrenches division and inequality between themselves and workers in standard employment.

The discussion in chapter four showed that the practice could also be understood in terms of the processes of vertical disintegration and informalisation. The end result of the latter approach is that work in terms of this practice is being performed without the protection of labour law. The structuralist account, which can be equated to informalisation from above, was used to explain the relationships between large firms and subordinated economic units and workers that serve to reduce the firm's labour costs, resulting in poor working conditions for the workers.

7.2.2 Key findings on the regulation of the practice

Chapter five began by identifying two key challenges that the practice of contracting work out to self-employed workers presents for labour law. The first challenge is that the practice undermines three key assumptions underlying conventional labour law. These assumptions are that the employer is a unitary and bounded entity, that the employment relationship is bilateral and personal, and that there is a clear divide between employment and self-employment. This discussion drew extensively from the work of Davis and Freedland, Freedland and Fudge. The second challenge that the practice presents relates to its multi-dimensional nature. This arises from the fact that the practice is primarily constituted by the intersection of externalisation via commodification and externalisation via intermediation, and may in turn give rise to casualisation.

It was argued in chapter five that, in order to adequately regulate the practice of contracting work out to self-employed workers, labour law would have to adopt principles and concepts that transcend the above assumptions underpinning conventional labour law. It would also have to develop regulatory responses that recognise and grapple with the multi-dimensional nature of the practice. These two

challenges formed the basis on which the South African legal approaches examined in the chapter were assessed.

The core of chapter five examined the body of South African laws that regulate non-standard forms of work. It considered the legal approaches that are applicable to externalisation via commodification. These comprise laws and principles that essentially expand the concept of the employee within the parameters of the binary divide, as developed by the courts, the statutory presumption of employment and the Code of Good Practice on Who is an Employee. It also considered the provision in the BCEA which allows the Minister of Labour to deem any category of workers as employees. Finally, it considered the Constitution's concept of a worker as developed by Le Roux, and its potential to be used as a broader concept that would transcend the binary divide.

Chapter five also considered the legal approaches that have been developed to regulate externalisation via intermediation. These include the statutory joint and several liability provisions relating to temporary employment agencies, and the business transfer provisions. In addition, it includes the corporate veil doctrine as it has been developed by the courts.

Each of these legal approaches was examined to determine the extent to which it directly applied or could be extended to regulate the practice of contracting work out to self-employed workers. It was found that only the Code of Good Practice explicitly recognises the practice and provides for the protection of both the self-employed workers and their workers. It provides that a worker who meets the test for employment through the application of the dominant impression test or the presumption of employment is not precluded from being found to be an employee

merely because s/he provides her/his services via the medium of a corporate entity and/or employs other workers to assist her/him. It also provides that the workers of the self-employed worker could also be found to be employees of the core enterprise provided the core enterprise exercises some degree of control over these workers. The Code of Good Practice, however amounts to soft-law and does not necessarily bind the Courts.

It was found that some of the remaining legal approaches could be extended to apply to self-employed workers and their workers despite the fact that they were not specifically designed to regulate the practice under scrutiny. This included the deeming of certain categories of workers to be employees, which could be applied to bring self employed workers within the scope of labour protection. It was suggested that the Minister could determine on the basis of occupational categories where the practice is found to be prevalent, including those mentioned in the case studies. It was also argued that, in principle, a self-employed worker could be designated as a worker as envisaged in section 23 of the Constitution. However, the Court's development of this constitutional concept is yet to extend its use to bridging the binary divide between employee and independent contractor.

Importantly, the corporate veil doctrine was found to be potentially applicable to both self-employed workers and their workers. On the one hand, the doctrine could be applied to hold a core enterprise jointly and severally liable (with the self-employed worker being the employer) for the labour rights and working conditions of the workers of self-employed workers. It could also be used to hold that the self-employed worker are in reality employed by the core enterprise only, or by the core enterprise and the self-employed workers together as co-employers or a joint employer. On the other hand, the doctrine could also be applied to pierce

the veil between the self-employed worker and the core enterprise to find that the self-employed worker is an employee of the core enterprise.

The key finding of the discussion of existing South African approaches is that the direct recognition and regulation of the practice under scrutiny was fairly limited as it was only found in a soft-law instrument which offered a very limited remedy or solution for self-employed workers and their workers. It was also found that the broader body of legal approaches were not directly applicable but could be extended to regulate the practice. These findings make a strong case for the development of more direct and robust regulation in the form of legislation directly regulating the practice under scrutiny.

This legislation would be enacted by Parliament which is the highest source of law-making power in South Africa. This could take the form of a separate Act of Parliament dedicated to the regulation of the practice under scrutiny. Alternatively, the legislative changes could be brought about by the insertion of additional provisions into the existing labour legislation.

The case for legislation to specifically regulate contracting work out to self-employed workers was buttressed by the fact that presently non-state institutions appear to have the *carte blanche* to determine whether and when labour law will be applicable to self-employed workers and their workers. The discussion in the final part of chapter five showed that the strategies that these institutions have developed to regulate the practice on developing the entrepreneurial potential of self-employed workers in the hope that this will put them in a position to provide fair working conditions for their workers. Essentially, these strategies preclude the application of labour law to the core enterprise- self employed worker relationship.

In addition, they (with one exception) prevent the imposition of any liability for the working conditions of the workers of self-employed workers onto the core enterprise.

It is submitted that this situation is untenable and can only be remedied by the enactment of appropriate legislation which would provide some clarity and a framework for the application of labour law to self-employed workers and their workers. Non-state institutions would then have to operate within the parameters of this legal framework and ensure that their initiatives did not inhibit the application of labour law. This approach would still recognise the valuable contribution that non-state institutions could make to the regulation of the practice given their greater ability to access and influence self-employed workers and their workers through a number of strategies.

Chapter six analysed the extent to which the ILO has recognised and regulated the practice of contracting work out to self-employed workers through an analysis of its discussions on self-employment, contract labour and the employment relationship. It found that the discussions on self-employment promotion identified the concept of the nominally self-employed who work in terms of contracting arrangements. While the resolution on self-employment promotion called for measures to extend labour and social protection to self-employed workers and their workers in contracting arrangements, no international labour standards were adopted to give effect. The resolution on self-employment promotion was primarily geared towards the provision of entrepreneurial support to self-employed workers to enable them to develop their enterprises.

The initial report on contract labour identified the contracting out of work to self-employed workers who in turn employed other workers as one of the many facets of contract labour. However, as the ILO's move to adopt international labour standards on contract labour gained momentum, the definition and protection afforded to contract workers were progressively excluded and no attention was specifically given to the practice under scrutiny. These draft instruments were not adopted and the final outcome of the ILO's endeavours was Recommendation 198 which does little in recognising and regulating the practice under scrutiny. Chapter six concluded that, notwithstanding the disappointing outcome, the ILO's earlier work in relation to self-employment promotion and contract labour did provide some enlightenment on regulating the practice.

7.2.3 Towards the development of more effective regulation of the practice

Having identified the current state of South Africa's regulation of the practice and pointed out the need for the regulation of the practice, it is necessary to consider what principles should inform the enactment of the proposed legislation. As a starting point, the development of effective regulation must be aligned to the pursuit of the principal goals and purposes of labour law as set out in chapter two. In that chapter, it was argued that the predominant purpose of labour law is to protect workers and ensure a fairer balance between them and more powerful employers. By doing so, labour law empowers workers and contributes to their well-being, to improved living standards and thus, social transformation and economic development.

It is submitted that giving full effect to the purpose of labour law would require measures to ensure that workers are protected regardless of their

employment status and regardless of the type of arrangements under which they work. This will entail the acceptance of the principle that a person who works for another and purports to employ others to assist her/him in respect of that work may be entitled to labour law's protection. This would accord with ILO's Decent Work Agenda, which aims to secure decent work for all workers regardless of their legal status and regardless of where they work. In the South African context, the most appropriate vehicle for the broader delivery of labour rights to may be found in the constitutional right of "everyone" to fair labour practices.

Importantly, the proposed legislation must respond appropriately to the challenges that the practice raises for labour law as expounded in chapter five and reiterated in section 7.2.2 above. This means that it must transcend the assumptions underlying conventional labour law and embrace principles that reflect the realities of the practice. This will imply a holistic perspective which recognises the multilateral nature of the relationship between the core enterprise, the self-employed worker and her/his workers. This would allow for the recognition of more than one employer, and/or the possible distribution of employer obligations between more than employer to ensure that the core enterprise bears (at least some of) the risks and responsibilities that are associated with the workers.

It is submitted that a holistic perspective of the practice would enable the law to give recognition to the multi-dimensional nature of the practice and to incorporate measures to address the structural relationship between the core-enterprise self-employed worker relationship and the relationship between the self-employed worker and her/his workers. It would also give effect to the principle of giving effect to substance over form by disregarding privity of contract and capital boundaries and corporate identities. This principle has already been recognised in

South African Labour courts in decisions identifying an employee and applying the corporate veil doctrine. It has also been recognised in the presumption of employment provisions and in the Code of Good Practice on Who is an Employee.

A final principle is that an effective approach must also be sensitive to the dynamics that have given rise to this practice in South Africa. It must strike a delicate balance between the need to protect vulnerable workers and to encourage and support nascent entrepreneurship.

7.2.4 Substantive principles of the proposed regulatory framework

This section outlines the key principles that could be included in the legislation to regulate the practice of contracting work out to self-employed workers. The principles are largely drawn from lessons learned from the South African legal system and the ILO's regulation of the practice. These recommendations are tentative at best and aim to highlight the issues that the legislation must recognise and address. It presents a number of possible options without prescribing which approach should be taken with regard to certain issues.

Any legal framework seeking to regulate the practice of contracting work out to self-employed workers would have to begin by defining a self-employed worker. It is suggested that a self-employed worker would be identified by the following features:

- a person performing work relating to a core enterprise's core or ancillary functions that arise in the normal course of events;

- the work is performed in terms of a commercial contract that states that the self-employed worker is an independent contractor, either in her/his personal capacity or via a corporate entity;
- the contract requires the person to perform the work personally, but expressly or tacitly allows him/her to hire others to assist him/her;
- the person personally performs the work and also hires other workers to assist him/her during the normal course of work; and
- the work is performed under circumstances in which there is an unequal balance of power between the self-employed worker and the core enterprise giving out the work and renders the former dependent on the latter.

In addition to the above criteria, two other factors would have to be considered and a decision made as to whether they would be incorporated into the definition. The first is whether the definition would include all workers meeting these requirements or whether it would only cover workers at the lower end of the labour market, such as truck drivers and home workers. The discussion of the practice in chapter four emphasised that those at the lower end of the market with lower skills levels are the most vulnerable and have little or no bargaining power in relation to the core enterprises giving out the work. By contrast, workers at the higher end of the labour market such as software engineers possess scarce skills and have greater bargaining power vis-a-vis enterprises they contract with and would not necessarily need protection.

If the objective is to protect the workers at the lower end, then one would have to determine how to achieve this. One way would be to use an income threshold and to exclude workers earning more than the maximum amount stipulated. However, this could potentially deny certain workers protection despite

the fact that they met all the substantive requirements. A better option would be to provide a list of examples of workers who could require protection, for example building workers, home workers, miners and owner drivers. This would not constitute a closed list, but would give some indication of the type of workers targeted by the regulation. The list could also be subject to revision to ensure that attention was drawn to new categories of workers needing protection.

The second factor which would have to be considered is whether the provisions would only apply in cases where the self-employed worker contracted exclusively with one core enterprise or whether it could apply in relation to a self employed worker contracting with several core enterprises. Traditionally, exclusivity has been treated as a factor indicating an employment relationship and the ability to service many “clients” an indicator of independence.

It is submitted that this assumption should not be applied strictly in the interest of ensuring maximum protection for self-employed workers and their workers. It would therefore be permissible to include self-employed workers with multiple clients within the scope of the provisions, provided that the features outlined above were present in respect of each relationship sought to be covered by the provisions.

Having dispensed with the definitional issues, we now turn to the consequences of a finding that a particular person was a self-employed worker. What status would be ascribed to a self-employed worker? They could be deemed to be an employee as defined in labour legislation, or as a worker in terms of section 23 of the Constitution. It would be useful to consider what the implications of such a choice would be, for example, whether a designation as an employee would entitle

the self-employed worker to the full suite of labour rights and the designation as a worker would entitle them to a limited bundle of labour rights. Another option would be to discard these categories and regulate the self-employed workers as a unique group of workers, and determine the labour rights that they would be entitled to in this capacity.

Regardless of the designation as employee, worker or self-employed worker, it would be the core enterprise that contracted the work out to the self-employed worker that would be responsible for her/his labour rights. The self-employed worker would be entitled to this protection in her/his capacity regardless of whether s/he also received business support from the state or a non-state institution. Provision would have to be made to ensure that core enterprises did not escape these obligations by placing several intermediaries between themselves and self-employed workers. Provision would also have to be made for the apportionment of these obligations on a pro rata basis in cases where the self-employed worker provided services to more than one core enterprise, provided the definitional criteria were met in respect to each of them.⁶

The consequences for the workers hired by self-employed workers would have to be carefully considered. A critical question would be how the law would treat the relationship between the self employed worker and the hired workers. On the one hand, the law could recognise and give effect to this relationship, thus allowing a self-employed worker to have a dual status as both a worker needing protection and an employer bound to guarantee the labour rights of her/his workers. This would give effect to contractual freedom (as expressed in the contract

⁶ J Fudge "The legal boundaries of the employer, precarious workers and labour protection" in G Davidov and B Langille *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford: Hart Publishing, 2006) 295-316 307-8.

regardless of whether both parties were genuinely free when entering the contract) and recognise the self-employed worker as the true employer of the hired workers and hold him/her primarily responsible for their terms and conditions of work and their statutory rights.

However, in recognition of the overarching power that the core enterprise exercises over such arrangements, some responsibility for these workers would have to be ascribed to it. This could be achieved by holding the core enterprise jointly and severally liable for the self-employed worker's failure to meet its employer obligations. This approach could be supported on the basis that joint and several liability would provide an incentive to core enterprises to contract on favourable terms that would enable self-employed workers to meet their employer obligations and take measures to ensure that this was done in practice.

On the other hand, the law could disregard the contract purportedly concluded between the self-employed workers and the hired workers and place the core enterprise in the former's shoes. The second option would entail disregarding privity of contract and deeming the core enterprise to be the employer of the workers hired by the self-employed workers. The core enterprise would therefore be primarily and solely responsible for the terms and conditions of work and statutory entitlements of these workers in addition to those of the self-employed workers.

On what basis could this deviation from the common law doctrine of privity of contract be justified? On one hand, it could be argued that the core enterprise's express or tacit authorisation to engage workers to assist could be construed as an agency agreement whereby the self-employed workers would hire the assistant's on

the core enterprise's behalf.⁷ A less tenuous and more appealing justification would be the need to give effect to substance over form in order to ensure equity and fairness. This principle is already recognised in South African law. This would recognise the risk that in most cases self-employed workers operating on the scale of a micro or very small enterprise would not be in a position to meet these requirements. It would also place the risk and responsibility for the workers upon the party benefiting the most from the fruits of their labour.

Given the choice between finding the self-employed worker or the core enterprise to be the employer, one would have to determine whether the regulatory framework would incorporate one to the exclusion of the other or whether it would include both as alternative solutions depending on the circumstances. This decision would involve balancing the rights of the workers against the interests of the core enterprise. Given the diversity of situations that may arise involving self-employed workers, it would be prudent to include both options. To maximise protection for the workers, it is suggested that the default position be that the core enterprise be deemed to be the true employer. Parties would only be allowed to invoke the joint and several liability principle in exceptional circumstances.

The consequence of the suggested provisions would be to disregard any attempts to treat the self-employed worker and her/his workers operating under an entity separate from the core enterprise. Provision would however have to be made for the fact that a self-employed worker's circumstances do not necessarily remain static and that s/he may advance to a stage where s/he becomes a genuine entrepreneur. Given the government's identification of small businesses as an engine for economic growth, care must be taken to ensure that the regulatory

⁷ This was suggested by Sankaran, as discussed in part 5.2 of chapter five.

framework proposed would not unnecessarily stifle small business development. Some thought would have to be dedicated to determining what factors could be used to identify an emerging entrepreneur and decide what support would be appropriate.

Finally, the legislation should make provision for special measures to be taken with regard to particular categories of self-employees and their workers. An example would be home workers who may have special needs by virtue of the location of their work.

7.3 CONCLUDING REMARKS

This thesis has analysed the legal regulation of the practice of contracting work out to self-employed workers in South Africa. The practice has provided a microcosm within to examine some of the broader challenges that labour law faces in protecting workers in an ever-changing world of work. Having examined the dynamics and consequences of the practice in South Africa and the shortcomings of the current legal framework, it made some tentative suggestions as to how the practice should be regulated in South Africa.

The recommendations made are by no means a panacea for the challenges that labour law continues to face in ensuring its continued relevance in the world of work. Admittedly, the recommended legislation would not “wipe the slate clean” to completely eliminate the assumptions that continue to underpin labour law. Nevertheless, the principles underlying the proposed legislation – most of which South Africa has already recognised in relation to other non-standard work practices – indicate that there is a gradual shift away from the focus on the binary

divide and on the standard employment relationship as determinants of labour law's scope.

It is suggested that the incorporation of such principles which grapple with the complexities presented by the changed world of work may contribute to freeing labour law of the limitations imposed by the conventional assumptions. Given the diversity of the arrangements characterising the world of work and the continuous changes, it is difficult to say whether a new paradigm would be appropriate or predict what such a paradigm would look like.

A further limitation of the recommended legislation is that ensuring its relevance to the practice it regulates would not eliminate it in its entirety. This is because labour law, like any other branch of law, faces a number of limitations to its ability to ensure the translation of its rules and principles into tangible and meaningful outcomes for the people it applies to. It is therefore submitted that the enactment of the legislation envisaged in part 7.2 above will not protect the workers in contracting arrangements unless certain broader socio-economic challenges are addressed.

One such challenge relates to the fact that many workers are and continue to be unaware of their rights in terms of labour law. Another is the high levels of poverty and unemployment, which render many workers complicit in the infringement of their labour rights. A third issue is the increasing fragmentation of workers in the changed world of work and the inability of trade unions to bridge the divisions and build solidarity amongst workers employed under more diversified relationships. The final hurdle is the tendency for employers to seek to avoid the application of labour law at any cost, and their failure to recognise the potential

benefits that a better protected workforce can provide them and to the broader society.

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